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PRESENCE OF A THIRD PARTY DURING PROCEDURAL ACTS IN PREPARATORY PROCEEDINGS INVOLVING A SUSPECT

RADOSŁAW KOPER*

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Abstract

The article analyses a new regulation in Polish criminal procedure. The Act of 14 April 2023, amending the Code of Criminal Procedure introduced a new right for the suspect, i.e. the possibility of the presence of a legal representative, actual guardian, or a person indicated by a minor suspect during a procedural act in preparatory proceedings involving the suspect. That person shall have the status of a third party who, although not usually a party to the proceedings, functions as a special person of trust. Despite some reservations concerning certain elements of this regulation, it deserves appreciation, as it is aimed at strengthening the protection of the suspect's interests and guaranteeing the proper conduct of procedural acts.

Key words: suspect, minor, protection, preparatory proceedings, procedural acts

ORIGIN OF THE REGULATION

Admitting third parties to criminal proceedings involves allowing these persons to be present during the performance of the relevant procedural act. Most often, this presence is limited to a passive form, meaning no possibility of acting in a way that would affect the course or outcome of the act. It is generally motivated by the need to ensure the correctness of the procedural acts being carried out or to protect the interests of the participant involved in them.

* Professor LLD hab., Faculty of Law and Administration, University of Silesia in Katowice (Poland), e-mail: radoslaw.koper@us.edu.pl; ORCID: 0000-0002-6447-8981

The analysis of the provisions of the Code of Criminal Procedure allows us to state that the legislator – for the above reasons – is gradually expanding the scope of regulations allowing third parties to participate in procedural activities. As a result of the Amending Act of 2023,[1] a new Article 299b was added to the Code of Criminal Procedure. It provides for the possibility of the presence of a legal representative, a person exercising custody over the suspect, or an adult person indicated by the suspect during activities involving a suspect who is under 18 years of age, carried out in preparatory proceedings. The justification for the draft April Amendment indicated the need to implement Article 15(4) of the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[2] According to this provision, Member States shall ensure that children have the right to be accompanied by the holder of parental responsibility, or by another appropriate adult nominated by the child and accepted as such by the competent authority during stages of the proceedings other than court hearings at which the child is present where the competent authority considers that: it is in the child's best interests to be accompanied by that entity or person, and the presence of that entity or person will not prejudice the criminal proceedings. It was rightly emphasised in the justification of the April Amendment that the provisions of the Code of Criminal Procedure did not provide for the presence of persons other than statutory representatives in preparatory proceedings involving the suspect, with statutory representatives being referred to only in Article 316 § 1 of the Code of Criminal Procedure (CCP), which, incidentally, applies only to exceptional activities. In the period preceding the entry into force of Article 299b CCP, the possibilities of admitting specific persons of trust to the indicated investigation or inquiry activities were therefore very limited. The new provision of Article 299b is also part of a broader package of amendments aimed at replacing the term 'minor' with a wording referring to an accused or suspect who is under 18 years of age, as the above-mentioned Directive uses the concept of 'child', defining a child as a person under the age of 18 (Article 3(1) of the Directive).

ESSENCE AND PURPOSES

Certainly, the provision of Article 299b CCP serves to protect the interests of the suspect. A more detailed specification of the type of interests subject to protection is already difficult. However, defining the essence and objectives of the discussed regulation is not possible without a preliminary attempt to determine the legal status of the person present during the procedural activity. This issue is the starting point for a proper explanation of the general conditions of this regulation.

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1 The Act of 14 April 2023 amending the Code of Criminal Procedure and Certain Other Acts, Journal of Laws of 2023, item 818, hereinafter 'the April Amendment'.

2 OJ L 132, 21.5.2016, p. 1. For arguments concerning persons with intellectual disabilities see K. Girdwoyń, 'Prawo do odpowiedniej reprezentacji oskarżonych z niepełnosprawnością intelektualną', *Ius Novum*, 2020, No. 3, pp. 67 et seq.

Meanwhile, even a cursory analysis of Article 299b CCP proves that the legislator did not apply a solution identical to that which concerns the victim, as provided for in Article 299a § 1 CCP. According to the latter provision, during activities involving the injured party in preparatory proceedings, a person indicated by the injured party may be present, provided that this does not prevent the activity from being carried out or significantly hinder it. In Article 299b CCP, the legislator allowed other persons to participate in preparatory proceedings in a more extensive manner. The range of entities that may participate in activities involving the suspect is broader and, in addition, the prevention of activities is based on a wider set of premises than in the regulation relating to the victim.

Article 299b CCP refers to the statutory representative of the suspect and the person under whose care the suspect remains. These entities have the status of procedural representatives of the accused (suspect). They may undertake all procedural activities on his behalf (Article 76 CCP). This fact could clearly suggest that they cannot be present during activities involving the suspect merely as neutral observers, because they have the status of procedural participants and, moreover, are authorised to perform procedural actions. When the indicated entities cannot be present during the activities (for reasons discussed below), the suspect has the right to indicate another adult person. In this case, the thesis about admitting a third party to the procedural activities becomes justified, i.e. one who is not a participant in the criminal proceedings and does not take part in the process in a role defined by the regulations. After all, the indicated provision does not grant this person any rights or obligations. This, in turn, suggests that their role is passive, i.e. it consists of providing support during the procedural activity carried out with the participation of the suspect.

At this point, it should be recalled that presence is not the same as participation. Presence means a passive attitude, consisting solely of observing the course of the activity. Participation assumes adopting a stance involving direct or indirect engagement in the course of a given activity (e.g. providing explanations, statements, motions, or asking questions by the party or its representative). This dichotomy is confirmed by the legislator in the regulation of Article 299a § 1 CCP, reserving the form of presence for a third party and the form of participation for the victim.[3]

In the case of the regulation of Article 299b CCP, the correct qualification of the form of involvement of a third party in the activity was not made easier. While the 'presence' of the statutory representative or actual guardian is mentioned first, later – when discussing the occurrence of circumstances excluding the statutory representative or actual guardian from the activity – the term 'participation' is used twice. It is also used in relation to the premises excluding another adult person. Perhaps this inconsistency should not be given too much significance, as it may have been a matter of linguistic correctness, adapted to the stylistic constructions applied. However, the impression of confusion remains.

It can therefore be argued that, in Article 299b CCP, there is a dualistic stratification, consisting in the fact that the statutory representative or actual

[3] R. Koper, 'Obecność osoby wskazanej przez pokrzywdzonego podczas czynności procesu karnego z jego udziałem', *Monitor Prawniczy*, 2016, No. 22, p. 1194.

guardian takes part in the activity, because such a possibility results from the nature of their procedural status, while another adult person can only be present, since, not being a participant in the proceedings, they cannot influence the course or outcome of the activity. The thesis that this other adult person exercises the right to be present during the activity is further confirmed by the content of Article 76a § 1 CCP. This provision provides for an analogous legal solution, applicable in court proceedings, during a main trial or session. The grounds for excluding this person from the activity are clearly linked there to their presence.

However, it seems that the above-presented method of argumentation is not accurate. It would be difficult to rationally justify such differentiation. It would mean an uneven scope of protection for suspects participating in procedural activities. A suspect who uses the assistance of a statutory representative or actual guardian could rely on their active participation during the activities. A suspect who does not have a statutory representative or actual guardian, or has one but cannot use their assistance due to circumstances preventing their participation in the activities, could expect only the silent presence of another adult. This would indicate a weaker procedural position for suspects belonging to the second group.

In an attempt to resolve the issue under consideration, it is ultimately necessary to refer to a systemic and teleological interpretation. The provision of Article 299b CCP is located after the provision of Article 299a § 1 CCP, which – as noted above – regulates the presence of a third party indicated by the victim during preparatory proceedings. This fact clearly suggests that Article 299b CCP regulates an analogous situation in relation to all entities indicated therein. In addition, it cannot be overlooked that Article 299b CCP concerns a suspect who is under 18 years of age, and therefore a person susceptible to harm or requiring special protection. For this reason, the scope of entities admitted to activities involving such a suspect had to be shaped in a broader way than in the case of the injured party as such, and in a way adequate to the factual and legal situation of a minor suspect. As a result, it is logical to assume that the content of Article 299b CCP entitles the statutory representative or actual guardian only to be present during the activities, which does not deprive these entities of the possibility of actively acting on behalf of the suspect in other procedural situations. This assumption is also compatible with the above-mentioned Article 15(4) of the EU Directive. It should therefore be recalled that this provision refers to the child being accompanied by the entity holding parental responsibility or another person, and even literally emphasises the presence of these entities.

To sum up this part of the considerations, it should be assumed that each entity authorised under Article 299b CCP to participate in a procedural act exercises its right through its presence during its performance. After all, it does not become the subject of the act, because it does not acquire additional rights by doing so.[4] As a result, it cannot ask questions of the suspect or any other person, speak on issues that are the subject of the act, make procedural statements, etc. Furthermore,

[4] M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 1–424*, Vol. I, Warszawa, 2024, p. 1077. The legislative recitals of the April Amendment also clearly and explicitly state that each of the entities authorised under Article 299b of the Code of Criminal Procedure has the right to be present.

this entity does not have the right to independent presence in the sense that its presence is directly dependant on the participation of the suspect – as a party – in the procedural acts in the preparatory proceedings. It can only appear alongside the suspect, and never in their place. In this context, it seems justified to use the term 'third party', because even if the person has the status of a participant in the process, their role during the act referred to in Article 299b CCP, in the procedural sense, is entirely passive. There is nothing to prevent this person from providing verbal advice or support to the suspect, provided this does not disrupt the proper course of the activity.

However, it does not seem that a 'person selected' was created within Article 299b CCP.[5] This term (also known as a 'witness selected') is understood to mean a person who has been appointed to participate in a specific procedural activity in order to ensure that the activity is conducted correctly.[6] A good example in this respect is the premises search. According to Article 224 § 2 CCP, regardless of the presence of the person whose premises are being searched, the person selected by the authority conducting the activity has the right to be present, as does the person indicated by the person whose premises are being searched, if this does not prevent the search or hinder it in any other way. A witness selected is therefore a person indicated by the procedural body or another participant in the process, but at the same time for the purpose of ensuring the proper conduct of procedural activities.

As follows from Article 299b CCP, the status of a third-party observer is not necessarily determined by the indication made by the suspect. They may take the initiative in this respect only in relation to 'another adult person'. Naturally, however, they have no choice when it comes to allowing a legal representative or a *de facto* guardian to act. In this respect, one can even speak of a kind of statutory priority, largely independent of the opinion of the procedural body.

It is also problematic whether the presence of a third party in this case is connected with guaranteeing the legality of the act. Even a cursory analysis of the content of the indicated provision allows us to conclude that its purpose is to protect the rights and interests of the suspect. After all, the young age of the perpetrator and the statutory reference to the impossibility of participation by a person whose presence may lead to the violation of the suspect's rights or interests, or would be inappropriate for their well-being, indicate that the presence of a third party is to provide the suspect with support and a sense of security. There may also be a need for educational influence on the suspect in order to guarantee their proper development, particularly from a psychological and social perspective. It cannot be ruled out that, in certain cases, regardless of the fact that the suspect committed the offence, they will express remorse and sincerely admit guilt, and their participation in procedural acts will be a source of specific difficulties and negative internal experiences for them (a sense of shame, low self-esteem, alienation, etc.). Then, the presence of a third party – when it is the person closest to them, or at least not

[5] Differently: ibidem.

[6] E.g., M. Chiavario, *Diritto processuale penale. Profilo istituzionale*, Torino, 2007, p. 204; P. Corso, *Commento al codice di procedura penale*, Piacenza, 2008, p. 529; K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice, 2013, p. 394.

holding such status but emotionally close, friendly, and inspiring trust – will serve to eliminate these negative experiences and inconveniences for the suspect.

Therefore, while on the basis of the regulation in Article 299a § 1 CCP it is equally about not only protecting the interests of the victim but also ensuring the proper course of procedural activities (and consequently, the person indicated by the victim is a qualified, special form of a witness selected),[7] the specificity of the regulation in Article 299b CCP is more complex. The fact that the suspect is a minor, combined with the need to protect their rights and interests, means that the primary protected value here is precisely that protection, and the third party does not obtain the status of a witness selected.

There seems to be no obstacle to assuming, however, that the mobilising influence of this person on the procedural body in terms of ensuring the legality of the action being carried out cannot be excluded. We could then speak of secondary protection – i.e. protection that does not constitute the *raison d'être* of the regulation in question but cannot be ignored, as it may be fulfilled while protecting the suspect. In such a case, the third party may also serve as a kind of person of trust, whose role is to ensure that the provisions concerning the conditions and procedure for carrying out a given action are observed. In this context, their presence may also prevent the raising of unjustified complaints or allegations concerning the performance of the action.

To sum up: the presence of a third party is primarily intended to have a positive effect on the situation of the suspect, but at the same time (although in a secondary role), it may stimulate the procedural body to exercise maximum diligence when carrying out the action.

CONDITIONS FOR APPLICATION

The conditions of the regulation in question are the grounds enabling its application. In this matter, it is necessary to specify the positive and negative conditions. In turn, three conditions can be identified in the group of positive conditions.

Firstly, the right under Article 299b of the CCP may be exercised by an entity that is a suspect, and therefore meets the conditions specified in Article 71 § 1 CCP. It must be a suspect who has not reached the age of 18. This group includes a perpetrator subject to criminal liability in exceptional situations specified in Article 10 § 2 and 2a of the Criminal Code, if they committed a prohibited act after reaching the age of 15 or 14, respectively. Of course, this also includes a perpetrator who committed a prohibited act after reaching the age of 17 but before reaching the age of 18. In this case, the following question is important: is it decisive that the person was under 18 at the time of performing a given act, or at the time of committing the crime? If the latter option were adopted, Article 299b CCP would also apply to suspects who were minors at the time of committing a crime, but had already turned 18 before the date of a specific procedural act. This solution would be contrary to the idea

[7] Thus, for instance, K.T. Boratyńska, P. Czarnecki, R. Koper, in: Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 882; R. Koper, 'Obecność…', op. cit., p. 1195.

and purpose of the regulation in question. Therefore, Article 299b CCP refers to a suspect who was under 18 on the date of the given act.[8]

Secondly, the scope of application of this regulation has been directly limited to preparatory proceedings. In this context, a systemic interpretation results from the inclusion of Article 299b in Section VII CCP, 'Preparatory Proceedings', and the fact that a separate provision (Article 76a CCP) provides for an analogous possibility at the stage of court proceedings. The reservation of the presence of a third party in preparatory proceedings allows for the application of Article 299b CCP in relation to activities taking place from the moment of initiation of such proceedings. It is necessary to take into account both initiation by issuing a decision to that effect (Article 303 CCP) and by conducting an inquiry to the necessary extent (actual initiation of preparatory proceedings – Article 308 CCP). There are no obstacles to Article 299b CCP covering judicial activities in preparatory proceedings (Chapter 38 CCP). These are still activities located within the structure of preparatory proceedings; only the entity carrying out the given activity changes.

Thirdly, these must be activities involving the suspect within the meaning of Article 299b CCP. This means limiting the application of this provision to activities in which the suspect participates as a party, and therefore activities with their actual participation, excluding those in which they have the right to participate but do not.[9] In principle, there are no restrictions on the type of activities in preparatory proceedings at which a third party may be present. These may be activities dedicated to the suspect, i.e. with their main participation, as well as other activities in which their participation results, at least, from the procedural initiative of the defence counsel. Therefore, they may include identification, medical and psychological examinations (Article 74 § 2 CCP), non-repeatable activities (Article 316 CCP), interrogation of an expert (Article 318 CCP), or other activities pursuant to Article 317 CCP. It cannot be denied that the suspect's minority may sometimes render their participation in the activity pointless.

It is no accident that interrogation is missing from this list. It is not clear whether it falls within the scope of the regulation of Article 299b CCP. The reason for this doubt arises from the current content of Article 171 § 3 CCP. According to this provision, if the person interrogated is under 18 years of age, activities involving them should, to the extent possible, be conducted in the presence of a statutory representative, actual guardian or an adult indicated by the person interrogated, unless the good of the proceedings prevents this or the person interrogated objects thereto.

As can be seen, this provision applies to all persons subjected to interrogation, including the accused (suspect). Confirmation of this thesis results not only from grammatical and systemic interpretation, but also from the explicit mention in Article 171 § 9 CCP, where – in the context of Article 171 § 3 – the suspect and the witness are directly indicated. The scope of application of Article 171 § 3 CCP is therefore limited, referring to interrogation, while the regulation of Article 299b covers all activities of preparatory proceedings. On the one hand, this fact could

[8] See also M. Kurowski, in: Świecki D. (ed), *Kodeks postępowania*…, op. cit., p. 1076.
[9] Ibidem.

suggest that the latter provision is of a *lex generalis* nature, while the former, regulating only one possible activity, concerns a fragmentary situation and therefore constitutes a special norm. This would mean that, in the part concerning the interrogation of the suspect, Article 299b CCP does not apply. On the other hand, this concept may be subject to reconsideration. After all, Article 171 § 3 CCP concerns interrogation in both preparatory and court proceedings. By contrast, Article 299b, if we were to assume its application to interrogation, considers this activity only within the framework of preparatory proceedings. In this arrangement, Article 299b could be interpreted as *lex specialis*. The fact remains that Article 171 § 3 seems to be better adapted to the specifics of interrogation when it comes to negative premises. One of them is the interest of the proceedings, understood in such a way that the presence of a third party may have a negative impact on the explanations or testimony of the person interrogated, which in turn may hinder the proper clarification of the circumstances of the case (implementation of the principle of truth). On the other hand, it is also possible to defend the thesis that the fear of preventing or significantly hindering questioning – within the meaning of Article 299b – in terms of protection against the negative influence of a third party on the person being interrogated is not without functionality. The scope of such premises may include the concern that the third party could negatively influence the suspect's freedom of expression.[10]

The problem under consideration is exceptionally difficult to resolve. A more favourable view is evoked by the possibility of including interrogation within the scope of Article 299b CCP. This thesis is expressed very cautiously, because the opposite interpretation is also supported by strong arguments. In any case, it is clearly evident that the issue has been regulated by the legislator in a confusing, unclear, and non-transparent manner.

As for the negative premises, they concern persons who may be present during activities involving the suspect. They are common to all such entities.

The first premise is that the presence of a third party during a given activity may lead to a violation of the suspect's rights or interests. This circumstance is subject to objective verification, carried out in the context of the suspect's right to defence or other rights. It is not necessary to determine the actual influence, because, since the legislator used the term 'may lead', he clearly indicated that it is sufficient to determine the potential (hypothetical) influence. This premise will occur, for example, in a situation where it is known that a legal representative has grossly neglected their duties towards a child who currently has the status of a suspect. Another example concerns a case where the victim is one of the suspect's parents, and in such circumstances the presence of the other parent during the proceedings could have a negative impact on the suspect's procedural situation. If one of the parents present during the proceedings shows solidarity with the parent who has the status of victim, and has a negative or even hostile attitude towards their child – the suspect – they may influence the suspect in various ways (persuasion, manipulation, etc.), as a result of which the suspect's situation will not improve (also in terms of the scope of their criminal liability), or may even worsen.

[10] R. Koper, 'Obecność…', op. cit., p. 1198.

The second negative condition concerns the determination that the presence of a third party is inappropriate for the best interests of the suspect. One should probably refer here to the suspect's psychological well-being, which is connected with the need to ensure the suspect's proper development. A threat to their well-being may arise when the third party exerts a negative influence on the suspect, causing a state of demoralisation or deepening it, instead of providing the necessary educational impact. In addition, there may be concern about a depressing or suggestive effect arising from this person's presence. It should be agreed that this condition may be fulfilled when it is known that the presence of a third party would not support the suspect – if only because of their helplessness resulting from developmental level, state of health, or other characteristics and personal circumstances.[11] Also, in relation to this condition, a situation involving a suspect who has committed a crime to the detriment of one of the parents may arise. When the parent who is not the victim feels a serious dilemma about how to respond to the situation, a conflict of interests is clearly revealed. As a result, their presence will negatively impact the suspect's well-being.

The third condition is related to the need to ensure the smooth conduct of preparatory proceedings. This is more in the public interest (the broadly understood interest of justice). It concerns the determination that the presence of a third party prevents the performance of the activity or significantly hinders it. Incidentally, the same circumstances exclude the person appointed from activities involving the victim (Article 299a § 1 CCP). A third party may, therefore, have a negative impact on the course of a given activity, though not necessarily on the proceedings as a whole. This may be a situation in which the application of Article 299b CCP is impossible due to difficulties in establishing contact with the authorised person. Sometimes this impossibility results from the nature of the activity itself, e.g. where the activity is urgent in nature, while the person mentioned above would only arrive after a significant delay. There may also be concern that the third party could seriously hinder the activity, resulting from their previous participation in the proceedings as a statutory representative. A negative attitude of the statutory representative or actual guardian towards the entire proceedings is also significant. The condition under consideration may prove useful when the procedural body intends to conduct an activity with the participation of a person indicated by the suspect (e.g. this is a person who will testify as a witness regarding the factual circumstances of the crime committed).

MODE OF ADMISSION OF THE THIRD PARTY

The rules for admitting a third party to preparatory proceedings vary depending on the group of entities authorised in this matter.

The first group comprises the legal representative and the person under whose care the suspect remains. They have priority in terms of the possibility of

[11] B. Skowron, in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX, 2023.

participating in activities involving the suspect. This is understandable, as these are individuals exercising parental authority or care over the suspect. Usually, the suspect has a strong emotional bond with them; these individuals are closest to him (in the colloquial sense), and therefore they are natural candidates in terms of providing psychological comfort. Their presence can have a calming effect on him.

Article 299b CCP states that the presence of a statutory representative or actual guardian is optional ('may be present'). As a result, the procedural body has not been given the right to decide independently on the presence of these persons. The decision in this respect belongs to the statutory representative and actual guardian, who will often be best informed about the existence of such a need. Provided there are no negative premises excluding the participation of these persons in the activity, the procedural body should admit them and allow them to observe the course of the activity. It is obvious that the relevant competence is vested in the body conducting the given activity (prosecutor, Police, court, etc.). It should be agreed with the doctrine[12] that, in the event of admitting a statutory representative or actual guardian to the activity, it is sufficient to note this fact in the minutes. In the event of refusal to admit, it would be appropriate for a procedural decision to be issued, especially since the occurrence of a negative premise must be justified. If the refusal is made by a body of preparatory proceedings, an order is sufficient. The importance of this decision does not justify the need to issue a resolution. However, if the matter concerns a judicial act in preparatory proceedings, the court must issue a resolution. It is obvious that the court does not issue orders, and in the situation under consideration, the competence of any of the judicial bodies authorised to issue orders, listed in Article 93 § 2 of the CCP, does not apply. A complaint against a negative decision is not possible, because the person whose rights would potentially be violated in this case is only the suspect (in whose interest the third party is to be admitted). Meanwhile, the only provision that comes into play in this case, Article 302 § 1 CCP, reserves the right to file an appeal only for persons who are not parties.

The second group of authorised persons includes a person other than the statutory representative and the person in whose care the suspect remains, provided that this other person is of age and is indicated by the suspect. The suspect may exercise this right only if they does not have a statutory representative or actual guardian, or if they have previously been excluded from participating in the activity due to the existence of one of the negative premises.

Who can act as a third party indicated by the suspect? The choice in this respect belongs to the suspect alone. It may be any adult person whom he – guided by specific, subjective reasons – indicates. This includes the closest persons within the meaning of Article 115 § 11 of the Criminal Code. It is also possible for the suspect to indicate a person related to him by personal or neighbourly ties. Considering that the suspect is a minor in this case, and that the regulation in Article 299b of the Criminal Code does not directly serve to ensure the correctness of the actions taken, there is little chance that the suspect would indicate a person who is a stranger to him, e.g. a representative of a social organisation or another institution. Although

[12] M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania*…, op. cit., p. 1076.

the legislator does not limit the types of entities that may obtain the status of a third party, one should not lose sight of certain limitations, which in this case are understandable. There are certain categories of people who must be subject to appropriate exclusion for reasons of order, e.g. persons in a state indicating the consumption of alcohol or in another condition incompatible with the seriousness of the procedural act.

On the basis of the regulation in Article 299a § 1 CCP, the literature reserves the possibility of the presence of only one person indicated by the victim.[13] This thesis remains valid in relation to the regulation in Article 299b CCP. After all, in this case too, the regulation applies only in preparatory proceedings. This means that the presence of only one third party is justified in light of the specificity of preparatory proceedings, taking into account the limitation of the principle of openness at this stage of the proceedings and the nature of some procedural activities, which are mainly carried out at that time.[14]

The procedural body cannot indicate a third party on its own initiative. When the suspect expresses the will to make use of this possibility but shows a certain helplessness in indicating a specific person, the role of the procedural body is limited to providing assistance by identifying groups of potential persons. However, this role cannot extend to replacing the suspect in making the decision.

The literature[15] expresses the view that, due to the different nature of the situation in question, when a third party is indicated by the suspect, admitting them to the proceedings requires the issuance of an order indicating the reasons for excluding the statutory representative or actual guardian. It seems that this view should be relativised. In fact, when the procedural body almost simultaneously refuses to admit the statutory representative or actual guardian and at the same time accepts the participation of another adult person in the proceedings, it must express its position in the form of a decision, because – as established above – the first issue requires it. Both matters are then resolved in one procedural decision (order of the preparatory proceedings body, or resolution of the court). Exceptional situations may arise when a specific period of time separates the refusal to admit the statutory representative or actual guardian and the admission of another adult person. In relation to the latter issue, there are no obstacles to simply recording the fact of their admission in the minutes. However, the refusal to admit this person must already take the form of a procedural decision (an order of the preparatory proceedings body or a resolution of the court). Also in this case, as with the previous one, there is no right of complaint under Article 302 § 1 CCP.

For the sake of clarity, it should be added that Article 300 § 1 of the CCP provides for a top-down requirement to instruct a suspect who has not reached the age of 18, before the first interrogation, on the content of Article 299b CCP. The instruction is also to be given to the statutory representative or the person in whose care the suspect remains.

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[13] Z. Brodzisz, in: Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2015, p. 710.

[14] R. Koper, 'Obecność…', op. cit., pp. 1196–1197.

[15] M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania…*, op. cit., p. 1077.

CONCLUSION

Introducing the possibility of the presence of a third party in preparatory proceedings involving the suspect should be assessed as a manifestation of the improvement of the procedural situation of this entity. It would be incorrect to assume that the aforementioned presence has purely technical significance and, therefore, offers only minor advantages. The protection of the interests of the suspect and, secondarily, the safeguarding of the proper conduct of activities carried out during a procedural stage characterised by a limited scope of openness are advantages that give this presence far greater significance than might initially appear. The guardianship function performed in relation to a suspect who has not reached the age of 18 gains a new, important point of reference in this context. At the same time, it cannot be ruled out that, in concrete terms, the interests of justice will also be protected.

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COUNSEL FOR A PERSON WHO IS NOT A PARTY TO A CRIMINAL PROCEEDING

JACEK KOSONOGA*
SŁAWOMIR ŻÓŁTEK**

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Abstract
The study analyses the issue of the availability of a counsel at law to persons who are not parties to criminal proceedings. It refers not only to the catalogue of entities authorised to appoint a counsel, but also to the grounds for refusing to allow such counsel to participate in procedural activities. Separate considerations are devoted to the issue of the procedure for participation of a counsel in a proceeding. In the final conclusions, *de lege ferenda*, it is proposed that the scope of the right to a counsel should be differentiated and should be made dependent on the level of protection of the interests of persons who are not parties.

Key words: right to a counsel, counsel at law, person who is not a party, suspect, interest of a participant in a criminal proceeding

INTRODUCTION

In the recitals to the Code of Criminal Procedure of 1997, it is rightly argued that the possibility of appointing a counsel to protect the interests of a person other than a party and a party who is not the accused (Article 87 CCP) constitutes significant progress in the scope of procedural guarantees for those participants in

* LLD hab., University Professor, Faculty of Law and Administration, Lazarski University in Warsaw (Poland), e-mail: jacek.kosonoga@lazarski.pl, ORCID: 0000-0001-7348-944X
** LLD hab., University Professor, Faculty of Law and Administration, University of Warsaw (Poland), e-mail: s.zoltek@wpia.uw.edu.pl, ORCID: 0000-0002-3918-1588

the proceedings.[1] However, at least within the scope relating to the first category, the statement requires re-evaluation and reconsideration. It was expressed over a quarter of a century ago, and certainly what was considered progress then cannot stand the test of time at present, especially in the context of constitutional and international standards.

There is a widely varied rationale for the participation of a counsel in criminal proceedings, which can be reduced to several of the most important reasons. Those indicated in the literature include, *inter alia*, the reason of professionalism, because a counsel has the legal knowledge and experience necessary to be on the case, while the person represented usually does not have such skills; the reason of mental state, because a counsel is not involved in defending their own legal interests, so their attitude to the case is less emotional than that of their clients, which allows them to assess the facts and evidence realistically and adopt appropriate tactics; the reason of psychological assistance, because in principle they should be a trusted person able to arouse the activeness of the represented persons in defence of their rights and procedural interests. Moreover, a counsel has the ability to replace their clients in situations where they cannot perform all procedural activities; a counsel at law or an attorney at law has better access to procedural bodies or court secretariats, and their assistance is particularly important when, for example, due to health conditions, the persons represented are unable to perform certain activities on their own.[2]

Although entities that are not parties constitute a group of participants in the proceedings only indirectly involved in criminal cases, the essence of which is the perpetrator and their act, the actions taken with them often significantly interfere with the sphere of their rights and freedoms, and also generate specific obligations on their part. The professional assistance of a counsel may be particularly necessary in such cases, which may translate into their potential liability, including criminal liability, or concern property related issues. The role of a counsel in connection with the activity of questioning witnesses is also particularly important. Not only can they ensure the comfort of the persons being questioned by requesting that the questions referred to in Article 171 § 6 CCP be waived, but above all, they can actively support these persons in the exercise and assessment of the rights that result from, for example, Article 183, Article 184, and Article 185 CCP, or are related to the protection of legally protected secrets to which potential depositions extend.

Even though the issue of the availability of a counsel has been the subject of numerous statements made in the doctrine of criminal procedure,[3] only sporadically

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1 *Nowe kodeksy karne z uzasadnieniami*, Warszawa, 1997, pp. 401–402.

2 C. Kulesza, 'Rola pełnomocnika w ochronie praw pokrzywdzonego', in: Mazowiecka L. (ed.), *Wiktymizacja wtórna. Geneza, istota i rola w przekształcaniu polityki traktowania ofiar przestępstw*, Warszawa, pp. 118 et seq.

3 M. Adamczyk, 'Profesjonalny pełnomocnik w postępowaniu karnym jako gwarant ochrony praw stron postępowania karnego', in: Karaźniewicz J., Kuczur T. (eds), *Karnomaterialne i procesowe instrumenty ochrony jednostki przed nadużyciami władzy państwowej*, Toruń, 2015, pp. 170–181; A. Drozd, 'Analiza wybranych aspektów funkcjonowania instytucji pełnomocnika w kontradyktoryjnym procesie karnym', in: Lach A. (ed.), *Postępowanie dowodowe w świetle nowelizacji kodeksu postępowania karnego*, Toruń, 2014, pp. 135–146; Z. Kwiatkowski, 'Uprawnienia radcy prawnego w postępowaniu przygotowawczym', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga*

has an attempt been made to analyse in detail the grounds for refusing them participation in the proceedings. Incidentally, what usually also remained to be thoroughly discussed was the problem of significant differentiation of procedural interests, the protection of which is a condition for the participation of a counsel, or the prospect of *de lege ferenda desiderata*.

ENTITIES WITH THE RIGHT TO APPOINT A COUNSEL

De lege lata, a person who is not a party may appoint a counsel if their interests in the ongoing proceeding require it (Article 87 § 2 CCP). The court and, in the preparatory proceedings, the prosecutor may refuse to allow a counsel to participate in the proceeding if they consider that the defence of the interests of the person who is not a party does not require it (Article 87 § 3 CCP). In turn, a party other than the accused may appoint a counsel without any additional restrictions (Article 87 § 1 CCP).

The latter category, apart from the accused, who has the right to assistance of counsel for the defence (Article 6 CCP), includes other parties to the proceeding, inter alia, substitute parties and new parties (Article 52, Article 58, Article 61 CCP). In criminal procedure, apart from parties, there are also other persons entitled to assistance of a counsel: a statutory representative or an actual guardian of the aggrieved who is a minor or a totally or partially incapacitated person (Article 51 § 2 CCP); an actual guardian of the aggrieved who is a person helpless due to old age or health (Article 51 § 3 CCP); and the accused seeking compensation for wrongful conviction, undoubtedly wrongful temporary arrest or detention, as well as persons who are entitled to compensation in the event of the death of the accused (Article 556 § 3 CCP).[4] In the event that the judgment on a person has been found invalid or a decision on their internment has been issued, the person, as well as their spouse, children and parents in the event of the person's death, has similar rights

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jubileuszowa Prof. J. Tylmana, Warszawa, 2011, pp. 71–89; M. Flis-Świeczkowska, 'Rola pełnomocnika w świetle wzmocnienia zasady kontradyktoryjności procesu karnego', in: Wiliński P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 539–552; M. Flis-Świeczkowska, 'Wpływ udziału pełnomocnika w postępowaniu karnym na prawo pokrzywdzonego do sądu w znowelizowanej procedurze karnej', in: Gil D., Kruk E. (eds), *Reformy procesu karnego w świetle jego zasad*, Lublin, 2016, pp. 13–39; J. Lisińska, 'Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym', *Palestra*, 2014, No. 7–8, pp. 72–81; A. Małolepszy, 'Uprawnienie oskarżonego do ustanowienia pełnomocnika w postępowaniach po uprawomocnieniu się wyroku', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, pp. 438–444; M. Mańczuk, 'Rola pełnomocnika pokrzywdzonego w kontradyktoryjnym procesie karnym – uwagi na tle projektu nowelizacji z dnia 8 listopada 2012 r.', in: Wiliński P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 651–661; R.A. Stefański, 'Pełnomocnik w procesie karnym', *Prokuratura i Prawo*, 2007, No. 2, pp. 45–58; A.R. Światłowski, 'Radca prawny jako pełnomocnik w postępowaniu karnym', *Radca Prawny*, 2002, No. 4–5, pp. 30–50; P. Starzyński, 'Rola pełnomocnika pokrzywdzonego w realizacji funkcji ścigania', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, pp. 215–223.

[4] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 2017, p. 1003.

when seeking compensation from the State Treasury for the damage and harm suffered as a result of the execution of this judgment or decision.[5] In turn, the owner of an enterprise threatened with forfeiture referred to in Article 44a § 2 CC is entitled to the rights of a party within the scope of procedural actions relating to this measure (Article 91b CCP). The provision of Article 87 § 1 CCP is also applied accordingly to the entity obliged to return the benefit or the equivalent of it (Article 91a § 4 CCP). Therefore, one cannot share the view that the entities indicated in Article 91a and Article 91b CCP receive assistance from a counsel based on Article 87 § 2 CCP,[6] i.e. only when their interests require it, since in the first case the legislator directly refers to Article 87 § 1 CCP (Article 91a § 4 CCP). Although the linguistic interpretation may suggest that a counsel may also be appointed by a public prosecutor who is a party to the proceeding other than the accused, in the doctrine, for institutional reasons, such a possibility is rightly denied. A prosecutor (Article 45 § 1 CCP) shall act in person, and a public prosecutor that is another State body (Article 45 § 2 CCP) through its employees.[7]

Basically, the aggrieved is a person who is not a party to court proceedings. They may receive assistance from a counsel under the terms laid down in Article 87 § 2 CCP in order to exercise their rights in the proceeding, provided that they do not obtain the status of a party (e.g. Article 53 CCP). This concerns, *inter alia*: filing a motion to rule on the obligation to redress the damage as a compensatory measure or compensation for the harm suffered (Article 49a CCP in conjunction with Article 46 § 1 CC); filing an objection to: issue a sentence at a sitting (Article 343 § 2); issue a sentence at a sitting without carrying out evidence hearing (Article 343a § 2 in conjunction with Article 343 § 2); issue a sentence at a trial without carrying out evidence hearing (Article 387 § 2); participation of their counsel in a sitting at which a minor under the age of 15 is questioned (Article 185a § 2 and Article 185b § 1); participation of their counsel in a sitting at which the aggrieved is questioned in connection with an offence laid down in Articles 197–199 CC (Article 185c § 2); participation in a sitting on: conditional discontinuance of a proceeding (Article 341 § 1); issuing a sentence (Article 343 § 5); conviction without carrying out evidence hearing (Article 343a § 2 in conjunction with Article 343 § 5); preparation for a trial (Article 349); participation in a trial for issuing a sentence without carrying out evidence hearing (Article 387 § 2); filing a motion to draw up and serve the *ratio decidendi* for the judgment conditionally discontinuing a procedure issued at a sitting (Article 422 § 1); lodging an appeal against a judgment conditionally discontinuing

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[5] Article 8(3) of the Act of 23 February 1991 on Recognising Judgments Issued against Persons Repressed for Their Activities for the Independent Existence of the Polish State as Invalid (consolidated text: Journal of Laws of 2024, item 442, as amended); also cf. R. Szarek, 'Z problematyki pełnomocnika w procesie karnym', *Palestra*, 1972, No. 5, p. 53.

[6] J. Zagrodnik, M. Burdzik, in: Głogowska S., Karaźniewicz J., Klejnowska M., Majda N., Palka I., Sychta K., Żyła K., Zagrodnik J., Burdzik M., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2024, Article 87, p. 318.

[7] T. Grzegorczyk, *Kodeks postępowania karnego. Tom I. Artykuły 1–467. Komentarz*, Warszawa, 2014, p. 387; R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., pp. 1002–1003; P. Niedzielak, K. Petryna, in: Kryże A., Niedzielak P., Petryna K., Wirzman T.E., *Kodeks postępowania karnego. Praktyczny komentarz z orzecznictwem*, Warszawa, 2001, p. 199.

a proceeding issued at a sitting (Article 444); filing a motion to resume a conditionally discontinued proceeding (Article 549).[8]

Apart from the aggrieved, various participants who are not parties to the proceeding but are involved in the course of the criminal proceeding have the right to appoint a counsel. In the literature, it is rightly indicated that such entities as, e.g. the head of the body obliged to provide an explanation on whom a fine was imposed for failure to provide it within a specified deadline (Article 19 § 4); the dean of the relevant council on whom a fine was imposed (Article 20 § 1a CCP); a person whose rights were violated by the issuance of a decision concerning a search, seizure of things or material evidence, and by means of other activities related thereto (Article 236); a person arrested (Article 244 § 1);[9] a person posting bail (Article 266 § 1); a person who may need protection in a criminal proceeding due to potential forfeiture of the property constituting bail or collection of assets (Article 268 § 1); a person entitled to lodge a complaint about a decision or a ruling issued in connection with the application of penalties for the breach of order (Article 290 § 2); a person who, in the course of a preparatory proceeding, is entitled to lodge a complaint about a decision, a ruling or an activity breaching their rights (Article 302 §§ 1 and 2); a person entitled to file a clemency request (Article 560 § 1);[10] an expert witness or translator, e.g. in the event that they claim due remuneration from the procedural body.[11]

Witnesses constitute a separate and diversified group of participants, depending on circumstances. It is rightly indicated in the case law that the possibility of questioning a witness who is accused in another on-going case of complicity in an offence subject to a proceeding, i.e. a person who has the right to refuse to testify in accordance with Article 182 § 3 CCP, is a typical situation in which this person may, based on the provision of Article 87 § 2 CCP, appoint a counsel, because their interests in the ongoing proceeding require it;[12] the assessment may be similar in relation to the need to protect the interests of a minor, anonymous or crown witness,[13] as well as a witness whose procedural status may change into that of a suspect and then the accused (Article 183 § 1 CCP)[14] or a witness who claims reimbursement of travel costs or remuneration lost due to participation in the proceeding.[15]

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[8] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., p. 1004; R.A. Stefański, 'Pełnomocnik…', op. cit., p. 48.

[9] For more see, e.g. A. Ludwiczek, 'Sytuacja prawna adwokata udzielającego pomocy prawnej w trybie art. 245 § 1 k.p.k.', *Problemy Prawa Karnego*, 2001, No. 24, p. 108.

[10] R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania…*, op. cit., p. 1004; R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 45–49; P. Starzyński, in: Kulesza C. (ed.), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, pp. 1058–1063; J. Lisińska, 'Podmioty uprawnione…', op. cit., pp. 72–81.

[11] K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, 7th edn, Warszawa, 2024, p. 430; T. Grzegorczyk, *Kodeks…*, op. cit., p. 387.

[12] Judgment of the Appellate Court in Katowice of 11 February 2013, II AKa 268/12, LEX No. 1422232.

[13] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–296*, Warszawa, 2007, p. 487.

[14] K. Eichstaedt, in: Świecki D. (ed.), *Kodeks…*, 7th edn, op. cit., p. 430.

[15] T. Grzegorczyk, *Kodeks…*, op. cit., p. 387.

The legal status of a person of interest, sometimes referred to in the doctrine as an actual suspect,[16] a potential suspect,[17] or an informal suspect,[18] may certainly require protection of their procedural interests. Leaving aside terminological issues and doctrinal differences, it is beyond dispute that the Code of Criminal Procedure does not define this term directly, despite the fact that it is used repeatedly[19] and imposes a number of obligations on these persons, as well as grants them certain rights in various procedural contexts, sometimes bringing their status closer to that of a suspect. In the literature, it is assumed that persons of interest are persons who have not been charged but in relation to whom some activities have been taken in the course of a preparatory proceeding;[20] certain procedural actions have been taken that indicate that they are treated as suspects;[21] such procedural actions as questioning, search, detention, temporary seizure of movable property or inspection have been taken, which places them in the legal situation of a suspect;[22] these are persons who remain in the sphere of interest of operational activities of law enforcement agencies.[23]

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[16] A. Murzynowski, 'Faktycznie podejrzany w postępowaniu przygotowawczym', *Palestra*, 1971, No. 10, pp. 39 et seq.; Z. Sobolewski, P.K. Sowiński, in: Artymiak G., Rogalski M., Klejnowska M. (eds), *Proces karny. Część ogólna*, Warszawa, 2012, pp. 150 et seq.; P. Kruszyński, *Zasada domniemania niewinności w polskim procesie karnym*, Warszawa, 1983, p. 143; K. Woźniewski, in: Grajewski J. (ed.), Papke-Olszauskas K., Steinborn S., Woźniewski K., *Prawo karne procesowe – część ogólna*, Warszawa, 2011, p. 295.

[17] Z. Sobolewski, 'Osoba podejrzana oraz potencjalnie podejrzana w znowelizowanym (2003) kodeksie postępowania karnego a gwarancje konstytucyjne', in: Sobolewski Z., Artymiak G., Kłak Cz.P. (eds), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 321; Z. Sobolewski, P.K. Sowiński, in: Artymiak G., Rogalski M., Klejnowska M. (eds), *Proces karny*…, op. cit., p. 151; Cz.P. Kłak, '„Osoba podejrzana" oraz „potencjalnie podejrzana" w polskim procesie karnym a zasada *nemo se ipsum accusare tenetur*', *Ius Novum*, 2012, No. 4, Vol. 6, pp. 58–60.

[18] R. Kmiecik, 'Glosa do postanowienia SN z 17.06.1994 r., WZ 122/94', *Wojskowy Przegląd Prawniczy*, 1995, No. 3–4, p. 79.

[19] See Article 74 §§ 3 and 3a; Article 189 § 3; Article 192a; Article 219 § 1; Article 225 § 2; Article 237 § 4; Article 247 § 1; Article 248 § 3; Article 278; Article 295 § 1; Article 308 § 1; Article 325g § 2; Article 517c § 1.

[20] A. Czapigo, 'Osoba podejrzana jako podmiot uprawniony do wniesienia zażalenia na postanowienie o umorzeniu postępowania przygotowawczego', *Wojskowy Przegląd Prawniczy*, 2009, No. 2, p. 45.

[21] K. Woźniewski, in: Grajewski J. (ed.), Papke-Olszauskas K., Steinborn S., Woźniewski K., *Prawo karne*…, op. cit., pp. 294–295.

[22] A. Murzynowski, 'Faktycznie podejrzany…', op. cit., p. 39; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa, 2023, p. 194; L. Schaff, *Zakres i formy postępowania przygotowawczego*, Warszawa, 1961, pp. 63–67; P. Kruszyński, *Zasada domniemania*…, op. cit., p. 143; E. Skrętowicz, 'Faktycznie podejrzany w polskim procesie karanym', in: Kruszyński P. (ed.), *Wybrane zagadnienia procedury karnej. Księga pamiątkowa ku czci Prof. A. Murzynowskiego*, *Studia Iuridica*, 1997, No. 33, p. 195; K. Grzegorczyk, 'Glosa do wyroku SN z 13.01.2000 r., III RN 116/99', *Wojskowy Przegląd Prawniczy*, 2002, No. 4, p. 137; judgment of the Supreme Court of 24 March 1970, V KRN 52/70, *OSNKW*, 1970, No. 7–8, item 77, with a gloss by J. Nelken, *Nowe Prawo*, 1971, No. 5, p. 814; the Supreme Court resolution of 23 May 1974, VI KZP 4/74, *OSNPG*, 1974, No. 8–9, item 98.

[23] K. Krasny, 'Faktycznie podejrzany w procesie o charakterze aferowym', *Problemy Praworządności*, 1978, No. 8–9, p. 7.

It is claimed that these are persons who are actually suspected of committing crime, against whom law enforcement agencies are taking procedural steps aimed at prosecuting them;[24] there are actual data indicating their participation in the crime, and their procedural status is determined by the evidence-taking procedure, which is the commencement of criminal prosecution;[25] law enforcement bodies have information that causes their action to focus on these persons,[26] or the evidence collected justifies obtaining the status of a suspect by these persons and presenting them with charges or questioning them as suspects, although they do not have this status due to deliberate or inadvertent acts of omission by the procedural bodies.[27] Taking into account the specific procedural status of a suspect, and in particular the likelihood of its change into a passive party to the criminal proceeding, the protection of their interests by a counsel seems particularly justified. At the same time, one cannot approve of the view that a person of interest can appoint counsel for the defence.[28]

From a broader systemic perspective, it should be noted that a counsel may also be appointed by an entity held liable in subsidiary cases and an intervener in fiscal penal proceedings as parties to the proceeding (Article 123 § 1 of the Fiscal Penal Code ('FPC'); Article 120 § 1 FPC) as well as a representative of a collective entity entered for the proceeding against a perpetrator at the court stage, from which grounds for this entity's liability may subsequently arise.[29] The possibility of appointing a counsel is also provided for in misdemeanour related proceedings.[30]

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[24] A. Baj, 'Czy osoba podejrzana jest stroną postępowania przygotowawczego?', *Prokuratura i Prawo*, 2016, No. 10, p. 91; S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej', in: Rogacka-Rzewnicka M., Gajewska-Kraczkowska H., Bieńkowska B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Prof. P. Kruszyńskiego*, Warszawa, 2015, p. 447.

[25] See F. Prusak, *Pociągnięcie podejrzanego do odpowiedzialności w procesie karnym*, Warszawa, 1973, pp. 165–166; F. Prusak, *Komentarz do kodeksu postępowania karnego*, Vol. I, Warszawa, 1999, p. 276; S. Pikulski, K. Szczechowicz, *Zatrzymanie i tymczasowe aresztowanie w świetle praw i wolności obywatelskich*, Olsztyn, 2004, p. 21; the Supreme Court resolution of 23 May 1974, VI KZP 4/74, *OSNPG*, 1974, No. 8–9, item 98.

[26] Z. Gostyński, S. Zabłocki, in: Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 2003, p. 513; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania…*, op. cit., p. 400; K.T. Boratyńska, P. Czarnecki, in: Boratyńska K.T., Czarnecki P., Górski A., Sakowicz A., Warchoł M., Ważny A., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2016, p. 217; K. Kremens, in: Gruszecka D., Kremens K., Nowicki K., Skorupka J. (ed.), *Proces karny*, Warszawa, 2017, p. 316.

[27] P. Nowak, 'Definicja podejrzanego i oskarżonego a konstytucyjne prawo do obrony', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2016, No. 4, p. 64.

[28] A. Murzynowski, 'Udział obrońcy w postępowaniu przygotowawczym *de lege lata*', *Palestra*, 1987, No. 12, pp. 39–41.

[29] Article 21a(2) of the Act on the Liability of Collective Entities; also see T. Grzegorczyk, 'Podmiot zbiorowy jako *quasi*-strona postępowania karnego i karnego skarbowego', *Przegląd Sądowy*, 2007, No. 2, p. 30.

[30] For more see A. Świtłowski, in: Kulesza C. (ed.), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, pp. 1064 et seq.

PROTECTION OF THE INTEREST OF A PERSON AS GROUNDS FOR ADMISSION OF A COUNSEL TO A PROCEEDING

In the event a counsel is appointed by a person who is not a party, the court and the prosecutor, in the preparatory proceeding, assess whether, *verba legis*, this is required by the interests of the person in the ongoing proceeding (Article 87 § 2 CCP). These bodies may refuse to allow a counsel to participate in the proceeding if they consider that this is not required by the protection of the interests of a person who is not a party (Article 87 § 3 CCP).

A criminal proceeding, by its nature, consists in a course of activities that repeatedly generate a conflict of mutually contradictory interests. It arises not only in relations between procedural parties, but also between them and the procedural body or other participants. Some interests, including in particular those of the accused, are protected by general procedural guarantees resulting also from the primary procedural principles. Sometimes, however, the legislator explicitly indicates certain categories of interests and orders their protection in the course of the proceeding, doing so by adopting a subjective approach (the interest of the aggrieved, the accused, a procedural party) or an objective approach (the interest of the State, society, administration of justice). A specific preference of certain procedural interests may result indirectly from the fact that the collision of various contradictory values may result in a slowdown in the proceeding or even weaken the implementation of the principle of truth. Most often, however, it concerns axiological considerations and statutory protection of values that are particularly exposed as a result of taking specific procedural steps, or whose carriers are specific entities (e.g. the interest of the Republic of Poland) or ideas (administration of justice, social interest).

It concerns the interest of, e.g. the aggrieved (Article 2 § 1(3), Article 11 § 1, Article 335 §§ 1 and 2 CCP), a suspect (Article 299a CCP), the accused (Article 76a, Article 85 § 1 CCP), a party (Article 161 CCP), a person who is not a party (Article 87 § 2 CCP), an appellant (Article 425 § 3 CCP), other (than the State or self-government) institutions or persons (Article 156a CCP), but also the interest of: society (Article 12 § 4, Article 55 § 5, Article 60 § 1, Article 661 § 2 CCP), society or an individual incorporated in the statutory tasks of a social organisation (Article 90 § 1 CCP), administration of justice (Article 90 §§ 4 and 6, Article 589z (1), Article 589zn § 1, Article 590 § 1, Article 591 § 1, Article 592, Article 592c § 1, Article 592d § 2 CCP), as well as legal interest (Article 96 § 1, Article 152, Article 404c § 2 CCP), important interest of the State (Article 100 § 7, Article 156 § 5, Article 157 § 2, Article 360 § 1(c) CCP), important interest of the Republic of Poland (Article 589c § 5 CCP), private interest (Article 360 § 1(d) CCP), including private interest of persons participating in the trial (Article 147 § 4 CCP), or the interest of the investigation (Article 317 § 2 CCP).

The level of protection of this interest is also varied. Sometimes it is ordered to take into account a given interest (Article 2 § 1(3), Article 335 §§ 1 and 2 CCP), to have regard to the fact that a given interest does not oppose it (Article 11 § 1 CCP), to state that a given interest speaks in favour of it (Article 12 § 4 CCP), the protection of a given interest requires it (Article 55 § 5, Article 60 § 1 CCP) or a given interest

(Article 87 § 2, Article 589zn § 1, Article 590 § 1, Article 591 § 1, Article 592, Article 592c § 1, Article 592d § 2, Article 661 § 2 CCP), there is a need to protect a given interest (Article 90 §§ 4 and 6 CCP), to protect an important interest (Article 156 § 5 CCP), there is a necessity of protecting a given interest (Article 76a § 2 CCP), an important reason for the protection of a given interest (Article 147 § 4 CCP), an important interest speaks in its favour (Article 156a CCP), participation of given persons may lead to the violation of the interests of specified persons (Article 76a, Article 299a CCP), or it is in someone's interest (Article 90 §§ 4 and 6 CCP), there is no conflict of interests (Article 85 § 1 CCP), it is necessary for the exercise of interests (Article 161 CCP), the interest does not require it (Article 589x (1) CCP), a given interest is against a given activity (Article 661 § 4 CCP). Sometimes a statute requires that an interest be demonstrated in order to obtain a given right, e.g. participation in procedural activities (Article 96 § 1 CCP); however, more often the assessment in this respect is left to the procedural body.

Article 87 § 2 CCP stipulates that a person who is not a party may appoint a counsel if their interests in the ongoing proceeding require it. In the analysed case, reference is made to the individual interest of persons who are not parties, assessed from the perspective of the ongoing proceeding with their participation. For obvious reasons, even of a semantic nature, it cannot be identified with general clauses and abstract interests such as, e.g. public interest,[31] the interest of administration of justice,[32] or the protection of the rule of law.[33] It is also unjustified to adopt the perspective of

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[31] For more see, e.g. K. Dudka, M. Mozgawa, 'Interes społeczny jako przesłanka prokuratorskiej ingerencji w ściganie przestępstw prywatnoskargowych w trybie art. 60 k.p.k.', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga jubileuszowa Prof. J. Tylmana*, Warszawa, 2011, pp. 55–69; B. Dudzik, 'Interes społeczny jako kryterium ingerencji prokuratora w ściganie przestępstw prywatnoskargowych', in: Korybski A., Kostycki M.W., Leszczyński L. (eds), *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy. Materiały z seminarium (Lublin, 04.2005 r.)*, Lublin, 2006, pp. 189–197; M. Czekaj, 'Ingerencja prokuratora w sprawach o przestępstwa prywatnoskargowe', *Prokuratura i Prawo*, 1999, No. 7–8, pp. 46–64; M. Cieślak, 'Interes społeczny jako czynnik warunkujący prokuratorskie objęcie oskarżenia w sprawie prywatnoskargowej', *Państwo i Prawo*, 1956, No. 12, pp. 1049 et seq. For a broader systemic approach see, e.g. M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa, 1986, pp. 11 et seq.; J. Lang, 'Z rozważań nad pojęciem interesu w prawie administracyjnym', *Przegląd Prawa i Administracji*, 1997, Vol. XXXVII, pp. 130 et seq.; H. Groszyk, A. Korybski, 'O pojęciu interesu w naukach prawnych (przegląd wybranej problematyki z perspektywy teoretycznoprawnej)', in: Korybski A., Kostycki M.W., Leszczyński L. (eds), *Pojęcie interesu*…, op. cit., pp. 8 et seq.; A. Żurawik, '„Interes publiczny", „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2013, No. 2, pp. 57 et seq.; J. Sztumski, 'Konflikt społeczny', *Studia Socjologiczne*, 1973, No. 3, pp. 178 et seq.; P.J. Suwaj, *Konflikt interesów w administracji publicznej*, Warszawa, 2009.

[32] For more see J. Kosonoga , 'Dobro wymiaru sprawiedliwości jako przesłanka dokonywania czynności procesowych', in: Cieślak W., Steinborn S. (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa, 2013, pp. 869–903.

[33] For more see J. Kosonoga, 'Ochrona praworządności oraz interes społeczny jako granice prokuratorskiej ingerencji w postępowanie prywatnoskargowe', in: Rogalski M., Kosonoga J., Dąbrowski J. (eds), *Prawo karne na przełomie wieków. Księga Jubileuszowa Profesora Ryszarda A. Stefańskiego*, Warszawa, 2025, pp. 633 et seq.; also see A. Moszerer, *Stanowisko i czynności procesowe prokuratora w postępowaniu cywilnym*, Warszawa, 1957; K. Stefko, *Udział prokuratora w postępowaniu cywilnym*, Warszawa, 1956; S. Włodyka, *Powództwo prokuratora w polskim procesie cywilnym*, Warszawa, 1957; W. Masewicz, *Prokurator w postępowaniu cywilnym*, Warszawa, 1975. In foreign

a procedural body and be guided by its interests. The provision only provides for the interest of a specific participant, regardless of whether, as a result of appointing a counsel, any interests of the procedural body may suffer, including, e.g. the need to meet deadlines and the efficiency of the conducted proceedings, or the concentration of evidence. The greater degree of formalism, which inevitably requires the participation of a professional counsel, and the risk of lodging appeals, motions or procedural statements by them are of no importance.

This is an unclear and discretionary premise creating considerable latitude in decision-making for the procedural body. However, its assessment should certainly take place on two fundamental planes: *in genere* – from the point of view of the existence of such an interest in general, and *in concreto* – from the perspective of the need to protect this interest by a counsel in a specific procedural arrangement. It must therefore be an interest, the protection of which requires the appointment of a professional counsel; i.e. a situation in which, without such participation, there would be a risk of harm to the interests of the person involved in a given activity. The scope of this assessment is also determined by linguistic interpretation. This is because it concerns a situation where the protection of interests requires it; 'to require', on the other hand, means to indispensably need something;[34] in turn, 'indispensable' is understood as one that is absolutely necessary and it is impossible to manage without it.[35] Indeed, these will be cases where the ongoing criminal proceedings require the participation of a counsel, because it may have an impact on the legal or factual situation of a given person, i.e. directly translate into the sphere of their rights and obligations.

In the content of both Article 87 § 2 CCP and Article 87 § 3 CCP, the legislator uses the term 'interest' in the plural form, which may suggest that, in order to use a counsel, it is necessary to demonstrate at least two interests of a given participant. However, this conclusion is not correct. In the case law, it is rightly assumed that the mere use of the plural form in the content of a legal norm to define the subject of direct protection, the subject of the causative action, or the means used to commit a crime does not mean that the legislator uses it within the meaning of 'at least two', i.e. in order to limit the grounds for liability. The listing by the legislator of the items specified in the content of penal norms in the plural form is not a means aimed at excluding liability in cases where the item is *in concreto* single.[36] This view, although

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literature, see J. Raz, 'The Rule of Law and Its Virtue', *Law Quarterly Review*, 1977, No. 2, pp. 211–215; R.S. Summers, 'The Ideal Socio–Legal Order. Its Rule of Law Dimension', *Ratio Iuris*, 1988, No. 2, pp. 154 et seq.; L. Fuller, *The Morality of Law*, New Haven, 1964, p. 39.

[34] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. V, Warszawa, 2003, p. 302.

[35] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. II, Warszawa, 2003, p. 1196.

[36] The Supreme Court resolution of 21 November 2001, I KZP 26/01, *OSNKW*, 2002, No. 1–2, item 4, with glosses by: O. Sitarz, *Państwo i Prawo*, 2003, No. 10, p. 127; P. Palka, M. Przetak, *Przegląd Sądowy*, 2003, No. 11–12, p. 181; M. Klubińska, *Prokuratura i Prawo*, 2003, No. 12, p. 107; W. Marcinkowski, *Prokurator*, 2002, No. 2, p. 104; also cf. judgment of the Appellate Court in Lublin of 18 December 2001, II AKa 270/01, *Prokuratura i Prawo*, 2002, No. 12, item 30; similarly judgment of the Appellate Court in Wrocław of 21 February 2003, II AKa 586/02, *OSA*, 2003, No. 5, item 45; differently, however, judgment of the Appellate Court in Lublin of 29 April 2002, II AKa 330/02, *Prokuratura i Prawo*, 2003, No. 4, item 19.

it refers to substantive law, can also be directly applied to the interpretation of Article 87 CCP.

In addition, there should be no doubt that this refers only to specific criminal proceedings involving a person who is not a party to them, and not any other, as is suggested in the literature,[37] including, e.g. administrative proceedings or proceedings conducted before an international body if it is conducted at the same time. This is supported by the linguistic interpretation. It concerns interests occurring in specific, ongoing proceedings. Apart from that, the assessment of the need for the participation of a counsel in these other proceedings may be entirely different than in the context of the circumstances of the case conducted.

The premise referred to in Article 87 § 2 CCP is subject, first of all, to the subjective assessment of the person intending to appoint counsel; secondly, to the procedural body, whose judgment should be objective. The requirement of an objective assessment, in the sense of avoiding not only an unjustified (positive or negative) attitude towards one of the parties to the proceeding, but also the overestimation of circumstances supporting one or another argument not based on the realities of the case under examination,[38] results indirectly from Article 4 CCP, as well as non-statutory regulations.[39] For guarantee reasons, it is rightly assumed in the doctrine that not only the accused, but also other participants in the proceeding, including e.g. the aggrieved party or the auxiliary prosecutor, is a beneficiary of the principle of objectivity (Article 4 CCP).[40] That is why, although observation of the practice might lead to the opposite thesis, it is impossible to share the view that the assessment of the interest of a person who is not a party, as a premise for appointing a counsel, is not subject to an objective assessment by a procedural body.[41] However, when making such an assessment, a procedural body should take into account the individual perspective of the entitled entity, which is determined, *inter alia*, by the scope of their procedural rights, the type and extent of potential procedural consequences, or their personal predispositions.

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[37] M. Piech, 'Odmowa dopuszczenia do udziału w postępowaniu pełnomocnika osoby niebędącej stroną', in: Hofmański P. (ed.), *Kluczowe problemy procesu karnego*, Warszawa, 2011, p. 328.

[38] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania…*, op. cit., pp. 40–41.

[39] For more, see J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, Warszawa, 2017, pp. 86 et seq.

[40] Z. Gostyński, S. Zabłocki, in: Bratoszewski J., Gardocki L., Gostyński Z., Przyjemski S.M., Stefański R.A., Zabłocki S., *Kodeks…*, op. cit., p. 206; J. Grajewski, in: Grajewski J., Paprzycki L.K., Steinborn S., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 2010, pp. 51–52; also see judgment of the Supreme Court of 6 February 1967, VI KZP 18/67, *OSNKW*, 1967, No. 11, item 114, with a gloss of approval by S. Waltoś, *Nowe Prawo*, 1968, No. 2, pp. 317 et seq. It is also rightly noted that the statutory approach to the principle of objectivism is too narrow (S. Waltoś, 'Glosa do wyroku SN z 6.02.1967 r., VI KZP 18/67', *Nowe Prawo*, 1968, No. 2, p. 318).

[41] Thus, M. Piech, 'Odmowa dopuszczenia…', op. cit., p. 327; differently, e.g. P. Niedzielak, K. Petryna, in: Kryże A., Niedzielak P., Petryna K., Wirzman T.E., *Kodeks…*, op. cit., p. 199.

PROCEDURE FOR ADMITTING A COUNSEL TO A PROCEEDING

The scheme for introducing a counsel into the proceedings is based on their initial appointment by an entitled person (Article 87 § 2 CCP), followed by verification of this fact by a procedural body (Article 87 § 3 CCP). The appointment of a counsel means that they may act in the proceeding from the very moment of this appointment. The statute does not require a positive decision in this respect; however, a negative decision is possible if the procedural body considers that the defence of the interests of the person who is not a party does not require it. The lack of a negative decision authorises a counsel to act in the proceeding. Such regulation of the issue, as is rightly indicated in the literature, means that the statute provides for a presumption of the existence of a need to defend the interests of a person who is not a party with the assistance of a counsel.[42] The advantage of this solution is the possibility of the almost immediate appointment of counsel, while the drawback lies in the lack of knowledge of the circumstances justifying their participation in the proceedings. It is rightly deemed that they are not indicated in the power of attorney, which means that they are not known to the procedural body; for tactical reasons, a person appointing a counsel may not be interested in indicating what procedural interests specifically matter.[43] Therefore, the indication of the interest may take place on the occasion of a given activity, e.g. in connection with the appearance of a witness with a counsel in company for their interrogation. For guarantee reasons, it cannot be excluded that the justification of a premise under Article 87 § 2 CCP will be presented in a separate procedural document. However, the power of attorney itself may be granted in writing or by means of a statement for the minutes taken by the person carrying out the criminal proceeding (Article 83 § 2 CCP in conjunction with Article 88 § 1 CCP).

Refusal to allow a counsel to participate in the proceeding takes, depending on the stage, the form of a ruling issued by the prosecutor or the court (*arg. ex* Article 93 § 1).[44] The prosecutor's ruling can be appealed against pursuant to Article 302 § 1 CCP, because the refusal to admit a counsel to the proceeding violates the rights of a person entitled to appoint them. A court ruling on refusal to admit a counsel to the proceeding shall not be subject to appeal.

The issue of whether a person who is not a party to the proceeding may request the appointment of a counsel *ex officio* may raise some doubts. On the one hand, it is argued that *de lege lata* there are no grounds for the appointment of a counsel *ex officio*, because the power of attorney is based solely on choice;[45] the law of the poor does not apply to a person who does not have the status of a party to the proceeding.[46] On the other hand, it is rightly considered that Article 88 § 1 CCP, which refers to the analogous application of Article 78 § 1 CCP, does not differentiate between

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42 R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 46–47.

43 M. Piech, 'Odmowa dopuszczenia…', op. cit., p. 328.

44 A.R. Światłowski, 'Radca prawny…', op. cit., pp. 30 et seq.

45 F. Prusak, *Komentarz do kodeksu…*, op. cit., p. 314.

46 E. Bieńkowska, 'Pokrzywdzony w postępowaniu karnym po zmianach z dnia 11 marca 2016 r.', *Prokuratura i Prawo*, 2016, No. 10, pp. 6–26; K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX/el., 2025, Article 87.

entities lodging such a motion, which means that any entity entitled to appoint a counsel may submit such a request.[47] In addition, such a conclusion results from the principle of analogous application of the provisions of law. It is commonly accepted in the doctrine that this may produce three results, i.e. a situation where the provision applied by analogy will not undergo any modifications; where it will be applied after a prior change; or where it will not be applied at all.[48] Therefore, although analogous application of provisions is a construction similar to *analogia legis* and consists in 'the application of a given provision or legal norm to a similar case, but one that is not regulated by other provisions',[49] there is no room for complete discretion in its application. Each time, a choice must be made between the application of the provision directly (without modification), the application of the provision after the introduction of some changes (a modified one), and the refusal to apply a specific provision. A decision on which of the three options is appropriate should result from a systemic and functional interpretation, taking into account not only similarities, but also, and perhaps above all, differences between measures to which a referring provision and the provision referred to belong.[50] The second of the above-mentioned situations occurs most often. The modification of the provision in such a case should consist in supplementing the regulation in which the referring provision is contained in a way that takes into account the nature of this measure and in such a way that it is not contrary to the provisions to which it is to apply; it should lead to the creation, together with the referring provision, of a legal norm that will regulate a specific sphere in the provisions in which the referring provision functions, in a way that is consistent with their essence and the regulations contained therein.[51] However, in the analysed case, there are no grounds for modifying or abandoning the application of Article 88 § 1 CCP directly to the institution of the power of attorney.[52] On the contrary, there are strong reasons

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[47] R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 52–53, and at the same time, as the author indicates, the president's decision on the refusal to appoint a counsel *ex officio* for a person who is not a party does not determine whether the legal premises under Article 87 § 2 CCP are met, i.e. whether it is in the interest of the non-party individual, since this matter is reserved for the prosecutor and the court adjudicating on the admission of a counsel to the proceeding. With regard to the issue of a counsel *ex officio* in criminal proceedings, see also the Supreme Court ruling of 16 November 2000, I KZP 32/00, *OSNKW*, 2000, No. 11–12, item 98.

[48] J. Nowacki, '„Odpowiednie" stosowanie przepisów prawa', *Państwo i Prawo*, 1964, No. 3, pp. 370–371; J. Nowacki, *Analogia legis*, Warszawa, 1966, pp. 135 et seq.; J. Wróblewski, 'Przepisy odsyłające', *Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno–Społeczne*, 1964, Issue 35, p. 35; A. Błachnio-Parzych, 'Przepisy odsyłające systemowo (wybrane zagadnienia)', *Państwo i Prawo*, 2003, No. 1, pp. 43 et seq.; M. Hauser, 'Odpowiednie stosowanie przepisów prawa – uwagi porządkujące', *Przegląd Prawa i Administracji*, Vol. LXV, Wrocław, 2005, pp. 151 et seq.; resolution of seven judges of the Supreme Court of 30 January 2001, I KZP 50/00, *OSNKW*, 2001, Issue 3–4, item 16.

[49] J. Nowacki, *Analogia legis…*, op. cit., pp. 9 and 156.

[50] L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń, 2002, pp. 299–300.

[51] J. Nowacki, '„Odpowiednie" stosowanie…', op. cit., pp. 372–373, and 376; J. Wróblewski, *Pisma wybrane*, Warszawa, 2015, p. 272; A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe*, Warszawa, 2008, p. 183.

[52] See the Supreme Court ruling of 16 November 2000, I KZP 32/00, *OSNKW*, 2000, No. 11–12, item 98.

for not differentiating between the situation of the accused and a person who is not a party in this respect. They primarily result from the *ratio legis* of Article 78 § 1 CCP and the need to protect the rights of impecunious people.

The same scope of procedural rights of the accused seeking the appointment of counsel for the defence *ex officio*, and of another person requesting that, is implemented in the same proceeding of examining the applications in this respect.[53] *Ex officio* counsel is appointed by the president of the court competent to hear the case, provided that a person requesting the appointment of a counsel duly demonstrates that they are not able to bear the costs of appointing one without detriment to the necessary maintenance of themselves and their family (Article 78 § 1 CCP in conjunction with Article 88 § 1 CCP).[54] It is rightly noted in the doctrine that the situation of an entity that is not a natural person is different, because the premise indicated in Article 78 § 1 CCP does not apply to such an entity, namely that they are unable to bear the costs of defence without detriment to the necessary maintenance of themselves and their family, which directly applies only to natural persons. In this respect, based on the reference from Article 89 CCP, analogous provisions of the Code of Criminal Procedure shall be applicable.[55] In appointing a counsel *ex officio*, the president of the court shall not examine whether this is required by the protection of the interests of the person applying for such appointment. Such a decision is left to the prosecutor or the court (Article 87 § 3 CCP).[56]

It is rightly pointed out that the appointment of a counsel is always optional. The legislator did not provide for a mandatory power of attorney,[57] although in the literature there were *desiderata* for the introduction of a provision obliging the procedural body to appoint a counsel *ex officio* in the event of obvious helplessness of the person entitled.[58]

A party's counsel is not limited in the direction of actions taken on behalf of their principal and therefore any action, even unfavourable for the represented person, taken within the scope of the power of attorney, produces consequences for them, including unfavourable ones. This also applies to failure to take action, and in particular to lodging an appeal or failing to meet the deadline related to this measure.[59]

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[53] Ibidem.

[54] For more see R.A. Stefański, 'Prawo do wyznaczenia obrońcy z urzędu ze względu na niezamożność', in: Gerecka-Żołyńska A., Górecki P., Paluszkiewicz H., Wiliński P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi*, Warszawa, 2008, pp. 343–358; also see J. Kosonoga, 'Appointed counsel for the defence in the Polish criminal proceeding', *Ius Novum*, 2016, No. 2, pp. 95–111.

[55] R.A. Stefański, 'Pełnomocnik…', op. cit., pp. 53–54.

[56] Ibidem, p. 54.

[57] Ibidem, pp. 52–53.

[58] W. Posnow, 'Pełnomocnik w procesie karnym (uwagi na tle regulacji w k.p.k. z 1997 r.)', in: Bogunia L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. 2, Wrocław, 1997, p. 151.

[59] The Supreme Court ruling of 20 May 1997, V KZ 45/97, *OSN, Prokuratura i Prawo*, 1997, No. 11, item 3.

CONCLUSIONS

De lege lata the right of persons who are not parties to appoint a counsel is not assessed unequivocally in the doctrine. Critical opinions, not without reason, prevail. Not only is the use of an exceptionally vague and judgmental expression in Article 87 § 3 CCP, as a premise for not admitting a counsel, questioned, but it is also pointed out that if a person is granted a right in the proceedings, they should likewise have the possibility of using professional assistance within that scope. Such a person, deprived of the possibility of using the assistance of a counsel, may not exercise their right, especially when legal knowledge is required to do so.[60] It is pointed out that there are no objective criteria that the court or the prosecutor should apply when they deprive a person who is not a party of the possibility of protecting their interests with the assistance of a counsel, and moreover, that such a refusal may seriously jeopardise the effectiveness of the appellate measures lodged by such persons.[61]

The statement that, from the subjective perspective, the catalogue of persons entitled to use the assistance of a counsel has been very broadly defined should remain beyond dispute. As a certain simplification, it may be assumed that it includes everyone, if only their interests require it. A natural consequence of such an assumption is the fact that the type and importance of procedural interests that may require protection are very diverse. The legislator left this aspect to be assessed *in concreto*, by referring it to a specific participant and a specific procedural arrangement. However, the subjective differentiation of the legal situation of a person entitled to the use of the assistance of a counsel should be considered, and it should be done on three levels.

Firstly, *de lege lata*, the greatest deficit in the protection of procedural interests by a counsel undoubtedly occurs in the case of a person of interest, or more broadly, all the persons who are not parties, with respect to whom procedural steps have been taken aimed at their criminal prosecution. As mentioned earlier, it is indeed a statutory term, but it is not defined. The issue of the status of a person of interest is widely discussed in the literature, and – especially in the context of ensuring an effective right to defence[62] – is of such significance that the *desideratum* for its

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[60] W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Bydgoszcz, 2000, p. 282.

[61] W. Posnow, 'Pełnomocnik…', op. cit., p. 149.

[62] It is in particular essential in this case to fully implement Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1); see, in particular, Article 3(2) in conjunction with Article 2(1) of the Directive; also see the opinion of the Criminal Law Codification Commission on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 to Polish law, pp. 2–4, by S. Steinborn, available at: https://arch-bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego [accessed on 6 June 2025]; K. Oleksy, 'Bezpośredni skutek „dyrektywy obrończej" w polskim procesie karnym', *Problemy Prawa Karnego*, 2019, Vol. 3, p. 42; A. Gajda, 'Umocnienie praw jednostki w postępowaniu karnym w Unii Europejskiej a dyrektywa w sprawie dostępu do adwokata', *Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i Prace*, 2014, No. 1, p. 11; A. Klamczyńska, T. Ostropolski, 'Prawo do adwokata

regulation is becoming increasingly urgent. This would certainly also resolve the issues related to the appointment of a counsel for persons who are not parties and whose status is similar to that of a person of interest. The *desiderata* in this respect have already been reported in the doctrine. On the one hand, it was pointed out that there was a need to introduce a definition of the legal term ' person of interest' into the Code of Criminal Procedure and grant them the right to defence, including the right to use the assistance of counsel for the defence, while leaving the construction of the 'suspect' unchanged.[63] On the other hand, there were proposals to redefine the 'suspect', aimed at moving the moment of acquiring the status of a suspect to an earlier stage. The latter conception seems interesting; it assumes the conjunction of two premises:[64] a material one, in the form of a justified suspicion that a given person has committed a prohibited act, and a formal one, in the form of taking procedural actions aimed at prosecuting them, such as detention, identification parade, collection of evidence or carrying out other activities referred to in Article 74 § 3 CCP, searching the apartment they occupy or their vehicle, or procedural bugging.[65] The conception is close to the solutions of the German Code of Criminal Procedure, which does not provide a formal definition of a suspect. The status of a suspect (*Beschuldigter*) may be acquired either by means of being questioned in such a capacity or by performing activities that are permissible only against a suspect. However, the will to prosecute, in the event of a suspicion of the commission of a crime, must be objectively manifested and manifest itself in a specific action directed against a given person. It is indicated in the German literature that the local legislator deliberately waived the requirement of an explicit, formal presentation of charges, because then the law enforcement authorities could circumvent the requirement provided for in § 163a (4) StPO to inform the suspect of the charges and instruct them on their rights, by refraining

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w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy', *Białostockie Studia Prawnicze*, 2014, No. 15, http://repozytorium.uwb.edu.pl/jspui/bitstream/11320/2193/1/BSP_15_2014_Klamczynska_Ostropolski.pdf [accessed on 6 June 2025]. In the context of the Strasburg standard, see the ECtHR judgment of 27 November 2008 in the case of *Salduz v Turkey*, application no. 36391/02; ECtHR judgment of 24 September 2009 in the case of *Pishchalnikov v Russia*, application no. 7025/04; ECtHR judgment of 14 October 2010 in the case of *Brusco v France*, application no. 1466/07; detention or temporary arrest: ECtHR judgment of 2 March 2010 in the case of *Adamkiewicz v Poland*, application no. 54729/00; ECtHR judgment of 18 January 2022 in the case of *Atristain Gorosabel v Spain*, application no. 15508/15; identification parade: ECtHR judgment of 13 September 2011 in the case of *Serif Oner v Turkey*, application no. 50356/08; on-site reconstruction of the course of the events: ECHR judgment of 19 February 2009 in the case of *Shabelnik v Ukraine*, application no. 16404/03 (all the judgments are available in the HUDOC database).

63 See e.g. R.A. Stefański, 'Prawo do obrony osoby podejrzanej', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, p. 257; G. Krysztofiuk, 'Prawo do obrony osoby podejrzanej oraz faktycznie podejrzanego – uwagi na tle uchwał SN z dnia 26 kwietnia 2007 r., I KZP 4/07 oraz z dnia 20 września 2007 r., I KZP 26/07', in: Bieńkowska B.T., Szafrański D. (eds), *Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym. Część druga*, Warszawa, 2009, p. 163.

64 Cf. A. Murzynowski, 'Faktycznie podejrzany…', op. cit., p. 39; F. Prusak, 'Podstawa faktyczna przedstawienia zarzutów w procesie karnym', *Palestra*, 1971, No. 6, pp. 50 et seq.

65 S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu…', op. cit., p. 447; S. Steinborn, 'Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi *de lege lata* i *de lege ferenda*)', in: Kardas P., Sroka T., Wróbel W. (eds), *Państwo prawa i prawo karne. Księga Jubileuszowa Prof. A. Zolla*, Vol. 2, Warszawa, 2012, pp. 1800 et seq.

from explicitly blaming the suspect.[66] Normative regulation of the status of a suspect and providing him with the right to formal defence would solve the existing *de lege lata* problem of the deficit of the right to a counsel faced by this category of persons who are not parties, as well as the scope of protection of their procedural interests.

This is not the only possible normative construction, of course. Similar solutions, based on French regulations, have already been reported in the doctrine, taking as a model the institution of a witness with assistance,[67] or, more precisely, the so-called 'assisted witness' (French: *un témoin assisté*).[68] In this context, it is proposed to grant the witness the right to request to be questioned as a person of interest if they are mentioned in the content of the crime report as a potential perpetrator, or if a reasonable suspicion that the person is the perpetrator of the act that is subject to the proceeding could be derived from the information contained in the case files. Such a person would have to be informed about such a right, and the decision should be made by the prosecutor by means of issuing a ruling on this matter that could be appealed against to the court. The proposal, although worth considering, is, however, imperfect because if the data existing at the time of initiation of the investigation or collected in its course sufficiently justify the suspicion that a given person has committed the act, a decision to present charges is issued, it is immediately announced to the suspect, and they are questioned.[69] Thus, the premise for acquiring the status of a person of interest would coincide with the premise for presenting charges.

Secondly, the exclusion of persons of interest from the provisions of Article 87 § 2 CCP does not close the way to identifying other categories of participants in the proceeding whose interest is so significant and obvious that leaving the current discretionary formula of its protection by a counsel seems insufficient. By way of example, cases of a minor witness or a witness with disorders (Article 185a–185c CCP),[70] one who is to be questioned on circumstances related to

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[66] See C. Roxin, B. Schünemann, *Strafverfahrensrecht. Ein Studienbuch*, München, 2009, p. 176.

[67] See K. Żyła, 'Prawo do obrony a przesłuchanie osoby podejrzanej w procesie karnym', *Folia Iuridica Universitatis Wratislaviensis*, 2021, No. 1, pp. 178–180.

[68] In French law, the status of assisted witness was introduced in 1987 and is regulated in the Presumption of Innocence Act of 2000. In turn, the detailed regulations on procedural guarantees for assisted witnesses are laid down in Articles 113–1 to 113–8 of the French Code of Criminal Procedure. This status constitutes an intermediate position between that of a witness and the accused. The investigating judge (French: *un juge d'instruction*) grants this status, when the conditions for indicting a witness have not been met, but at the same time there is a suspicion that the person has committed a prohibited act. The person concerned may acquire the status of an assisted witness, *inter alia*, if identified by the aggrieved party or a witness. Unlike the accused, an assisted witness cannot be placed in pre-trial detention or subjected to electronic monitoring. They do not take an oath that would make them liable for giving false testimony (Article 113–7 of the French Code of Criminal Proceeding). An assisted witness who has already been questioned by the judge may be subject to an investigation if serious or corroborating evidence against them emerge in the course of the investigation.

[69] For more see J. Kosonoga, in: Stefański R.A. (ed.), *System Prawa Karnego Procesowego. Tom X. Postępowanie przygotowawcze*, Warszawa, 2016, pp. 748 et seq.

[70] The legislator recognises the specific situation of these categories of witnesses not only by introducing a special mode of interrogation, but also by providing for the right of counsel to participate in the hearing concerning the interrogation. However, this does not prejudge the right of the witness to a counsel on grounds other than those laid down in Article 87 § 2 CCP, unless the witness also has the status of a party, e.g. the aggrieved party (Article 87 § 1 CPP).

the protection of classified information (Articles 179–180 CCP), or one who posts bail, in particular in connection with a sitting concerning the ruling of forfeiture (Article 270 § 2 CCP), may be given consideration.[71] Their procedural guarantees could be increased either by adding them to the catalogue of entities indicated in Article 87 § 1 CCP or by explicit indication that they have an independent right to appoint a counsel, as the legislator did, e.g. in Article 91a CCP and Article 556 § 3 CCP. A similar solution was adopted, e.g. in German criminal procedure, by allowing an attorney at law to participate in the questioning of a witness under certain rules (*Zeugenbeistand* – Article 68b of the German Code of Criminal Procedure), *inter alia*, when there are 'interests worthy of protection' (*schutzwürdige Interessen*).

Thirdly, for the remaining categories of persons, the current state *de lege lata* seems to be sufficient.

There are other solutions worth considering, such as, e.g. the *desideratum* reported by the National Bar Association (NRA)[72] to grant unlimited access to a counsel at law, with the simultaneous assumption that their absence at the date of a procedural activity does not constitute an obstacle to conducting it; or the proposal to make the refusal to admit a counsel at the stage of a court proceeding also appealable;[73] or a suggestion to grant the right to appeal against the refusal to admit a counsel to the activities of the preparatory proceeding to the prosecutor who is a direct superior, with the obligation to forward this measure directly to the court in the event the appeal is dismissed.[74]

However, it seems that subjectively differentiating the scope of the right to legal counsel, and making it dependent on the level of protection afforded to the interests of persons who are not parties, more fully reflects the idea behind the power of attorney and at the same time allows for maintaining appropriate balance between procedural efficiency and the right to counsel.

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[71] In the case of a surety, the statute provides only for their right to participate in the hearing concerning the forfeiture of the bail or the collection of the bail (Article 270 § 2 CCP).

[72] Resolution of NRA (Polish Bar Association) No. 623/2025 of 20 March 2025 concerning the submission in the public interest of a call for amendment of Article 87 of the Code of Criminal Procedure; also see P. Starzyński, in: Kulesza C. (ed.), *System Prawa…*, op. cit., p. 1063.

[73] M. Piech, 'Odmowa dopuszczenia…', op. cit., pp. 323–332.

[74] See, e.g. public address by the Commissioner for Human Rights of 12 October 2018, II.511.1613.2014.MK, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20pe%C5%82nomocnika%20osoby%20nie%20b%C4%99d%C4%85cej%20stron%C4%85%20post%C4%99powania.pdf [accessed on 6 June 2025].

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OBLIGATION TO LEAVE THE PREMISES OCCUPIED JOINTLY WITH THE VICTIM AS A PROBATION MEASURE

BLANKA J. STEFAŃSKA*

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Abstract

The subject of the article is the obligation to leave the premises occupied jointly with the aggrieved party, imposed on the accused person as a probation measure. The considerations include the evolution of this obligation, its legal nature, purpose, essence, grounds, mode of adjudication, timing, manner of execution and the effects of its violation. The aim of the article is to analyse the probation measure of the perpetrator's obligation to leave the premises occupied jointly with the aggrieved party and to indicate the function fulfilled by this measure. The research thesis is that the obligation to leave residential premises occupied jointly with the aggrieved party as a probation measure serves mainly to protect the aggrieved, and affects the convicted person to a lesser extent. The research hypothesis is the assumption that this obligation is generally regulated correctly and requires some small normative amendments. The theoretical-legal method is used in the article, as it focuses on the analysis of theoretical aspects of this order and its normative analysis in relation to the views of representatives of the doctrine.

Key words: conditional discontinuance of a proceeding, conditional release from serving the sentence, conditional suspension of the execution of the sentence, domestic violence, aggrieved party, obligation to leave, premises, probation measure, probation period

* LLD hab., Professor of Lazarski University, Lazarski University in Warsaw (Poland), e-mail: blanka.stefanska@lazarski.pl, ORCID: 0000-0003-3146-6842

INTRODUCTION

Striving to increase the effectiveness of counteracting domestic violence, and to initiate and support actions aimed at raising social awareness of the causes and effects of domestic violence, the legislator introduced, *inter alia*, an accused person's order/obligation to leave the premises occupied jointly with the aggrieved party, giving it a varied legal character. It occurs in the form of:

1) a civil law measure (Articles 560^2 – Article 560^{12} of the Code of Civil Procedure);
2) an injunction (Articles 755^1–755^3 of the Code of Civil Procedure);
3) a provisional measure applied by the Police (Articles 15aa–15ak of the Act of 6 April 1990 on the Police);[1]
4) a provisional measure applied by the Military Police (Articles 18a–18k of the Act of 24 August 2001 on the Military Police and Military Order-Enforcing Bodies);[2]
5) an obligation under conditional Police probation (Article 275 § 3 of the Code of Criminal Procedure);
6) a preventive measure of an order to temporarily leave the residential premises occupied jointly with the aggrieved (Article 275a of the Code of Criminal Procedure);
7) a penal measure of an order to leave the premises occupied jointly with the aggrieved (Article 39(2e), Article 41a §§ 1 and 2 of the Penal Code (PC));
8) a probation measure in connection with the conditional suspension of the sentence execution (Article 72 § 1(7b) PC);
9) a probation measure in connection with the conditional discontinuance of the criminal proceeding (Article 67 § 3 PC);
10) a probation measure in connection with conditional release from serving the remaining part of the imprisonment sentence (Article 159 § 1 Executive Penal Code (EPC) in conjunction with Article 72 § 1 PC).

The article is aimed at analysing the probation measure in the form of a perpetrator's obligation to leave the premises occupied jointly with the aggrieved party and at indicating the function fulfilled by the measure. The research thesis is that the obligation to leave the premises occupied jointly with the aggrieved party as a probation measure mainly serves to protect the aggrieved and affects the convicted person to a lesser extent.

The research hypothesis is the assumption that this obligation is regulated correctly and does not require normative changes. The theoretical-legal method is used in the considerations because they focus on the analysis of the theoretical aspects of this order and its normative analysis in relation to the views of representatives of the doctrine.

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[1] Journal of Laws of 2024, item 145.
[2] Journal of Laws of 2023, item 1266.

DEVELOPMENT OF THE ACCUSED PERSON'S OBLIGATION TO LEAVE THE PREMISES OCCUPIED JOINTLY WITH THE AGGRIEVED PARTY AS A PROBATION MEASURE

The obligation to leave the premises occupied jointly with the aggrieved was introduced into the catalogue of probation measures in connection with the conditional suspension of the execution of the sentence by the Act of 29 July 2005 on Counteracting Family Violence[3] (Article 15(3)(c)), which added the obligation to leave the premises occupied jointly with the aggrieved to Article 72 § 1 item 7b PC.

The act of 10 June 2010 amending the Act on Counteracting Family Violence and Certain Other Acts[4] (Article 5(5)(b)) obliged the court that imposes an obligation on a perpetrator of an offence committed with the use of violence or illegal threat against a close relative to leave the premises occupied jointly with the aggrieved to specify the way in which the convicted person may contact the aggrieved (Article 72 § 1a PC). By force of the Act of 20 February 2015 amending the Act: Penal Code and Certain Other Acts[5] (Article 1(36)(c)) the content of this provision has been numbered § 1b.

The Act of 29 July 2005 on Counteracting Family Violence did not add the obligation to the probation measures adjudicated in connection with the conditional discontinuance of a criminal proceeding (Article 67 § 3 PC), despite the fact that the Act amended this provision. However, Article 13 ACDV stipulated that while conditionally discontinuing a criminal proceeding against a perpetrator of an offence committed with the use of violence or illegal threat against a close relative or suspending the execution of a sentence for such an offence, the court imposing the obligation referred to in Article 72 § 1(7a) and (7b) PC shall specify the way in which the convicted person may contact the aggrieved or may prohibit the convicted person from approaching the aggrieved in particular circumstances. The mention of the obligation to leave the premises occupied jointly with the aggrieved in the provision of Article 72 § 1(7b) PC raises doubts as to whether this allows for the adjudication of the measure also in the event of conditional discontinuance of a proceeding. It is assumed in the doctrine that the cited Article 13 extends the content of Article 67 § 3 PC, allowing the possibility of imposing this obligation in the event of conditional discontinuance of a criminal proceeding, arguing that Article 13 ACDV is *lex specialis* in relation to Article 67 § 3 PC, but only with regard to a perpetrator of an offence committed with the use of violence or an unlawful threat against a family member, as indicated by the hypothesis of this norm.[6] This view is incorrect, because in order to be able to adjudicate the measure, it would have to result directly from the provision. Since such a probation measure does not exist in Article 67 § 3 PC, the content of Article 13 ACDV cannot be applied to it.[7] Deriving such a possibility from Article 13 ACDV is unacceptable, as it results from an inadmissible extensive interpretation.

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[3] Journal of Laws of 2024, item 167, hereinafter 'the ACDV'.

[4] Journal of Laws of 2010, No. 125, item 842, hereinafter 'the 2010 Amendment'.

[5] Journal of Laws of 2015, item 396.

[6] R.A. Stefański, 'Nowe środki probacyjne', *Prokuratura i Prawo*, 2006, No. 4, pp. 27–28.

[7] Thus, also, S. Spurek, *Przeciwdziałanie przemocy domowej. Komentarz*, Warszawa, 2023, p. 422.

The obligation on the accused person to leave the premises occupied jointly with the aggrieved was added to the probation measures applied in connection with the conditional discontinuance of a proceeding by means of the 2010 Amendment (Article 5(4)) and the reference made in Article 67 § 3 PC to Article 72 § 1(7b), providing for such a measure, while repealing Article 13 ACDV at the same time. The last provision, in connection with the adjudication of this measure against a perpetrator of an offence committed with the use of violence or an illegal threat against a family member, required specification of the way in which the convicted person could contact the aggrieved or the possibility of prohibiting the convicted person from approaching the aggrieved in particular circumstances. The 2010 Amendment introduced an obligation to specify the way in which a perpetrator can contact the aggrieved in the event of the obligation to leave the premises occupied jointly with the aggrieved, in relation to a perpetrator of an offence committed with the use of violence or an unlawful threat, but only when the offence is committed against a close relative (Article 67 § 3 *in fine* PC),[8] and not just a family member. The Act of 11 March 2016 amending the Act: Penal Code and Certain Other Acts[9] (Article 7(7)) specified the possibility of adjudicating this obligation by reference to the adequate application of the provisions of Article 72 § 1(7b) PC.

The order to leave the premises occupied jointly with the aggrieved party became a probation measure once it was added to Article 72 § 1 PC, because since it entered into force, the penitentiary court was authorised to impose obligations referred to in Article 72 § 1 PC on the conditionally released convict; thus every change to this provision also concerned obligations related to the conditional release.

Due to the fact that the admissibility of the application of this measure in connection with the conditional discontinuance of a criminal proceeding and conditional release from the execution of the remaining penalty was regulated by means of the reference made in Article 67 § 3 PC to some obligations under Article 72 § 1 PC, including the obligation in question, and in Article 159 § 1 EPC to the whole Article 72 § 1 PC, the last provision is of fundamental importance.

LEGAL NATURE OF THE OBLIGATION

Determination of the legal nature of the obligation to leave premises occupied jointly with the aggrieved, as provided for in Article 67 § 3, Article 72 § 1(7b) PC, and Article 159 § 1 EPC, is relatively straightforward. Article 72 § 1 PC contains obligations applicable during the probation period related to the conditional suspension of the execution of the penalty of deprivation of liberty. Article 67 § 3 PC and Article 159 § 1 EPC refer to the obligations laid down in Article 72 § 1 PC, applicable respectively in the event of conditional discontinuance of a criminal proceeding and conditional release from the remaining imprisonment penalty, which means that in all these cases they have the same legal nature. The obligations during the probation period, as is rightly emphasised

[8] In the wording of Article 3(2) of the Act of 3 February 2011 amending Act: Penal Code and Certain Other Acts (Journal of Laws of 2011, No. 39, item 202).

[9] Journal of Laws of 2016, item 437.

in the doctrine, are the basis of Polish probation.[10] The obligation to leave premises occupied jointly with the aggrieved party in all these cases is a probation measure.[11] Doubts as to such a definition of the legal nature are raised by statements in the literature in relation to measures adjudicated in connection with the conditional discontinuance of a criminal proceeding.[12] It is assumed that they constitute, *inter alia*, a substitute for punishment (*quasi*-punishment),[13] criminal law measures of socialisation,[14] educational measures of socialisation devoid of penal elements,[15] adaptation measures constituting verifiers of a positive criminological prognosis[16] or a substitute for a penal measure.[17] Their nature is also determined by their placement in Article 72 § 1 PC, because they are not mentioned by name in Article 67 § 3 PC and Article 159 § 1 EPC, as indicated earlier, but by reference to Article 72 § 1(7b) PC.

OBJECTIVE OF THE OBLIGATION

In general, the obligation to leave premises occupied jointly with the aggrieved party is primarily intended to eliminate the conditions that enable the perpetrator to perpetrate another offence against the aggrieved, as well as to protect the aggrieved from experiencing emotional harm resulting from daily contact with the perpetrator.[18] It is intended to guarantee the aggrieved a sense of security and to enable them to live in safe and peaceful conditions, in which the perpetrator of an offence is isolated from them.[19] It is one of the ways of ensuring that the aggrieved are secure.[20]

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[10] J. Śliwowski, *Zasady wykonania kary pozbawienia wolności i ograniczenia wolności według nowego ustawodawstwa karnego,* Warszawa, 1969, p. 34.

[11] B. Kunicka-Michalska, in: Melezini M. (ed.), *System Prawa Karnego. Kara i inne środki reakcji prawnokarnej*, Vol. 6, Warszawa, 2016, p. 1071; S. Spurek, *Izolacja sprawcy od ofiary. Instrumenty przeciwdziałania przemocy w rodzinie,* Warszawa, 2013, p. 258; A. Jaworska-Wieloch, O. Sitarz, 'Funkcjonalność i adekwatność środka karnego i obowiązku probacyjnego nakazu opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonym. Czy regulacje prawnokarne odpowiadają potrzebom osób pokrzywdzonych?', *Archiwum Kryminologii*, 2019, No. 1, p. 300; judgment of the Supreme Court of 18 June 2009, IV KK 144/09, LEX No. 512111.

[12] For more see B. Kunicka-Michalska, *Warunkowe umorzenie postępowania karnego w latach 1970–1977*, Wrocław–Warszawa–Kraków–Łódź, 1982, pp. 133–141, and the literature cited therein.

[13] M. Leonieni, W. Michalski, *Efektywność warunkowego umorzenia postępowania karnego w praktyce sądowej,* Warszawa, 1975, p. 10; S. Pawela, 'Środki probacyjne w kodeksie karnym', *Nowe Prawo*, 1974, No. 2, p. 141; B. Kunicka-Michalska, *Warunkowe umorzenie*…, op. cit., p. 235.

[14] A. Marek, *Warunkowe umorzenie postępowania karnego*, Warszawa, 1973, pp. 61 and 131.

[15] J. Kutrzebski, 'Warunkowe umorzenie postępowania a odpowiedzialność karna', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 1974, No. 63, p. 183.

[16] A. Zoll, *Materialnoprawna problematyka warunkowego umorzenia postępowania karnego*, Kraków, 1973, pp. 94–97.

[17] B. Kunicka-Michalska, in: Melezini M. (ed.), *System Prawa Karnego*…, op. cit., p. 1071.

[18] S. Spurek, *Ustawa o przeciwdziałaniu przemocy w rodzinie*, Warszawa, 2011, pp. 21–40.

[19] P. Skonieczna-Masternak, 'Prawnonaturalne aspekty istnienia środków kompensacyjnych w polskim prawie karnym z punktu widzenia rozwoju systemu pomocy osobom pokrzywdzonym przestępstwem', in: Sopiński M. (ed.), *Aksjologia systemu prawa*, Vol. II, Warszawa, 2023, pp. 161–162.

[20] S. Spurek, 'Izolacja sprawcy przemocy w rodzinie od ofiary', *Prokuratura i Prawo*, 2013, No. 7–8, p. 147.

Joint use of the premises by the perpetrator and the aggrieved poses a risk of a repeat act of aggression. It is rightly argued that in a legal system that does not provide for a procedure obliging the perpetrator to leave the place of residence, or in which such an obligation cannot be enforced, people experiencing violence are not adequately protected.[21]

It is rightly noted in the literature that the application of this measure is an expression not only of the protection of the aggrieved against violence, but also of the prevention of offences against minors by significantly hindering, and in principle preventing, contact of the perpetrator not only with the aggrieved but also with other members of the household; it is also intended to influence the perpetrator's psyche and make them reconsider their conduct.[22]

The primary objective of this obligation as a probation measure is to increase the effectiveness of counteracting domestic violence, including protecting victims against further harm, as well as helping the perpetrators change their attitude.[23] It is to prevent the perpetrator from continuing to commit offences, in particular from abusing close relatives, and to protect them from negative experiences connected with everyday contact with the perpetrator.[24]

CONTENT OF THE OBLIGATION

The obligation to leave premises occupied jointly with the aggrieved party consists in physically leaving the premises that the perpetrator used to occupy together with the aggrieved. The word 'leaving' (*opuszczenie* in Polish) means 'moving out, quitting, going away'.[25] The linguistic interpretation does not raise any doubts that the perpetrator must not only leave the premises but also may not return to them. The Supreme Court, in the light of Article 41a § 1 PC, rightly indicated that the essence of leaving the premises occupied jointly with the aggrieved party does not come down only to leaving the premises but also includes the obligation to remain outside the premises occupied jointly with the aggrieved.[26]

Therefore, it is a form of separation that enables the aggrieved affected by violence to remain in the occupied premises, and is an alternative to escaping from them and having to look for another safe shelter for themselves and possibly their children.[27]

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[21] G. Wrona, 'Obowiązki nakładane na osoby skazane z art. 207 § 1 k.k. w orzecznictwie sądów rejonowych', *Archiwum Kryminologii*, 2011, No. XXXIII, p. 216.

[22] M. Słapek, 'Nakaz okresowego opuszczenia lokalu zajmowanego wspólnie z pokrzywdzonymi i inne środki ochrony prawnej pokrzywdzonych przemocą domową', in: Helios J., Jedlecka W., Kwieciński A. (eds), *Prawo wobec wyzwań współczesności. Z zagadnień nauk penalnych*, Wrocław, 2019, pp. 185–186.

[23] R.A. Stefański, 'Nowe środki…', op. cit., p. 25; S. Spurek, *Przeciwdziałanie przemocy…*, op. cit., p. 451.

[24] S. Spurek, *Przeciwdziałanie przemocy…*, op. cit., pp. 453–454.

[25] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 26, Poznań, 2000, p. 389.

[26] Judgment of the Supreme Court of 6 December 2012, V KK 306/12, LEX No. 1231655.

[27] M. Czarkowska, 'Nakaz opuszczenia wspólnie zajmowanego mieszkania przez osobę stosującą przemoc w rodzinie', *Praca Socjalna*, 2021, No. 1, p. 141.

The mere fact of leaving the premises may not fully protect the aggrieved, as the perpetrator may come close to them and negatively affect their well-being with his behaviour, or even commit acts of aggression against them. As a result, a conclusion *de lege ferenda* can be formulated that this obligation should be combined with the obligation to refrain from approaching the jointly occupied premises and their immediate surroundings. Article 72 § 1(7b) PC might read as follows: '7b – to leave the premises occupied jointly with the aggrieved party, and not to approach them and their immediate surroundings'. Such an obligation is provided for cumulatively with the order to leave the premises occupied jointly with the aggrieved, which has a different legal nature. And thus:

– a preventive measure in the form of an order to temporarily leave the premises occupied jointly with the aggrieved is combined with an order to leave their immediate surroundings (Article 275a § 1 CPP);
– a civil law measure includes the obligation to leave the apartment occupied jointly and its immediate surroundings (Article 260^7 CCP);
– a temporary measure applied by the Police or the Military Police takes the form of an order to immediately leave the apartment occupied jointly and its immediate surroundings and a ban on approaching the apartment occupied jointly and its immediate surroundings (Article 15aa Act of 6 April 1990 on the Police,[28] Article 18a Act of 24 August 2001 on the Military Police and Military Order-Enforcing Bodies).[29]

Only the penal measure is in the form of an order to temporarily leave the premises occupied jointly with the aggrieved party (Article 41a § 1 PC).

However, it is permissible to impose an additional obligation to refrain from staying in certain places as a probation obligation (Article 72 § 1 item 7 PC) or a penal measure in the form of a ban on staying in certain environments and places (Article 41a § 1 PC), which may be the immediate surroundings of the premises left by the accused. Nevertheless, a simpler solution is to combine these obligations or orders into a single one. Moreover, this is supported by the symmetry of these regulations.

The legislator uses the term 'premises' (*lokal* in Polish) to describe the place that a perpetrator is to leave. It is defined in legislation as:

– a place used to meet housing needs, as well as a studio used by an artist to conduct activity in the field of culture and art; places intended for short-term stays, in particular those located in boarding houses, dormitories, guesthouses, hotels, holiday homes, or other buildings used for tourist or recreational purposes, are not considered premises within the meaning of the statute (Article 2(1)(4) of the Act of 21 June 2001 on the Protection of Tenants' Rights, the Communes' Housing Resources, and amending Civil Code);[30]
– premises comprising a separate residential apartment or premises used for other purposes (Article 2(1) of the Act of 24 June 1994 on the Ownership of Premises).[31]

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[28] Journal of Laws of 2024, item 145.
[29] Journal of Laws of 2023, item 1266.
[30] Journal of Laws of 2023, item 725.
[31] Journal of Laws of 2021, item 1048.

A separate residential apartment is defined as a room or a set of rooms with permanent walls separating them within the building, which, together with auxiliary rooms, serve to satisfy housing needs. However, the definition also applies accordingly to separate premises used in accordance with their intended non-residential purpose (Article 2(2) of the above-cited statute). The premises may include, as their component part, accessory rooms, even if they are not directly adjacent to the premises or are located within the boundaries of the real property ground but outside the building in which the given premises are separated, in particular: a cellar, an attic, a storeroom, a garage (Article 2(4) of the above-cited statute);

– a room or a set of rooms separated by permanent walls within a building, together with other rooms intended for the permanent residence of people, or a residential building in which there is only one residential apartment, provided that the building or premises have a separate entrance from the outside or from a staircase (§ 3(1) of the Regulation of the Minister of the Interior and Administration of 16 August 1999 on technical requirements for the use of residential buildings).[32]

It might seem that these definitions should also be applied to the interpretation of the term 'premises' used in defining the measure in question, since a statutory definition can apply to other legal acts if it is included in the act considered to be the basic one in the field.[33] The problem lies in the fact that the above-mentioned definitions differ significantly from one another, which results from the different purposes they are meant to serve. Therefore, it is not possible to transfer any of them directly to the Penal Code. Indeed, none of the above-mentioned definitions is binding when interpreting terms used in the Penal Code, although they may be helpful in the interpretation of the concepts contained therein.[34]

In the linguistic sense, *premises* (*lokal* in Polish) means 'apartment, room, part of a house or building', but also 'a public place, an establishment conducting business or entertainment activities, where people spend time, most often with others in company'.[35]

Taking into account these definitions and the colloquial sense of the word *lokal*, one can assume that the obligation in question refers to a room or a set of rooms separated by permanent walls within a building, together with auxiliary rooms used to meet housing needs. What is important is not the designated purpose of the room, but its actual use. Article 72 § 1(7b) PC emphasises joint occupation of the premises and not residing in them, which means that its scope includes not only premises intended for residential purposes. There is no doubt that the concept includes an apartment, which is a set of residential and auxiliary rooms, with a separate entrance, separated by permanent building partitions, enabling permanent stay of people and running an

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[32] Journal of Laws of 1999, No. 74, item 836.

[33] M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa, 2010, p. 331.

[34] R.A. Stefański, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Legalis, 2024, thesis 52 to Article 41a.

[35] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 19, Poznań, 1998, p. 285.

independent household (§ 3(9) of the Regulation of the Minister of Infrastructure of 12 April 2002 on the technical requirements that buildings and their location should meet).[36] It can also be a room for temporary use, e.g. a shanty or a barge.[37]

In the literature, the term 'premises' is interpreted as any separate room used for residential purposes,[38] as well as a room or rooms separated by permanent walls within a building, together with other auxiliary rooms serving to meet the housing needs of people (accessory rooms), e.g. a cellar, attic, storage room, and garage located within the boundaries of one land property.[39]

Premises, within the meaning discussed above, do not include:

– commercial premises consisting of one room or a set of rooms separated by permanent building partitions, not constituting an apartment, a technical room or a utility room (§ 3(14) of the above-cited Regulation), despite the fact that the name contains the word 'premises'. Such premises are used for purposes other than residential, e.g. for conducting business activities;
– a utility room, as it is a room located outside the apartment or commercial premises, used for storing objects or groceries owned by the users of the building, materials or equipment related to the operation of the building, as well as fuel or solid waste (§ 3(13) of the above-cited Regulation);
– a technical room, which is a room intended for devices used for the operation and technical maintenance of the building (§ 3(12) of the above-cited Regulation).

It is assumed in the doctrine that *premises* within the meaning of the Penal Code also include commercial premises, because they are a place of conflict or the subject of conflict exhausting the features of offences, the commission of which should be prevented.[40] It does not seem necessary to reach for such a burdensome penal instrument, because if an offence is committed on such premises, the penalty itself is sufficient.

A building where separate rooms do not constitute an integral whole but are arranged in such a way that the connecting link enabling their use is another room, e.g. a corridor, on the opposite sides of which there are rooms, and this connecting link is a room common to several premises, should be treated as containing separate premises. It is rightly assumed in case law that:

> 'Since the persons residing in the premises have the possibility of satisfying their housing needs on the basis of a separate set of rooms and premises, even in a situation where they are located on opposite sides of the corridor and separated from each other by a staircase, this does not constitute sufficient grounds to deny these premises the attribute of independence'.[41]

The obligation to leave premises occupied jointly with the aggrieved party does not depend on who owns the premises; it may also be imposed on the accused when

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[36] Journal of Laws of 2022, item 1225, as amended.

[37] R.A. Stefański, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 403; M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 198.

[38] M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks…*, op. cit., Warszawa, p. 1198.

[39] R.A. Stefański, in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 249.

[40] V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 523.

[41] R.A. Stefański, in: Filar M. (ed.), *Kodeks karny…*, op. cit., p. 249.

he is the owner or co-owner of the premises.[42] In this way, his right to ownership is limited, which includes the rights to possess property (*ius possidendi*), to use property (*ius utendi*), to collect benefits (*ius fruendi*), to consume the property (*ius abutendi*) and to dispose of it (*ius disponendi*). By using property, its owner may, in particular, collect benefits and other income from it (Article 140 CC). The accused who is the owner of the premises is deprived, by force of a court decision, of the possibility of using the premises. These restrictions do not concern the possibility of disposing of the premises, so he may sell or rent the premises.[43] An objection is raised in the literature that the application of this measure in relation to a perpetrator who is the owner of the premises is in conflict with the Polish legal order expressed in Article 21(1) of the Constitution of the Republic of Poland of 1997, i.e. the principle of protection of ownership rights,[44] as well as Article 64(3) of the Constitution of the Republic of Poland, which stipulates that:

> 'The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.'[45]

For this reason, it is claimed that the obligation does not apply to the owner of the premises, because the statute does not contain an appropriate consent formulated *expressis verbis*.[46] When questioning the latter objection, it is rightly argued that the content of Article 64(3) of the Constitution of the Republic of Poland cannot be interpreted in such a way that every restriction on ownership requires an act of the rank of a statute, because an act is always a legal act of a general and not individual nature, and the above-mentioned provision of the Constitution of the Republic of Poland requires that restrictions on ownership have their basis in a statute. Based on the statutory restriction on the right to ownership contained in the Penal Code, the court has the right to oblige the perpetrator who is the owner or co-owner of the premises to leave them for a specified period, adjudicating this in a conditionally suspended imprisonment sentence.[47]

The imposition of this obligation is not prevented by the perpetrator's registration of residence in the premises he must leave, because residence registration is actually

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[42] A. Ziółkowska, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 312; P. Zakrzewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 326.

[43] R.A. Stefański, 'Warunkowy dozór Policji – nowy środek zapobiegawczy', *Państwo i Prawo*, 2006, No. 6, p. 42.

[44] M. Tomkiewicz, 'Bezpieczeństwo rodziny w świetle znowelizowanych przepisów prawa polskiego – teoria i rzeczywistość', *Studia Warmińskie*, 2012, No. 49, p. 281.

[45] J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 32–116*, Vol. 2, Warszawa, 2011, p. 571. The author softened this view, stating that 'One must bear in mind, however, that the admissibility and imposition of such an obligation on the owner (co-owner) constitutes a limitation to the right to ownership, which is protected in the Constitution of the Republic of Poland (cf. Article 64(1)–(2)). This regulation should therefore be applied exceptionally and with caution.' (J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 32–116*, Vol. 2, Warszawa, 2021, p. 1002).

[46] J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 595.

[47] V. Konarska-Wrzosek, in: Konarska-Wrzosek V., *Kodeks*…, op. cit., p. 523.

a material and technical activity specified in Article 28(4) of the Act on Registration of Population[48] and certifies the stay of a person in the premises and the right to stay there. However, it is not a legal title to take possession of the real property.[49]

GROUNDS FOR ADJUDICATING THE OBLIGATION

The Penal Code and the Executive Penal Code do not determine the grounds for adjudicating not only the obligation in question but also other probation measures. This means that the court has a wide range of possibilities for applying this measure. However, this is a significant shortcoming in the regulation. It is rightly pointed out in the literature that the lack of more detailed directives opens the way to fairly arbitrary interpretation, both broadening and narrowing.[50] The Penal Code does not limit the use of this measure to a specific type of crime.

It might seem that this obligation can only be applied in the event of a conviction for domestic violence-related offences, since the obligation adjudicated in connection with the conditional suspension of the penalty execution was added by the Act of 29 July 2005 on Counteracting Family Violence, and by the Act of 9 March 2023 amending the Act on Counteracting Family Violence and Certain Other Acts,[51] renamed as the Act on Counteracting Domestic Violence, and in connection with the conditional discontinuance of a criminal proceeding by the Act of 10 June 2010 amending the Act on Counteracting Family Violence and Certain Other Acts. It is rightly pointed out in the literature that the subject matter of statutes introducing the probation obligation does not determine the scope of application, unless such a limitation is laid down.[52] This means that the adjudication of this measure depends on a conviction for an offence in which the aggrieved party is a person occupying the premises jointly with the perpetrator, and the circumstances of its commission and the characteristic features of the perpetrator support this, in particular the fear of its commission if the perpetrator occupies the premises jointly with the aggrieved. The limitation of the catalogue of offences to those committed to the detriment of persons occupying the premises jointly with the perpetrator results from the essence of this obligation; the obligation should be related to the offence committed.[53] Its adjudication is also not limited to offences committed with the use of violence or unlawful threat, which is supported by the fact that the obligation to determine the

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[48] Journal of Laws of 2024, item 736.

[49] A. Grochoła, D. Kozłowska, 'Aspekty przeciwdziałania przemocy w rodzinie w świetle nowelizacji Kodeksu postępowania karnego z 11 marca 2016 r. Wybrane zagadnienia', *Kwartalnik Policyjny*, 2017, No. 1, p. 84.

[50] J. Skupiński, *Warunkowe skazanie w prawie polskim na tle prawnoporównawczym*, Warszawa, 1992, p. 282.

[51] Journal of Laws of 2023, item 535.

[52] T. Kozioł, *Warunkowe umorzenie postępowania karnego*, Warszawa, 2009, p. 202.

[53] M. Leonieni, W. Michalski, *Efektywność warunkowego umorzenia*…, op. cit., p. 55; J. Skupiński, *Warunkowe skazanie*…, op. cit., pp. 289–290; judgment of the Supreme Court of 6 November 1970, V KRN 419/70, *OSNKW*, 1971, No. 2, item 26; judgment of the Supreme Court of 6 February 1973, V KRN 582/71, *OSNKW*, 1973, No. 11, item 139.

manner of contact between the convicted person and the aggrieved party – when the obligation to leave premises occupied jointly with the aggrieved is imposed – is expressly restricted to that category of offences (Article 72 § 1b PC).

The measure is imposed regardless of the will of the aggrieved party; it may be applied even when they raise an objection. This is somewhat peculiar, given that the measure is intended to serve their interests and was introduced into the Penal Code primarily for that purpose. The solution has been criticised in the literature, with arguments including: firstly, if the perpetrator is the owner of the premises, they may sell the property or otherwise decide on its use, which could create an unfavourable situation for the aggrieved, who might otherwise assess the risk of such an outcome and decide for themselves on the appropriateness of applying the measure; secondly, the aggrieved may have no interest in the removal of the perpetrator from the premises for economic reasons – for example, where the perpetrator is the main provider for the family and the aggrieved lacks the means to meet basic living needs; and thirdly, disregarding the victim's wishes may result in the separation of a family who, despite the problems that led to the infringement of certain legal interests, still care for one another and wish to maintain their relationship.[54]

This does not mean that the court may apply this measure arbitrarily. It is rightly emphasised in the doctrine that when applying probation measures, the court is obliged to carefully consider the type of criminal act and the circumstances of its commission, as well as the conditions and personal characteristic features of the perpetrator.[55] They are to be adequate to the act committed and the personality traits of the perpetrator.[56] It is assumed that its adjudication should be considered primarily in the case of a conviction for offences against the family, in particular the abuse of a close relative (Article 207 PC), or against life or health.[57]

The Supreme Court indicated that:

> 'Obligations imposed in connection with the conditional suspension of the penalty execution (…) should take into account the basic purpose of a conditional sentence, which is to prevent a return of crime.'[58]

Emphasising the importance of educational considerations, it is argued that the establishment, extension or change of obligations during the probation period may take place, in accordance with Article 74 § 2 CPP, if educational considerations support it.[59] In general, such a view is correct, but not for every measure. In the case of the obligation to leave the premises occupied jointly with the aggrieved, these

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[54] A. Jaworska-Wieloch, O. Sitarz, 'Funkcjonalność i adekwatność…', op. cit., p. 305.

[55] M. Leonieni, *Warunkowe zawieszenie wykonania kary w polskim kodeksie karny. Analiza ustawy i praktyki sądowej*, Warszawa, 1974, p. 117.

[56] Judgment of the Supreme Court of 6 February 1973, V KRN 582/72, *OSNKW*, 1973, No. 11, item 139.

[57] P. Hofmański, L.K. Paprzycki. A. Sakowicz, in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, pp. 549–550.

[58] Judgment of the Supreme Court of 11 October 2011, WA 21/11, *OSNwSK*, 2011, No. 1, item 1812.

[59] J. Skupiński, *Warunkowe skazanie…*, op. cit., p. 281.

considerations are secondary, and the protection of the aggrieved is paramount; this circumstance is the overriding priority.

The Supreme Court is undoubtedly correct in stating that it is not permissible to impose an obligation that would constitute one of the penal measures or an element of a penalty on the perpetrator whose imprisonment sentence execution was conditionally suspended.[60] This stance is indirectly supported by the content of Article 72 § 1 *in principio* PC, which stipulates that the mandatory adjudication of a probation obligation becomes optional when a penal measure is applied. This is a particularly valid recommendation in the field of adjudicating the obligation to leave the premises occupied jointly with the aggrieved party, since its content overlaps with the penal measure of the order to temporarily leave the premises occupied jointly with the aggrieved.

ADJUDICATION PROCEDURE

Adjudication of this obligation in connection with the conditional discontinuance of a criminal proceeding and the conditional release from serving the remainder of the deprivation of liberty penalty is optional; it is left to the discretion of the court. Article 67 § 3 PC and Article 159 § 1 CPP specify the court's rules of conduct in relation to this obligation with the use of the phrase 'it may impose it'. As for the application of probation measures in the event of conditional release, it is noted that the court's is left to assess which measures are necessary in a given case to achieve the goals of the conditional release and successful continuation of the re-adaptation process in non-custodial conditions. The court should apply only such measures as are truly necessary to obtain a positive result from the probation.[61] Undoubtedly, these recommendations do not fully apply to the obligation to leave the premises occupied jointly with the aggrieved party, because – as indicated earlier – its main purpose is to isolate the convicted person from the aggrieved person. Due to the fact that this measure plays an important role in ensuring peace of mind to the person occupying the premises with the convict, one cannot share the view that there is no point in applying it to persons conditionally released.[62]

The situation is different in the case of conditional suspension of the penalty execution. Article 72 § 1 PC stipulates that the adjudication of a probation measure is obligatory; it becomes optional when the court adjudicates a penal measure.[63]

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[60] Judgment of the Supreme Court of 28 September 1972, I KR 134/72, *OSNKW*, 1973, No. 1, item 8; the Supreme Court ruling of 12 March 2020, V KK 19/20, LEX No. 3009110; judgment of the Appellate Court in Kraków of 24 June 1999, II AKa 119/99, LEX No. 38092; judgment of the Appellate Court in Katowice of 16 February 2006, II AKa 5/06, LEX No. 191747; judgment of the Appellate Court in Gdańsk of 18 March 2022, II AKa 382/21, LEX No. 3398669; A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 53–116*, Vol. I, Part 2, Warszawa, 2016, p. 320.

[61] K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2017, p. 762.

[62] S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2020, p. 642.

[63] Judgment of the Supreme Court of 17 December 2019 II KK 369/19, LEX No. 3561629; judgment of the Supreme Court of 16 April 2019, II KK 283/18, LEX No. 2657501.

This solution is approved in the literature.[64] The ruling of at least one obligation is mandatory (Article 72 § 1 *in fine* PC), which significantly mitigates the obligatory nature of their application. Despite the optional nature of the ruling regarding obligation to leave the premises occupied jointly with the aggrieved party, it should be applied if the circumstances of the offence and the characteristic features of the perpetrator support its adjudication. The Supreme Court rightly pointed out that a right should be transformed into an obligation if the circumstances of the case support a socially justified need to impose any of the obligations on the perpetrator, while noting that not every measure is universally applicable.[65] It is assumed in the doctrine that its application is justified in particular in cases of any type of domestic violence against people who live under the same roof and have a legal title to it.[66]

In the literature, there is a *de lege ferenda* proposal to introduce mandatory imposition of probation obligations on the perpetrator regardless of the application of penal measures against him, which would make it possible to achieve the goals of probation more completely, i.e. to genuinely verify a positive criminological forecast, and would have a positive influence on the social perception of the conditional suspension of the execution of a penalty.[67] This is unfounded, because the court can best assess, based on the circumstances of a specific case, whether the application of a specific measure is necessary.

TIME AND MANNER OF FULFILLING THE OBLIGATION

The obligation is imposed for a probation period and is closely related to it. The Penal Code does not specify the deadline for the perpetrator to leave the premises, which gives rise to doubts in this regard. In the doctrine, it is assumed that the court, having heard the convicted person, shall decide on this based on Article 74 § 1 PC.[68] The requirement to impose the obligation after 'having heard the convicted person' means that hearing him is mandatory and the court cannot waive this rule.[69] However, the Supreme Court rightly points out that:

> 'The phrase contained in the provision: "after having heard the convicted person" should be interpreted as 'a directive, the implementation of which requires making every effort to hear the convicted person and their counsel for the defence, especially before issuing

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[64] P. Gensikowski, in: 'Obowiązki probacyjne związane z poddaniem sprawcy próbie w świetle najnowszych zmian kodeksu karnego', in: Adamski A., Berent M., Leciak M. (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Warszawa, 2016, pp. 246–250.

[65] Judgment of the Supreme Court of 6 November 1970, V KRN 419/70, *OSNKW*, 1971, No. 2, item 26.

[66] V. Konarska-Wrzosek, in: Konarska-Wrzosek V., *Kodeks*…, op. cit., p. 522.

[67] B. Kolarz, M. Literski, K. Sączek, 'Obowiązki probacyjne (istota, założenia, cele oraz stosowanie w praktyce sądowej)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2018, No. 1, p. 87.

[68] R.A. Stefański, 'Nowe środki…', op. cit., p. 29; W. Marcinkowski, 'Termin wykonalności orzeczeń sądowych w przedmiocie roszczeń majątkowych wynikających z zastosowania środków karnych bądź nałożenia obowiązków probacyjnych', *Przegląd Sądowy*, 2005, No. 2, p. 61; V. Konarska-Wrzosek, in: Konarska-Wrzosek V., *Kodeks*…, op. cit., p. 523.

[69] B. Kunicka-Michalska, in: Melezini M. (ed.), *System Prawa*…, op. cit., p. 1071.

> a judgment that may be unfavourable for the convicted person. Refraining from hearing them should be of an exceptional nature and is only permissible when it is not possible to perform this activity. It cannot be justified by the application of temporary detention of the convicted person in another case, in particular when in the procedural documents he raises circumstances that may be significant for the judgment.'[70]

In this mode, the court determines a specific date by which the perpetrator must fulfil the obligation.[71] Article 74 § 1 PC applies to this obligation adjudicated in connection with the conditional discontinuance of a criminal proceeding by reference to it in Article 67 § 4 PC.

On the other hand, the Penalty Execution Code does not refer to Article 74 § 1 PC and does not contain a similar provision concerning conditional release, and therefore, this obligation is binding on the convicted person from the moment of his release. This means that he cannot return to the premises he used to occupy with the aggrieved before he started serving the sentence.

This measure may be executed until the end of the probation period. The Supreme Court rightly stated that:

> 'The essence of probation measures imposed in accordance with Article 72 § 1 and § 2 PC is that they may be executed, but also enforced, only in the probation period.'[72]

It is accessory in nature and is connected with the conditional discontinuance of a proceeding, conditional suspension of the execution of a penalty, and a conditional release respectively; in the event of the expiry of the probation period, this obligation loses its *raison d'être*.[73]

A conditionally released convict who has not been placed under supervision and has been ordered to fulfil the obligations connected with the probation period is required to: (1) without delay, and no later than within seven days of release from prison, report to the professional probation offices of the regional court in the district of his permanent residence; (2) report to the professional probation officer on dates specified by him and provide explanations as to the course of the probation period; (3) refrain from changing the place of permanent residence; fulfil obligations imposed on him (Article 159 § 2 EPC).

In the event of adjudicating the measure against the perpetrator of an offence committed with the use of violence or unlawful threat against a close relative in connection with conditional discontinuance of a proceeding and conditional suspension

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[70] Judgment of the Supreme Court of 25 January 1996, II KRN 183/95, *OSNKW*, 1996, No. 11–12, item 91; the Supreme Court ruling of 10 June 1991, II KRN 48/91, *OSNKW*, 1991, No. 10–12, item 54.

[71] A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks*…, op. cit., p. 324; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 823.

[72] Judgment of the Supreme Court of 10 December 2008, II KK 106/08, *OSNwSK*, 2008, No. 1, item 2530.

[73] Judgment of the Supreme Court of 23 August 2018, V KK 262/18, LEX No. 2538861; judgment of the Supreme Court of 21 November 2017, III KK 472/17, LEX No. 2408305, KZS 2018, No. 2, item 7; judgment of the Supreme Court of 16 October 2014, III KK 261/14, KZS 2015, No. 1, item 17; J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, pp. 594–595.

of the execution of a penalty, the court shall determine the way in which the convict may contact the aggrieved (Article 72 § 1b, and Article 67 § 3 in conjunction with Article 72 § 1b PC). Its determination is mandatory. It concerns the determination of the minimum distance from protected persons, which the perpetrator must not breach. According to the Supreme Court:

> 'Determining the way in which the accused may contact the aggrieved, pursuant to Article 72 § 1a PC, is supplementary to the ruling on the obligation to leave the premises, referred to in Article 72 § 1(7b) PC.'[74]

The phrase 'imposing an obligation on the perpetrator' used in Article 72 § 1b PC indicates that the determination of the manner of fulfilling the obligation in question must occur simultaneously with the ruling. This obligation must therefore be stated in a judgment. Although, pursuant to Article 74 § 1 PC, the time and manner of fulfilling the obligation may be specified both in the jurisdictional proceeding and in the execution proceeding, the provision is applied in the execution proceeding if the court does not specify the time and manner of fulfilling the obligations in the sentence.[75] The provision constitutes a basis for the accused to demand the specification of these contacts, and the court must specify them even if the aggrieved party opposes this.[76] However, the determination of these contacts by the court may, in certain situations, be justified and dictated by the need to determine important current issues concerning, for example, the children of the accused and the aggrieved, and the court, depending on the circumstances, may specify the way of contact that will ensure the safety of the aggrieved party.[77] It mainly concerns the specification of the way in which close relatives in conflict may contact each other in order to settle important life matters, e.g. property-related ones or those concerning their minor children, in order to guarantee the possibility of contact between people who stop living together and to ensure maximum safety for the aggrieved and not to create opportunities for the accused to commit new offences. It is necessary to specify in the judgment the way in which the accused may contact the aggrieved, even if it is to be only indirect contact for the purpose of discussing and settling certain matters.

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[74] Judgment of the Supreme Court of 25 June 2014, II KK 96/14, LEX No. 1483579 with an approving gloss by K. Postulski, 'Glosa do wyroku SN z dnia 25 czerwca 2014 r., II KK 96/14', LEX/el., 2015.

[75] M. Siwek, 'Glosa do wyroku SA w Lublinie z dnia 27 września 2000 r., II AKa 180/00', *Palestra*, 2003, No. 7–8, p. 256; R.A. Stefański, 'Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2010 r.', *Wojskowy Przegląd Prawniczy*, 2006, No. 1, p. 81; K. Postulski, 'Postępowanie przed sądem w zmienionym kodeksie karnym wykonawczym', *Prokuratura i Prawo*, 2012, No. 2, p. 107; K. Postulski, 'Glosa…', op. cit.; judgment of the Appellate Court in Katowice of 26 January 2012, II AKa 518/11, KZS 2012, No. 7–8, item 79.

[76] R.A. Stefański, 'Środki probacyjne. mające na celu przeciwdziałanie przemocy w rodzinie', *Probacja*, 2011, No. 1, p. 17.

[77] S. Spurek, 'Izolacja sprawcy…', op. cit., p. 261.

At the same time, it is possible to impose an obligation to refrain from contacting the aggrieved or other persons in a specified manner or from approaching the aggrieved or other persons (Article 72 § 1(7a) PC).[78]

CONSEQUENCES OF BREACH OF THE OBLIGATION

The decision contained in the judgment on the obligation to leave the premises occupied jointly with the aggrieved party does not constitute independent grounds for carrying out eviction.[79] A judgment containing such an obligation does not constitute an enforcement title allowing for the commencement of a mandatory proceeding conducted in the execution proceeding mode.[80]

In the event of failure to fulfil the obligation adjudicated in connection with the conditional suspension of the penalty execution, there is a possibility of ruling the execution of the suspended imprisonment sentence (Article 75 § 2 PC), and in the event of the obligation adjudicated in connection with the conditional discontinuance of a criminal proceeding, it is possible to resume this proceeding (Article 68 § 2 PC), and in the case of the obligation imposed in connection with the conditional release – to revoke the conditional release (Article 160 § 3 EPC).

Although the Supreme Court expressed the opinion that: 'The literal interpretation of Article 244 PC suggests that the scope of this provision should cover the conduct that violates the obligations imposed in accordance with Article 72 § 1 PC,'[81] Article 244 PC does not mention the obligation in question. The provision sanctions failure to comply with the order ruled by the court *verba legis* 'to temporarily leave the premises occupied jointly with the aggrieved party', and this is how this order, which is a penal measure, is defined (Article 39(2e) PC). The lack of the word 'temporarily' in the name of the obligation to leave the premises occupied jointly with the aggrieved, which is a probation measure, makes it impossible to include failure to comply with it within the scope of Article 244 PC, because doing so would require reasoning *per analogiam*, which is inadmissible in criminal law. The Supreme Court rightly pointed out that:

> 'The application of analogy to the detriment of the perpetrator within the scope of the catalogue of prohibitions and obligations is excluded under Article 244 PC.'[82]

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[78] V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 523.

[79] G. Łabuda, in: Giezek J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 622.

[80] R. Skarbek, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz do artykułów 32–116*, Vol. II, Warszawa, 2010, p. 466; J. Mierzwińska-Lorencka, in: *Kodeks*…, op. cit., 2025, p. 594.

[81] Judgment of the Supreme Court of 21 November 2012, III KK 42/12, LEX No. 1252719; judgment of the Supreme Court of 29 October 2019, III KK 522/19, LEX No. 3561391.

[82] The Supreme Court ruling of 24 February 2010, I KZP 33/09, *OSNKW*, 2010, No. 3, item 25 with approving glosses by B. Kurzępa, 'Glosa do postanowienia SN z dnia 24 lutego 2010 r., I KZP 33/09', *Prokuratura i Prawo*, 2010, No. 7–8, pp. 333–339; W. Zalewski, 'Glosa do postanowienia SN z dnia 24 lutego 2010 r., I KZP 33/09', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2010, No. 3–4, pp. 131–138; C. Kąkol, 'Glosa do postanowienia SN z dnia 24 lutego 2010 r., I KZP 33/09', *Prokuratura i Prawo*, 2011, No. 3, pp. 175–184; and approving comments

There is no need to include the said obligation in this provision, because the sanctions provided for in Article 68 § 2, Article 75 § 2 PC, and Article 160 § 3 EPC are sufficient for its enforcement.

CONCLUSIONS

1. The analysis carried out herein confirmed the research thesis that the obligation to leave the residential premises occupied jointly with the aggrieved party, ruled as a probation measure, serves mainly to protect the aggrieved and to a lesser extent affects the convicted person. The research hypothesis that its regulation does not require significant changes was also positively verified. In order to ensure its full effectiveness, it is justified to extend it to include the obligation to refrain from approaching the premises occupied jointly with the aggrieved and its immediate surroundings. It also allowed for the formulation of several *de lege lata* conclusions.
2. The order/obligation imposed on the accused to leave the premises occupied jointly with the aggrieved party occurs in various legal forms in criminal law, but their common purpose is to increase the effectiveness of counteracting domestic violence and to eliminate the conditions enabling the perpetrator to commit a repeat offence against the aggrieved; they are to guarantee the aggrieved a sense of security and enable them to live in safe and peaceful conditions.
3. The obligation on the accused to leave the premises occupied jointly with the aggrieved, applied in the event of conditional discontinuance of a criminal proceeding, conditional suspension of the imprisonment sentence execution, or conditional release from serving the remaining part of the penalty of deprivation of liberty, plays the role of a probation measure, which results from its placement in the catalogue of probation measures laid down in Article 72 § 1 PC, to which Article 67 § 1 and Article 159 § 1 EPC refer.
4. The regulations of this obligation do not contain specified grounds for its application or for limiting its adjudication to specific offences. Nevertheless, the purpose and content of the obligation indicate that its adjudication depends on a conviction for an offence, the aggrieved party of which is a person occupying the premises jointly with the perpetrator, and the circumstances of its commission

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by R.A. Stefański, 'Przegląd uchwał…', op. cit., pp. 95–99; judgment of the Supreme Court of 4 April 2000, II KKN 335/99, *Prokuratura i Prawo* – supplement 2001, No. 9, item 1; the Supreme Court ruling of 29 January 2009, I KZP 28/08, *OSNKW*, 2009, No. 2, item 14; the Constitutional Tribunal ruling of 13 June 1994, S 1/94, *Orzecznictwo Trybunału Konstytucyjnego*, 1994, No. 1, item 28; judgment of the Constitutional Tribunal of 6 July 1999, P 2/99, *Orzecznictwo Trybunału Konstytucyjnego*, 1999, No. 5, item 103; judgment of the Constitutional Tribunal of 20 February 2001, P 2/00, *Orzecznictwo Trybunału Konstytucyjnego*, 2001, No. 2, item 32; judgment the of Constitutional Tribunal of 7 July 2003, SK 38/01, *Orzecznictwo Trybunału Konstytucyjnego*, Series A, 2003, No. 6, item 61; judgment of the Constitutional Tribunal of 25 May 2004, SK 44/03, *Orzecznictwo Trybunału Konstytucyjnego*, Series A, 2004, No. 5, item 46; R. Dębski, *Pozaustawowe znamiona przestępstwa*, Łódź, 1995, p. 19; L. Morawski, *Zasady wykładni prawa*, Toruń, 2010, pp. 194 and 224–233.

and the characteristic features of the perpetrator support this, in particular the fear that the offence will be committed in the event of joint occupation of the premises with the aggrieved. Although the court, when adjudicating probation measures, should take into account their educational purpose, these considerations are of secondary importance as regards this measure, and the protection of the aggrieved is a priority.

5. This obligation is imposed for a probation period and is closely related to it, but there is no statutory deadline for the perpetrator to leave the premises. In the event of applying it in connection with conditional discontinuance of a proceeding and conditional suspension of the execution of a penalty, the court shall determine the date for leaving the premises after hearing the accused. In the event of conditional release, the obligation is binding on the convicted person from the moment he is released and means that he cannot return to the premises he used to occupy with the aggrieved before he started serving the sentence.
6. In the event of failure to comply with the obligation imposed in connection with conditional suspension of the execution of the sentence, there is a possibility of ruling the execution of the suspended imprisonment sentence (Article 75 § 2 PC); it is possible to revoke the proceeding in the case of the obligation adjudicated in connection with conditionally suspended criminal proceeding (Article 68 § 2 PC); and in the case of the obligation adjudicated in connection with a conditionally release, it is possible to revoke the conditional release (Article 160 § 3 EPC). Failure to comply with the obligation does not exhaust the features of the offence under Article 244 PC, as it is not listed therein; this provision concerns the order for the temporary eviction from premises occupied jointly with the aggrieved, which constitutes a penal measure (Article 39(2e) PC).

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HALVING OF AN ARBITRARY DEPARTURE (ARTICLE 338 OF THE PENAL CODE AND ARTICLE 682, PARAGRAPH 2, POINT 2 OF THE DEFENCE ACT)

AGATA ZIÓŁKOWSKA*

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Abstract

The article analyses the type of behaviour of arbitrary separation in terms of its division between criminal law and misdemeanour law. This behaviour has been considered bitype since the entry into force of the Act of 11 March 2022 on Homeland Defence (i.e. since 23 April 2022), but not to its full substantive scope. Halving only applies to the arbitrary leaving of a designated place of residence and does not cover criminal behaviour consisting in the arbitrary leaving of an entity – which should be criticised. In this article, in order to provide a comprehensive approach to the analysed issues, the historical outline of the penalisation of the crime of arbitrary separation is presented, and *de lege ferenda* tasks are set, the implementation of which will result in, among others: removing the loophole in the law in the form of total impunity for one-off, arbitrary separation of a soldier from their unit, lasting no more than 48 hours, which has been present in the military criminal law system continuously since 1 January 2010, i.e. since the entry into force of the amendment changing, among others, the wording of the provision of Article 338 of the Penal Code.

Key words: arbitrary separation, bisection, bitype, arbitrary leaving the designated place of stay, soldier, criminal law, misdemeanour law, military crime, military misdemeanour

* LLD, Department of Criminal Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń (Poland), Corporal of the Reserve, e-mail: a.ziolkowska@umk.pl, ORCID: 0000-0001-7178-8227

INTRODUCTION

The scope of military criminal law (*de lege lata* decreed as the third part of the Criminal Code)[1] permits the assumption that it is not only a specific constituent element co-creating an integrated system of criminal law norms, but in terms of safeguarding the interests of the Armed Forces (hereafter 'AF'), it also represents a complex field for legal science. While over the last 100 years military criminal law has been technically regulated differently (i.e. as autonomous legal acts,[2] as well as constituent parts of the general criminal codes),[3] in each case two main sets of norms could be discerned in these provisions. The first contained so-called general provisions, while the second consisted of provisions criminalising specific types of military offences. Therefore, uninterruptedly over the years and notwithstanding the unification into a single legal act of military and general criminal law (lasting from the entry into force of the 1969 Criminal Code – i.e. since 1 January 1970, up to the present day), the military criminal provisions are still perceived as: '(…) a kind of criminal [military – note AZ] code in miniature'.[4]

As a preliminary note, it is also important to mention that until the entry into force of the Act of 11 March 2022 on Homeland Defence[5] (i.e. until 23 April 2022), military offences were indivisible acts, i.e. acts that were not divided between criminal and misdemeanour law. This was owing to the general lack of typification of military offences in the Code of Offences[6] or any other piece of legislation. In fact, the acts penalised by the HDA which had already been repealed did not have a military aspect – the 1967 Act on the Universal Obligation to Defend the Republic of Poland.[7] This is because the penal provisions contained therein were *de facto* acts of a universal character which, due to their gravity, primarily constituted a catalogue of offences (Articles 224–240 AUOD and Article 242 AUOD) accompanied – as should be emphasised – by a single offence (Article 241 AUOD).

Thus, until the entry into force of the HDA (i.e. until 23 April 2022), the classification of acts as military offences was carried out solely on the grounds of the procedural jurisdiction of the military garrison court as a court of first instance

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1 Act of 6 June 1997, Criminal Code, i.e. Journal of Laws of 2025, item 383 (hereinafter 'the CC').

2 See Regulation of the President of the Republic of Poland of 22 March 1928 on the Military Criminal Code, Journal of Laws of 1928, No. 36, item 328, as amended (hereinafter 'the 1928 MCC'); Regulation of the President of the Republic of Poland of 21 October 1932, Military Penal Code, Journal of Laws of 1932, No. 91, item 765 (hereinafter 'the 1932 MCC'); Decree of the Polish Committee of National Liberation of 23 September 1944, Provisions introducing the Polish Army Criminal Code, Journal of Laws of 1944, No. 6, item 28 (hereinafter 'the PACC').

3 See Act of 19 April 1969, Criminal Code, Journal of Laws of 1969, No. 13, item 94, as amended (hereinafter 'the 1969 CC'), and the CC.

4 M. Flemming, 'Przedmowa', in: Flemming M., *Kodeks karny – część wojskowa. Komentarz*, Warszawa, 2000, p. IX.

5 Act of 11 March 2022 on Homeland Defence, Journal of Laws of 2023, item 1615 (hereinafter 'the HDA').

6 Act of 20 May 1971, Code of Offences, Journal of Laws of 2023, item 1234 (hereinafter 'the ACO').

7 Act of 21 November 1967 on Universal Obligation to Defend the Republic of Poland, Journal of Laws of 1967, No. 44, item 220, as amended (hereinafter 'the AUOD').

(Article 10 of the Act of 24 August 2001, Code of Proceedings in Cases of Offences)[8, 9] – which was the appropriate solution.

However, subsequently to that date, apart from the indicated general way of categorising acts as military offences (which *de facto* is still in force), certain qualitative changes occurred at the discussed level. In Section XXV of the HDA, entitled 'Penal provisions and provisions on financial penalties', an illustrative catalogue of military offences was included – something that had not been practised in the criminal law system *sensu largo* prior to that time. This is an unprecedented situation, all the more so as one of them (i.e. the military offence from the provision of Article 682(2)(2) HDA) has also led to the division of a military offence from the provision of Article 338 of the Penal Code consisting in arbitrary separation.[10] This is the first systemic case of the division of a military offence ever being made.

ARBITRARY SEPARATION (ARTICLE 338 OF THE CC) – HISTORICAL PERSPECTIVE

The discussion on the military offence of arbitrary separation (Article 338 of the CC), as well as its division, should be preceded by a concise analysis with regard to the evolution of the criminalisation of this act in the system of military criminal law. This is because this offence holds a historically well-established position, as it is the common denominator of all criminal-military regulations enacted in the last century, starting from the provisions contained in separate and strictly military criminal codes, and ending with the military parts that co-create the general criminal-law code regulations.

In the first military penal regulation (which was enacted ten years after Poland regained its independence), i.e. the 1928 MCC,[11] the subject matter in question was directly referred to by the very title of one of its parts, which reads: 'Wilful separation and desertion'. This offence was committed by an offender who: physically distanced himself from the unit, left his post of duty (Article 48 of the 1928 MCC); exceeded the number of leave days granted (Article 48 of the 1928 MCC); or committed an act 'in the field' by failing to join the nearest unit or the unit from which he had previously detached himself; or by failing to report immediately

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[8] Act of 24 August 2001, Code of Procedure in Petty Offences, Journal of Laws of 2022, item 1124 (hereinafter 'the CPPO').

[9] In principle, for committing a military offence, a soldier bears misdemeanour liability initiated by a request for prosecution submitted by the Commander of the Military Unit (hereinafter 'the MU') in which they serve. In this respect, the Commander of the MU is the sole competent authority (Article 86a § 1 of the CPPO). The second type of responsibility that may be applied to a soldier for committing a military offence is military disciplinary liability, which is also initiated by the Commander of the MU, provided that the Commander waives the right to request for prosecution (Article 86a § 2 of the CPPO, subject to the wording of Article 86a § 3 of the CPPO).

[10] A. Ziółkowska, 'Komentarz do art. 338 k.k.', in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1575.

[11] The 1928 Military Criminal Code was in force from 1 August 1928 until 31 December 1932.

to the unit as soon as his captivity ended (Article 49 of the 1928 MCC). In terms of gravity, this offence constituted a military misdemeanour.

A slightly different approach to the issue in question was adopted in the next military penal regulation, i.e. the MCC of 1932.[12] When decreeing the issue in question, the term 'wilful separation' was not used at all, even though the content of individual provisions of the code (in particular those in Chapter VII entitled 'Offences against military duty') clearly implied it. The conduct of a soldier in failing to register immediately after returning from captivity at his unit, which was included in a separate provision (i.e. Article 44 § 1 of the 1932 MCC), was excluded from the substantive scope of the military offence in question. Furthermore, the said offence could admittedly be committed by arbitrarily exceeding the number of leave days granted, but this conduct was no longer explicitly included in the Code as one of the forms of the above-mentioned offence (this was not the case in the 1928 MCC, see Article 48 of the 1928 MCC).[13]

Under the provisions of the 1932 Military Penal Code, a soldier who left his unit or post of duty or remained outside them (Article 43 § 1 of the 1932 MCC) was criminally liable for arbitrary separation. In terms of gravity, this offence was a military misdemeanour, which did not forfeit its character even if the act was committed during wartime (Article 43 § 2 of the 1932 MCC). The exception was if a soldier – pursuant to the wording of Article 43 § 1 of the 1932 MCC – undertook actions: '(…) for the purpose of permanently evading his military duty or if [his – AZ's note] absence from the unit lasted more than six months' – in which case he committed a military crime (Article 46 § 1 of the 1932 MCC).

Also in the last separate military-criminal regulation – i.e. in the CCPA[14] – the legislator, in decreeing the military offence in question, did not expressly use the phrase 'arbitrary separation'. Moreover, this offence was part of the catalogue of the so-called 'Offences against Military Obligation' (Chapter XIX CCPA), and in terms of its gravity it was either a military misdemeanour (in terms of a soldier leaving or remaining outside a unit or post of duty – Article 115 § 1 CCPA); or a military crime (if the wilful desertion occurred during a war – Article 115 § 2 CCPA; or e.g. '(…) with a view to a prolonged or permanent evasion of military duty' – Article 118 § 1 CCPA).

The common denominator of all the above-mentioned military criminal regulations was that the duration of a soldier's absence was neutral to the essence of the military offence in question. However, it was of significance in assessing the punishment (see Articles 51 and 52 of the 1928 MCC; Article 46 § 1 of the 1932 MCC; or Article 118 CCPA), in assessing the gravity of the act (see Article 46 § 1 of the 1932 MCC; Article 115 § 2 CCPA; or Article 118 § 1 CCPA), and in choosing the method

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[12] The 1932 Military Criminal Code was in force from 1 January 1932 until 29 September 1944.

[13] At the time when the 1932 MCC was in force, it was emphasised that: 'Remaining outside a unit or post of duty is a form of negative attitude on the part of a soldier towards their military duty. It may consist, for example, in failing to return on time after a leave of absence (…)'; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 43 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, Warszawa, 1933, p. 103.

[14] The 1944 Criminal Code of the Polish Army was in force from 30 September 1944 until 31 December 1969 (hereinafter 'the CCPA').

of criminal repression, i.e. judicial or disciplinary penalisation).[15] This was because, in cases of lesser gravity, the offence of 'arbitrary separation' was punishable by disciplinary punishment[16] (see Article 45(1) of the 1928 MCC; Article 32(a) of the 1932 MCC; Article 7 CCPA).[17]

Moreover, a common element was also the permanent nature of this offence, the fact that its elements were already realised by a single behaviour of the offender, as well as the requirement that the offender's action must have been intentional (with direct or possible intent). In fact, the offender had to have been aware of and willing to violate the obligation incumbent upon him *in concreto*, by causing his absence from the place specified by the military obligation.[18]

However, a different approach to the circumstance of the 'duration of absence of a soldier' acting under the conditions of arbitrary separation was taken in the 1969 CC (Article 303). Such an offence was a military misdemeanour included in the 'Offences against the obligation to perform military service' (Chapter XXXVIII of the 1969 CC).

Under the main mode, criminal responsibility was envisaged in the case of a soldier's arbitrary departure from a unit or a designated place of stay, as well as for arbitrary remaining outside them, the absenteeism having to amount to more than two calendar days[19] (Article 303 § 1 of the 1969 CC) and lasting up to a maximum of 14 calendar days (*argumentum a contrario* from Article 303 § 3 of the 1969 CC). The reasoning for reducing the lower threshold for penalising the act to below two calendar days, on the other hand, was the situation in which a soldier had previously been convicted for arbitrary separation (i.e. acting under conditions of recidivism) or had been subjected to disciplinary punishment for such an act within the last six months, in the form of an arrest sentence[20] (Article 303 § 2 of the

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[15] E. Mecnarowski, E. Saski, M. Buszyński, B. Matzner, 'Komentarz do art. 48 k.k.woj. z 1928 r.', in: Mecnarowski E., Saski E., Buszyński M., Matzner B., *Kodeks karny wojskowy*, Warszawa, 1928, p. 98.

[16] M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 43 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, London, 1944, p. 40.

[17] The literature on the subject emphasised that: 'A violation (…) of the established order of military service (…) [was – AZ] not always a military offence. (…) [It could – AZ] only be an offence punishable on disciplinary grounds. Soldiers in active military service (…) [were liable – AZ] for offences only under the disciplinary procedure (…)' – H. Aratyn, A. Zawirski, *Wojskowe prawo karne*, Warszawa, 1960, p. 7.

[18] E. Mecnarowski, E. Saski, M. Buszyński, B. Matzner, 'Komentarz do art. 48 k.k.woj. …', op. cit., pp. 97–98; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 46 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, Warszawa, 1933, p. 110; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 46 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, London, 1944, p. 43; J. Kaczorowski, J.K. Cisek, R. Vogl, 'Komentarz do art. 115 k.k.W.P.', in: Kaczorowski J., Cisek J.K., Vogl R., *Kodeks karny Wojska Polskiego i ustawy dodatkowe z komentarzem*, Warszawa, 1946, pp. 128 and 130.

[19] On 'absenteeism exceeding 2 calendar days', see judgment of the Supreme Court of 4 May 1970, Rw 306/70, *OSNKW*, 1970, No. 9, item 106; I. Andrejew, 'Komentarz do art. 303 k.k. z 1969', in: Andrejew I., *Kodeks karny. Krótki komentarz*, Warszawa, 1981, p. 250; I. Andrejew, 'Komentarz do art. 303 k.k. z 1969', in: Andrejew I., *Kodeks karny. Krótki komentarz*, Warszawa, 1988, p. 263.

[20] On 'disciplinary penalisation', see the IWSN resolution of 16 May 1972, U 1/72, *OSNKW*, 1972, No. 7–8, item 128; judgment of the Supreme Court of 19 December 1975, Rw 403/75,

1969 CC). If, on the other hand, the soldier's absenteeism on account of arbitrary separation exceeded 14 calendar days (Article 303 § 3 of the 1969 CC),[21] or if, in carrying out the act in question within the temporal dimension indicated, the soldier took his weapon with him (Article 303 § 4 of the 1969 CC), he was liable for the commission of the qualified offence of arbitrary separation.[22]

Moreover, the 1969 CC introduced a certain subjective exclusion, as the provisions criminalising arbitrary separation did not apply to officers, warrant officers, professional, and periodic service soldiers (Article 303 § 6 of the 1969 CC).[23] That was a solution hitherto unknown.

Notwithstanding certain polarisations,[24] the 1969 CC reproduced the solutions developed in the previously existing separate military penal codes with regard to the offence in question. This is because it was still of a permanent nature,[25] its elements were fulfilled by a single behaviour of the offender (subject, however, to its minimum temporal dimension – Article 303 § 1 and 2 of the 1969 CC), and the offender was required to act intentionally (with direct or possible intent).[26]

Based on the above, it should be emphasised that from the time the 1928 MCC came into force (i.e. from the beginning of August 1928) until the time the 1969 CC remained in effect (i.e. until the end of August 1998), the military offence of arbitrary separation was an act that was not divided between criminal law and the law of misdemeanours.

OSNKW, 1976, No. 3, item 51; judgment of the Supreme Court of 27 March 1970, Rw 232/70, *OSNKW*, 1970, No. 7, item 88; resolution of the Supreme Court (7) of 27 March 1974, U 2/74, *OSNKW*, 1974, No. 6, item 122; judgment of the Supreme Court of 4 October 1972, Rw 964/72, *OSNKW*, 1972, No. 12, item 202; judgment of the Supreme Court of 18 November 1971, Rw 1198/71, *OSNKW*, 1972, No. 3, item 56.

[21] On 'absenteeism exceeding 14 calendar days', see judgment of the Supreme Court of 26 February 1970, Rw 134/70, *OSNKW*, 1970, No. 6, item 64; W. Sieracki, 'Glosa do wyroku SN z 26.02.1970, Rw 134/70', *Wojskowy Przegląd Prawniczy*, 1970, No. 3, p. 386 (critical); it should also be noted that arbitrary separation exceeding 14 days was treated by the CCPA as desertion – L. Czubiński, *Polskie wojskowe prawo karne w zarysie*, Warszawa, 1981, p. 114.

[22] See I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa, 1980, p. 460.

[23] See H. Popławski, R. Skarbek, 'Przestępstwa wojskowe', in: Popławski H., Skarbek R., Szczurek Z., *Prawo karne wojskowe i skarbowe*, Gdańsk, 1983, p. 38; K. Buchała, *Prawo karne materialne*, Warszawa, 1980, p. 760.

[24] A certain new solution adopted in the 1969 CC, previously unknown, concerned the application mode of prosecution for offences under Article 303 §§ 1–2 of the 1969 CC. Competence in this respect was vested in the Commander of the MU. An exception was made for the military prosecutor, who could initiate proceedings for these offences *ex officio* if, in their opinion, considerations of military discipline warranted it (Article 576 § 1 of the Act of 19 April 1969, Code of Criminal Procedure, Journal of Laws of 1969, No. 13, item 96, as amended; hereinafter 'the 1969 CCP') – S. Rybarczyk, *Zarys prawa wojskowego. Prawo karne wojskowe*, Vol. IV, Warszawa, 1974, p. 204.

[25] Judgment of the Supreme Court of 3 July 1984, Rw 364/84, *OSNKW*, 1985, No. 3–4, item 24; K. Mioduski, 'Komentarz do art. 303 k.k. z 1969', in: Bafia J., Mioduski K., Siewierski J., *Kodeks karny. Komentarz*, Warszawa, 1971, p. 675; I. Andrejew, 'Komentarz do art. 303 k.k. …', op. cit., 1988, p. 263.

[26] On 'wilful misconduct' see T. Leśko, S. Rybarczyk, *Prawo wojskowe PRL*, Vol. II, Warszawa, 1987, p. 166; J. Muszyński, 'Część czwarta. Wojskowe prawo karne materialne', in: Łustacz L. (ed.), *Podstawowe wiadomości o prawie wojskowym*, Warszawa, 1969, p. 219.

ARBITRARY SEPARATION (ARTICLE 338 CC) – THE *DE LEGE LATA* PERSPECTIVE

The analysis of the provision of Article 338 CC which penalises arbitrary separation *de lege lata* allows the inference that the legislator, when decreeing its content, used two different ways of approaching the code matter. The first one (applied previously in the 1969 CC and partly in the strictly military penal codes) assumes the punishability of each (even single) behaviour of the offender, provided that the temporal dimension of his/her absence due to arbitrary separation reached at least the minimum indicated in the content of the provision (see Article 338 § 2 and 3 CC). The second approach, on the other hand, subjects the existence of military-criminal responsibility for arbitrary separation to the condition of repetition (but not juridical recidivism) of the offender's conduct (Article 338 § 1 CC) – which had not been employed hitherto.

The literature (with a view to the severity of the sanctions) distinguishes the following types of arbitrary separation:[27]

– short-term arbitrary separation – occurs when at least two arbitrary absences of a soldier, each lasting no longer than 48 hours, have been committed within a period not exceeding three months; this offence is punishable by restriction of liberty (Article 338 § 1 CC);
– medium-term arbitrary separation – occurs when a single arbitrary absence of a soldier lasts for more than 48 hours but does not exceed seven days; this offence is punishable by restriction of liberty, up to one year's military detention, or up to one year's imprisonment (Article 338 § 2 CC);
– long-term arbitrary separation – occurs when a single arbitrary absence of a soldier lasts more than seven days; this offence is punishable by military detention (up to two years) or imprisonment for up to three years (Article 338 § 3 CC).

The Code's treatment of the timeframe currently determining the lower temporal limit for the existence of military criminal liability for arbitrary separation is not original, but is the result of the amendment of this provision made under Article 92(2) of the Act of 9 October 2009 on Military Discipline.[28]

Until the entry into force of the AMD (i.e. until 1 January 2010), the elements of the offence in question were fulfilled by every (even the smallest) arbitrary departure of a soldier from his unit or designated place of stay, or by remaining outside them.[29] On the other hand, depending on the duration of the absence, it was either

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[27] W. Marcinkowski, 'Komentarz do art. 338 k.k.', in: Marcinkowski W., *Kodeks karny. Część wojskowa. Komentarz*, Warszawa, 2011, p. 197.

[28] Act of 9 October 2009 on Military Discipline, Journal of Laws of 2009, No. 190, item 1474, as amended (hereinafter 'the AMD').

[29] See S. Hoc, 'Komentarz do art. 338 k.k.', in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 1725; A. Kamieński, 'Komentarz do art. 338 k.k.', in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 975; R. Góral, 'Komentarz do art. 338 k.k.', in: Góral R., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warszawa, 2005, p. 543; J. Wojciechowski, 'Komentarz do art. 338 k.k.', in: Wojciechowski J., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warszawa, 1997, pp. 571–572.

a misdemeanour of the principal type[30] if the soldier's arbitrary absence lasted more than 14 calendar days (Article 338 § 1 CC in the wording prior to 1 January 2010), or a misdemeanour of the privileged type[31] if the soldier's arbitrary absence lasted less than 14 calendar days (Article 338 § 2 CC in the wording prior to 1 January 2010).[32]

The original shape of the elements of the crime of arbitrary separation (i.e. that in the wording prior to 1 January 2010) was a literal repetition of the solutions previously decreed in the strictly military penal codes – and it was a correct approach. Adoption in the 1997 Criminal Code, in relation to the phenomenon of arbitrary separation, of solutions substantially different from those previously decreed in the 1969 code regulation, was justified, *inter alia*, by the need to eliminate the existing stratification of crimes of this type. As aptly emphasised at the time, that stratification was the result of attaching too much weight: '(…) to the temporal aspect of the soldier's unlawful stay outside the unit/post of duty (…). The result was an excessively casuistic typification, not favourable to the conduct – contrary to appearances – of an effective action against a criminal act'.[33] For this reason, the lower limit of the privileged type of the offence of arbitrary separation (in its original wording) decreed in the CC was completely detached from the criterion of time, while the entire content of the provision defining the scope of the elements of the offence in question was formulated in a highly synthetic manner. It was emphasised that the circumstance in the form of the soldier's awareness of the threat of criminal-military responsibility for every instance (even the shortest) of arbitrary separation was a factor conducive to maintaining an adequate level of military subordination.

Despite the passage of time, the aforementioned position on the need to eliminate the excessive stratification of crimes of this nature, among others, has not grown obsolete. On the contrary. This state of affairs has, unfortunately, been exacerbated by the amendment of the elements constituting the offence of arbitrary separation – or in other words, their new formulation – which has remained in force since 1 January 2010. The introduction of a lower threshold of absence (not exceeding 48 hours on a single occasion) as a condition for criminal-military liability for arbitrary separation was justified at the time by the need to strengthen: '(…) the role of the

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[30] This offence was prosecuted *ex officio* (under the public prosecution mode) and was punishable by military detention or imprisonment of up to three years – Article 338 § 1 CC in the wording prior to 1 January 2010.

[31] This offence was prosecuted at the request of the Commander of the MU (public prosecution mode) and was punishable by restriction of liberty, military detention for up to one year, or imprisonment for up to one year – Article 338 § 2 CC in the wording prior to 1 January 2010.

[32] Liability for the offence of arbitrary separation (in the wording of Article 338 CC prior to 1 January 2010) was similar to liability under Article 303 of 1969 CC, with only a minor mitigation of the sanction. Moreover, Article 338 CC (in the wording prior to 1 January 2010): (1) retained the stricter liability for arbitrary separations exceeding 14 calendar days (§ 1); (2) retained the application mode for prosecution of arbitrary separations amounting to less than 14 calendar days (§ 3), (3) decreed the subjective exclusions (§ 4).

[33] Komisja ds. Reformy Prawa Karnego, 'XXXIX Przestępstwa przeciwko obowiązkowi pełnienia służby wojskowej', in: Komisja ds. Reformy Prawa Karnego, *Projekt Kodeksu Karnego*, November 1990, p. 111.

commander in considering short-term arbitrary separations (…)'.[34] However, from a logical standpoint, it is difficult to agree with this justification; especially since, in practice, the amendment had precisely the opposite effect. Moreover, it triggered a discussion in the doctrine of criminal law regarding the number of varieties of arbitrary separation types decreed in Article 338 CC,[35] as well as a state of complete impunity for behaviour consisting in a single arbitrary absence of a soldier from a unit for less than 48 hours, which has lasted from 1 January 2010 to the present day.

The aforementioned amendment has also led to a systemic inconsistency, existing to this day, which relates to the adopted temporal elements constituting the prohibited act of a short-term arbitrary separation (Article 338 § 1 CC). The lower time limit conditioning criminal-military responsibility under the provision in question is in fact established for at least two arbitrary separations effected within a period of not more than three months, with a single absence on each occasion not exceeding 48 hours. It should be noted that, in accordance with the literal wording of Article 338 § 1 CC, there may be more than two such arbitrary separations of a soldier within a period of not more than three months; or there may be only two such incidents, with each of them lasting continuously for as long as, for example, 48 hours (or, naturally, less).

In this case, the time of the soldier's actual remaining in the conditions of arbitrary separation – amounting in the cited example to 96 hours, but (given the statutory conditions and circumstances of the case) still justifying the legal qualification of the act as a short-term arbitrary separation under Article 338 § 1 CC (i.e. as a misdemeanour of the basic type[36] or of the privileged type,[37] depending on the adopted approach in this regard) – *de facto* constitutes a temporal dimension significantly longer than the lower temporal limit conditioning criminal-military responsibility for the medium-term arbitrary separation under Article 338 § 2 CC, which (also depending on the adopted approach in this regard) is recognised in criminal law doctrine as a misdemeanour of the basic type[38] or of the privileged variant.[39]

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[34] *Uzasadnienie do ustawy o dyscyplinie wojskowej*, p. 20, https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1666 [accessed on 31 December 2023].

[35] In the doctrine of criminal law, one may encounter two clearly polarised positions as to how many types of arbitrary separation were decreed in the content of the provision of Article 338 CC following its amendment in 2009. There are proponents of the position that the offence in question has three types: a privileged type (i.e. *short-term arbitrary separation* – Article 338 § 1 CC); a basic type (i.e. *medium-term arbitrary separation* – Article 338 § 2 CC); and a qualified type (i.e. *long-term arbitrary separation* – Article 338 § 3 CC). Thus, W. Marcinkowski, 'Komentarz do art. 338 k.k. …', op. cit., p. 201. Their opponents, on the other hand, are of the opinion that the offence in question comprises of two types: the basic type (i.e. *short-term arbitrary separation* – Article 338 § 1 CC) and 2 forms of the qualified type (i.e. *medium-term and long-term arbitrary separation* – Article 338 § 2 and 3 CC) – thus, A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2015, p. 1868.

[36] See A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

[37] See W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 201.

[38] Ibidem.

[39] See A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

An analogous systemic inconsistency also exists between short-term arbitrary separation under Article 338 § 1 CC and *long-term arbitrary separation* under Article 338 § 3 CC,[40] i.e. an offence subject to much stricter penalisation, when the time of the soldier's effective presence in the conditions of arbitrary separation totals more than seven days, but it is not a one-off and continuous absence (i.e. the absence referred to in Article 338 § 3 CC), but a number of behaviours (e.g. ten arbitrary separations) carried out over a period not exceeding three months, each of them amounting to, for example, 48 hours. Such arbitrary separation will, in fact, last 20 days.

Although this state of affairs is a direct consequence of the change in the content of Article 338 CC (through the addition by way of amendment of, *inter alia*, § 1), the removal of the said systemic inconsistency is also not facilitated by the permanent nature of the crime in question.[41] After all, the legal qualification of the act depends not on the actual (i.e. cumulative) duration of the soldier's arbitrary separation, but on how long each of his or her unlawful absences was on a single occasion.

Apart from the permanent nature of this crime, another circumstance that has not changed over the years is the fact that, as a rule, its elements are realised by a single behaviour of the offender (with the reservation that it must last for at least the minimum period of time indicated in the wording of the provision, i.e. 48 hours – Article 338 § 2 CC, or more than seven days – Article 388 § 3 CC), while the perpetrator of arbitrary separation is at the same time still required to act intentionally (with direct or possible intent).[42]

ARBITRARY ABANDONMENT OF A DESIGNATED PLACE OF STAY (ARTICLE 682(2)(2) HDA) – A *DE LEGE LATA* APPROACH

By virtue of the provisions of the HDA (in force since 23 April 2022), the criminal law system *sensu largo* has, *inter alia*, provided examples of the typification of military offences, with one of them also bisecting – but to a limited extent – the military code offence under Article 338 CC, i.e. arbitrary separation.

A literal interpretation of Article 338 CC results in the conclusion that this offence refers to three different places/situations: (1) leaving one's unit; (2) leaving the designated place of stay; (3) remaining outside them; with the common denominator of these being the 'arbitrary' element of the offender's action. On the other hand, the substantive scope of the military offence under Article 682(2)(2) HDA criminalises only the unjustified and arbitrary leaving of a designated post while on duty.

However, arbitrary departure from a designated place of stay is not the same as arbitrary departure from one's unit.

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[40] See W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 201; A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

[41] W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 214; S.M. Przyjemski, 'Komentarz do art. 338 k.k.', in: Górniok O., Hoc S., Przyjemski S.M., *Kodeks karny. Komentarz*, Vol. III, Gdańsk, 1999, p. 491.

[42] W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 215.

The soldier's so-called 'own unit' (to which the wording of Article 338 CC refers directly) should be considered to be the MU in which the soldier performs active military service, i.e. for example: the area of a company, brigade, regiment, battalion, school, institution,[43] or training centre.

On the other hand, a soldier's 'designated place of stay' may be either a place designated within the territory of his unit (while being a place other than that where he usually stays) or a place designated outside the territory of his unit (e.g., another training ground, warehouse, exercise area,[44] building,[45] garrison, tactical strip, or the route of a service vehicle) – with the proviso that arbitrary departure from the designated place of residence occurs only in the second of the cases indicated by way of example, as the first in fact qualifies as arbitrary departure from the unit.

The designation of the place of stay may occur by means of, for example: a temporary pass, a permanent pass,[46] a superior's referral of a soldier for psychiatric observation,[47] the granting of leave, the granting of exemption from official duties (including sick leave),[48] or an order to leave. For this reason, the 'designated place of stay' of a soldier (to which *expressis verbis* reference is made both in Article 338 CC and in Article 682(2)(2) HDA) is any place indicated to a soldier by their superior, which is situated outside the soldier's home MU, in which the soldier has a task for a definite or permanent period of time (alone or with other soldiers) in order to: (1) perform service / perform official activities; (2) be on readiness to perform or perform service / perform official activities; or (3) be at the disposal of his superior.

In this context, it is difficult to assume that the military offence under Article 682(2)(2) HDA represents a halving of the military offence under Article 338 CC, since the gap in the law existing since 1 January 2010, with regard to the lack of criminalisation of behaviour consisting in a one-off and arbitrary separation of a soldier from a unit for no longer than 48 hours, continues to be present in the criminal law system. This state of affairs results from the change in the content of the elements of Article 338 CC (as already mentioned), as well as the fact that the scope of the elements of the military offence under Article 682(2)(2) HDA is significantly narrower than the scope of the elements of the military offence under Article 338 CC.

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43 See S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1723.

44 R. Góral, 'Komentarz do art. 338 k.k.', op. cit., p. 542.

45 S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1724.

46 See 'The arbitrary departure of a soldier from a garrison in the area in which he or she was obliged to remain on the basis of a permanent pass constitutes an arbitrary departure from the designated place of stay' – judgment of the Supreme Court IW of 31 May 1995, WR 62/95, *OSNKW*, 1996, No. 1–2, item 4.

47 See '(…) the arbitrary departure of a soldier from a psychiatric hospital to which he or she has been referred by a superior for observation constitutes arbitrary departure from the designated place of stay (…)' – judgment of the Supreme Court IW of 18 December 1984, RW 683/84, *OSNKW*, 1985, item 42; Z. Ćwiąkalski, A. Zoll, 'Przegląd orzecznictwa Sądu Najwyższego z zakresu prawa karnego materialnego za I półrocze 1985 r.', *Nowe Prawo*, 1986, No. 7–8, p. 115.

48 Cf. 'The stay of a soldier outside the unit or designated place of stay outside the unit after the expiry of the period until which he or she was entitled to be outside them (…), i.e. the failure to return to duty on time, also constitutes the realisation of the offence of arbitrary separation – in this case in the form of omission' – S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1724, cited after: A. Kamieński, 'Komentarz do art. 338 k.k.', in: Górniok O. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 974.

When addressing the military offence under Article 682(2)(2) HDA, it is also worthwhile to make a synthesised reference to its temporal dimension – more specifically, to the lack of indication of the temporal boundary dividing the discussed act, in terms of subject matter, between a military misdemeanour and a military crime. Therefore, in order to make the relevant distinction, it is necessary to use an interpretation *a contrario* with respect to Article 338 § 1 or 2 CC (as these wordings refer to the same temporal dimension) and assume that any (even if only a one-off) unjustified and arbitrary departure of a soldier from the designated place of stay lasting not longer than 48 hours at a time should be qualified as a military misdemeanour under Article 682(2)(2) HDA.

CONCLUSION, OR ARBITRARY SEPARATION / ARBITRARY DEPARTURE FROM A DESIGNATED PLACE OF STAY – A *DE LEGE FERENDA* PERSPECTIVE

The analysis in the area of the military offence of arbitrary separation (Article 338 CC) and its partial halving, i.e. the military misdemeanour of arbitrary abandonment of a designated place of stay (Article 682(2)(2) HDA), shows the extent of *de lege ferenda* tasks still to be carried out in the area in question.

Two proposals for revision should be considered with a view to eliminating overly casuistic typification, ensuring systemic consistency, providing conditions for effective action against crime and, above all, closing the loophole in the law in the form of complete impunity for one-off arbitrary separations of up to 48 hours by a soldier from the unit.

The first assumes a return to the original form of typification of the crime of arbitrary separation, i.e. to the one existing before 1 January 2010, along with a complete resignation from the subjective exclusion previously included in Article 338 § 4 CC in the wording from before 1 January 2010. This is because it unjustifiably differentiated the legal situation of *de facto* the same subjects (i.e. soldiers in active military service) for committing the same act (i.e. arbitrary separation), clearly privileging the soldiers indicated in the content of this provision, who were not subject to criminal liability for arbitrary separation.[49]

Legal sanctioning of the proposed amendment would inevitably determine the pointlessness of the continued existence of the discussed type of military misdemeanour. On the other hand, the removal of the (currently existing) halving would eliminate unnecessary stratification of this type of objectionable behaviour. Indeed, the original wording of the elements of the offence of arbitrary separation criminalised every (even one-off) behaviour of this type by the offender, and for the substance of the military offence in question, the duration of the soldier's absence was irrelevant. Thus, the return to the wording of Article 338 CC (from

[49] Similarly also: W. Marcinkowski, 'Zmiany w prawie karnym oraz w prawie wykroczeń wynikające z nowej ustawy o dyscyplinie wojskowej', *Wojskowy Przegląd Prawniczy*, 2009, No. 4, p. 50.

before 1 January 2010) would result in a *de facto* return to the historically sanctioned (in separate criminal-military regulations) manner of describing and criminalising the offence of arbitrary separation.

The second *de lege ferenda* proposal, on the other hand, is to retain arbitrary separation as an act divided between criminal law and misdemeanour law, but with some changes to the content of both Article 338 CC and Article 682(2)(2) HDA.

With respect to Article 338 CC, a *de lege ferenda* task should be the removal of § 1. There is no justification for making this offence (whether treated as a privileged or basic type, depending on the approach adopted) dependant on the repetition of the offender's behaviour, while the essence of the other, much more serious, types of this offence under Article 338 § 2 or Article 338 § 3 CC is already exhausted by a one-off act of the offender, which must last for more than 48 hours (Article 338 § 2 CC) or more than 7 days (Article 338 § 3 CC).

In turn, the content of Article 682(2)(2) HDA should be broadened to ensure that the substantive scope of the military misdemeanour set out therein is fully aligned with the substantive scope of the military offence under Article 338 CC. Thus, criminalisation under Article 682(2)(2) HDA would also need to cover arbitrary departure from one's unit, as well as unauthorised stay outside one's unit or designated place of stay. Only such an approach will guarantee a comprehensive and coherent systemic solution within the scope of the penalisation of a soldier's arbitrary conduct consisting in leaving the unit, designated place of stay, or remaining outside them.

Furthermore, consideration should be given to adding a provision to Article 682(2)(2) HDA explicitly defining the maximum time period for such an act. Currently, it is only on the basis of an *a contrario* interpretation (already mentioned) that it may be concluded that a military offence is any (even single) unjustified and arbitrary separation of the perpetrator for a period 'not exceeding 48 hours'.

Moreover, irrespective of the adopted concept of amendments, one should also consider the need to include in the content of the provision of Article 338 CC the postulate raised in the doctrine of criminal law that arbitrary separation of a soldier should be introduced as a qualified type of this military offence when committed: '(…) outside the country, as well as during the performance (…) of tasks with the use of military weapons or during combat operations'.[50] This is a valid proposal, if only due to progressive globalisation and the ever-increasing internationalisation of the activities of the Polish Armed Forces, as evidenced, for example, in stabilisation, peacekeeping, and humanitarian missions or overseas deployments of military contingents.

[50] S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1726 cited after A. Kamieński, 'Komentarz do art. 338 k.k.', in: Górniok O. (ed.), op. cit., pp. 975–976.

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‘MODERNISATION WITHOUT MODERNISM’: CHANGES IN POLISH CRIMINAL PROCEDURE IN THE LAST DECADE AND VISIONS OF THE CRIMINAL PROCESS OF THE FUTURE*

KACPER OLEKSY**

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Abstract

The legislatively complex fate of Polish criminal law, including criminal procedure, over the last ten years, as well as the currently open prospect of further reforms in this area, prompts one to reflect from a distance on how these multidirectional changes position themselves within the broader trends in the development of the criminal process worldwide, and to what extent the Polish criminal process is in fact being ‘modernised’ in its essence, rather than merely ‘modernised’ in a technological sense. This reflection leads to the question of how these ‘modernisations’, regardless of their level, relate to the functioning of the Polish criminal process in the postmodern era and whether postmodernism, as an intellectual current, can offer something to the criminal process, especially in the area of the problems that trouble it and require urgent solution. What emerges from the analysis is a picture of legislative randomness and impermanence of changes, and the covering of what is obsolete in Polish criminal procedure with technological novelties in its organisational layer. For this reason, it is vital to urgently discuss the reformist demands being made for criminal procedure – so that they do not remain purely academic considerations, but are translated into real changes to the law and social practices constituting the criminal process.

Key words: criminal trial, postmodernism, modernisation, postmodernity, adversarial reform, reform of criminal law and procedure, decodification, conflict theory

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** LLD, Department of Criminal Procedure, Faculty of Law and Administration, University of Warsaw (Poland), e-maill: k.oleksy@wpia.uw.edu.pl, ORCID: 0000-0001-6386-6985

PRELIMINARY REMARKS

The titular 'modernisation without modernism'[1] is of course to some extent a journalistic term, but it succinctly describes a phenomenon observed by social and cultural researchers from various disciplines (sociologists, cultural anthropologists, historians, etc.), whereby social institutions accept the material achievements of the modern era, particularly contemporary technologies of various kinds, without the simultaneous adoption (internalisation) of the values on which the modern era was founded, such as reason (or even in its extreme form – faith in reason), progress, humanism and order.[2] Throughout the world, this phenomenon can be seen in many places on a macro scale: the foreign example closest to us would probably be Russia, but the Persian Gulf countries, among others, are also cited in this respect. In all these cases, the adoption of modern technology or visible economic growth does not translate into social progress or the independent creation of technological innovation.[3] Moreover, this concerns not just progress seen in terms of a 'Western-style' transformation of social axiology, but even in terms of economic and social change, if only because the fruits of economic development in these countries have not been redistributed.

Modernisation limited precisely to certain external forms is even sometimes referred to, using such countries as an example, as 'modernisation of poverty'.[4] Such discrepancies between form and substance could, of course, also be sought among the conditions of social life in Poland. However, in order not to engage in a political discussion, to which such a search would inevitably lead, I would like to focus on the question of whether the title slogan 'modernisation without modernism' can be applied to the needs of legal research, i.e. to the assessment of the state of Polish law, and more specifically to criminal procedure (it is not, of course, precluded that a similar endeavour would also make sense in other areas of law). I would like to argue that one characteristic of Polish criminal procedure in recent years is the presence of selective, purely formal modernisation, limited to organisational and technical issues, but without respect for the values of a modern criminal process, let alone an attempt to direct it in any way onto a new path, responding to the current

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[1] This term was used – following the distinction between these two components of modernity as identified by F. Jameson – by J. Sowa in *Fantomowe ciało króla. Peryferyjne zmagania z nowoczesną formą*, Kraków, 2011, p. 529, in order to criticise those who demand technological modernity without modernising culture or values.

[2] See, regarding these values as foundations of modernity, which postmodernism abandons, Z. Bauman, *Ponowoczesność jako źródło cierpień*, Warszawa, 2000, passim; in the context of law – L. Morawski, *Co może dać nauce prawa postmodernizm*, Toruń, 2001, pp. 36–37.

[3] On the occurrence of economic growth without modernisation (including, e.g. technical modernisation), A. Leszczyński, *Skok w nowoczesność. Polityka wzrostu w krajach peryferyjnych*, Warszawa, 2013, pp. 39–40, who points to, *inter alia*, the example of Arab countries whose economies are based on the extraction and export of oil; the situation of China, on the other hand, is specific – as it is an autocratic country as well, founded on values rather alien to European modernism, yet one that until recently was undergoing dynamic economic and social development and was highly innovative in terms of technology (applying these advanced technologies to the extreme surveillance of its citizens, which clearly illustrates the antinomy of 'modernisation without modernism').

[4] J. Sowa, *Fantomowe ciało...*, op. cit., pp. 31–32.

era or even the future. The proposed attempt starts from the assumption that the phenomenon referred to above, since it is recorded by researchers of society-wide processes, also occurs at (at least some) lower levels of social organisation, of which the law is indisputably a component.

To further elaborate on the title of the study, it should be made clear that, although it may suggest a focus on the past, the point is rather that the future, without reflection on the past, cannot, in my view, be discussed constructively. J. Bardach wrote that such an approach 'makes it possible to avoid a very dangerous conviction of the omnipotence of legal regulation by showing the place of law in the general current of changes, its variability, and the conditions of this variability'.[5] Illustrating the main argument of this paper by means of historical (meaning past – even though chronologically very recent) examples is intended to help identify it as a barrier, without the removal of which it will be impossible to find such a vision of the criminal process of the future that allows the realisation of the goals this legal institution is supposed to achieve and makes it a viable tool for regulating social relations emerging in response to crime.

ASSESSING THE MODERNISING DIMENSION OF THE 2015 ADVERSARIAL REFORM

It is worth starting in this context with the famous so-called adversarial reform of the 2015 criminal procedure,[6] constituting an extensive and profound change to the regulations of the Code of Criminal Procedure (CCP). The essence of this change was succinctly presented by R. Zawłocki who indicated that its three pillars were adversarialism, consensualism and compensation.[7] The first pillar is, of course, an expression of the model choice made by the legislator,[8] of fundamental importance from the perspective of criminal trial theory, which gave this reform its name. The idea was to conceptually transform – at least within the judicial process – the previously accepted model of a mixed trial, operating with an apparent skew towards inquisitorial elements. The court hearing was to become the forum for the full realisation of the adversarial principle: the goal was to make it a dispute between two equal litigants, the prosecutor and the accused (defence), where the court would occupy the role of an impartial and uninvolved arbiter. This change itself constituted a revolution for Polish legal society – as it required prosecutors to assume more responsibility than before for the fate of cases after indictment, forced judges to restrain themselves from

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[5] J. Bardach, 'Themis a Clio, czyli o potrzebie podejścia historycznego w prawoznawstwie', in: Bardach J., *Themis a Clio, czyli prawo a historia*, Warszawa, 2011, pp. 13–15.

[6] Introduced by the Act of 27 September 2013 amending the Act on the Code of Criminal Procedure (Journal of Laws, item 1282), which entered into force on 1 July 2015.

[7] R. Zawłocki, 'Ocena społecznej szkodliwości czynu w kompensacyjnym, konsensualnym i kontradyktoryjnym procesie karnym', in: Bojarski M., Brzezińska J., Łucarz K. (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej: księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław, 2015, p. 400.

[8] M. Langer, 'The Long Shadow of the Adversarial and Inquisitorial Categories', in: Dubber M.D., Hörnle T. (eds), *The Oxford Handbook of Criminal Law*, Oxford, 2014, p. 891.

engaging in the investigation of the case at trial, gave new options to defence lawyers, but also new obligations related to the representation of the interests of the accused (procedural passivity, permissible on the part of the defence due to the presumption of innocence, could become purely praxeologically unprofitable).

Consensualism was to be expressed in the increased role of the – already statistically very important at the time – measures of simplified recognition of the case, modelled upon the idea of plea bargaining, in which the accused agrees to accept certain consequences of conviction, specified in agreement with the prosecutor, as seen in, first and foremost, the institutions of conviction without trial (Article 335 CCP) and voluntary submission to punishment (Article 387 CCP). Such a change was intended to further simplify and expedite the criminal process in those cases where the accused chose not to take an active defence, instead hoping for lenient treatment or at least a quicker assumption of the consequences of their criminal responsibility being established. This was to allow the courts to focus on those cases where, for various reasons, the so-called consensual procedures could not be applied.

The compensatory character, meanwhile, was to be a manifestation of a greater integration of restorative justice into the *instrumentarium* of both substantive and procedural criminal law. The key role here was played by the distinction of compensatory measures in substantive law and the introduction of compensatory discontinuation of proceedings under the now repealed Article 59a of the Criminal Code – which allowed, in minor cases, criminal prosecutions to be dropped because the damage caused by the crime had been repaired. In combination with the Act on Protection of and Assistance to the Victim and Witness (implementing EU regulations) passed in 2014,[9] the Polish criminal process was supposed to better protect the rights and interests of crime victims.

The reform referred to above was abandoned after only nine months in force. The new parliamentary majority (after the 2015 elections) declaratively reinstated the previous regulations of the Code of Criminal Procedure, leading to the establishment of a somewhat hybrid procedure that retained certain elements of the 2015 reform, inconsistent with the reinstated former regulations.[10] The legislative justification for this amendment can hardly be regarded as a manifestation of rational lawmaking – it constituted a purely ideological disagreement with the introduced changes, with the subsequent amendments to the Criminal Code and the Code of Criminal Procedure (some of which will be discussed further on) vividly illustrating the actual reason for the change. For the record, however, it is also necessary to refer, even if briefly, to the academic criticism of the adversarial reform. It was accused (apart from its legislative or conceptual shortcomings), *inter alia*, of having stopped 'in mid-step' and of not having taken the trouble to fully reform the pre-trial proceedings, thereby continuing the subservience of the judicial phase to this part of the procedure – something that had been criticised for years and was alien to the classical model of both mixed and

[9] Act of 28 November 2014 on Protection of and Assistance to the Victim and Witness (Journal of Laws of 2015, item 14, as amended).

[10] Act of 11 March 2016 amending the Act on the Code of Criminal Procedure and Certain Other Acts (Journal of Laws, item 437).

adversarial trials.[11] A number of allegations concerned the lack of organisational or even – here closely linked to the slogan 'modernisation without modernism' – mental preparation of the Polish criminal justice system for such a reform.[12] It was even stated that the reform had been designed without answering the fundamental question of what the Polish criminal process is in its essence (or is supposed to be).[13]

Ultimately, it is important to consider to what extent this reform was a leap into the future at all, and to what extent it was an attempt to catch up with a certain backwardness. This 'catching up' is, incidentally, closely related to the topic at hand, as numerous works analysing the condition of Polish society indicate that for centuries one of the dominant motives (or 'engines') of Polish public life has been precisely 'catching up with the West': sometimes rational, sometimes blind.[14] It seems that the goal was precisely to catch up with certain trends, particularly in the area of consensualism and even more so with regard to compensation. The most problematic, however, was adversarialism, because the adversarial principle by itself does not constitute a sign of the 'modern nature' of the criminal process. This was more of an axiological choice, stemming from the conviction (all in all correct and constituting a *communis opinio doctorum* of the science of criminal process)[15] of the superiority of this form of truth-seeking in the criminal trial over the inquisitorial principle. However, the literature[16] cautioned against repeating the failed experiment in which extensive adversarialism was introduced into Italian criminal procedure in the late 1980s and early 1990s. This change did not succeed at all – it was undone by the rulings of the Italian Constitutional Court and the interpretations of the Court of Cassation, which remained deeply rooted in the traditional mentality of the mixed process. Also speaking in the Polish press,[17] the professor of comparative law from Yale University, J.Q. Whitman, argued that the attempt to transplant

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[11] J. Tylman, 'Postępowanie przygotowawcze w świetle nowelizacji z lat 2013–2016', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017, pp. 471, 484, who also draws attention to the generally 'overly-optimistic' justification of the amendment in terms of the objectives it set for itself; R.A. Stefański, 'O nieadekwatności projektowanych zmian w zakresie postępowania przygotowawczego do proponowanego modelu rozprawy głównej', in: P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, pp. 225 et seq., where the 'selective nature' of the entire adversarial reform is highlighted.

[12] This is how one can interpret the statements of participants in a discussion recorded in the aforementioned volume *Kontradyktoryjność w polskim procesie karnym*, namely those of R. Hernand or Ł. Chojniak, who drew attention to the force of habit and possible organisational inertia (despite, in the case of Ł. Chojniak, general enthusiasm for the reform); the then Prosecutor General also distanced himself from the reform – see A. Seremet, 'Prokuratura a kontradyktoryjny model postępowania sądowego. Wyzwania i możliwe zagrożenia', *Prokuratura i Prawo*, 2015, No. 1–2.

[13] T. Gardocka, 'Zamęt w wymiarze sprawiedliwości karnej', in: Gardocka T., Jagiełło D., Herbowski P., *Zamęt w wymiarze sprawiedliwości karnej*, Warszawa, 2016, pp. 2–3.

[14] See the works of J. Sowa and A. Leszczyński cited above.

[15] See other studies and voices in the discussion, collected in the aforementioned volume: P. Wiliński (ed.), *Kontradyktoryjność…*, op. cit.

[16] A. Lach, 'Zasada kontradyktoryjności w postępowaniu sądowym w procesie karnym *de lege lata* i *de lege ferenda*', *Palestra*, 2012, No. 5–6.

[17] E. Świętochowska, 'Amerykański model procesu jest wydajny, ale…' (interview with J.Q. Whitman), *Dziennik Gazeta Prawna*, 23 December 2014.

Anglo-American adversarialism into continental conditions – carried out in the way planned in the 2015 reform – would not succeed, as adversarialism is only one component of the American criminal process, closely related to others that had not been introduced (most notably, the rules of evidence).

ASSESSING THE MODERNISING DIMENSION OF THE 2016–2023 AMENDMENTS TO CRIMINAL PROCEDURE

Subsequent years have brought, as I have already noted, numerous changes depicting a very different philosophy of the criminal process from that which underpinned the adversarial reform. It is, of course, necessary to consider these changes in a broader context – particularly with regard to amendments to the Criminal Code and the system of common courts and public prosecutors. The changes to the substantive law were in many cases regarded as pure penal populism,[18] or even as a straightforward return to the patterns of criminal law of the People's Republic of Poland.[19] Meanwhile, the changes to the system of common courts and public prosecutors were aimed at limiting judicial independence and abolishing the independence of prosecutors, which remained only as an empty statutory declaration, devoid of practical manifestation.

The changes being made to criminal procedure were assessed in a similar manner (as regressive).[20] It is worth drawing attention here to three areas that have been shaped in a way that does not correspond to the contemporary tendencies in the development of the criminal process, common in Euro-Atlantic legal culture. The first area is the principle of equality of arms, considered a component of the fair trial standard entrenched in the European Convention on Human Rights. The changes in question have brought about a gradual disruption of this equality, of course to the benefit of the prosecutor, who is becoming less and less an advocate of the public interest and more and more a representative of the executive power in the criminal process. The prosecutor has been given the power to submit a number of procedural declarations binding on the court, in the form of objections: to the exclusion of the hearing from public view (Article 360 § CCP), to the stipulation of bail when applying the so-called conditional pre-trial detention (Article 257 § 3 CCP), and to the issuance

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[18] T. Kaczmarek, 'O reorientacji badawczej i metodologicznej współczesnej nauki prawa karnego i kryminologii oraz jej wpływie na procesy prawotwórcze (w okresie zmian ustrojowych w Polsce po 2015 r.)', in: Zalewski W. (ed.), *Prawo karne jutra – między pragmatyzmem a dogmatyzmem*, Warszawa, 2018.

[19] This is discussed at length in the expert report: A. Barczak-Oplustil, M. Małecki, Sz. Tarapata, M. Iwański, *Populistyczna nowelizacja prawa karnego. Ustawa z dnia 7.07.2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, 19 July 2022, Krakow Institute of Criminal Law, https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego/ [accessed on 13 May 2025].

[20] For example, J. Zagrodnik, 'Model procesu karnego *status quo* i *status futurus* – kilka refleksji na temat dwóch rzeczywistości, nie tylko normatywnych', in: Szumiło-Kulczycka D., Czarnecki P. (eds), *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosiowi*, Warszawa, 2022, pp. 120–123; and earlier – numerous studies in: S. Steinborn, K. Woźniewski (eds), *Polski proces karny w dobie przemian. Zagadnienia ogólne*, Gdańsk, 2018.

of a letter of safe conduct (Article 281 § 2 CCP). Previously, all these rulings were, regardless of the positions of the parties, at the sole discretion of the court. The prosecutor's consent to voluntary submission to punishment is now also required (Article 387 § 2 CCP; previously, the lack of an active objection was sufficient), and the prosecutor is also allowed to initiate the procedure of transferring the case out of the competent court in the interest of the justice system (Article 37 §§ 1 and 2 CCP). Other parties to the proceedings, especially the accused confronted with the prosecutor, do not have such powers. What is particularly bizarre is that the powers referred to above are not only not granted to benefit other parties, but also limit the role of the court as the ruling authority of the trial (*dominus litis*) in the judicial phase.

The second area is the guarantees of the right of defence. The accused and the defence lawyer have been hindered in their procedural activities not only by the expansion of the prosecutor's powers, but also by allowing the court to conduct the evidentiary proceedings in the excused absence of the defence and/or the accused, while the accompanying 'remedial' procedure, supposed to correct the violation of the right of defence in this way, is obviously ineffective (Article 378a CCP). The compatibility of this regulation with EU law, i.e. the provisions of the so-called Defence Directive,[21] is also highly questionable. Other provisions, for example, allow, at least in the observed judicial practice, the trial to be closed and the closing remarks to be made despite the excused absence of the accused (Article 117 § 3a CCP), thus depriving the accused of the right to the 'last word'. These changes *de facto* lead to the introduction into the Polish criminal trial, through the back door, of a quasi-*in absentia* sentencing, which would seem to be generally unthinkable in modern criminal procedure. The justification for these changes – reflected in an allegedly profound scale of procedural obstruction by absentee accused or defence lawyers – is not supported by any empirical evidence.

The third area concerns the rights of the victim. A number of amendments in recent years have followed under the slogan of protecting the rights of victims, although in fact the rights of victims have been curtailed in at least one very important aspect. This is because the path of appeal by the victim against the decision to discontinue the investigation has been made longer, with the prosecution having the option to postpone the final decision in this regard (Article 330 § 2 CCP). As long as there is no such decision, the victim cannot file a subsidiary indictment. The prosecutor has thus gained a tool for inhibiting victims from pursuing, in a complementary way, a public indictment not pursued by the public prosecutor. This solution actually contradicts the principle of legalism, which is central to the prosecution's activities, because, as has been emphasised in the doctrine for years, a subsidiary indictment is supposed to safeguard this principle.[22] This also limits the procedural autonomy

[21] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

[22] K. Dudka, 'Oskarżyciel posiłkowy subsydiarny', in: Hofmański P., Kulesza C. (eds), *System Prawa Karnego Procesowego. Tom VI. Strony i inni uczestnicy postępowania karnego*, Warszawa, 2016, p. 412.

of the victim as a potential autonomous subsidiary prosecutor. Moreover, even if the victim succeeds in filing a subsidiary indictment, the public prosecutor has recently gained a competence equivalent to that of the court to check whether the person filing is in fact the victim, which allows the prosecutor to refuse to send the case files to the court (Article 330 § 4 CCP). In principle, it is not clear why, according to the drafters of this amendment, judicial control of this issue would be insufficient. The only evident observation about these changes is the desire to completely reserve the prosecuting functions in the criminal trial to the public prosecution and to exclude any initiative by individuals in this regard. However, this is a paternalistic and outdated solution (which, of course, does not necessarily mean that the prosecution function would be privatised – it is merely a matter of limiting the public prosecutor's strict monopoly on this issue, which does not always serve society).

Simultaneously, changes in criminal procedure aim at its technological modernisation (digital files in the prosecutor's office – Article 156 § 5 CCP, Article 321 § 1 CCP; service of letters through the court's official information system – Article 133a CCP; remote participation of the prosecutor or persons deprived of liberty in hearings – Article 374 § 3 and 4 CCP). All of this is intended to expedite and simplify criminal proceedings and reduce their costs. These 'technical' changes, however, go hand in hand with the conceptual shifts discussed earlier, which in essence revert the criminal process back to bygone eras, doing so without any connection to the objective needs of criminal policy. It is difficult not to get the impression that these changes (as with the previously mentioned changes to substantive criminal law) were motivated by populist propaganda promoting an image of an 'effective' executive power pursuing criminals.

THE POSSIBILITY OF A POSTMODERN CRIMINAL PROCEDURE

As things stand, therefore, we have a criminal procedure whose normative framework is substantially disorganised, with solutions that raise reservations and doubts as to whether they fit the circumstances of the era in which they occur. This is because the aforementioned manifestations of technological modernisation are merely a façade, moreover – used rather for the convenience of the judicial authorities. For example, in principle, remote participation in a hearing without any restrictions is only possible for the prosecutor (depending on the prosecutor's request and the technical availability of such a solution – Article 374 § 3 CCP), while for other parties it is only possible when they are deprived of liberty (in the case of the accused, the defence lawyer has the choice whether to appear in court or to be with the accused at their place of detention); moreover, it is mandatory for a law enforcement officer to be present at that person's place of stay. The same is true of the latest innovation, the service of pleadings via the courts' official information system: only the courts are free to send letters this way, but this possibility for parties is closed for the foreseeable future.[23]

[23] Although, as it has recently turned out, not necessarily distant, given the projected possibility of allowing professional actors to file pleadings through the information portal – see the bill

There is thus no balance in this regard, and it is apparent that the digitalisation of criminal procedure is being carried out in the interests of the procedural authorities rather than those of the parties.

Meanwhile, the three areas of change in criminal procedural regulation described earlier appear to be regressive, being phenomena that run against the tide of the fundamental contemporary trends in the development of the criminal process.[24] Indeed, the areas of equality of arms and defence rights must be linked to the theory of procedural guarantees and fairness, and the changes introduced – which is probably obvious – serve neither procedural guarantees nor fairness. It should, of course, be noted that certain forms of limiting the defence rights, simplifying evidence, and expanding the powers of the public authorities to interfere with the rights of the individual are sometimes justified by the need to protect society and public safety from serious crime – especially terrorism and organised groups. Indeed, the events of the last 25 years in the West may have shaken the sense of security that many had previously felt. It is even pointed out in the literature that a so-called 'preventive turn' has been taking place in criminal law and procedure around the world in recent years, whereby the regulations of this area of law are beginning to be used more and more extensively in order to prevent the commission of a crime, as a tool for actively preventing criminal behaviour, rather than merely reacting to it.[25] The point is, however, that – at least in Poland – there is no data-based justification, in terms of the statistical scale and types of criminal offences committed, for reconstructing the criminal process in a way that increases the efficiency of prosecution at the expense of its 'due process' dimension.[26] There is, in fact, no pathological proliferation of crime that would justify the restrictions imposed on citizens' rights that have already been introduced and are still being proposed to facilitate the suppression of criminal phenomena.

The area of victims' rights, on the other hand, should be associated with the victimology strand, oriented towards the protection of the dignity, autonomy, and rights of the victim of crime. There can be no doubt that the changes referred to above do not serve this purpose – for the victim, at a certain stage, loses any influence over whether the case will ever go to court. The paternalistic primacy of the prosecutor's office is, contrary to the assumptions of this trend, significantly reinforced. This also entails a reduction in the importance of the consensual trend – i.e. the abandonment of certain forms, such as the compensatory discontinuation already mentioned, or the lack of impetus for the development and use of mediation in criminal cases. The criminal process is being made an entirely 'public issue', while the currents of victimology and consensualism were supposed to herald a move away from this trend towards the more important 'private' aspects of criminal justice.

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of 31 December 2024 amending the Act on the Code of Criminal Procedure and Certain Other Acts; No. UD143 on the list of legislative works of the Council of Ministers.

[24] These currents are classified and described by M. Rogacka-Rzewnicka, *Proces karny w perspektywie ewolucji naukowej i współczesnych trendów rozwojowych*, Warszawa, 2021, pp. 365 et seq.; the ensuing argumentation refers back to this typological proposal.

[25] A. Lach, 'Zwrot prewencyjny w polskim prawie i procesie karnym', *Państwo i Prawo*, 2021, No. 10.

[26] If one were to assume in advance that the guarantee dimension and efficiency must be at odds.

All this gives an image of chaos, incoherence, polyphony – something truly 'postmodern', but in a colloquial, rhetorical sense rather than a scientific and descriptive one. Postmodernism, although it is indeed difficult to define its positive agenda (both in science and in social practice),[27] is nevertheless not completely devoid of substance and cannot be defined solely as a kind of 'cacophony of dissent'. The point, however, is that the ideas and values to which postmodernism refers pose a significant challenge to the law. The ideas of postmodernism question concepts that are apparently axiomatic for modern legal systems – for example, the existence of a systemic hierarchy of legal norms and sources of law. Instead of the 'pyramid' as a geometric expression of the structure of the legal system, it is argued that the system of law has taken on the characteristics of a 'network', particularly in terms of how it is created.[28] One could speak in this context of the polycentricity of contemporary legal systems – and this is a proposition that is taught during basic law lectures,[29] and thus does not constitute a preliminary scientific idea to be developed or a part of an ongoing 'higher' academic discussion, which is indicative of the rather commonplace presence of these observations and the fact that the legal system already manifests certain postmodern characteristics in contemporary times.

This does not, however, mean that the postmodern ideas have been tightly integrated into the existing concepts of the legal system and no longer pose any difficulties for it. A prominent example of this, and of capital importance for the application of law, i.e. actual practice, is the postmodern approach to textual interpretation. Legal interpretation, as a variant of humanistic interpretation, is, of course, largely utilitarian in nature, but if one were to adopt a postmodern view of the issue, the fundamental assumptions regarding the purpose and methods of interpretation would collapse. Indeed, postmodernism, following earlier structuralism in the humanities and social sciences, rejects in the first place the importance of authorial intention or the circumstances of a text production in the process of interpretation. In the practice of legal interpretation, this would mean a break, at the minimum, with the assumption of the legislator's rationality, with the need to refer to the *ratio legis* of a given normative act, and with the use of legislative work materials when interpreting legal provisions. However, this stream of thought goes further – namely, it rejects not only the authorial intention, but also the immanent intention (meaning) of the text itself. 'The text is just a pretext to activate the creative invention of the interpreter with post-structuralist (deconstructivist) inclinations'[30] – and thus any 'objective' meaning of the text is negated. In such a situation, the text of the law – if everyone could derive whatever they wanted from it – would lose any norm-making role. Possibly, this would not lead to a state of complete anomy, but it would constitute a rejection

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[27] A. Szahaj, enumerating the features of postmodern thinking, lists as many as seven out of eleven given characteristics that start with the prefix 'anti-' – which emphatically illustrates, first and foremost, the oppositional, critical character of this intellectual trend (A. Szahaj, *Ponowoczesność i postmodernizm dla średniozaawansowanych*, Warszawa, 2021, p. 169).

[28] F. Ost, M. van de Kerchove, 'De la pyramide au réseau? Vers un nouveau mode de production du droit?', *Revue interdisciplinaire d'études juridiques*, 2000/1, Vol. 44.

[29] T. Chauvin, T. Stawecki, P. Winczorek (eds.), *Wstęp do prawoznawstwa*, Warszawa, 2019, pp. 163–164, and further references to the literature cited therein.

[30] A. Szahaj, *Ponowoczesność*…, op. cit., p. 186.

of the authority of the written legal act – a gesture with far-reaching consequences from the perspective of the current assumptions of the legal system.

There are numerous examples as well as detailed considerations of this kind, but it is nevertheless worthwhile, in order to make more concrete the proposition made here about the discrepancies between the assumptions of contemporary legal systems and those of postmodernism, to flesh them out in the field of criminal law, which is central to this argument. For if postmodernism opposes the central place of truth in cognition ('anti-truthocentrism'),[31] then the guiding and, for many, unshakeable principle of the criminal process, i.e. the principle of material truth, loses its *raison d'être*; similarly, if there is no borderline between logic and rhetoric, and the image takes the place of writing in interpersonal communication, then, as already signalled above, the future of legal interpretation is uncertain, particularly in criminal law, which is so attached to the text and to the objectified properties of language, especially in the semantic sphere (it would be rather frightening for a modern lawyer to imagine criminal interpretation as the 'imaginative play' of the interpreter). Taking this a step further: if postmodernism abrogates the 'objective-subjective' opposition, one might ask how it is at all possible to render a judgment resolving a dispute in which, according to the postmodern ideal, each side is 'subjectively' right. The question is whether this is what the criminal process of the postmodern era is (or should be) heading towards,[32] and (more broadly) to what extent postmodernism can be a source of a positive programme for the entirety of law at all, rather than merely a critical revision of the existing theory.

Contrary to the argument that this theory, i.e. legal positivism, is an obsolete myth or even a fossil,[33] its ideas, beliefs and habits still persist in Polish law-making, interpretation, and application. No other paradigm (in T. Kuhn's terms) has so far replaced this one, while attempts at such different approaches to law are present in the academic sphere, but do not spread more widely within legislative or judicial practice. The 'postmodern' state of the criminal process, as referred to above, is more a side effect of legislative changes than the realisation of an intended goal. It should be noted that, despite everything, the Code of Criminal Procedure has not (so far) been affected to a greater extent by the phenomenon of decodification (which is present and described, for example, in private law), i.e. abandoning the central position of the code and the dispersion of regulations previously contained in the code among other normative acts, which – as I believe, sharing the intuitions of other authors – should be associated precisely with the functioning of law in the postmodern era.[34] Decodification

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[31] I borrow the terms for the characteristics of postmodernism cited in this paragraph from A. Szahaj (ibidem; also p. 41).

[32] M. Rogacka-Rzewnicka, *Proces karny*…, op. cit., pp. 338–365; L. Morawski, *Co może dać*…, op. cit., pp. 71–75 (on the advantages and disadvantages of 'polyvocal' legal interpretation).

[33] T. Gizbert-Studnicki, 'Pozytywistyczny park jurajski', *Forum Prawnicze*, 2013, No. 1, pp. 50–51.

[34] A similar view is expressed by P. Święcicka, who discusses decodification in the context of the frequently proclaimed 'ends' (of an era, of the entire history, etc.), as 'an element of the postmodern narrative of legal reality' – P. Święcicka, 'Kodeks zdemitologizowany – metafora, w której ciągle żyjemy', in: Longchamps de Bérier F. (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa, 2017, pp. 38, 84.

is a gradable phenomenon,[35] and that is why, even though in the case of the Code of Criminal Procedure there are no significant gaps in regulation or matters transferred outside the Code, the aforementioned issues and difficulties show the instability of its normative structures and the disruption of the code's, as an ideal type, imperative and top-down normative model, according to which the code is drawn up and applied.

CONDITIONS OF AND PROPOSALS FOR BUILDING THE CRIMINAL PROCEDURE OF THE FUTURE

While the criminal process of the future is likely to be multifaceted, as it is currently difficult to imagine that any of the aforementioned developmental trends would be completely abandoned, there is also a need to call for a certain order and vision to govern criminal procedure. It is necessary to attempt to codify this multifacetedness,[36] as the ideal of a code does not exclude drawing on different approaches, visions, or traditions in shaping criminal procedure. At the same time, one must not fall into a reformist intoxication with mere technological progress in criminal procedure, for, as I have tried to show, this alone does not demonstrate that criminal procedure is modern. It may result in greater speed or lower cost, but it would be a grave mistake to regard these essentially secondary aspects as signs of a 'forward-looking' reform of the criminal justice process.

A very interesting and worthwhile proposal, which combines – on Polish grounds – the postulates of order and the multiplicity of considered trends, is the concept developed in recent years by P. Wiliński.[37] It is based on the premise that the object of a criminal trial is, as a matter of fact, the social conflict caused by the commission of a crime, and that it is therefore a fundamental purpose of the criminal trial to resolve that conflict. To this end, the legislator should introduce a kind of gradation of forms and models for settling this conflict: from the most simplified form, concerning misdemeanours and minor offences, where restitution (compensation for the damage caused by the offence) and registration of the case would be sufficient, without initiating proceedings; through the procedural form, where proceedings would be conducted, but as a result of restitution (compensation) it would be possible to close the case without a judgment; to the consensual procedural form – where a judgment would be made, but based on the agreement of the parties; and the adversarial procedural form – corresponding to the traditional course of a criminal trial as a dispute between the parties. P. Wiliński concludes that the current criminal procedural regulation extensively features the last two forms, the

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[35] T. Giaro, 'Dekodyfikacja. Uwagi historyczno-teoretyczne', in: Longchamps de Bérier F. (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa, 2017, p. 22.

[36] I would like to refrain from engaging once again in a discussion on the advantages and disadvantages, or the opportunities and threats of decodification, as this would require a separate paper (see the previously cited studies in: Longchamps de Bérier F. (ed.), *Dekodyfikacja*…, op. cit.), and argue instead for maintaining the ideal of a code as a certain conceptual *status quo*.

[37] P. Wiliński, *Zarys teorii konfliktu w prawie karnym*, Warszawa, 2020.

third has been introduced only residually as compensatory discontinuation, while the first form has yet to be discussed and developed.

The common characteristic of the aforementioned guarantee, victimological and consensual trends and theories and of the proposal made here is, in my view, one fundamental demand: to bring the object of the criminal process closer to the individuals concerned. They are to be more empowered, regardless of which side of the conflict they are on. I do not mean to suggest that the history of criminal law is about to come full circle, but just as the tendency of its development over the centuries was to make it 'public',[38] today – it seems – the pendulum has swung too far in the direction of this public character of criminal law, losing sight of the individual or even private elements.[39] It seems that reconciliation between these trends is the first and essential condition for any change to be successful. This is an extremely difficult task, entangled above all in the paradox of inconsistent social expectations: on the one hand, a number of studies show how much people value informalised forums of mediation or conciliation used for settling cases, while also identifying decreasingly rigorous expectations regarding criminal policy,[40] and on the other hand, there is still frequent discussion of highly punitive attitudes within Polish society. Here, however, the fundamental problem is the destructive role of penal populism. It is unclear whether these alleged punitive expectations and attitudes are genuine, or whether politicians engaging in punitive populism, posing as tribunes of the people, are merely claiming (without any real foundation) that this is what society expects, equating their own opinions with the 'voice of the people'.[41]

In addition to this initial condition for constructing a new criminal process, there are a number of second-level, though not secondary, problems. I would like to highlight one of them, very controversial in recent public debate and a good illustration of the need to build a minimum of social consensus around the various institutions of public life. This issue concerns the status of the prosecutor's office. The main problems in this debate are well known: first, a constitutional problem, i.e. the separation of the prosecutor's office and the Ministry of Justice versus the personal union of the Minister and the Prosecutor General; and second, a procedural problem, i.e. the role of the prosecutor's office in criminal proceedings (whether the prosecutor is to be an investigator or an accuser). Regardless of the final answers to these questions, one thing seems essential to me – the inclusion of this leading institution among law enforcement bodies in the Constitution. The silence of the current Constitution on this subject is, in the long run, entirely unacceptable, as the position of the prosecutor's office can, in principle, be

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[38] See on this subject: M. Rogacka-Rzewnicka, 'O wątpliwej przynależności współczesnego prawa karnego (procesu karnego) do prawa publicznego. Analiza systemowo-historyczna', in: Kasiński J. et al. (eds), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo. Rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, Warszawa–Łódź, 2019, pp. 85, 87.

[39] T. Kirchengast, *The Victim in Criminal Law and Justice*, London, 2006, pp. 13–14.

[40] T. Szymanowski, *Przestępczość i polityka karna w Polsce w świetle faktów i opinii społeczeństwa w okresie transformacji*, Warszawa, 2012, pp. 310–311.

[41] T. Kaczmarek, 'O reorientacji badawczej…', op. cit.; K. Krajewski, 'Punitywność społeczeństwa polskiego', in: Czapska J., Kury H. (eds), *Mit represyjności albo o znaczeniu prewencji kryminalnej*, Kraków, 2002, pp. 178–179.

radically changed with every four-year parliamentary term. However, amending the Constitution requires broad political and social consensus.

It is with this thought in mind that this paper shall be concluded: the law (including criminal procedural law) has been and will continue to be a convention, that is, a social construct based on agreement and on the consensual respect of certain rules of conduct by the members of a community governed by this law. Shaping the criminal process of the future will therefore require a broad social consensus, otherwise the process risks stagnation, regression or even decomposition. Even the best proposals for change, if not supported by such consensus, will contribute little or nothing at all. The modern nature of a criminal trial cannot be equated with its use of videoconferencing or digital record-keeping – these are useful tools but, from the perspective of the purpose of the trial and its social functions, they remain incidental. They are no substitute for deeper conceptual reflection on the improvement of criminal justice, not only in terms of quantitative factors (expediency and the cost of proceedings), but above all in terms of qualitative factors (such as the correctness and authority of rulings and the achievement of socially important goals through the criminal process).

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VERIFICATION OF FINAL DECISIONS ON SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES UNDER EXTRAORDINARY MODES: THE MOST COMMON REASONS FOR THEIR INITIATION

AGNIESZKA ZIÓŁKOWSKA*

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Abstract

The article examines the verification of final scholarship decisions issued to students with disabilities as an exception to the principle of permanence of administrative decisions – which underlies legal certainty and guarantees the protection of acquired rights – in terms of typical (i.e. most common) reasons for such verification. To this end, the analysis covers the provisions of the Higher Education and Science Act, insofar as they regulate the premises for granting the benefit in question and allow for the verification of scholarship decisions. I also examine the provisions of the Code of Administrative Procedure that govern extraordinary modes of conduct: resumption of administrative proceedings, declaration of an administrative decision's invalidity, and revision of a decision based on special provisions. The article emphasises the lack of discretion in their selection and the inadmissibility of their simultaneous application. The discussion identifies the typical premises for applying these modes to decisions on material support for students with disabilities. Judicial practice relevant to the eponymous matter is also analysed.

Key words: scholarship for disabled students, scholarship proceedings in the rights of disabled students, repeal of a scholarship decision, declaration of a scholarship decision's invalidity, resumption of scholarship proceedings

* LLD hab., Professor of the University of Silesia, Faculty of Law and Administration, University of Silesia in Katowice (Poland), e-mail: agnieszka.ziolkowska@us.edu.pl, ORCID: 0000-0002-9933-2667

INTRODUCTION

The academic community, with students as the most numerous group, constitutes a diverse milieu. Its members include both fully able individuals and persons with disabilities, resulting from congenital or acquired illnesses, accidents, or the ageing process. Opening the higher education system to this social group contributes to social inclusion and is to be commended. The inclusion of individuals facing the risk of exclusion, such as persons with disabilities, represents an important aspect of educational services and an attempt to ensure equal opportunities in this domain. Contemporary society devotes considerable attention to accessibility, understood as the elimination of barriers that limit the use of public goods, in order to make them available to the widest possible group of recipients. Accessibility encompasses architectural, communication, and legal solutions that enable persons experiencing various difficulties to participate in social life on equal terms. As such, it requires instruments and mechanisms that promote social solidarity between fully able individuals and persons with disabilities in the sphere of education and research. In higher education, such solutions include: guaranteeing adherence to the Act of 19 July 2019 on Accessibility for Persons with Special Needs[1] – particularly architectural, digital, and information-communication accessibility, at least as defined by the minimum requirements referred to in Article 6 of the Act; a more flexible education process allowing for individual timetables or special arrangements;[2] the introduction of teaching assistants; equipment rental services for persons with disabilities; programmes designed for students with disabilities;[3] and material support through a scholarship system.

In Poland, the legal basis for granting scholarship to students with disabilities is set out in Article 86(1)(2) of the Higher Education and Science Act (HESA)[4] and university regulations on student benefits (Article 95 HESA). Scholarship proceedings follow the Code of Administrative Procedure (CAP),[5] with a scholarship committee acting as the first instance and an appeal scholarship committee as the second. The benefits are financed through a scholarship fund referred to in Article 412(1) HESA and Article 413 HESA (for non-public universities), with the amount determined

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[1] Consolidated text, Journal of Laws of 2022, item 2240, as amended.

[2] Polish universities' statutes provide for this option either as part of generally available individual timetables (see the University of Warsaw's Study Regulations, 2019, Article 26(4)(7)) or as a separate solution (see the University of Silesia's Study Regulations, 2023, Article 16).

[3] For example, university programs such **as** the programme for persons with disabilities 'Niepełnosprawni – Pełnosprawni na studiach' (Disabled – Fully Able to Study), see http://niepelnosprawni.wsg.byd.pl/id,200/program-niepelnosprawni-pelnosprawni-na-studiach [accessed on 27 May 2025]; project 'Aktywny absolwent' (Active Graduate) by the Polish Association of the Blind (PZN), see https://pzn.org.pl/aktywny-absolwent [accessed on 27 May 2025]; programme 'Aktywny samorząd' (Active Self-Government), see https://www.pfron.org.pl/o-funduszu/programy-i-zadania-pfron/programy-i-zadania-real/aktywny-samorzad [accessed on 27 May 2025]; programme 'STUDENT II', see https://www.pfron.org.pl/o-funduszu/programy-i-zadania-pfron/programy-ktorych-reali/student-ii [accessed on 28 January 2024].

[4] The Higher Education and Science Act of 20 July 2018, Journal of Laws of 2023, item 742, as amended, hereinafter 'the HESA'.

[5] Code of Administrative Procedure of 14 June 1960, Journal of Laws of 2023, item 775, as amended, hereinafter 'the CAP'.

by the university president's instruction. Students with disabilities receive material support following scholarship proceedings, which begin after the university president files an application – typically submitted via the university's electronic student service system.[6] These proceedings conclude with an administrative decision, either positive or negative – i.e. one that grants or refuses the benefit. Once the decision becomes final, it enters legal circulation and produces legal effect. Nevertheless, following ordinary administrative verification of a scholarship decision, certain defects may become apparent, giving rise to grounds for initiating one of the extraordinary modes defined in the CAP.

Importantly, local government units may independently establish their own grant types. As such, a student with a disability may also receive this form of support – although local government funding is generally allocated to research, arts, and sports grants[7] (Article 96 HESA). In such cases, the local government unit defines the criteria and methods of awarding the grant, the maximum amount a student may apply for, and the payment conditions. A student meeting the requirements set out in the relevant resolution may receive support from both the university and the local government. However, grants funded by local government units are not always awarded by way of an administrative decision[8] – other forms, such as a commune mayor's instruction[9] or a decision, though not within the meaning of the CAP.[10] Therefore, this group of benefits falls outside the scope of this article.

DISABILITY AS A SCHOLARSHIP PREMISE

Polish legal system does not include the term 'person with disability'. According to an opinion issued by the Polish Language Council (RJP) at the Polish Academy of Sciences (PAS) in March 2021,[11] the term 'disabled person' does not automatically stigmatise an individual. However, language constantly evolves, and the term 'person with disability' increasingly appears in texts, including official documents, as a manifestation of inclusion also in the semantic aspect.[12] The same process is taking

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[6] At some universities, students must register online and submit a printed application to the scholarship authority to initiate scholarship proceedings.

[7] See, e.g. Resolution No. LXVIII/1772/23 of the Wrocław Municipal Council of 25 May 2023 on the conditions and amounts of grants for undergraduate students and PhD students as part of the Student Grant Programme.

[8] Judgment II SA/Ol 818/21 of the Provincial Administrative Court (PAC) in Olsztyn of 10 February 2022.

[9] Resolution No. XXX/384/2018 of the Michałowice Municipality Council of 15 February 2018 on the conditions of John Paul II grants for university students.

[10] See, e.g. Resolution No. XXXVI/575/21 of the Nysa Town Council of 31 March 2021 on the conditions of student grants governed by the Nysa Mayor's Grants Program (Article 4(11)).

[11] See https://rjp.pan.pl/porady-jezykowe-main/2014-wyrazenia-osoba-niepelnosprawna-i-osoba-z-niepelnosprawnoscia-2 [accessed on 28 January 2024], opinion on 'disabled person' and 'person with disability' by Prof. Marek Łaziński, professor of the University of Warsaw, on behalf of the Polish Language Council, March 2021.

[12] For more information, see, e.g. D. Galasiński, 'Osoby niepełnosprawne czy z niepełnosprawnością?', *Niepełnosprawność – Zagadnienia, Problemy, Rozwiązania*, 2013, Vol. 9, No. IV,

place in higher education, where institutions establish support centres for persons with disabilities[13] or offices for persons with disabilities[14] rather than for disabled persons. Such actions implement the assumptions outlined in the HESA preamble, which states that the principles of higher education include co-shaping the moral standards of public life. The legislator also notes the need to unify the terminology used in normative acts, primarily in line with the Convention on the Rights of Persons with Disabilities (CRPD).[15] Article 1, sentence 2 of the Convention provides that

> 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

Both Article 86(1)(2) HESA, which specifies the scholarship analysed herein, and Article 89 HESA, which defines the conditions a student must meet to receive that scholarship, use the term 'disabled person' rather than 'person with disability'.

Under Article 89 HESA, a scholarship for disabled persons may be granted to a student who holds a disability certificate, a disability degree certificate, or a certificate referred to in Articles 5 and 62 of the Act of 27 August 1997 on the Social and Professional Rehabilitation and Employment of Disabled Persons.[16] According to this Act, a disabled person (a normative legal category) is: (1) a person who has a disability confirmed by a certificate in which the evaluation bodies assign one of the three degrees defined in Article 3 of the Act – namely, mild, moderate, or severe; (2) a person with a partial or total incapacity to work, as established under separate provisions; or (3) a person who has a disability certificate issued before the age of 16. Depending on the disability degree, the person in question requires permanent or long-term care and assistance to fulfil social roles due to an inability to lead an independent life (severe disability); requires temporary or partial assistance to fulfil social roles (moderate disability); or has limitations in fulfilling social roles but is able to compensate for them with orthopaedic equipment, auxiliary measures, or technical means (mild disability). Thus, the premise for granting the scholarship in question is a valid certificate confirming a severe, moderate, or mild disability degree – formerly referred to as disability group I, II, or III. The bodies

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pp. 3–6; M. Szeroczyńska, 'Niepełnosprawność i osoba niepełnosprawna', in: Fundacja Instytut Rozwoju Regionalnego, *Polska droga do Konwencji o prawach osób niepełnosprawnych ONZ*, Kraków, 2008, p. 18.

[13] See, e.g. https://wszop.edu.pl/centrum-wsparcia-osob-z-niepelnosprawnoscia, https://cwozn.ujk.edu.pl [accessed on 27 May 2025].

[14] See, e.g. https://bon.uw.edu.pl, https://www.umcs.pl/pl/zespol-ds-wsparcia-osob-z-niepelnosprawnosciami,3222.htm [accessed on 28 January 2024].

[15] Adopted in New York on 13 December 2006 (Journal of Laws of 2012, item 1169, and of 2018, item 1217). See also the review of the legal terminology for disability and its types in terms of coherence and conformity with CRPD, and suggested legal amendments to unify and adjust that terminology (*Przegląd terminologii stosowanej w różnych aktach prawnych, odnoszącej się do niepełnosprawności lub jej rodzajów, pod kątem spójności i zgodności z 'Konwencją ONZ o prawach osób niepełnosprawnych' oraz propozycje zmian aktów prawnych ujednolicające i dostosowujące tę terminologię*, Warszawa, 2022), https://www.gov.pl/attachment/a7a16a78-4da7-4e5f-b43a-501d0b624976 [accessed on 27 May 2024].

[16] Journal of Laws of 2024, item 44, as amended.

that certify disability include district/municipal (first instance) and provincial (second instance)[17] disability evaluation teams. Their certificates constitute official documents as defined in Article 76(1) CAP and serve as proof of what they officially state. Therefore, the certificates possess special probative value, which means that a body cannot disregard the existence of a fact stated in an official document unless it provides evidence to the contrary.[18] Consequently, a university president or scholarship committee must not independently determine the disability onset date when awarding a scholarship to a person with disability. Doing so would breach the subject-matter competence of the above-mentioned teams, which are responsible for indicating the onset date or period for both the disability and the disability degree. The same principle applies in cases where new evidence or documents relevant to the determination of the onset date emerge after the disability evaluation team has issued the certificate and the proceedings to determine scholarship entitlement have begun. A *novum* (new evidence) that arises at this stage of the scholarship proceedings lies beyond the competence of the university president or scholarship committee.

Importantly, the teams cannot arbitrarily indicate the onset date or period of the disability or its degree. Instead, they must follow a formalised procedure based on medical documentation specified by law[19] and the course of the condition. Initiation of the relevant proceedings requires an application filed by the person concerned, their statutory representative, or – with the consent of the person or representative – by a social welfare centre or social services centre. A district or provincial disability evaluation team may amend a previously issued valid disability certificate at any time, but this also requires an application from the person concerned.[20] As emphasised in judicial practice:

> 'The effects of a disability certificate stem from solidarity and relate to the social sphere, where state bodies take actions to eliminate the disproportion in the quality of life and social functioning between healthy persons and those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'[21]

PREMISES FOR GRANTING A SCHOLARSHIP FOR DISABLED PERSONS

Under Article 86(1)(2) HESA, a student may apply for a scholarship for disabled persons. The right to receive the scholarship does not arise *ex lege* once the entitled person obtains student status. Instead, the required legal form for granting the scholarship is an administrative decision (Article 86(2) HESA). On a side note,

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[17] They also perform specialised examinations, including psychological assessments, of persons applying for a disability certificate or a disability degree certificate, based on referrals from doctors or psychologists who are members of the disability evaluation teams.

[18] Judgment I GSK 477/22 of the Supreme Administrative Court (SAC) of 24 May 2022.

[19] Judgment III SA/Łd 356/22 of the PAC in Łódź of 26 July 2022.

[20] See order III UZP 8/22 of the Supreme Court (SC) of 27 April 2023, *OSNP*, 2023/11/120.

[21] Judgment I OSK 330/20 of the SAC of 17 September 2020, Legalis.

the scholarship committee and the appeal scholarship committee allocate not only this benefit, but also financial aid, the special assistance grant, and the university president's scholarship. Most committee members are students. The committee chair either signs the scholarship administrative decision themselves or authorises the deputy chair to do so.

HESA defines both positive and negative premises for granting a scholarship for disabled persons. The positive premises include the status of a student in first-cycle, second-cycle, or long-cycle studies – an obvious requirement – and a disability certificate, a disability degree certificate, or the certificate referred to in Article 5 or Article 62. The certificate required by Article 5 is issued by a certifying doctor of the Social Insurance Institution (ZUS). The document in question: (1) states total incapacity to work and equates to a severe disability certificate; (2) states the incapacity to lead an independent life and equals a severe disability certificate; (3) states total incapacity to work and equals a moderate disability certificate; or (4) states partial incapacity to work and equals a mild disability certificate. Article 62 applies to persons classified into one of the three former disability groups[22] before the entry into force of the Act of 27 August 1997 on the Social and Professional Rehabilitation and Employment of Disabled Persons.[23] During the scholarship proceedings, the student must submit a binding certificate which states its own validity period. Moreover, since the financial support in question requires an application, one must complete the relevant form – or draft the document themselves if no form exists – and then validly submit or serve the completed application.

The negative premises for granting a scholarship for disabled persons form a triad; fulfilling any of them provides a sufficient and autonomous basis to issue a decision refusing to grant the scholarship. The first restriction prevents students from receiving the scholarship in more than one study programme. This does not exclude obtaining a different type of benefit – such as financial aid or the university president's scholarship – in another study programme, provided that the premises for granting that other benefit are fulfilled. However, one may receive a scholarship for disabled persons in only one study programme, as indicated in the application (Article 93(2) HESA). Importantly, restricting the financial support to one study programme remains in line with citizens' constitutional right to education and with the principle of equality before the law.[24]

Second, financial support is excluded after graduating from second-cycle studies. The situation of a student in their first study programme differs from that of one who has commenced another study programme after graduating with a master's degree or an equivalent degree[25] (Article 93(3)(1) HESA). The negative premise also applies when a student commences first-cycle studies again after obtaining a degree (Article 93(3)(2) HESA). Lack of such a restriction would undermine the purpose of financial support for persons with disabilities and reduce that support

[22] Disability group I equals a severe disability certificate; group II equals a moderate disability certificate; and group III equals a mild disability certificate.

[23] Consolidated text, Journal of Laws of 2024, item 44, as amended.

[24] Judgment II SA/Sz 1200/19 of the PAC in Szczecin of 10 September 2020.

[25] Ibidem.

to co-financing further education. Thus, a student may receive the scholarship in question only if their second study programme results in obtaining a master's degree or an equivalent degree for the first time.[26]

The third negative premise is the time limit. The total period of eligibility for the benefit referred to in Article 86(1)(2) equals 12 semesters, regardless of whether the student actually receives the benefit. This period may include up to nine semesters in first-cycle studies and up to seven semesters in second-cycle studies. Crucially, the periods stipulated in Article 93(4) cover all the semesters commenced in first-cycle, second-cycle, and long-cycle studies, regardless of how long the person concerned had student status in those studies – for example, throughout a month or a whole semester. Only the number of commenced semesters counts, whether completed or not. Moreover, after the amendment introduced by the Act of 17 November 2021 on amending the Higher Education and Science Act and Certain Other Acts,[27] it remains relevant whether the student actually received the scholarship during the period specified in this provision. The legislator has disconnected the benefit eligibility period from the period of actually receiving the benefit, and has conditioned eligibility solely upon the study period. In other words, the period during which the student actually received the benefit has lost relevance for determining the eligibility period.[28] Significantly, the periods stipulated in Article 93(4) HESA become two semesters longer if the student commences long-cycle studies whose legally defined duration equals 11 semesters (pharmacy) or 12 semesters (medicine). This solution allows students who take maternity leave or sick leave to remain eligible for material support. If the disability onset occurs during studies or after obtaining a university degree, this extends the eligibility period for the benefit referred to in Article 86(1)(2) by a further 12 semesters, which equals the full duration – that is, the first and second cycle – of another study programme.[29] The described rules of granting scholarships to persons with disabilities also apply to those who have studied or obtained university degrees abroad.

During the investigation proceedings to determine the fulfilment of the scholarship granting premises, an important role belongs to POL-on – an integrated information system for higher education and science, referred to in Article 342 HESA. The system contains a database of students, including: the type of granted benefits referred to in Article 86(1)(1)–(4) HESA; the number of the diploma confirming graduation from a study programme, cycle, and profile; the study commencement date; and the graduation date with the obtained degree or the disenrolment date (Article 344 HESA). Therefore, the system permits tracing each student's education, in particular the commenced semesters – especially for studies at various universities. Nonetheless, when basing their decision on the POL-on data,

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[26] Cf. judgment I OSK 1724/12 of the SAC of 31 October 2012, Legalis.

[27] Journal of Laws of 2021, item 2232, as amended.

[28] See judgment III SA/Gl 31/23 of the PAC in Gliwice of 28 February 2023; judgment III SA/Gd 110/23 of the PAC in Gdańsk of 15 June 2023; judgment III SA/Lu 134/23 of the PAC in Lublin of 29 June 2023.

[29] See the justification of the government's bill amending the Higher Education and Science Act and Certain Other Acts, form No. 1569.

the scholarship granting bodies must indicate the date of downloading the data for use in the proceedings, and when the student questions the data's correctness, the bodies must clarify the circumstances highlighted by the student. Only in this way can the supplemented evidence 'permit an unambiguous assessment whether the student meets the scholarship eligibility criteria'.[30] During the investigation proceedings, the student must also submit statements which assert that the student has not obtained a university degree, receives no scholarship for disabled persons at another study programme or university, and does not have the status of a career soldier or a career soldier candidate, as explained below. The statements must contain a clause of criminal responsibility for providing untrue data, based on Article 233(1) of the Act of 6 June 1997 – Criminal Code (CC).[31]

Internal regulations of certain universities extend the statutory list of negative premises, refusing to grant the scholarship for disabled persons to the following students: career soldiers or career soldier candidates who have commenced studies upon referral by a competent military body and have received education support under the provisions on career soldiers' military service; and state service officers or candidates for such officers who have commenced studies upon referral or with the consent of a competent superior and have received education support under the provisions on career soldiers' military service.[32] POL-on does not store data on career soldier students.

EXTRAORDINARY MODES OF VERIFYING FINAL SCHOLARSHIP DECISIONS ISSUED TO STUDENTS WITH DISABILITIES

The competent bodies responsible for conducting scholarship granting proceedings regarding persons with disabilities may initiate an extraordinary mode of proceedings governed by Chapters 12 and 13 CAP – either *ex officio* or upon application. This constitutes an exception to the procedural principle of administrative decisions permanence, which means that a final decision remains in force until repealed or amended by a new decision based on a relevant provision of law. The principle safeguards important values such as legal certainty, trust in the state, and protection of acquired rights. Therefore, using these modes requires a material defect present either in the decision or in the activities preceding the decision, or one that stems from a *lex specialis*. When initiating any of the modes, the body must clearly state the grounds for challenging the final decision and indicate the specific

[30] Judgment II SA/Sz 466/23 of the PAC in Szczecin of 3 August 2023.

[31] Journal of Laws of 2024, item 17, as amended.

[32] See, e.g. Article 4(5) of the Student Benefit Regulations of 19 September 2023 of the University of Rzeszów, https://www.ur.edu.pl/pl/student/stypendia-zapomogi-kredyty-ubezpieczenia/stypendia/regulamin-swiadczen-wnioski; Article 4(10) of the Student Benefit Regulations of 30 September 2022 of the Pomerania University of Humanities in Chojnice, http://www.pomeraniachojnice.edu.pl/653-2; Article 2(2) of the Student Benefit Regulations of 25 September 2023 of the University of Linguistics and Technology in Przasnysz, https://ult.edu.pl/wp-content/uploads/2023/12/Zalacznik-nr-31-REGULAMIN-SWIADCZEN-DLA-STUDENTOW-ULT-w-PRZASNYSZU.pdf [accessed on 28 January 2024].

provisions applicable to the relevant mode. Extraordinary proceedings may concern both positive and negative final decisions – that is, those which either grant or refuse to grant a scholarship.

REPEAL OR AMENDMENT OF A DECISION WHICH GRANTED THE RIGHT UNDER *LEX SPECIALIS*

Under Article 86(4) HESA, the university president must issue an administrative decision to repeal an unlawful decision by the scholarship committee or the appeal scholarship committee. The president may exercise this right *ex officio* in respect of both a non-final (first-instance) decision and a final decision. The latter includes a first-instance decision after its appeal deadline has expired and a second-instance decision issued by the appeal committee. The president's right in this regard is a non-code form of eliminating the scholarship committee's decision and stems from Article 86(4) HESA as a substantive law provision.[33] This mode ends with a remand decision – namely, one which does not rule on the merits of the case but refers the case back to the committee which issued the non-final decision. The basis for final scholarship decisions includes Article 86(4) HESA and Article 163 CAP, which permits the amendment or repeal of a right-granting decision in cases and on grounds other than those stipulated in CAP. However, Article 163 CAP is a cross-referencing provision and thus cannot serve as the sole basis for repealing or amending a final decision.[34] As highlighted in judicial practice, the application of Article 163 CAP 'together with the relevant provisions of substantive law proves unnecessary and bears no significance for the decision recipient's rights or responsibilities. The validity and application of provisions separate from the code does not require signalling or citing a provision whose function remains informational or cognitive, and hence non-normative'.[35] Challenging a non-final decision in this mode would breach the principle of two instances. Instead, it is necessary to establish that the committee issued the decision in question unlawfully, namely by violating substantive law – for instance, the HESA or the scholarship granting regulations (Article 95 HESA);[36] or by violating procedural law – for instance, by acting in the absence of a certificate issued by a competent body,[37] or by failing to exhaustively gather and consider evidence. To challenge a scholarship decision under the above provisions, one must determine that the decision creates acquired rights for its parties – that is, grants a scholarship. Importantly, 'acquiring a right under a decision equals the legal benefit that the party concerned derives from settling the matter via an administrative decision. Thus, to

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[33] Cf. judgment II SA/Po 412/22 of the PAC in Poznań of 29 September 2022.

[34] See also K. Kotarba, 'Przesłanki uzasadniające odwołalność decyzji administracyjnych na podstawie art. 163 k.p.a.', *Przegląd Prawa Publicznego*, 2009, No. 1, p. 43.

[35] Judgment I GSK 2764/18 of the SAC of 29 July 2022.

[36] Both public and private universities have to draft regulations. They do so by exercising their institutional authority and their autonomy, in consultation with the student self-government. Article 95 HESA defines the subject matter scope of such regulations.

[37] See, e.g. judgment II SA/Wa 1127/20 of the PAC in Warsaw of 13 January 2021.

establish that the decision creates acquired rights, one must: (1) examine the decision content or determine that the decision content allows the parties to derive legal benefits, derive rights, or specify the responsibilities of other subjects of law which correlate with their own rights';[38] (2) determine that separate provisions apply and directly permit challenging the decision (Article 86(4) HESA); and (3) decide whether the existing factual and legal situation permits an extraordinary mode of challenging the decision because grounds exist for applying separate provisions.[39] Applying the mode in question undoubtedly deviates from the fundamental principles of the rule of law: the protection of validly acquired rights, which concerns the substantive sphere; and the principle of permanence of final decisions (Article 16(1) CAP), which concerns the formal and procedural sphere. Here, Article 163 CAP plays the role of 'a mere connection between the procedural institution of repealing a decision and the substantive institution of withdrawing a right, following which the right-granting decision loses its legal existence'.[40] As highlighted in judicial practice:

> 'The exercise of a right acquired under a decision causes its expiration, and the lack of an administrative law relationship arising under the constitutive decision results in lack of legal grounds for amending or repealing the decision which shaped that relationship, based on Article 163 of the Code of Administrative Procedure, which makes the proceedings in this mode groundless.'[41]

To verify a final scholarship decision, the body must choose the correct mode of proceedings. First and foremost, it needs to assess whether the special provision referred to in Article 163 CAP permits the repeal or amendment of the decision based on the premises specified in that provision. If the non-code provisions do not permit elimination of a defective scholarship decision in such a mode, one must establish whether grounds exist to declare the decision invalid (Article 156 CAP) or to resume the proceedings (Articles 145, 145a, 145aa, 145b CAP). The indicated provisions point to qualified defects, which justify either procedure.[42] If the invalidity premises and the resumption premises coincide, priority belongs to the former mode, as it produces the most profound effects.

DECLARING A SCHOLARSHIP DECISION INVALID

If a scholarship decision contains substantively qualified defects,[43] one conducts invalidity proceedings (Article 156 et seq. CAP). The defects in question concern the legal relationship's subject or object, the legal basis, or other faults stemming from

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[38] Judgment I OSK 1574/10 of the SAC of 27 January 2011; see also A. Ziółkowska, 'Zmiana i uchylenie decyzji administracyjnej na podstawie art. 154 i 155 k.p.a.', in: Niczyporuk J. (ed.), *Kodyfikacja postępowania administracyjnego na 50-lecie K.P.A.*, Lublin, 2010, p. 961.

[39] Judgment II GSK 1237/13 of the SAC of 24 September 2014.

[40] Judgment II SA/Wa 1531/10 of the PAC in Warsaw of 4 March 2011.

[41] Judgment II SA/Op 57/08 of the PAC in Opole of 22 April 2008.

[42] Judgment IV SA/Gl 680/08 of the PAC in Gliwice of 18 November 2008.

[43] Cf., e.g. M. Kamiński, *Nieważność decyzji administracyjnej. Studium teoretyczne*, Kraków, 2006, p. 46.

special provisions. When determining decision invalidity, a public administration body authoritatively identifies a severe defect which has existed in the decision since its issue date, and issues a remand declarative decision with *ex tunc*[44] effect. The invalidity mode usually applies to cases where a scholarship decision was issued with a flagrant violation of law, concerned a scholarship case previously settled via another final decision, or was addressed to a student other than the party to the proceedings; in such cases, Article 156 CAP applies to the final decision. In the first substantive defect indicated above, one must determine whether the violation of law is evident, which means an indisputable, obvious,[45] and immediately visible contradiction between the decision's content and the provision of law forming the legal basis for that decision. In other words, one simply needs to compare the decision's content with the applied provision of law, thus obtaining evident inconsistency. A flagrant violation of law occurs when the application of a substantive legal provision forming the decision's legal basis produces a legal effect which could not have occurred under that provision.[46] For scholarship decisions, the legal basis consists of Article 86(1)(2) HESA and internal university regulations, including the student benefit regulations referred to in Article 95 HESA. However, 'a flagrant violation concerns only provisions which one can apply directly, that is, which do not require interpretation of the law',[47] because they are clear and understandable. Consequently, a decision stemming from a different interpretation of a legal norm cannot constitute a flagrant violation of law. Before the 2021 amendment mentioned above, the interpretation of Article 93(4) HESA often led students to cite a flagrant violation of law as a defect justifying a declaration of invalidity. However, an interpretation of the phrase 'flagrant violation of law' should take into account the violation's effects, scope, and type.[48] Thus, the discussed invalidity premise additionally requires the occurrence of decision effects that are impossible to accept from the perspective of the rule of law.[49]

To declare a scholarship decision invalid due to a previous settlement of the same case via a decision (*res iudicata*), the two cases must be identical in terms of their subject, object, and matter of fact and law – that is, the same legal situation and unchanged facts. The identity of a case therefore exists when the same parties are involved, the case concerns the same subject matter and the same legal status, while the factual circumstances remain unchanged.

Article 156(1)(4) CAP stipulates another premise for decision invalidity: addressing the decision to a person other than the party to the proceedings.

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[44] Even though the decision contains constitutive elements; see J. Borkowski, in: Adamiak B., Borkowski J., *KPA. Komentarz*, Warszawa, 2004, p. 746.

[45] Cf. J. Jendrośka, B. Adamiak, 'Zagadnienie rażącego naruszenia prawa w postępowaniu administracyjnym', *Państwo i Prawo*, 1986, No. 1, p. 69.

[46] Cf. judgment II OSK 1029/19 of the SAC of 6 April 2022.

[47] Judgment III OSK 421/22 of the SAC of 7 July 2023.

[48] See A. Sieniuć, 'Rażące naruszenie prawa w rozumieniu Kodeksu postępowania administracyjnego', in: Niczyporuk J. (ed.), *Kodyfikacja postępowania administracyjnego na 50-lecie K.P.A.*, Lublin, 2010, p. 709; A. Zieliński, 'O „rażącym" naruszeniu prawa w rozumieniu art. 156 k.p.a.', *Państwo i Prawo*, 1986, No. 2, p. 104.

[49] Cf. judgment II SA/Op 249/22 of the PAC in Opole of 30 December 2022.

However, in such a case, an incorrect indication of the party through an erroneous spelling of the name or surname is insufficient. Instead, the decision in question must shape the legal situation of subjects who should not have received that decision,[50] because they have no legal interest in, or obligation pertaining to, the case[51] – for example, a student who did not apply for a scholarship for disabled persons, or a student who does not meet the substantive premises stemming from HESA, and thus cannot exercise the rights granted. An incomplete indication of the student as a party to the scholarship proceedings does not render a decision invalid. However, the competent body may declare invalid a decision issued for a deceased person.[52] Such a decision bears an invalidity defect and should be removed from legal circulation.[53] Importantly, issuing a decision for a person other than the party to the proceedings differs from serving a decision on such other person. Serving documents is simply a procedural and technical activity through which the body conducting the proceedings fulfils its obligation. Therefore, a person served a decision does not become that decision's addressee.

The negative premises for determining decision invalidity stipulated in Article 156(2) CAP include two further factors: statute of limitations and irreversibility of legal effects. Regarding the statute of limitations, one cannot declare a decision invalid for the reasons listed in Article 156(1) CAP if ten years have passed since the decision's serving or publication. The statute of limitations for declaring invalidity is a substantive feature and therefore cannot be reinstated. The irreversibility of a decision's legal effects means that one cannot reverse, abolish, or retract those effects through actions for which the public administration body concerned has a statutory authorisation. In other words, the body cannot resolve the case via an individual administrative act or administrative proceedings.[54] The two premises serve to protect the rights acquired after issuing the invalid decision.

The entity competent to declare a decision invalid is a higher-level body – the university president. The proceedings for determining the invalidity of a scholarship decision begin at a party's request or *ex officio*. Apart from the party to the ordinary proceedings which ended in the challenged decision, the new parties include all other persons whose legal interests or obligations may be affected by the effects of the decision's invalidity. If the competent body declares the decision invalid, the case is remanded to the main proceedings, depending on whether the document in question is a first- or second-instance decision. However, if thirty years have passed since the serving or publication of the decision referred to in Article 156(2) CAP, the body does not initiate invalidity proceedings. In turn, when the public administration

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[50] Judgment I SA/Po 327/22 of the PAC in Poznań of 25 October 2022.

[51] Cf. A. Matan, in: Łaszczyca G., Martysz C., Matan A., *Kodeks postępowania administracyjnego. Komentarz*, Vol. 2, Warszawa, 2007, p. 332.

[52] See, e.g. judgment I OSK 621/20 of the SAC of 6 July 2023.

[53] See judgment II SA/Gl 1604/21 of the PAC in Gliwice of 24 March 2022.

[54] See judgment IV SA/Wa 1990/06 of the PAC in Warsaw of 2 February 2007. L. Bosek offers a different interpretation of irreversible legal effects. In his view, the legal impossibility of restoring a legal situation should not depend solely on the competence of the authority. See L. Bosek, 'Glosa do uchwały SN z dnia 8 listopada 2002 r., III CZP 73/02', *Orzecznictwo Sądów Polskich*, 2003, No. 9.

body cannot declare the decision invalid based on the circumstances referred to in Article 156(2) CAP, the body merely determines that the challenged decision was issued in violation of law and indicates the circumstances which prevented the declaration of invalidity. The resulting document should mention the existence of a positive premise for the challenged decision's invalidity (Article 156(1) CAP), declare that a negative premise has arisen (Article 156(2) CAP), and state that the challenged decision was issued in violation of law (Article 158(2) in connection with Article 156(2) CAP).

A decision which declares invalidity and one which states a violation of law produce different legal effects. The former eliminates the defective decision from legal circulation and abolishes its legal effects, thus restoring the previous legal situation. The latter retains the scholarship decision in legal circulation[55] together with its legal effects despite the existing defect, and restoration of the previous legal situation remains impossible.

RESUMING SCHOLARSHIP PROCEEDINGS

A formal defectiveness in the proceedings to grant a scholarship for a person with disability requires examining whether premises exist to justify a resumption of the proceedings (Article 145 et seq. CAP). The most common reasons for this extraordinary mode include grounding a final scholarship decision on evidence which served as the basis for determining material factual circumstances and was later proven false (Article 145(1)(1) CAP), and the emergence of new material factual circumstances or evidence which existed on the decision issue date but remained unknown to the issuing body (Article 145(1)(5) CAP).

The falsity premise encompasses any type of evidence that may arise during the investigation proceedings for granting a scholarship to a person with disability. One cannot limit this premise to documentary evidence such as a statement, even though this remains the most frequent type used during proceedings in chambers. In particular, falsity may occur in witness testimonies,[56] party statements, party testimonies given during an interrogation, expert opinions, or document translations. The last example is especially relevant in the cases of persons who studied or obtained university degrees abroad, as parties must submit evidence either drafted in Polish or translated into Polish. Document falsity may be formal or intellectual. Formal falsity entails forgery, where one creates a fake document that appears to have been drafted by the actual issuer; and alteration, where one changes the document's original content.[57] Intellectual falsity equals attestation of an untruth – for example, a statement referring to factual circumstances or a legal situation which never existed – even though the document's form remains authentic and raises no reservations. Determining the falsity of evidence falls outside the competence of

[55] Cf., e.g. judgment IV CSK 575/17 of the SC of 14 February 2019.

[56] See, e.g. Z. Kukuła, 'Wpływ przestępstwa na akty administracyjne', *Samorząd Terytorialny*, 2013, No. 1–2, p. 141.

[57] Judgment III OSK 4317/21 of the SAC of 5 November 2021.

the body conducting the scholarship proceedings. Resuming proceedings due to evidence falsity becomes possible only after a court or another competent body[58] has issued a ruling stating the evidence's falsity and has sentenced a public officer for attesting an untruth in a document, or sentenced any other person for altering or forging a document for use as an authentic one. Article 145(2–3) CAP permits an exception: one can resume proceedings even before a determination of falsity provided that the falsity is obvious and that resumption is necessary to avoid danger to human life or health, or serious damage to the public interest; importantly, both premises must be met. Obviousness applies to the external features of falsity and occurs when the falsity is indisputable and certain. The damage that may arise must be serious, as evaluated by the body; another situation includes the impossibility of initiating proceedings before a court or another body due to the passage of time or for other reasons specified in law. A mere belief or presumption of falsity is insufficient.[59] Thus, resuming scholarship proceedings under Article 145(1)(1) CAP requires the fulfilment of three conditions: the party used falsified evidence during the evidentiary hearing, a final ruling by a court or another competent body has confirmed the falsity, and the false evidence served as the basis for determining material factual circumstances.[60]

A student must return the benefit for a person with disability if it was granted on the basis of untrue data or the student's false statement. Moreover, the submission of untrue data or false statements to the scholarship body may form grounds for initiating disciplinary proceedings by the student disciplinary committee. This does not preclude responsibility under other provisions, namely the Criminal Code.

The second most frequent premise for resuming the scholarship proceedings is Article 145(1)(5) CAP. This provision may form the basis for examining a scholarship case and settling it via a final decision, provided that the evidence or factual circumstances presented by the party – independently or jointly[61] – meet three conditions: (1) they are new and remained unknown to the body examining the case in the ordinary proceedings; (2) they are material to the case owing to their law-shaping potential from the perspective of the substantive law provision applicable to the case – that is, they affect the manner of applying a norm of substantive administrative law; in other words, they influence the shape of the party's scholarship rights in the final decision and are subject to the body's evaluation in this respect; (3) they existed on the day of issuing the decision to which the resumption demand relates.[62] Importantly, new circumstances exclude information that the scholarship body could have accessed during the ordinary proceedings – for example, data available in POL-on.

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[58] See, e.g. judgment I SA/Po 280/22 of the PAC in Poznań of 14 December 2022, and G. Krawiec, 'Stwierdzenie sfałszowania dowodu (popełnienia przestępstwa) jako warunek wznowienia postępowania administracyjnego na podstawie art. 145 § 1 pkt. 1 i 2 k.p.a.', *Przegląd Prawa Publicznego*, 2008, No. 7–8, pp. 89–96.

[59] See judgment VII SA/Wa 1721/19 of the PAC in Warsaw of 29 January 2020.

[60] Judgment II OSK 3096/19 of the SAC of 5 October 2022.

[61] See more in A. Ziółkowska, 'Kontrowersje w orzecznictwie sądowym i doktrynie na tle art. 145 § 1 pkt 5 k.p.a.', *Samorząd Terytorialny*, 2008, No. 5; A. Ziółkowska, *Nowe okoliczności i nowe dowody jako podstawa wznowienia ogólnego postępowania administracyjnego*, Sosnowiec, 2008.

[62] Cf., e.g. judgment II SA/Bk 583/21 of the PAC in Białystok of 18 January 2022.

A changed evaluation, or omission, of evidence already existing in the case file cannot justify resuming proceedings. The *novum* as the basis for resumption must refer to personal or physical evidence. The feature of novelty does not apply to evidence – or circumstances presenting the factual and legal situation – that the party already knew and could have used in the scholarship proceedings. As highlighted in judicial practice, 'one cannot exclude a factual and legal situation where a circumstance or evidence obviously – that is, without a detailed examination – meets the premises stipulated in Article 145(1)(5) CAP and entails violation of law.'[63]

The indicated grounds for resuming the scholarship proceedings apply to an untrue or incomplete picture of reality as determined by the body in a situation where the proceedings leading to the decision bore a qualified procedural defect. Faults in the evidentiary hearing – one of the most important phases of the proceedings[64] – also affect the decision, which thus bears a qualified defect and would probably have read differently if the body had relied on non-falsified evidence or a full range of evidence. Otherwise, the body cannot fully implement the principle of objective truth (Article 7 CAP), which demands careful clarification of the factual situation and exhaustive examination of the entire evidence.

The negative premises for resuming proceedings include the statute of limitations, which means that one cannot repeal a decision for the reasons stipulated in Article 145(1)(1) and 145(1)(2) if ten years have passed since the decision's service or publication, or for the reasons stipulated in Article 145(1)(3–8) and Articles 145a–145b if five years have passed since the decision's service or publication; the above deadlines are substantive and therefore impossible to reinstate. Another negative premise involves a situation where the resumed proceedings would necessarily end with a decision whose essence corresponds to that of the existing decision (Article 146 CAP). In other words, the procedural defect did not affect the correct application of substantive law provisions to the case, and its removal in the resumed proceedings would lead to a conclusion that the decision's content complies with the law and should remain unchanged. Therefore, the indicated premises limit the possibility of deciding on the merits of the case in the resumed proceedings.

Resumption of proceedings takes place at the party's request or *ex officio*. However, resumption for the reasons stipulated in Article 145(1)(4) and Articles 145a–145b takes place solely at the party's request. The party must submit a resumption application to the body that issued the decision in the first instance. The submission deadline is one month from the day the party became aware of the circumstance providing the basis for resumption. The competent body to conduct the resumption proceedings is the body that issued the decision in the last instance.

After resuming the administrative proceedings which ended in a final administrative decision, the body should examine the case within the boundaries stipulated by the established grounds for resumption.[65] The resulting decision either refuses to repeal the existing decision if the body determines a lack of grounds for repeal under

[63] Judgment II OSK 276/21 of the SAC of 26 October 2023.

[64] See more in: A. Ziółkowska, 'Formy wadliwości postępowania wyjaśniającego w ogólnym postępowaniu administracyjnym', *Samorząd Terytorialny*, 2009, No. 9.

[65] Judgment II OSK 586/22 of the SAC of 21 June 2023.

Article 145(1), Article 145a, Article 145aa, or Article 145b; or repeals the existing decision if the body determines the existence of grounds for repeal under the indicated provisions. In the latter case, the body issues a new decision which settles the merits of the case. If negative premises prevent the decision repeal following the resumed proceedings, the body only states that the challenged decision was issued in violation of the law, and indicates the circumstances which prevent the repeal. Such a decision allows the party to file a claim for damages,[66] but the challenged final decision remains in legal circulation and continues to shape the legal relationship.[67] To issue such a decision, the body must first conduct proceedings examining the resumption grounds and settle the merits of the case. If the body finds that the resumed proceedings are objectless, it shall discontinue those proceedings by issuing a decision.

CONCLUSION

Scholarship for persons with disabilities ranges from PLN 500[68] to 3,000[69] per month depending on the disability degree. The benefit amount can also be fixed regardless of the disability degree.[70] Such figures may indeed provide real support to students with disabilities, although scholarship obviously cannot in any way compensate for disability. Financial aid serves as a manifestation of social solidarity in education and science. Therefore, the possibility to repeal or amend a decision which granted the scholarship right should be clearly defined in law and remain extraordinary.

Final administrative decisions, including those which grant scholarships to students with disabilities, are presumed valid and legal. At the same time, the principle of permanence of final decisions, which stems from Article 16(1), first sentence of the CAP, determines their boundaries because permanence fulfils its role only for defect-free decisions.[71] The principle in question contributes to legal security and certainty, builds trust in the state and the law, and protects acquired rights – in accordance with the need to ensure stability and certainty of administrative legal relationships over time.[72] However, this principle is not absolute. Article 16(1), second sentence of the CAP provides exceptions which stipulate that one may repeal or amend a final decision, declare it invalid, or resume the proceedings only in the cases defined in the Code or specific acts; as such, the exceptions require a strict, narrowing interpretation.[73]

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[66] See more, e.g. in: A. Ziółkowska, *Nowe okoliczności*…, op. cit., p.172.

[67] Judgment I GSK 14/22 of the SAC of 25 August 2022.

[68] See https://stypendia.uj.edu.pl/aktualnosci/-/journal_content/56_INSTANCE_y6768Q8EMW3g/141626430/154602413 [accessed on 28 January 2024].

[69] See https://wsb.edu.pl/student/stypendia [accessed on 28 January 2024].

[70] See, e.g. https://www.ue.katowice.pl/jednostki/centrum-dostepnosci/swiadczenia-socjalne/stypendium-dla-osob-z-niepelnosprawnoscia.html [accessed on 28 January 2024].

[71] B. Jaworska-Dembska, 'O podstawach do wznowienia postępowania administracyjnego', *Zeszyty Naukowe Uniwersytetu Łódzkiego*, 1974, Issue 106, p. 83.

[72] Judgment II SA/Łd 886/23 of the PAC in Łódź of 10 January 2024.

[73] See, e.g. B. Adamiak, 'Koncepcja nadzwyczajnych trybów postępowania administracyjnego', *Acta Universitatis Wratislaviensis. Prawo CXII*, 1985, Vol. 112, No. 648, p. 93; G. Krawiec, *Wznowienie ogólnego postępowania administracyjnego*, Sosnowiec, 2007, pp. 70–71.

Verification of a scholarship decision via extraordinary proceedings means controlling the correctness of the decision issued in the first and second instances of ordinary proceedings. However, the extraordinary procedure for verifying a scholarship decision granting a benefit to a person with a disability is not an arbitrary measure: neither the university president nor the student can freely choose this procedure. Instead, to initiate any extraordinary mode, the law requires the positive premises indicated *expressis verbis* in CAP. In turn, repealing the decision following the proceedings equals the simultaneous absence of negative premises.

Multiple defects of various types may complicate the selection of the appropriate extraordinary mode to verify a scholarship decision. According to judicial practice, if a collision occurs:

> 'Between the Code modes for eliminating final decisions from legal circulation – that is, resumption of proceedings, declaring a decision invalid, amending or repealing a decision, or expiration of a decision – and the modes defined in the special provisions to which Article 163 CAP refers, the Code's provisions shall prevail. However, the above principle does not apply to a decision issued based on a special provision to which Article 163 CAP refers if that decision bears no legal defect. In the absence of a legal defect, the special provision to which Article 163 CAP refers shall prevail over the Code modes in accordance with the *lex specialis derogat legi generali* principle.'[74]

Moreover, in practice, one cannot *a priori* exclude a situation where one scholarship decision bears multiple defects which provide the basis for both resuming the proceedings and declaring the decision invalid. Although the Code lacks a clear regulation in this scope, one should then prioritise the mode which produces the most profound effects – that is, initiate the invalidity proceedings, which allows for restoration of the situation that preceded the issued decision.

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[74] Judgment VI SA/Wa 2614/10 of the PAC in Warsaw of 4 February 2011; W. Chróścielewski, A. Korzeniowska, 'Glosa do wyroku NSA z dnia 31 lipca 2002 r., II SA/Gd 441/00', *Orzecznictwo Sądów Polskich*, 2004, No. 2, item 1.

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ENSURING THE CONTINUITY OF THE EXECUTIVE BRANCH OF THE COMMUNE SELF-GOVERNMENT FOLLOWING THE EXPIRY OF THE MAYOR'S MANDATE

MAGDALENA GURDEK*

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Abstract

The present study focuses on issues relating to continuity of the executive branch of commune self-government following expiry of the mayor's mandate. It is an original scientific article that aims to answer the question of whether the regulations currently in force sufficiently safeguard the principle of continuity of the executive branch of commune self-government. It is hypothesised that, unfortunately, the legislature has not ensured preservation of this principle in every case. To confirm this hypothesis, it was necessary to thoroughly analyse the provisions not only of the Act on the Commune Self-Government but also of the Constitution and the other two acts governing the local self-government system (the legal-dogmatic method). Since, in practice, this gap creates very serious difficulties in the functioning of communes, the study does not merely answer the above question but also proposes and discusses possible legislative amendments to guarantee continuity of the executive branch of commune self-government in every case.

Key words: mayor, term of office, continuity of government, expiry of mandate, person designated by the Prime Minister

* LLD hab., Professor of the Humanitas University, Institute of Legal Sciences, Humanitas University in Sosnowiec (Poland), e-mail: magdalena.gurdek@humanitas.edu.pl, ORCID: 0000-0002-4924-348X

INTRODUCTION

The principle of continuity in the operations of the executive branch ensures that the executive authority can continue to perform its duties without interruption. As regards the Council of Ministers, this principle is expressed in Article 162(3) of the Constitution of the Republic of Poland,[1] which provides that, in the event that the Prime Minister submits the Council of Ministers' resignation (regardless of the reason), the President of the Republic of Poland, when accepting the resignation, shall oblige the Council of Ministers to continue performing its duties until a new Council is appointed.[2]

Since 1990, when local self-government was restored in Poland, the need to ensure this principle of continuity (non-interruption) has also been discussed in relation to local authorities.[3] Although, under Article 169(1) of the Constitution of the Republic of Poland, local self-government units carry out their tasks through legislative and executive authorities, the aforementioned principle applies only to the executive ones, following the example of the Council of Ministers. Indeed, while a local self-government unit can function for some time without a legislative authority,[4] which in any case meets in sessions usually convened once a month or less frequently,[5] the primary role of the executive authorities is to perform public tasks on a continuous basis. The destabilisation of their operations may thus adversely affect the proper functioning of a local self-government unit.[6] Hence, to ensure continuity, Article 29 of the Act on the Commune Self-Government[7] provides that, after the end of the term of office for which the mayor (*wójt* – in certain communes, the equivalent authority is referred to as *burmistrz* or *prezydent miasta*) has been elected, they shall perform the mayor's functions until a newly elected mayor takes over (paragraph 1).

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

2 This situation is referred to in the literature as an 'atypical' Council of Ministers and, among others, prevents the passing of a vote of no confidence or a vote of confidence in the Council, as such a decision would be pointless. It is further noted that, in such a situation, the Council of Ministers and its individual members should limit themselves to performing their duties only to the necessary (strictly necessary) extent. This is, of course, an argument that needs to be treated rather as an element of political culture – see P. Czarny, 'Komentarz do art. 162 Konstytucji Rzeczypospolitej Polskiej', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warszawa, 2023, electronic version: https://sip.lex.pl/#/commentary/587939419/736859/tuleja-piotr-red-konstytucja-rzeczypospolitej-polskiej-komentarz-wydii?pit=2023-12-23&cm=URELATIONS [accessed on 30 December 2023].

3 See M. Kasiński, 'Ciągłość funkcji wykonawczej a zakończenie działalności zarządu gminy', *Samorząd Terytorialny*, 1996, No. 7–8, pp. 20–34.

4 See P. Kubalski, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Drembkowski P. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2019, electronic version: https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrrg4ztomzoobqxalrugmydkojwgq2q&refSource=toc#tabs-metrical-info [accessed on 29 December 2023].

5 As per the applicable regulations, but at least once a quarter.

6 Cz. Martysz, 'Komentarz do art. 31b ustawy o samorządzie powiatowym', in: Dolnicki B. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2020, electronic version: https://sip.lex.pl/#/commentary/587821156/618596/dolnicki-bogdan-red-ustawa-o-samorzadzie-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS [accessed on 28 December 2023].

7 The Act of 8 March 1990 on the Commune Self-Government, Journal of Laws of 2023, item 40; hereinafter 'the Commune Act'.

At the same time, in this scenario, a deputy mayor shall perform their duties until a newly appointed deputy mayor takes over (paragraph 2). In turn, under Article 28 of the Act on the District Self-Government[8] and, accordingly, Article 42 of the Act on the Province Self-Government,[9] the district/province executive board (*zarząd powiatu* / *zarząd województwa*) shall operate until a new one is elected. As can be seen, the above provisions ensure continuity in the operations of the executive branch of local self-government where a given authority has functioned uninterruptedly throughout the entire period for which it was elected.[10]

However, this is not always the case. In certain circumstances, when specific grounds are met, persons elected to perform a particular authority's functions (referred to as 'office holders') perform their duties for a shorter period than that for which they were originally elected. This is because – as in the case of the Council of Ministers – their election is not irrevocable. If certain circumstances arise, they lose office earlier. Interestingly, in the case of the Council of Ministers, Article 162(3) of the Constitution stipulates that, irrespective of the reason for the Council's resignation – which is not necessarily submitted at the end of the Sejm's term of office (i.e. the period for which the Council was appointed), but may also be due to a failure to receive a vote of confidence from the Sejm, a vote of no confidence being passed by the Sejm, or the Prime Minister's resignation – the President of the Republic of Poland, when accepting the Council's resignation, shall oblige the Council to continue its duties until a new Council of Ministers is appointed. Therefore, as regards the Council of Ministers, the principle of continuity of the executive branch applies in every case, even if the Council has lost the Sejm's confidence. Then, until a new Council is chosen, the departing one is obliged to continue performing its previous duties. Notably, the legislature has not provided for the Council to be immediately precluded from performing its functions. These matters are thus regulated jointly in a single provision, regardless of the circumstances leading to the Council's resignation.

Meanwhile, in the case of local self-government authorities, the legislature has established distinct regulations for situations where office is lost before the end of the period for which a particular authority was elected. As far as mayors are concerned, the legislature has specified the circumstances resulting in a mayor's early loss of office in Article 492(1) of the Election Code.[11] If these grounds are met,

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[8] The Act of 5 June 1998 on the District Self-Government, Journal of Laws of 2022, item 1526, as amended; hereinafter 'the District Act'.

[9] The Act of 5 June 1998 on the Province Self-Government, Journal of Laws of 2022, item 2094; hereinafter 'the Province Act'.

[10] The same opinion expressed by Cz. Martysz, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Dolnicki B. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2020, electronic version: https://sip.lex.pl/#/commentary/587821150/618590/dolnicki-bogdan-red-ustawa-o-samorzadzie-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS [accessed on 25 December 2023]; and P. Chmielnicki, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Chmielnicki P. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, LexisNexis, 2005, electronic version: https://sip.lex.pl/#/commentary/587524603/322043/chmielnicki-pawel-red-ustawa-o-samorzadzie-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS [accessed on 25 December 2023].

[11] The Act of 5 January 2011 – the Election Code, Journal of Laws of 2023, item 2408, as amended.

they result in the expiry of the mayor's mandate before the end of the mayor's term of office. This, in turn, under Article 28f(1) of the Commune Act, immediately (automatically) precludes the mayor from performing their functions – as these functions are assumed by a person designated by the Prime Minister until a newly elected mayor takes over. As can be seen, theoretically, this provision is also intended to ensure continuity of government. Indeed, the legislature does not leave the commune (*gmina*) without an executive branch after its mayor is removed – but the executive power is no longer exercised by the previous mayor. Moreover, and most importantly, the legislature has not indicated when a person to take over the mayor's functions should be designated. All this raises doubts as to whether the principle in question is actually guaranteed.

There are no corresponding provisions on the expiry of mandates in the District and Province Acts. This is because the executive board members are not directly elected and thus are not granted a mandate, so there is no question of its expiry. However, these Acts contain other provisions which state that if circumstances resulting in an early loss of office arise (e.g. in the case of dismissal or resignation), the departing executive boards – like the Council of Ministers – shall continue their duties until a new executive board is elected. This effectively prevents the principle of continuity of the executive branch from being compromised.

The present study, firstly, seeks to answer the question of whether the regulations currently in force sufficiently safeguard the principle of continuity of the executive branch of the commune self-government. Secondly, the main point of the discussion in this study is an attempt to propose amendments to the existing regulations to guarantee the continuity of the executive branch of the commune self-government even if the mayor's mandate expires before the end of their term of office. To this end, the analysis will cover not only the applicable provisions of all three acts governing the local self-government system but also the provisions of draft regulations recently submitted to the Sejm.

THE PRINCIPLE OF CONTINUITY OF THE EXECUTIVE BRANCH IN THE REGULATIONS IN FORCE UNTIL 2002

When local self-government was reinstated at the commune level in 1990 and then extended to the other self-government units, i.e. the district (*powiat*) and the province (*województwo*), the executive authorities (executive boards) of all three units were indirectly elected by their legislative bodies. The latter were first directly elected by a particular self-government unit's local community. These executive boards were collective bodies without an explicitly defined term of office and were, by definition, elected for the duration of the term of office of the legislative bodies that elected them. Accordingly, each newly elected commune and district council (*rada*) and province assembly (*sejmik*) was obliged to elect its executive authority. This solution guaranteed continuity of the executive branch since, under Article 29 of the Commune Act, Article 29 of the District Act, and Article 42 of the Province Act, the departing executive board was supposed to continue its duties until a new

one was elected. However, the Commune Act and the Province Act explicitly stated that these provisions applied only to the election of a new executive board by a new council or assembly following the end of the previous one's term of office. Yet the need to elect an executive board could arise not only when the term of office of the council/assembly that had elected the former executive board ended, but also earlier. The council/assembly could, for instance, dismiss the executive board, in which case it would be expected to elect a new one. A similar situation would arise if the executive board resigned during the ongoing term of office of the council/assembly.[12] In the legal situation at that time, the issues of maintaining the continuity of the executive branch in such cases were regulated by the legislature in different ways. With regard to districts, Article 28 of the District Act was the sole regulation relating to the continued performance of the executive board's duties. However, as this provision did not stipulate that it applied only to the election of a new executive board after the end of the council's term of office, it was, in practice, the basis on which – whenever it became necessary to elect a new executive board – the departing one continued its duties until a new one was elected. Over time, however, objections began to be raised that, given the placement of Article 28 in the structure of the District Act, it was not supposed to apply to situations where the executive board was dismissed or had resigned. It was therefore argued that new regulations directly addressing such cases were necessary.

Conversely, as regards the commune and province self-government, while the legislature established – in addition to Article 29 of the Commune Act and Article 42 of the Province Act, applicable only to the election of a new executive board by a new council or assembly following the end of the former one's term of office – other provisions, these concerned merely the executive board's dismissal. Namely, under Article 28e(3) of the Commune Act, if a commune's executive board was dismissed, it continued its duties until the election of a new one. Pursuant to Article 39(2) of the Province Act, the dismissed province executive board or its individual members continued their previous duties until the election of a new province executive board or its individual members. The province assembly could release a member of the province executive board from this obligation.

Notably, no regulations in the Commune and Province Acts referred to the executive board's resignation. Moreover, there were differences between their provisions governing the executive board's dismissal. Hence, the legislature decided to harmonise these provisions and introduce identical regulations, covering both dismissals and resignations, in all three acts governing the local self-government system. This was accomplished by the Act of 11 April 2001.[13] The new provisions

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[12] As a side note, it should be mentioned that the composition of a collective executive authority was personally designed by its chairperson. This means that councillors first elected the chairperson, and only then, upon the chairperson's motion, the remaining members. This interdependence had far-reaching consequences. Namely, the dismissal of the chairperson entailed the dismissal of the entire executive board. Likewise, their resignation was tantamount to the resignation of the entire executive board.

[13] The Act of 11 April 2001 amending the Acts on the Commune Self-Government, on the District Self-Government, on the Province Self-Government, and on the Government Administration in the Province and Certain Other Acts, Journal of Laws of 2001, No. 45, item 497.

explicitly ensured continuity of the executive branch both after the end of a legislative body's term of office and during this term. Indeed, under the newly added Article 28e(3) and (4) of the Commune Act, Article 31b(3) and (4) of the District Act, and Article 39(3) and (4) of the Province Act, the dismissed executive board was supposed to continue its duties until a new one was elected.[14] The same rules applied if the entire executive board resigned.

THE PRINCIPLE OF CONTINUITY OF THE EXECUTIVE BRANCH IN REGULATIONS IN FORCE AFTER 2002

In 2002, fundamental systemic changes were made to the basic self-government unit, that is, the commune. In the other self-government units, i.e. districts and provinces, the existing regulations have not changed and are still in force. In turn, in communes, the aforementioned amendment replaced the collective, indirectly elected executive board with the mayor as a single-person, directly elected executive authority. As a result of this change, the mayor (as opposed to the members of executive boards, who remain the executive authorities of districts and provinces) is granted a mandate upon election. By definition, the mandate is granted for the entire term of office. To ensure the continuity of the executive branch, Article 29 of the Commune Act provides that, after the end of the mayor's term of office, they shall perform the mayor's functions until a newly elected mayor takes over. Accordingly, a deputy mayor shall continue with their duties until a newly appointed deputy mayor takes over.[15]

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[14] The same principle applies to individual dismissed members of the executive board, although the council could release an executive board member from this obligation. However, this concerned the release of a single member rather than all members in the event that the whole executive board was dismissed, as that would prevent its operation. According to Cz. Martysz, 'all dismissed members of the executive board may submit a request for release, but the wording of Article 31b(3) *in fine* indicates that the release in question may apply to one or more members of the executive board, therefore, releasing the entire board from these duties does not seem possible' – Cz. Martysz, 'Komentarz do art. 31b…', op. cit. Nonetheless, doubts may arise regarding the executive board's obligation to continue performing its duties, given that Article 65 of the Constitution guarantees the freedom to choose and to pursue one's occupation and to choose one's place of work. Still, the legislator did not specify in any way – even by providing some examples – what reasons could justify a decision to release an executive board member; for more on this issue, see P. Dańczak, 'Komentarz do art. 31b ustawy o samorządzie powiatowym', in: Gajewski S., Jakubowski A. (eds), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2019, electronic version: https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrtga2damjoobqxalrug44tgnzuha4a&refSource=guide1#tabs-metrical-info [accessed on 31 December 2023].

[15] For more on the subject, see J. Czerw, 'Komentarz do art. 29 ustawy o samorządzie gminnym', in: Chmielnicki P. (ed.), *Ustawa o samorządzie gminnym*, Warszawa, 2022, electronic version: https://sip.lex.pl/#/ commentary/587896956/694396/chmielnicki-pawel-red-ustawa-o-samorzadzie-gminnym?pit=2023-12-23&cm=URELATIONS [accessed on 22 December 2023]. The Provincial Administrative Court in Szczecin, in its judgment of 12 December 2012 (II SA/Sz 1016/12, LEX No. 1340452), stated that 'Article 29(2) of the Commune Act does not so much guarantee that a deputy mayor will perform their functions until a newly appointed deputy mayor takes over, as it obliges a deputy mayor to continue with their duties unless the mayor decides otherwise.' It is, therefore, their obligation, just as it is the

Yet, the mayor does not always serve the entire term of office, just as it was (and still is) the case with executive board members. As already mentioned above, this is because there are a number of grounds relating to executive authorities which, if met, result in an early loss of office. However, in the case of mayors – elected directly since 2002 – these grounds result in an earlier expiry of the mayor's mandate (before the end of the mayor's term of office), which permanently and effectively precludes them from performing previous functions. Under Article 28f(1) of the Commune Act, if the mayor's mandate expires before the end of their term of office, the mayor's functions shall be performed by a person designated by the Prime Minister until a newly elected mayor takes over. In turn, Article 28e of the Commune Act clearly states that the expiry of the mayor's mandate before the end of their term of office shall be tantamount to the dismissal of their deputy or deputies.[16] This stems from the fact that the mayor personally designs their team of collaborators.[17] Since the mayor chooses the deputy (or deputies), they must also share the consequences of the expiry of the mayor's mandate. Therefore, both the mayor and the deputy mayor are simultaneously removed from office and no longer perform their duties until a new mayor and their deputy are elected. Meanwhile, as mentioned earlier, in the case of executive board members – who are not granted a mandate due to their indirect election – these grounds (though not all of them)[18] are set out in various regulations: some result in losing membership in the district/province executive board (such as prohibitions on holding multiple offices or employment positions), while others result in dismissal. It is also possible to resign from membership in an executive board. However, under the provisions of the Act on the District Self-Government and the Act on the Province Self-Government, none of these circumstances immediately preclude the executive board from performing its previous duties, and in each of these cases, in order to maintain the continuity of the executive branch, the legislature obliges the executive board to continue with its duties until a new one is elected.

The above analysis clearly shows a fundamental difference between the regulations applicable to communes and those applicable to districts and provinces. The legislature expressly differentiates the legal position of executive board members from that of a mayor where the same circumstances occur – e.g. election as an MP,

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obligation of the departing mayor. This raises the same doubts as those mentioned in the previous footnote.

16 Under Article 26a(2) of the Commune Act, up to four deputy mayors may be appointed in a commune, depending on the number of its inhabitants.

17 Cz. Martysz, 'Komentarz do art. 28e ustawy o samorządzie gminnym', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa, 2021, electronic version: https://sip.lex.pl/#/commentary/587718880/645584/dolnicki-bogdan-red-ustawa-o-samorzadzie-gminnym-komentarz-wyd-iii?pit=2023-12-23&cm=URELATIONS [accessed on 28 December 2023].

18 For instance, the Acts on the District Self-Government and on the Province Self-Government do not contain provisions that would determine the effects of the death of a district executive (*starosta* – the chairperson of the district executive board) or a province executive (*marszałek* – the chairperson of the province executive board) and its impact on the executive board's further operations. In the case of communes, this is one of the grounds for the expiry of the mayor's mandate.

violation of the prohibition on holding multiple offices, or even relinquishing the membership/mandate. However, I cannot find any reasonable explanation why, for example, a dismissed executive board can continue with its duties, whereas a dismissed mayor cannot do so. Indeed, both cases involve a loss of trust[19] from voters. The time it takes to elect a new executive board or mayor is no justification either. If this time were significantly shorter in the case of electing an executive board than in the case of holding an early election of a mayor, it would be an argument in favour of allowing the dismissed executive board to remain in power for a short period, as opposed to the mayor. Yet both a new executive board and a new mayor are to be elected within an almost identical period.[20]

As can be seen, in the case of communes, the legislature has sought to ensure the principle of continuity of the executive branch in a completely different way. In such situations, the mayor's functions are to be performed not by the departing mayor but by a person appointed by the Prime Minister. Leaving this difference aside, the most important point is that, in districts and provinces, the departing executive boards continue to operate without any interruption.[21] Meanwhile, in the case of communes, the legislature has failed to specify any time limit for such a person to be appointed. Hence, in practice, there are numerous known cases in which this has taken as many as several weeks – not infrequently more than four, and sometimes even longer.[22] This shows that, unfortunately, the solution in question does not

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[19] With regard to the executive board, I am referring here to dismissal as an expression of the councillors' will, i.e. dismissal carried out at the request of the councillors or possibly due to fact that the council has not granted approval of the financial accounts or has not passed a vote of confidence. Apart from this, an executive board may also be dismissed as a result of a violation by the district/province executive of the prohibitions set out in the so-called Anti-Corruption Act (Article 5(3) of the Act of 21 August 1997 on Restrictions on the Conduct of Business by Persons Performing Public Functions (Journal of Laws of 2023, item 1090) or due to their failure to submit an asset declaration within the time limit prescribed in Article 25f(3) of the District Act, which legally obliges the council/assembly to dismiss them.

[20] More precisely, pursuant to Article 31b(1) of the District Act, in the event of the dismissal or resignation of the entire executive board, the district council shall elect a new one in the manner referred to in Article 27 within three months from the date of its dismissal or the date of accepting its resignation, respectively. In turn, under Article 474(2) in conjunction with Article 372(1) of the Election Code, an early election of a mayor should be ordered and conducted within 90 days from the date on which the cause occurred – which is also almost three months, depending on which three months the 90-day period falls into. However, importantly, under Article 474(3) of the Election Code, if the council's resolution or the electoral commissioner's decision on the expiry of the mayor's mandate has been challenged before an administrative court, the early election of a mayor shall be ordered and conducted within 60 days from the date the judgment of the administrative court dismissing the complaint becomes final and non-appealable. In such a case, this period is thus even shorter.

[21] For example, in the Kłobuck District, the district executive was elected a member of the Sejm in the parliamentary election held on 15 October 2023. The district executive board continued to operate until a new one was elected on 22 November 2023 – see M. Mamoń, 'Starosta kłobucki został posłem, więc wybrano nowego i cały zarząd powiatu. Postawiono na kobiety', *Gazeta Wyborcza*, 22 November 2023, https://czestochowa.wyborcza.pl/czestochowa/7,48725,30432626,starosta-klobucki-zostal-poslem-wiec-wybrano-nowego-i-caly.html [accessed on 26 December 2023].

[22] In the parliamentary election held on 15 October 2023, as many as 14 mayors were elected members of the Sejm or Senate – see 'Prezydenci, burmistrzowie oraz wójtowie zostali posłami

guarantee the continuity of the operation of the executive branch, even though it should do so. This results in significant problems for communes in practice. For many weeks, they strive to function based on authorisations granted by the mayor (usually to commune clerks) before the expiry of the mayor's mandate.[23] However, not all powers can be exercised in this way, e.g. those concerning budget and budget-related matters. These powers belong exclusively to the mayor and cannot be delegated through authorisation.[24] These powers belong exclusively to the mayor and cannot be delegated through authorisation.[25]

Hence, a fundamental question arises as to what changes are needed to ensure continuity in the operation of the commune self-government's executive branch.

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i senatorami. Co będzie się działo w samorządach, które opuszczają?', *Portal tvn24.pl*, https://tvn24.pl/wybory-parlamentarne-2023/wybory-2023-prezydenci-burmistrzowie-oraz-wojtowie-zostali-poslami-i-senatorami-w-samorzadach-rzadzic-beda-komisarze-7396770 [accessed on 26 December 2023]. The appointment of persons to take over their functions was a lengthy process. The Prime Minister appointed the first six persons on 10 November 2023, i.e. more than three weeks after the election – see article: 'Znamy nazwiska sześciu komisarzy, którzy zastąpią samorządowców wybranych do parlamentu', *Serwis Samorządowy PAP*, https://samorzad.pap.pl/kategoria/aktualnosci/znamy-nazwiska-szesciu-komisarzy-ktorzy-zastapia-samorzadowcow-wybranych-do [accessed on 22 December 2023]. The last, fourteenth appointee, for the city of Inowrocław, was designated as late as on 28 November 2023, i.e. more than six weeks after the election – see J. Blikowska, 'Ostatnie z czekających miast ma komisarza. „Policzek wymierzony mieszkańcom", *Rzeczpospolita*, 29 November 2023, https://regiony.rp.pl/spolecznosci-lokalne/art39493741-ostatnie-z-czekajacych-miast-ma-komisarza-policzek-wymierzony-mieszkancom [accessed on 22 December 2023].

[23] This is because the expiry of the mayor's mandate does not affect the authorisations granted by the mayor. The same position was taken by the Provincial Administrative Court in Łódź in its judgment of 23 June 2020, III SA/Łd 410/20 LEX No. 3027804. A different opinion has been expressed by J. Pitera, see J. Pitera, 'Ważność upoważnienia administracyjnego oraz pełnomocnictwa w przypadku vacatu piastuna organu administracji publicznej', *Kwartalnik Prawa Publicznego*, 2009, No. 1–2, pp. 91–107.

[24] The drafter pointed this out in the explanatory memorandum to the Draft Act of 23 November 2023 amending the Act on the Commune Self-Government and the Election Code Act, Sejm print No. 75, p. 3, https://orka.sejm.gov.pl/Druki10ka.nsf/0/FC23452B0DBC21B4C1258A-76003D5823/%24File/75.pdf [accessed on 20 December 2023]. See also judgment of the Provincial Administrative Court in Poznań of 28 October 2015, I SA/Po1300/15, in which the Court expressly indicated that, under the regulations in force, a deputy mayor is not authorised to make changes to the budget resolution – Regulation Impact Assessment concerning the Draft Act submitted by members of the Sejm amending the Act on the Commune Self-Government and the Election Code Act (Sejm print No. 75), https://orka.sejm.gov.pl/Druki10ka.nsf/0/41095D2A05ADAF54C1258A-830049D852/%24File/75-001.pdf [accessed on 20 December 2023].

[25] For example, Andrzej Dziuba, the former mayor of the City of Tychy, pointed this out during the prolonged time of waiting for a person designated by the Prime Minister. At a briefing held on 8 November 2023, he said that '15 November is the deadline for submitting it [the budget – M.G.] to the city council. Of course, it has been prepared and is only waiting for signature by a person who has the right to sign it, and such a person is the city mayor or a person performing the mayor's duties, i.e. the commissioner' – see J. Pierończyk, 'Tychy ciągle bez prezydenta. Kto rządzi miastem?', *Dziennik Zachodni*, 8 November 2023, https://dziennikzachodni.pl/tychy-ciagle-bez-prezydenta-kto-rzadzi-miastem/ar/c1-18052779 [accessed on 22 December 2023]. The same position was taken by the Provincial Administrative Court in Warsaw in its judgment of 10 October 2006, I SA/Wa 913/06, LEX No. 303211.

PROPOSED LEGISLATIVE AMENDMENTS TO ENSURE THE CONTINUITY OF THE EXECUTIVE BRANCH

It seems that two paths can be taken in this discussion. The first would involve respecting the legislature's will as expressed to date, i.e. a distinct regulation in the Act on the Commune Self-Government that provides for the mayor being effectively and immediately precluded from performing their duties in the event that the mayor's mandate expires before the end of the term of office. Accordingly, without any fundamental changes – and thus maintaining the current regulations – it would only be necessary to set a short, fixed time limit, e.g. 48 or perhaps even 24 hours,[26] for the Prime Minister to designate a new person to take over the mayor's functions, since it is necessary for the mayor's tasks and competences to be transferred quickly. The other path would involve a fundamental change, namely the introduction into the Act on the Commune Self-Government of solutions modelled on the other two local self-government acts and on the provisions of the Constitution of the Republic of Poland concerning the Council of Ministers' operations. These amendments would mean that the mayor, regardless of the circumstances, would always perform their duties until they are taken over by a newly elected mayor.[27] Accordingly, Article 28e and Article 28f(1) of the Commune Act should be repealed, and the wording of Article 29(1) of the Commune Act should be amended by extending its scope and providing that, after the mayor's term of office ends or in the event that the mayor's mandate expires before the end of the term of office, the mayor shall perform their functions until a newly elected mayor takes over. It would also be possible to shorten the wording of this provision by stating that the mayor (in each case) shall perform their functions until a newly elected mayor takes over. Article 29(2) of the Commune Act, relating to a deputy mayor, would need to be amended similarly.

The first of the aforementioned ways of amending the Commune Act – while it seems to be the simplest, as it would not revolutionise the existing regulations – has a certain drawback. Namely, a person designated by the Prime Minister – even if, following the expiry of the mayor's mandate before the end of the mayor's term of office, they took over the mayor's functions in a very short time – would still not

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[26] The setting of a time limit with a specific number of hours is not unusual for the Act on the Commune Self-Government. In another case that also requires quick designation of a person to take over the mayor's tasks and powers, in Article 28g(7) of the Commune Act, the legislator has set the chairperson of the commune council a 48-hour time limit to notify the province governor [*wojewoda* – the representative of the Council of Ministers in a province] in writing of the occurrence of such a circumstance.

[27] A different opinion has been expressed by Cz. Martysz, who argues that 'for obvious reasons, these functions cannot be entrusted to the person who has served as the mayor to date because it was precisely this person's activities that resulted in the expiry of their mandate, e.g. due to removal through a referendum or resignation' – Cz. Martysz, 'Komentarz do art. 28f ustawy o samorządzie gminnym', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa, 2021, electronic version: https://sip.lex.pl/#/commentary/587718880/645584/dolnicki-bogdan-red-ustawa-o-samorzadzie-gminnym-komentarz-wyd-iii?pit=2023-12-23&cm=URELATIONS [accessed on 28 December 2023]. Nevertheless, in the case of the district and province self-government and the Council of Ministers, the legislator has decided to adopt such a solution.

guarantee the proper functioning of the commune during the ensuing period, i.e. until a newly elected mayor takes over. As a side note, it should be mentioned that this period may even extend to 12 months.[28] This gives rise to another issue, namely that, unfortunately, the legislator leaves the Prime Minister complete discretion in selecting such a person – which, in my opinion, is not a good solution. In such cases, in districts and provinces, despite the executive board's dismissal, resignation or a member losing their membership, the executive authority's functions continue to be performed by the same persons involved in its duties to date. Meanwhile, in the case of communes, in a similar situation, any person whatsoever may be designated to perform the mayor's functions. Therefore, it would also be appropriate to introduce a further change in this respect to exclude the possibility of entrusting the mayor's functions to a random person who is not in any way related to the functioning of the commune and is unfamiliar with its affairs. It would be possible to at least specify the conditions such a person should meet. At a minimum, this person would need to be, for instance, an employee of the commune office – so as to narrow down the group from whom the Prime Minister could choose. Given that the legislature has not decided to introduce the same mechanism for the commune self-government as that applicable to districts or provinces – which would mean that the mayor continues with their duties until a new mayor is elected – then, perhaps, at the very least, it would be possible to have a deputy mayor exercise the executive power in this interim period. Undoubtedly, a deputy mayor would be the most suitable person to do this, as they are perfectly aware of the current situation of the commune due to being familiar, on an ongoing basis, with the performance of the commune's tasks. After all, the grounds for the expiry of the mayor's mandate apply strictly to the mayor as an individual and not to their deputy. Although, in the current legal situation, a deputy mayor is dismissed upon the expiry of the mayor's mandate by operation of law, they would still be the best candidate to take over the mayor's functions until a new mayor is elected.

The potential of a departing deputy mayor is recognised by local government officials and the legislature. Namely, on 23 November 2023, a Draft Act Amending the Act on the Commune Self-Government and the Election Code Act, authored by members of the Sejm from the Parliamentary Club of Poland 2050 – Third Way (*Polska 2050 – Trzecia Droga*),[29] was submitted to the Sejm. However, this draft act proposed other solutions, which, as it were, combined some of the ideas I mentioned

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[28] Under Article 28d(2) of the Commune Act, an early election shall not be held if its date falls within six months before the end of the mayor's term of office. An early election shall also not be held if the election date falls more than six and less than twelve months before the end of the mayor's term of office and the council resolves not to hold an election within 30 days of the date a resolution declaring the expiry of the mayor's mandate is passed.

[29] The Draft Act of 23 November 2023 amending the Act on the Commune Self-Government and the Election Code Act, Sejm print No. 75, https://orka.sejm.gov.pl/Druki10ka.nsf/0/FC23452B0DBC21B4C1258A76003D5823/%24File/75.pdf [accessed on 23 December 2023]. Some of the MPs who signed this bill had recently served as local government officials – see M. Rozalska, 'Nowe zasady powoływania komisarzy w gminach; do Sejmu trafił poselski projekt ustawy', *Serwis Samorządowy PAP*, https://samorzad.pap.pl/kategoria/aktualnosci/nowe-zasady-powolywania-komisarzy-w-gminach-do-sejmu-trafil-poselski-projekt [accessed on 23 December 2023].

above.[30] Namely, according to the newly added Article 28f(1a) of the Commune Act, until a person designated by the Prime Minister is appointed, the mayor's functions would be performed by the deputy mayor or, in communes where more deputy mayors have been appointed, the first deputy mayor, or, in communes where no deputy mayor has been appointed, the commune clerk (*sekretarz gminy*). At first glance, this proposal appears to be reasonable. Namely, to ensure the continuity of the executive branch's operations – which is necessary – it seems appropriate for the mayor's functions to be taken over immediately upon the expiry of the mayor's mandate, preferably by a person who could carry on the activities of the departing mayor in a continuous manner, so to speak. A deputy mayor is certainly such a person, as they are involved in the functioning of the commune on an ongoing basis and knows its problems, procedures and tasks in progress. A deputy mayor could, therefore, take over the mayor's functions and lead the commune safely through the period of waiting for a person designated by the Prime Minister.

The drafter provides that, in a commune where more deputies have been appointed, the mayor's functions would be taken over by the first deputy and, in a commune where no deputy has been appointed at all, the mayor's functions would be taken over by the commune clerk. These proposals also need to be discussed. While the regulation providing that the first deputy would take over the mayor's functions is appropriate, it seems it should be supplemented with a sentence stating that, if the first deputy is unable to do so for any reason (including if they do not consent),[31] then the mayor's functions should be taken over by the next deputy – and accordingly by the next two deputies, if appointed. In my opinion, further regulations to protect communes where no deputy has been appointed at all are, theoretically, entirely unnecessary, since at least one deputy mayor must be appointed in each commune according to the regulations in force. This directly results from the definite wording of Article 26a(1) of the Commune Act: 'the mayor shall appoint their deputy' – rather than 'may appoint their deputy'.[32] Moreover, it

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[30] M. Rozalska, 'Nowe zasady…', op. cit.

[31] It seems that in this case, as opposed to the regulation provided for in Article 29 of the Commune Act, it would not be possible to impose a strict obligation on a deputy mayor to take over the mayor's functions. After all, with the expiry of the mayor's mandate, the deputy mayor is dismissed (Article 28e of the Commune Act), and taking over the mayor's functions would impose new duties on them – unlike the case with dismissed executive boards, which continue with their previous duties. In their case, it is thus assumed that they are obliged to continue their operations under the still-existing employment relationship (in relation, of course, to those members who are employees).

[32] See, e.g. M. Gurdek, 'Status prawny zastępcy wójta', *Przegląd Prawa Publicznego*, 2008, No. 7–8, p. 107; M. Gurdek, *Monokratyczne organy jednostek samorządu terytorialnego*, Sosnowiec, 2012, p. 159; B. Dolnicki, 'Monokratyczne organy samorządu terytorialnego', *Samorząd Terytorialny*, 2003, No. 1–2, p. 53; M. Pogłódek, 'Prawnoustrojowa pozycja wójta (burmistrza, prezydenta) oraz starosty powiatowego i marszałka województwa', in: Michałowski S., Pawłowska A. (eds), *Samorząd lokalny w Polsce. Społeczno-polityczne aspekty funkcjonowania*, Lublin, 2004, p. 58; cf., for instance, W. Śniecikowski, 'Zagadnienia administracyjnoprawne wykonywania funkcji przewodniczącego zarządu gminy podczas jego nieobecności przez zastępcę wójta, burmistrza (prezydenta)', *Samorząd Terytorialny*, 2000, No. 11, p. 39; Cz. Martysz, 'Władze gminy', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentar*z, Warszawa, 2010, p. 486. A different view presented by: L. Wengler, 'Prawnoorganizacyjne aspekty „zawieszenia wykonywania mandatu"

is difficult to imagine a commune where a deputy mayor has not been appointed and the mayor is temporarily unable to exercise their powers for any reason (such as being on leave or due to illness not exceeding 30 days). This would paralyse the commune operations. However, since I realise that, in practice – unfortunately – there are communes where no deputy mayor has been appointed (especially for cost-saving reasons),[33] I must admit that the drafter was right to specify that the mayor's functions should be taken over by the commune clerk if there is no deputy mayor. The commune clerk should also do so in a situation where, despite the appointment of a deputy mayor (or deputy mayors), none of them is able to substitute for the mayor. The commune clerk seems to be a good candidate, as they are the next most important person in a commune. This is usually a person with a stable position in the commune office hierarchy and, through reporting lines or simply by their authority, can effectively influence other people involved in the commune tasks.[34] This, of course, would be an additional burden for the commune clerk since, apart from holding this position, they would also take over the tasks and powers of the mayor.[35] Nevertheless, such a regulation would ensure the smooth substitution of a new (but not unfamiliar)[36] person for the departing mayor.

While the proposed solution might ensure the continuity of the exercise of executive power by eliminating the 'gap' that currently exists between the expiry of the mayor's mandate and the designation of a person to perform the mayor's functions by the Prime Minister, it still does not solve the other problem, namely the Prime Minister's discretion in choosing the person who will ultimately take over the mayor's functions. Hence, it would perhaps be necessary to go a step further and adopt the idea of narrowing down the group from whom the Prime Minister could appoint a person to take over the mayor's functions, as already proposed above. However, since the best person seems to be a deputy mayor, it would make no sense for the Prime Minister to appoint the departing deputy mayor to perform the mayor's functions, as the deputy mayor would anyway, by operation of law, temporarily take over the mayor's functions upon the expiry of the mayor's mandate – only to be formally designated again by the Prime Minister. Therefore, if the potential of the deputy mayor (or possibly the commune clerk) is to be used, the best solution might be to give up the idea of designating another person and simply entrust the departing deputy mayor with this role from the moment of the

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wójta (burmistrza, prezydenta miasta)', in: Ura E. (ed.), *Sprawność działania administracji samorządowej*, Rzeszów, 2006, p. 663; see also A. Szewc, 'Władze gminy', in: Szewc A., Jyż G., Pławecki Z., *Samorząd terytorialny*, Warszawa, 2005, p. 296.

[33] M. Gurdek, 'Status prawny…', op. cit., pp. 107–110.

[34] See, e.g. A. Pytel, in: Horbaczewski R., *Premier ma za dużą dowolność w powołaniu komisarza, gdy wójt zostaje posłem*, 8 December 2023, https://www.prawo.pl/samorzad/powolanie-komisarza-a-wygasniecie-mandatu-wojta,524326.html [accessed on 20 December 2023].

[35] However, according to L. Świętalski, the Head of the Office of the Association of Rural Communes of the Republic of Poland, the commune clerk has a different position in the system and also performs labour-law-related activities with regard to the mayor, so they should not take over the mayor's functions – L. Świętalski, in: Horbaczewski R., *Premier ma za dużą dowolność w powołaniu komisarza, gdy wójt zostaje posłem*, 8 December 2023, https://www.prawo.pl/samorzad/powolanie-komisarza-a-wygasniecie-mandatu-wojta,524326.html [accessed on 20 December 2023].

[36] In the sense of a person from the outside, unfamiliar with the realities of the commune.

expiry of the mayor's mandate for the entire period until a new mayor is elected. This would be a reasonable solution.[37]

Of course, no solution is perfect. One can always raise some reservations, and this case is no different. Namely, due to the variety of grounds resulting in the expiry of the mayor's mandate, such a solution might raise doubts in certain situations, an example of which may be the expiry of the mayor's mandate due to their removal through a referendum. Given that the local community has decided to remove the mayor, or, in other words, revoke the authority granted to them during the election, the community might also have lost trust in the deputy mayor – appointed by the mayor themselves. In such a case, the local community might feel disappointed if the deputy mayor takes over the mayor's functions. In the other cases, however, the grounds for the expiry of the mayor's mandate are closely related to the mayor as an individual. Hence, for example, if they relinquish the mandate, decides to become an MP, or consciously fails to submit a financial disclosure statement on time, why should the commune not be managed by the person best suited for the job until a new mayor is elected?

Indeed, in light of the regulations of the Act on the District Self-Government or the Act on the Province Self-Government, this is arguably not a problem for the legislature. In these regulations, the legislature agrees that if the district or province executives are dismissed, which entails the dismissal of the entire executive board (after all, the dismissal does not necessarily have to result solely from objections to the executive's work – it may concern the work of the entire board), the departing executive board, including the dismissed district or province executive, will continue with their duties until a new executive board is elected. Why could this not be the case with a deputy mayor in a commune?

CONCLUSION

To summarise, based on the above discussion, it is difficult to find reasonable arguments justifying a situation where, in the case of district and province executive boards, the legislature does not object to them continuing with their duties after their dismissal until a new executive board is elected, while no such possibility has been provided for in the case of mayors. Nevertheless, respecting the legislature's rationality – as there must have been some reasons it was guided by – it must be pointed out that the current regulations of the Act on the Commune Self-Government need at least a minimal amendment, if only to limit, as much as possible, the time for the Prime Minister to appoint a person to take over the mayor's functions. All proposals put forward in this study need careful consideration by the legislature so that the regulations actually – and not just apparently – guarantee the continuity of the executive branch of the commune self-government. This issue is emphasised

[37] The issue of the deputy mayor's employment – specifically, on what basis they would perform this function – would also require analysis; however, this matter falls outside the scope of the present study.

by the multiple infamous examples that have arisen in practice, especially in recent months, when, in the last parliamentary election, a number of mayors were elected members of the Sejm or Senate.

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A SHARE IN A LIMITED LIABILITY COMPANY AS PART OF THE BANKRUPTCY ESTATE

BARTOSZ SIERAKOWSKI*

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Abstract
The article is of a scientific and research nature, and its subject is the determination of the legal status of a share in a limited liability company in the event of the declaration of bankruptcy of the person holding such a share (shareholder). The purpose of the research conducted is to determine the rules governing the management and disposal of shares in the context of a shareholder's bankruptcy. This requires determining who becomes the subject of the rights under the shares and the executor of these rights at the moment bankruptcy is declared. Given the special nature of bankruptcy laws, it is crucial to determine whether restrictions on the disposition of shares, as provided by the law or the articles of association, are also binding on the receiver.

The article demonstrates that the legal status of a share in a limited liability company, and the rights arising from such a share, changes upon the declaration of bankruptcy of a shareholder. Since a share becomes part of the bankruptcy estate, its management and rules of disposal are subordinated to the debt collection function of bankruptcy law. This, in turn, means that certain provisions of the articles of association become ineffective once a shareholder's bankruptcy is declared and are not binding within the framework of bankruptcy proceedings. The article also demonstrates that the prohibition of offering and promoting the acquisition of shares to an unspecified circle of addressees, as laid down in Article 182[1] of the Commercial Companies Code, is not applicable in bankruptcy proceedings. The paper mainly uses the dogmatic-legal method and critically analyses the views of the doctrine and the positions taken in judicial decisions.

Key words: bankruptcy proceedings, liquidation of bankruptcy estate, restrictions on the disposability of a share in a limited liability company, official receiver, crowdfunding

* LLD, Institute of Bankruptcy and Restructuring Law and Research into Insolvency, Lazarski University in Warsaw (Poland), e-mail: bartosz.sierakowski@lazarski.pl, ORCID: 0000-0002-1212-1729

INTRODUCTION

If a debtor becomes insolvent, Polish law allows the court to adjudicate them bankrupt, provided that a legitimate entity applies for this.[1] Bankruptcy proceedings are initiated in order to satisfy the claims of creditors to the highest possible extent.[2] In this context, the normative framework of bankruptcy law is subordinated to the debt collection function.[3] Once bankruptcy is declared, the entire property of the debtor becomes subject to the so-called bankruptcy bond and, from that moment, forms the bankruptcy estate, which is intended to serve the interests of creditors. At this point, the principles governing its management change and become subordinated to the fastest and most effective liquidation possible.

The assets forming the bankruptcy estate may include shares in a limited liability company. The aim of this article is to determine the legal status of such shares following the declaration of bankruptcy of a partner (shareholder). This issue is of considerable importance to both jurisprudence and the practice of law application. A proper determination of this status will make it possible to answer questions essential for the management and trading of shares: firstly, who becomes the subject and the executor of these rights upon the declaration of bankruptcy; and secondly, what the rules for disposing of such shares are, particularly whether the limitations on transferability resulting from the articles of association and the restrictions laid down in Article 182[1] of the Commercial Companies Code are binding.[4]

CONCEPT OF BANKRUPTCY ESTATE

The concept of 'bankruptcy estate' is defined in Articles 61 and 62 BL. In the first of these provisions, the legislator indicates that a bankruptcy estate is created the moment bankruptcy is declared, and what constitutes it are the bankrupt's assets, which are ultimately to serve to satisfy the claims of the creditors of the insolvent debtor. In turn, the latter provision clarifies that the bankruptcy estate includes the bankrupt's assets both existing on the date of the declaration of bankruptcy and acquired by the bankrupt during the bankruptcy proceeding, excluding, however, the assets that are not part of the bankruptcy estate based on special provisions.[5] Thus, as a result, from the moment bankruptcy is declared, two estates are created: one serving to satisfy the claims of the creditors in accordance with the provisions of bankruptcy law (bankruptcy estate), and the other not serving this purpose (the bankrupt's assets that are not part of the bankruptcy estate).[6] The bankruptcy

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1 See Articles 10–11 and 20 of the Act of 28 February 2003 on Bankruptcy Law (consolidated text, Journal of Laws of 2022, item 1520), hereinafter 'the BL'.

2 See Article 2(1) BL.

3 For more on the function of bankruptcy law, see F. Zedler, *Prawo upadłościowe i naprawcze z wprowadzeniem*, Zakamycze, 2003, pp. 31 et seq.

4 Act of 15 September 2000 – Commercial Companies Code (consolidated text, Journal of Laws of 2024, item 18), hereinafter 'the CCC'.

5 Articles 63–67a BL are special provisions.

6 B. Sierakowski, *Zobowiązania masy upadłości*, Warszawa, 2023, p. 112.

estate is temporary in nature (i.e. it lasts only until the date on which the decision of the bankruptcy court to annul, discontinue or terminate the bankruptcy proceedings becomes final) and purposeful (i.e. it is created solely for the purpose of satisfying the claims of creditors against the insolvent debtor).[7]

Despite the creation of the bankruptcy estate, only the bankrupt remains the legal entity (e.g. the owner of property) throughout the entire bankruptcy proceedings.[8] The change resulting from the declaration of bankruptcy consists in the fact that the bankrupt (legal entity) is deprived of the right to use, manage and dispose of the property that constitutes the bankruptcy estate (Article 75(1) BL). However, it is the bankrupt, and not the bankruptcy estate, that retains legal capacity and the capacity to perform legal acts (Article 185 (2) BL). Neither the receiver nor all creditors become subject to the property rights included in the bankruptcy estate.[9] The receiver is solely (in relation to the bankruptcy estate) an administrator of someone else's property,[10] who is referred to in court proceedings concerning the bankruptcy estate as the indirect proxy.[11]

The bankruptcy estate understood in this way, including its purpose, and the principle of maintaining the bankrupt's legal entity throughout the bankruptcy proceedings, are the starting point for further considerations on the nature of participation in a limited liability company in the context of the declaration of bankruptcy of the entity holding these rights (a shareholder).

EXERCISE OF SHARE RIGHTS

A share in a limited liability company is a property right; therefore, as an element of the bankrupt's property, from the moment bankruptcy is declared, it undoubtedly becomes part of the bankruptcy estate. This, in turn, means that the receiver shall take over such an asset, disclose and estimate it in a public register,[12] and finally liquidate it. Until liquidation, the asset remains under the management of the receiver.[13] 'Management' is understood as all activities concerning the property

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[7] Ibidem, p. 123.

[8] Cf, e.g. M. Koenner, *Likwidacja masy upadłości*, Zakamycze, 2006, p. 114.

[9] The concept of all creditors as the entity holding the rights included in the bankruptcy estate arose on the basis of the Austrian competition ordinance that was in force in Poland until 1 January 1935, and the German competition ordinance; see E. Till, *Zasady materyalnego prawa konkursowego austryackiego*, Lwów, 1907, p. 68; and J. Trammer, *Ustawa konkursowa*, Kraków, 1904, p. 86.

[10] P. Feliga, *Stanowisko prawne syndyka w procesie dotyczącym masy upadłości*, Warszawa, 2013, pp. 134–137.

[11] Thus: P. Feliga, *Stanowisko*…, op. cit., pp. 131–33; A. Hrycaj, *Syndyk masy upadłości*, Poznań, 2006, p. 46; I. Gil, *Sytuacja prawna syndyka masy upadłości*, Warszawa, 2007, p. 274.

[12] Having taken over the bankruptcy estate, the receiver, in accordance with the principles laid down in Article 69 BL, shall determine its composition and disclose all assets on an ongoing basis in the National Register of Indebted Persons (hereinafter 'the NRIP').

[13] In certain cases, management may be entrusted to a deputy receiver. In the event the management of the assets of the bankruptcy estate is entrusted to the deputy receiver, the scope of such management should be precisely defined by the decision of the judge-commissioner (Article 159 BL).

managed; therefore, the scope of management includes not only legal activities, but also factual and procedural activities undertaken in court and administrative proceedings.[14]

And here the first problematic issue arises in relation to the component of the bankruptcy estate in the form of shares in a limited liability company. Shares are indeed property rights, but not only that. They also constitute a bundle of personal rights called corporate or organisational rights.[15] A receiver, in turn, as an executive body in the bankruptcy proceeding, manages only the bankrupt's assets. A receiver does not interfere with the sphere of the bankrupt's personal rights, because such rights are not subject to liquidation for the purpose of encashment and therefore do not perform the debt collection function within the framework of universal enforcement. A bankrupt, regardless of whether they are a natural person or an organisational unit, exercises their personal rights independently. In accordance with this general principle, it should therefore be assumed that a receiver should not have the right to exercise non-property corporate rights based on shares in a limited liability company. Such a right may, for example, be the personal right granted by the articles of association to designate a member of the management board or a member of a supervisory board. However, *de lege lata* it is not so due to the validity of Article 186 BL. In accordance with the current[16] wording of the provision, after bankruptcy is declared, all rights of the bankrupt related to participation in companies, and thus in a limited liability company, are exercised by a receiver. This normative scope of Article 186 BL is consistent with the concept of the 'inseparability of share rights'.[17] As is emphasised in case law, the significance of this provision is demonstrated by the fact that, while the right to shares remains unchanged, it transfers the competence to exercise all rights resulting from those shares to an entity different from the bankrupt shareholder, and therefore the bankrupt is entirely excluded from exercising these rights.[18] As a result, the receiver is authorised to perform all actions to which a shareholder is authorised, regardless of their property or non-property related nature. Such a solution clearly supports the implementation of the debt

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[14] See F. Zedler, in: A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz*, 3rd edn, commentary to Article 76 BRL, Lex, 2011; also cf. Resolution (7) of the Supreme Court of 10 April 1991, III CZP 76/90, *OSNC*, 1991, No. 10–12, item 117.

[15] These will include, for example, the right to participate in the shareholders' general meetings, the right to vote, the right to control the company, the right to bring an action for the annulment or declaration of invalidity of a shareholders' resolution, the right to bring an action for the dissolution of the company (cited after: R. Pabis, in: Bieniak J., Bieniak M., Nita-Jagielski G., Oplustil K., Pabis R., Rachwał A., Spyra M., Suliński G., Tofel M., Wawer M., Zawłocki R., *Kodeks spółek handlowych. Komentarz*, 9th edn, Warszawa, 2024, commentary to Article 174 CCC, Legalis).

[16] The provision was amended on 2 May 2009. Previously, it stipulated that bankruptcy does not affect the organisational powers that the bankrupt has in companies, except for powers that may affect the bankrupt's assets. In the event of doubts concerning the scope of powers exercised by the receiver, the judge-commissioner used to specify the scope of such powers by means of a decision.

[17] This expression was used in the justification of the Bill of 6 March 2009 amending the Act: Bankruptcy and Restructuring Law, Act on the Bank Guarantee Fund, and Act on the National Court Register (Journal of Laws of 2009, No. 53, item 434), Sejm print No. 654, available on the website of the Sejm of the Polish Republic: https://www.sejm.gov.pl/ [accessed on 20 May 2025].

[18] See judgment of the Appellate Court in Szczecin of 4 March 2011, I ACa 784/10, Lex.

collection function of bankruptcy law, because it allows the receiver not only to sell (liquidate) a share, but also to manage it in all its aspects.

It seems, however, that the current scope of the legal norm decoded from Article 186 BL is too broad and, as a result, may violate the rights of the bankrupt. While it should be agreed that usually the exercise of corporate rights has at least an indirect impact on property rights,[19] it is not possible to exclude personal rights that do not show such a connection at all. Therefore, a more appropriate solution would be to supplement the current provision with a norm that would grant the judge-commissioner the possibility of determining, by way of an appealable decision, personal rights that do not affect the bankruptcy estate, which will be exercised by the bankrupt after bankruptcy is declared.

The exercise of the rights resulting from the company relationship, regardless of whether they are property-related or purely organisational in nature, may be associated with the obligation to provide specific benefits or incur costs (e.g. travel costs to a shareholders' general meeting). If such a situation occurs, the bankrupt will be an obliged party (debtor) in the material sense; however, the receiver, as the indirect proxy of the bankrupt shareholder, will provide the benefits. Therefore, one should agree with R. Adamus that all monetary obligations of the bankrupt resulting from participation in capital companies (e.g. resulting from additional payments) are subject to the general principles of bankruptcy law.[20] Thus, if the partner's obligation to provide financial benefits arises before the declaration of bankruptcy, it is subject to notification by the authorised entity (creditor) on the list of receivables and will be settled by dividing the bankruptcy estate funds. However, if the shareholder's obligation arises after announced, then, depending on its nature, it will be either a cost of the bankruptcy proceeding or another obligation of the bankruptcy estate, and therefore it will be subject to enforcement by the receiver on an ongoing basis, before the satisfaction of the bankrupt's creditors (Article 343(1)–(1a) in conjunction with Article 230 BL).[21]

LIQUIDATION OF A SHARE BY THE RECEIVER VS CONTRACTUAL AND STATUTORY RESTRICTIONS ON THE DISPOSAL OF SHARES

CONTRACTUAL RESTRICTIONS

Another important issue is the right to dispose of shares and the resulting rights. The principle is the freedom of disposal of shares resulting from the general rules of civil law (Article 57 § 1 Civil Code).[22] This does not mean, however, that the rule is

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[19] I. Weiss, in: Pyzioł W., Szumański A., Weiss I., *Prawo spółek*, Bydgoszcz, 1998, p. 240; A. Witosz, 'Uprawnienia organizacyjne (korporacyjne) upadłego', *Prawo Spółek*, 2007, No. 7–8, pp. 7–16; F. Zedler, in: Jakubecki A., Zedler F., *Prawo…*, op. cit., commentary to Article 186 BRL.

[20] R. Adamus, *Prawo upadłościowe. Komentarz*, 3rd edn, Warszawa, 2021, commentary to Article 186 BL, Legalis.

[21] For more on the differences between bankruptcy proceeding costs and other bankruptcy estate obligations see B. Sierakowski, *Zobowiązania…*, op. cit., pp. 168–179.

[22] R. Pabis, in: *Kodeks spółek…*, op. cit., commentary to Article 182 CCC, Legalis.

absolute. In accordance with Article 182 § 1 CCC, the articles of association may make the transfer of a share dependant on the company's consent or limit it in another way. In the light of this regulation, the question arises whether contractual restrictions on the transferability of shares bind the receiver. It should be noted from the outset that neither in company law nor in bankruptcy law is there an equivalent of Article 185 § 1 CCC, in accordance with which the sale of a share in enforcement proceedings gives the company the right to present a person who will acquire such a share during the enforcement with the consent of the registry court.[23] To answer the above question, first of all it is necessary to refer to the general principles of bankruptcy law and then to the provisions governing the liquidation of the bankruptcy estate and the effects of declaration of bankruptcy on contracts to which the bankrupt is a party.

Liquidation of shares by the receiver consists in their sale,[24] which may take place either by putting them out to tender or by means of unrestricted sale (Article 311(1) BL). Bankruptcy proceedings should be conducted in such a way that the creditors' claims are satisfied to the greatest extent[25] (the debt collection function of bankruptcy law).[26] As already mentioned in the introduction, a number of bankruptcy law institutions are subject to this principle, which aims to make the process of acquiring components of the bankruptcy estate attractive and, consequently, to enable the highest possible price to be obtained. That is why the sale in bankruptcy proceedings is of an enforcement nature (primary acquisition free from debts and encumbrances),[27] which allows for making a wider group of investors interested. In connection with this, the following issue emerges, namely, whether the debt collection function of bankruptcy law ensuring the protection of creditors' rights is strong enough to allow for non-application of contractual norms limiting the disposal of shares. The doctrine gives a positive answer to this question,[28] indicating that the provisions of bankruptcy law are separate and complementary in nature, including in relation to the provisions of the CCC.[29] However, the mere complexity and related specificity[30] of bankruptcy law provisions is not sufficient to state that the provision of Article 182 CCC is not applicable in the event of a shareholder's bankruptcy declaration. A.J. Witosz rightly emphasises

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[23] The provision has the following wording: 'If a share is to be sold by way of execution, the sale of which is subject to the company's consent or is otherwise restricted by the company's articles of association, the company has the right to present a person who will acquire the share at a price to be determined by the registry court after seeking, if necessary, an expert opinion.'

[24] Shares constitute a property right so the receiver may, until they are sold, exercise this right, including deriving benefits from it (e.g. a dividend).

[25] See Article 2(1) BL.

[26] That is why, in jurisprudence, bankruptcy is sometimes referred to as general or universal enforcement (cf. P. Horosz, *Wierzytelności zabezpieczane prawami zastawniczymi w upadłości likwidacyjnej*, Warszawa, 2013, pp. 67–70).

[27] See Article 313(1) BL.

[28] Thus, A. Szajkowski, M. Tarska, in: Sołtysiński S., Szajkowski A., Szumański A., Szwaja J., *Kodeks spółek handlowych. Komentarz*, Vol. 1–4, 2nd edn, Warszawa, 2005, commentary to Article 182 CCC, Legalis; R. Pabis, in: *Kodeks spółek…*, op. cit., commentary to Article 182 CCC, Legalis; P. Janda, *Prawo upadłościowe. Komentarz*, 3rd edn, Warszawa, 2023, commentary to Article 84, Lex.

[29] A.J. Witosz, 'Wymóg zgody spółki na zbycie udziałów (akcji) w toku postępowania upadłościowego', *Doradca Restrukturyzacyjny*, 2021, Vol. 4, No. 26, p. 33.

[30] I mean the principle: *lex specialis derogat legi generali*.

that contractual restrictions on the disposal of shares (e.g. the requirement to obtain the consent of a third party) are contrary to the essence of the liquidation of the bankruptcy estate (at least they make it more difficult), and therefore constitute clauses ineffective by the binding force of law.[31] This thesis finds normative justification in the content of Article 84(1) BL, which stipulates that: 'A provision of an agreement to which a bankrupt is a party, which prevents or hinders the achievement of the purpose of the bankruptcy proceedings, is ineffective in relation to the bankruptcy estate.' The essence of the cited provision is, *inter alia*, to shape the course of the bankruptcy proceeding in such a way that any obstacles hindering the liquidation of the assets of the bankruptcy estate or limiting the degree of such liquidation do not bind the receiver and, as a result, do not adversely affect the protection of the property interests of all creditors.[32] This way, the legislator limits the level of protection guaranteed to the party to the agreement, acting in confidence in its content, in favour of protecting the interests of the insolvent shareholder. Therefore, the legislator first of all requires respect for the stability of legal relations and the rights of the parties, the source of which is the contract, and only in a conflict situation, when the exercise of rights resulting from such a relationship cannot be reconciled with the protection of bankruptcy creditors, allows for the possibility of interfering with its content. Undoubtedly, contractual restrictions on the transferability of shares make it difficult to achieve the purpose of bankruptcy proceedings, because, firstly, they interfere with the principles of bankruptcy estate liquidation, creating in fact non-statutory conditions for the course of bankruptcy proceedings. Secondly, any restriction on transferability of shares that narrows or excludes the circle of potential purchasers affects lower satisfaction of creditors, and therefore is contrary to the optimisation directive indicated in Article 2(1) BL.

In connection with the current content of Article 84(1) BL, the stance of the Supreme Court expressed in its judgment of 31 May 1994 should be considered outdated.[33] According to that judgment, 'the disposal of a share of the bankrupt partner by the receiver in the event it is limited without obtaining an appropriate permission of the company constitutes the so-called defective act (*negotium claudicans*), the effectiveness of which is suspended.'[34] The view was formulated based on the pre-war Bankruptcy Law,[35] and at that time there was no regulation in the legal system analogous to the norm under Article 84(1) BL. In turn, already based on the currently binding provisions, the Supreme Court indicated that, *inter alia*, contractual restrictions on the disposal of components of the bankrupt's property are ineffective in relation to the bankruptcy estate within the meaning of Article 84 BL.[36] The same

[31] A.J. Witosz, *Wymóg*…, op. cit., pp. 36–37.

[32] W. Danielak, B. Sierakowski, 'Wpływ ogłoszenia upadłości lub otwarcia postępowania restrukturyzacyjnego na byt prawny umowy dowodowej', *Monitor Prawa Bankowego*, 2021, No. 2, p. 63.

[33] For a similar opinion on the Supreme Court's stance, see A.J. Witosz, *Wymóg*…, op. cit., p. 35.

[34] Judgment of the Supreme Court of 31 May 1994, I CRN 56/94, Lex.

[35] Regulation of the President of the Republic of Poland of 24 October 1934: Bankruptcy Law (Journal of Laws of 1934, No. 93, item 834, as amended).

[36] Judgment of the Supreme Court of 9 August 2016, II CSK 733/15, Lex.

conclusions should be drawn in relation to other contractual restrictions concerning the disposal of shares, e.g. the principles of establishing organic property rights. The moment a shareholder's bankruptcy is announced, the encumbrance of his their will be possible only with the consent of the creditors' committee (Article 206(1)(4) BL) or the judge-commissioner (Article 213 BL), and any competences of the company or third parties in this respect (consent to the establishment of an encumbrance) should be treated as non-binding pursuant to Article 84 (1) BL.

STATUTORY RESTRICTIONS

However, restrictions on the transferability of things or rights may also result from statutory provisions. This happens when the legislator, due to the protection of values other than the property rights of creditors, decides to interfere in the turnover of assets, regardless of the fact that the assets may potentially become (like shares) a component of the bankruptcy estate. In such a case, the scope of restrictions on transferability depends on the importance of the values protected by other provisions and on whether their implementation is possible without detriment to the achievement of the purpose of bankruptcy law. Therefore, there will be no systemic and axiological contradiction to the principles of bankruptcy law in the case where a norm in force significantly limits or even excludes the possibility of liquidating the estate if it is supported by other, usually higher values preferred by the legislator. An example would be the restrictions on real estate transactions when the potential buyer is a foreigner. In such a case, the legislator has introduced restrictions on real estate transactions (as a result, shares in companies that are owners or perpetual users of such real estates) for reasons of defence, state security or public order.[37] Since the legislator limits the group of people who can acquire such real estates, the sales process (regardless of its form – whether as part of the liquidation of the bankruptcy estate or based on a market transaction) must comply with these rules. Otherwise, the goal could not be achieved.[38] Thus, we are dealing with a formal conflict of norms, but the applied collision rules give precedence to the norm protecting higher-order values, the protection of which requires certain concessions at the level of lower-order values.

In the light of the above considerations, in the context of the axiology of bankruptcy law provisions, the issue of the effects of a shareholder's bankruptcy declaration arises in the context of restrictions referred to in Articles 182[1]

[37] See the provisions of the Act of 24 March 1920 on the Acquisition of Real Property by Foreign Citizens (consolidated text, Journal of Laws 2017, item 2278).

[38] A similar situation arises with regard to restrictions on the method of liquidating the assets of a bankrupt subject to sanctions in connection with Russia's armed aggression against Ukraine, where neither the receiver nor the judge-commissioner is exempt from the obligation to cooperate with the head of the National Tax Administration in matters concerning the disposal of the frozen assets included in the bankruptcy estate. For more information on the conflict between bankruptcy law provisions and provisions on sanctions, as well as the method of resolving such conflicts, see B. Sierakowski, M. Waberski, 'Ogłoszenie upadłości podmiotu wpisanego na listę sankcyjną', *Doradca Restrukturyzacyjny*, 2022, Vol. 3, No. 29, pp. 39–47.

and 595[1] CCC. The provisions express the norm in accordance with which it is prohibited, under pain of criminal liability, to offer to an unspecified group of recipients the acquisition of shares in a limited liability company, as well as to promote such an offer by directing advertising or other forms of promotion to an unspecified recipient. The entry into force, on 10 November 2023, of the Act on Crowdfunding for Business Undertakings[39] along with the applicable EU provisions on European providers of crowdfunding services for business undertakings, is the basis for the introduction of this prohibition.[40] On a literal basis, the subjective (anybody) and objective (shares in any limited liability company) scopes of the prohibition under Article 182[1] CCC do not raise any doubts. Thus, a view has been formulated in the literature that this prohibition also binds the receiver, *ergo* under pain of criminal liability the sale of shares cannot be promoted in the process of bankruptcy estate liquidation by targeting an unspecified group of addressees.[41]

However, when analysing the above prohibition in the context of a bankruptcy situation, it is necessary to remember that the reconstruction of legal norms from provisions is a more complex process than merely decoding the meaning of words in the language in which the provision was constructed. In accordance with the currently leading derivative conception of legal interpretation,[42] also accepted in case law,[43] the interpreter of a legal text does not focus solely on the wording of the provisions, even if they are sufficiently clear,[44] but is always obliged to subject the text to interpretation by applying all available interpretative directives (including linguistic, teleological and systemic ones), in order to derive from the provision a legal norm that is axiologically justified in the assessments attributed

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[39] Act of 7 July 2022 on Crowdfunding for Business Undertakings and Support of Credit Recipients (consolidated text, Journal of Laws of 2023, item 414), hereinafter 'the Act on Crowdfunding' or 'the Act on Social Funding'.

[40] Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, hereinafter 'Regulation 2020/1503'.

[41] Thus, e.g. J. Ostrowski, 'Wymóg złożenia oferty nabycia udziałów w spółce z ograniczoną odpowiedzialnością oznaczonemu adresatowi', *Doradca Restrukturyzacyjny*, 2023, Vol. 4, No. 34, pp. 78–81.

[42] This concept was developed within the Poznań–Szczecin centre of legal theory and philosophy by Z. Ziembiński and M. Zieliński (see M. Zieliński, 'Derywacyjna koncepcja wykładni jako koncepcja zintegrowana', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 2006, Issue 3, pp. 93 et seq.; M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, 6th edn, Warszawa, 2012). The principle underlying this concept, expressed in the maxim *omnia sunt interpretanda*, has been adopted in the case law of the Constitutional Tribunal (see judgment of the Constitutional Tribunal of 13 January 2005, P 15/02, Journal of Laws of 2005, No. 13, item 111).

[43] Cf. judgments of the Supreme Court: resolution of 27 February 2013, I KZP 26/12, resolution of 16 March 2007, III CZP 4/07, and the Supreme Court decision of 21 December 2022, I CNP 56/22, where the Supreme Court confirmed that the derivative conception of law interpretation is currently the dominant one (all the judgments referred to herein are available in the Lex database).

[44] It is so in the case of the formerly shared so-called 'clarificatory' interpretation of law following the conception of J. Wróblewski, based on the principle *clara non sunt interpretanda* (for more on the characteristic features of the clarificatory interpretation of law see M. Zieliński, *Wykładnia*…, op. cit., pp. 79–82).

to the legislator[45] and consistent with the entire system of norms in force at a given time and place. Law is therefore an interpretative fact; it creates an integrated set of rules and principles relating to justice, equity and fair trial,[46] and thus constitutes a legal system that is axiologically coherent and not merely coherent in terms of logic and semantics.

Accordingly, in order to answer the question of whether the prohibition stipulated in Article 182[1] CCC applies universally and in every situational context, it is necessary to determine the purpose of introducing such a norm and its connections with other elements (norms) of the system. The purpose means the function that the norm is to fulfil in the legal system. That is why, in the process of interpreting Article 182[1] CCC, it is necessary to decode the values that were the basis of the amendment,[47] and then resolve the potential conflicts in the light of other values simultaneously preferred by the legislator, such as the constitutional protection of property (Article 64 of the Constitution),[48] which, in accordance with bankruptcy law from the perspective of the creditor's property rights, is exercised, *inter alia*, by means of the debt collection function.[49] As far as the prohibition under Article 182[1] CCC is concerned, the purpose implemented by the legislator may be reconstructed based on other provisions of the Act on Crowdfunding and the justification of the Bill, as well as the content of Regulation 2020/1503, including its preamble. This Act and Regulation 2020/1503 aim to regulate the activity of social funding for business (crowdfunding), including the creation of mechanisms for supervising this type of activity. The national and EU regulations grant providers of crowdfunding services the freedom to provide services throughout the European Union, while at the same time imposing certain organisational obligations on them. Protective provisions have also been introduced, aimed at strengthening the position of investors (capital providers), primarily natural persons who do not have significant knowledge and experience in the field of investment.[50] In addition, the legislator introduced a system of mechanisms aimed at counteracting behaviours consisting in the organisation of crowdfunding in forms other than those provided for in the Act. Crowdfunding activities conducted in breach of the regulations, e.g. without the required permit, constitute a crime.

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[45] M. Zieliński, 'Derywacyjna koncepcja…', op. cit., p. 100.

[46] R. Dworkin, *Imperium prawa*, Warszawa, 2022 (transl. Winczorek J.), pp. 201 et seq.

[47] They are looked for, *inter alia*, in preliminary provisions of acts, preambles, as well as, although not always, in official justifications of bills (S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań, 2001, p. 168).

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

[49] For more on the values protected by BL and their conflict with other values legally protected, see P. Wołowski, *Kolizja zasady ochrony interesów masy upadłości z zasadą zaufania w prawie cywilnym,* Sopot, 2018, pp. 30 et seq.

[50] These solutions include, *inter alia*, a preliminary test of knowledge, an examination of the adequacy of crowdfunding offers for a particular investor, investment limits, or time for consideration before completing the transaction. For more on an inexperienced investor see recitals 42–47 of the Preamble and Articles 21–22 of Regulation 2020/1503, and Article 18 of the Polish Act on Crowdfunding.

Thus, there should be such institutional frameworks for crowdfunding activities that will allow for the development of this type of business activeness, while at the same time providing a sufficient level of protection for entities involved in it (in particular capital providers). In connection with this, the future effectiveness of the law at the stage of its creation is secured not only by a system of incentives, but also by the establishment of a system of sanctions, often criminal in nature, for activities that violate the purpose of this law. The construction of Articles 182[1] and 595[1] CCC is an example of such a legislative measure aimed at strengthening the security of crowdfunding. The legislator clearly explained the purpose of introducing this tool in the justification of the Bill on crowdfunding, indicating that the introduction of Articles 182[1] and 595[1] CCC will exclude:

> '(…) the possibility of selling shares in limited liability companies with the use of services of unsupervised entities that, while acting within the framework of the freedom of economic activity, could publicly promote the acquisition of such shares on Internet platforms performing a similar function to platforms operated by crowdfunding services providers. The concept of "promotion" should be interpreted as targeting advertisements and other forms of advertising at unspecified addressees.'[51]

The analysis of the Bill leads to the conclusion that the legislator limited the principles for organising the process of selling shares in a limited liability company due to a clear legal and institutional context, i.e. the emergence of crowdfunding in the legal system and the need to protect clients (capital providers) against abuse by entities wishing to conduct business activities similar to crowdfunding but outside the applicable format and legal framework. In introducing the prohibition under Article 182[1] CCC, the legislator did not aim to create a new nature of share rights in a capital company or to narrow the circle of entities that, due to the specific social or economic nature of these assets, should hold them (as the legislator does, for example, in relation to agricultural real estate).[52] The legislator's objective was to ensure such institutional frameworks so that crowdfunding activity requiring state permission would not be conducted on the basis of the freedom of economic activity by offering shares in a limited liability company, because in the Polish legal system they are not intended for public trading like shares in public limited companies. Therefore, by not introducing a regulation providing for public trading in shares,[53] which would undoubtedly change their legal nature, the legislator had to create protective mechanisms to ensure that this form of activity would not be used to conduct operations that are essentially similar to crowdfunding.

With such a purpose and function of the Act outlined, the question arises whether the protection of potential creditors is an absolute value and therefore becomes primary in relation to other values that are the axiological justification of

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[51] See the justification of the Bill on crowdfunding (Sejm print No. 2269, available on the Sejm website: https://www.sejm.gov.pl/ [accessed on 20 May 2025]).

[52] Cf. the Act of 11 April 2003 on Shaping Agricultural System (consolidated text, Journal of Laws of 2022, item 2569), including its preamble.

[53] It was directly explained in the justification of the Bill on Crowdfunding (Sejm print No. 2269, available on the Sejm website: https://www.sejm.gov.pl/ [accessed on 20 May 2025]).

previously applicable legal norms introduced by the same legislator. For example, whether the aim of the highest possible satisfaction of the creditors of an insolvent debtor (Article 2(1) BL) must, in some situational contexts, give way and priority to the protection of property rights of another group of entities (different from the creditors of the insolvent debtor). Analysing both groups of norms through the prism of the values that underlie them, one must conclude that this is not the case. This results from the fact that the normative aim of the maximum satisfaction of creditors can be achieved without detriment to the protection of the property sphere of potential investors in the process of illegal crowdfunding, i.e. in a way that does not violate the property rights of either group. It must be borne in mind that the legal status of a receiver is entirely different from the status of an entrepreneur. A receiver acts as an extrajudicial body of a bankruptcy proceeding and is a public official[54] at the same time. The legality of their actions is subject to control by the judge-commissioner (Article 152(1) BL, Article 491[12a] BL) and the Minister of Justice (Article 20b of the Act on the Licence of a Restructuring Advisor).[55] Thus, a receiver is not an ordinary participant in the market game; in particular, they cannot, on their own behalf, undertake any business activity in the interest of the bankrupt.[56] Apart from the programme norm requiring a receiver to act with due diligence (Article 179 BL),[57] the provisions regulating the status of a receiver contain a whole system of safeguards, including criminal law provisions, which aim to ensure the legality and effectiveness of a receiver's actions. Therefore, there is no doubt that the commencement of crowdfunding activities or activities similar to them by a receiver would be an unlawful act and would therefore trigger, *inter alia*, a criminal sanction for exceeding powers by a public official (Article 231 Criminal Code). In relation to the asset component, which is the shares in a limited liability company, a receiver may only disclose, estimate and liquidate these rights, and until their sale, exercise them (Articles 311 and 186 BL). The liquidation of the bankruptcy estate itself is a strictly formalised process (Articles 306–334 BL) and always subordinated to the rules resulting from Article 2(1) and Article 179 BL. As mentioned above, a receiver is an executive body carrying out the liquidation (Article 173 BL), and a judge-commissioner supervises the legality of this process (Article 152(1) BL). Within the framework of liquidating the bankruptcy estate, there is no room for a receiver's activity that would fit into the scheme of crowdfunding process organisation, and at the same time, there is a system of safeguards (i.e. sanctions) that are activated in the event of a breach of this prohibition. As a result, it should be concluded that the legal status of a receiver and the normative shape of the bankruptcy estate

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[54] A comprehensive analysis of the status of the receiver as a private entity performing the function of a public-law procedural body in bankruptcy proceedings was conducted by A. Hrycaj (see A. Hrycaj, *Syndyk…*, op. cit.).

[55] Act of 15 June 2007 on the Licence of a Restructuring Advisor (consolidated text, Journal of Laws of 2022, item 1007).

[56] The receiver, as the indirect proxy of the bankrupt in matters concerning the bankruptcy estate, performs activities in their own name, but on behalf of the bankrupt (Article 160(1) BL).

[57] The provision reads: 'The receiver is obliged to undertake actions with due diligence, in a way that makes it possible to optimally use the bankrupt's property in order to satisfy creditors at the highest possible level, in particular by minimising the costs of the proceeding.'

liquidation process allow for the achievement of the aim to protect potential capital providers (investors). Since this aim is achieved (guaranteed by law), there is in fact no conflict between the values justifying the shape of the liquidation process and the values justifying the institutional framework of crowdfunding. If each of these values (protection of investors' assets on the one hand, and protection of the creditors' assets on the other) can be achieved despite the declaration of bankruptcy of the holder of shares in a limited liability company, there is no axiological justification for a situation in which the bankruptcy proceeding bodies would be obliged to take actions that reduce the level of creditors' satisfaction. Such actions (i.e. refraining from promoting the liquidation process of a component of the bankruptcy estate) would in no way strengthen the protection of values that are the basis for introducing the prohibition under Article 182[1] CCC and would only weaken the level of protection of the property rights of the creditors of the insolvent debtor.

The arguments presented above, based on teleological interpretation guidelines, are not the only ones in favour of the thesis that Article 182[1] CCC should not be applied to the liquidation of a share as a component of the bankruptcy estate. This is also supported by systemic arguments based on the assumption that the legislator does not create legal provisions that are a source of mutually contradictory norms[58] (the so-called legislator's rationality).[59] Each asset included in the bankruptcy estate, as it is intended for liquidation, is first subject to recording and disclosure in the public register of the National Register of Indebted Persons. Upon disclosure, an unlimited group of addressees (i.e. everyone with access to the Internet) knows that these shares are part of the bankruptcy estate and will therefore be subject to sale by a receiver. This happens not because a receiver who is the holder of the shares decides to make this fact public, but because such an effect results from the statute (Article 5(1)(23) of the Act on the National Register of Indebted Persons[60] and Article 69(1ca), first sentence BL). The legislator obliged a receiver to disclose all assets included in the bankruptcy estate, because in this way they support the principle of transparency of the proceedings,[61] and through public promotion of the asset (information that it will be subject to sale) expand the circle of potential buyers. This method of organising the sale process is reinforced by legal norms obliging the judge-commissioner and the creditors' council to make public (by announcing in the NRIP) decisions and resolutions determining the

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[58] S. Wronkowska, Z. Ziembiński, *Zarys*…, op. cit., p. 174.

[59] When interpreting a legal text, it is assumed that a rational legislator's objective is to create a set of formally and praxeologically coherent norms legitimised by an axiologically coherent system of assessment (cf. Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa, 1980, pp. 273–274).

[60] Act of 6 December 2018 on the National Register of Indebted Persons (consolidated text, Journal of Laws of 2021, item 1909), hereinafter 'the Act on NRIP'.

[61] For more on the significance of the principle of transparency in bankruptcy proceedings during the drafting of the provisions of the Act on NRIP and subsequent amendments thereto, including the scope of data subject to disclosing, see the justification of the Bill of 28 May 2021 on amending Act on the National Register of Indebted Persons and Certain Other Acts (Journal of Laws of 2021, item 1080).

rules regarding sale of the bankruptcy estate components (e.g. permission for an unrestricted sale or approval of the tender conditions: Article 219(1d) in conjunction with Article 320(1)(1) in conjunction with Article 334(1) BL). All materially significant elements of the future sale transactions, i.e. the object (shares in a limited liability company), the minimum price and the selling entity (receiver), may result from these documents made available to an unspecified circle of addressees.

The above considerations based on the legislator's rationality lead to the conclusion that, since the legislator decided to introduce the principle of publicising the information about the process of bankruptcy estate liquidation and strongly strengthened it from 1 December 2021 by creating the National Register of Indebted Persons, two years later the same legislator could not introduce a norm limiting the principle of transparency and the public nature of the liquidation of the bankruptcy estate without constructing a clear legal basis. If this were to be the case, it would be necessary to introduce a legal norm based on the provisions of bankruptcy law, the nature of which is special in relation to the regulations of the CCC, obliging the bodies conducting bankruptcy proceedings to organise the process of publicising and liquidating shares in a limited liability company in a different way. Such restrictions can be exemplified by the receivables liquidation process, in respect of which the legislator stipulated that the information contained in the list of receivables due to the bankrupt is subject to disclosure only upon the announcement of a resolution passed by the creditors' council or a decision issued by the judge-commissioner giving consent for their sale in the NRIP (Article 69(1ca), second sentence BL). There are no such restrictions in relation to shares in a limited liability company. It is also not possible to rationally interpret such a restriction (i.e. a narrower scope of application of Article 69 BL) from Article 182^1 CCC. However, there is no doubt that the entire regulation under Article 69 BL is not a norm detached from other norms regulating the process of bankruptcy estate liquidation, but is coherent with them, and – figuratively speaking – an introduction to further norms that are its consequences. The disclosure of assets (including shares in a limited liability company) is not made for the sole purpose of disseminating knowledge about the assets of the insolvent debtor, but in order to liquidate these assets by the receiver on terms that are most favourable to the creditors (i.e. as quickly as possible – Article 308(2) BL – and for the highest possible price – Article 2(1) BL).

CONCLUSION

The conducted analysis of the provisions of Bankruptcy Law and the Commercial Companies Code leads to the conclusion that the legal status of a share in a limited liability company, and the rights arising from such a share change in the event of the declaration of the shareholder bankruptcy. At the same time, for the purpose of determining this status, it is irrelevant whether the shareholder is a natural person, a legal person, or another organisational unit; in each case, the share is subject to the so-called bankruptcy bond, and its management and liquidation are subordinated to the debt collection function of bankruptcy law.

As a result, in the event of declaring bankruptcy of a person holding shares in a limited liability company, the following rules shall apply:

1. Once bankruptcy is declared, the shares become part of the bankruptcy estate and are therefore subject to disclosure in the public NRIP, and then valuation for the purpose of their sale (liquidation) by the receiver for the highest possible price.
2. Despite the declaration of bankruptcy, the bankrupt (shareholder) remains the holder of the rights arising from the shares, but is deprived of the right to use, manage and dispose of the shares.
3. Until their liquidation, the shares and the rights arising from them are managed by the receiver, and – due to the special regulation under Article 186 BL – the receiver, as the indirect proxy of the shareholder, is entitled to exercise all rights to which the bankrupt is entitled as a shareholder, both property and non-property related (corporate) ones.
4. Restrictions on the disposal of shares laid down in agreements, including the articles of association, e.g. making the transfer of a share dependant on the consent of the company or a third party, are not binding on the receiver because they are clauses that hinder or prevent the achievement of the objective of the bankruptcy proceeding, and as a result constitute clauses *ipso iure* ineffective in relation to the bankruptcy estate (Article 84(1) BL).
5. The bankruptcy estate receiver, liquidating an asset in the form of a share in a limited liability company, is not bound by the prohibition on offering and promoting the purchase of a share to an unspecified group of addressees in the process of selling such shares, as referred to in Article 182^1 CCC.

The conducted research also allows for drawing the following conclusions, which are proposals *de lege ferenda* in nature:

1. Due to the criminal sanction for violating the prohibition under Article 182^1 CCC, it is worth specifying in a manner not raising any interpretational doubts (i.e. literally) that Article 182^1 CCC is not applicable in the event of the liquidation of a share in a limited liability company in accordance with the provisions of the Act of 28 February 2003: Bankruptcy Law. This would increase the transparency of the law and clarify the scope of the receiver's permitted.
2. Due to the existence of corporate rights resulting from participation in a limited liability company, which do not affect the bankrupt's property rights, it would be advisable – within the framework of Article 186 BL – to introduce a solution, in accordance with which the judge-commissioner, upon the bankrupt's request, determines by way of a decision the personal rights that do not affect the bankruptcy estate and that, following the declaration of bankruptcy, may be exercised by the bankrupt (an appeal against such a decision should be available to the receiver, creditors, and the bankrupt). This change would allow for the limitation of excessive interference by the receiver in the sphere of the bankrupt's non-property (personal) rights, while also ensuring (through judicial supervision by the judge-commissioner) the fulfilment of the debt collection function of bankruptcy law.

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LEGAL FRAMEWORKS FOR THE APPLICATION AND DEVELOPMENT OF THE METAVERSE IN MEDICINE

ADAM KOZIEŃ*

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Abstract

The article analyses the gradually evolving sphere of the metaverse. This sphere is currently, in a sense, a fusion of technological development with the world of the Internet and artificial intelligence, from the perspective of legal considerations crucial to medicine. The article addresses an original issue within the realm of new challenges faced by the law in the era of advancing digitisation. Simultaneously, it has both a review and monographic character. The central thesis posited is that the use of the metaverse in medicine may pose a danger of violating human rights and freedoms, particularly in the areas of individual liberty, personal data protection, and the protection of personal rights, which is relevant from a legal standpoint. The aim of the research conducted was to analyse the application of the metaverse in medicine from a legal perspective and to identify the dangers posed by the metaverse in the context of the risk of infringing fundamental rights and individual freedoms. Additionally, the study aims to propose legislative recommendations in this regard. The subject of the research and its results are original in nature, encompassing not only Polish law but also international law. The application of the research may be significant not only for academia but also for the practice of law, especially in relation to legislative actions at the international, European Union, and national levels.

Key words: law, metaverse, medicine, personal data protection, protection of personal rights

* LLD, MBA, Department of Administrative Procedure, Faculty of Law and Administration, Jagiellonian University in Krakow (Poland), e-mail: a.kozien@uj.edu.pl, ORCID: 0000-0002-9301-9645

INTRODUCTION

The modern world is developing in a very dynamic way, especially in terms of modern technologies. Nowadays, however, these up-to-date technologies do not merely involve technological improvements in specific devices or the development of the Internet, but also include artificial intelligence, which is gradually advancing. In addition to this, there is an entirely new phenomenon that can radically change the way people function, namely the metaverse – currently being promoted especially by social media – which represents in a sense, a combination of technological development with the world of the Internet and artificial intelligence. The metaverse should be regarded as a virtually unlimited world (*metaversum*), which encompasses all people, and to some extent may even go beyond the modern understanding of the world and universe. The idea of the metaverse was, until recently, treated as hypothetical and akin to science fiction. It can be observed, however, that concepts formerly confined to science fiction are gradually shedding their fictional element and becoming part of the real world, in which the individual must properly situate themselves. One cannot respond to such a changing world solely in terms of threat or fascination but should – recognising certain dangers – attempt to adapt new technical and technological advances accordingly, so that they serve the good of the individual and the common good. In this regard, a key element is common law, which should impose certain requirements and formal frameworks on modern technological achievements, in order to prevent violations of individual rights and freedoms as defined at the level of international law, EU law, and the national legal systems of democratic states governed by the rule of law. The metaverse is also gradually appearing in medicine, where, by virtue of its specificity, it can particularly interfere with individual freedoms and rights.

RESEARCH METHODOLOGY

The purpose of the research conducted was to analyse, from a legal perspective, the metaverse as applied to medicine, to identify the dangers of the metaverse in terms of the potential violation of fundamental individual rights and freedoms, and to formulate legislative proposals in this regard.

In conducting the research, the following methods, specific to legal science, were used:

– the theoretical and legal method, to analyse the concept of the metaverse and legal institutions of relevance to the subject of the study;
– the formal-dogmatic method, to analyse legal regulations and sources of common law relevant to the research topic;
– the method of literature criticism, enabling analysis within the field of the research subject, as well as the identification of gaps in the current state of knowledge and development trends in modern science concerning the topic of the study.

METAVERSE AS A MODERN TECHNOLOGICAL CHALLENGE

The metaverse is currently one of the more widely discussed and technologically developed issues. The metaverse[1] is related to the new era of the Internet that is currently being shaped, going beyond the currently accepted technological, cultural, and social patterns. This new era of the Internet is associated, firstly, with VR (virtual reality) or AR (augmented reality) technologies, and secondly, with the creation and coexistence of multiple 3D digital virtual worlds, as well as virtual reality itself. The term 'metaverse' was coined by Neal Stephenson in his 1992 science fiction novel *Snow Crash*, where it refers to a virtual world functioning in parallel to the real world. A current proponent and promoter of the metaverse is Mark Zuckerberg, the creator of Facebook, who sees the future of the organisation in the metaverse. The metaverse is also an area of interest for companies such as Microsoft, Apple, and Epic Games. At the same time, there are already metaverse-based platforms such as *Fortnite* and *Roblox*, which are related to gaming. It is also worth noting that VR technology enables sensory experiences in addition to movement through the virtual world, while AR technology, using elements from the metaverse, maps them onto the real world.

In this regard, it is worth pointing out that, nowadays, the sphere of the Internet and social media allows for virtual functioning; however, the division between the real world and the virtual world is still maintained, even though the virtual world is becoming increasingly similar to the real one. The idea of the metaverse is to create a digital world that would become the real world. Moreover, from a technological perspective, it is possible to create several virtual worlds, whether independent or overlapping. With the help of the metaverse, it will be possible to function in the virtual world as in the real world – thus to make contacts with others, run errands, shop, play games, and visit various places without leaving home. What is more, it will also be possible to connect different virtual worlds, between which one can move freely with appropriate technical equipment. An important aspect of the metaverse is also the fact that the person entering the virtual world feels as if they are actually moving and functioning within it. This raises the danger of the virtual world becoming blurred with the real world.

In order to function in the world of the metaverse, it becomes necessary to create avatars[2] of specific individuals, through which one can move around the metaverse as in the real world and also be recognised by other users. In the metaverse, where by definition one can function as in the real world, it is also necessary to introduce

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1 See M. Sparkes, 'What is a metaverse', *New Scientist*, 2021, Vol. 251, Issue 3348; S. Mystakidis, 'Metaverse', *Encyclopedia*, 2022, Vol. 2, Issue 1; I.A. Filipova, 'Creating the Metaverse: Consequences for Economy, Society, and Law', *Journal of Digital Technologies and Law*, 2023, Vol. 1, No. 1; M. Kalyvaki, 'Navigating the Metaverse Business and Legal Challenges: Intellectual Property, Privacy, and Jurisdiction', *Journal of Metaverse*, 2023, Vol. 3, Issue 1; S. Kasiyanto, M.R. Kilinc, 'The Legal Conundrums of the Metaverse', *Journal of Central Banking Law and Institutions*, 2022, Vol. 1, No. 2.

2 B.C. Cheong, 'Avatars in the metaverse: potential legal issues and remedies', *International Cybersecurity Law Review*, 2022, Vol. 3.

virtual ownership of property, goods, and identities. It is therefore necessary to implement an appropriate structure not only technologically, but also economically. To this end, cryptocurrencies and non-fungible tokens (NFTs) are being introduced.

The existence of metaverse virtual worlds is also strongly linked to the functioning of artificial intelligence. The metaverse has the character of a virtual, digital world, which is based on information and communication systems, within which artificial intelligence is playing an increasingly important role. At present, artificial intelligence operates on software developed and controlled by humans. However, consideration must be given to the potential existence in the near future of neural networks, capable of learning, developing and thinking on their own, and therefore independently of human programming. This raises the futurological question of whether, at some point, a self-learning and self-thinking artificial intelligence could begin to govern the virtual world of the metaverse independently of humans. This is currently a wholly speculative question; but at the same time, if the question of creating metaverse virtual worlds had been raised ten years ago, the public reception would likewise have been that such an idea was entirely speculative and unrealistic.

METAVERSE IN MEDICINE

The metaverse can also be applied to life sciences,[3] including medicine. World 3.0 opens up new opportunities for life sciences and medicine.[4] As the metaverse becomes increasingly close to the real world, it can prove very helpful in medical contexts. An example of the application of the metaverse in medicine could be consultations or even treatment within the metaverse via avatars. In such a case, the patient's avatar would have access to the full medical records of the real patient, and the doctor could conduct a consultation on this basis. Of course, not all examinations would be possible in the metaverse, but consultations such as nutritional advice or telemedicine in general are feasible within the virtual environment. Such consultations would also eliminate geographical and social barriers.

It is also worth noting that the medical world of the metaverse could significantly assist in the training of future doctors, as it would allow for non-invasive examinations and consultations to be conducted in the virtual world. It could also prove useful for simulating, for example, a real surgical operation. It should be emphasised that there are currently projects aimed at establishing a medical facility in the metaverse, as well as the creation of a metaverse hospital in the United Arab

[3] See S. Surveswaran, L. Deshpande, 'A Glimpse into the Future: AI, Digital Humans, and the Metaverse–Opportunities and Challenges for Life Sciences in Immersive Ecologies', in: Byrne M. (ed.), *AI in Clinical Medicine: A Practical Guide for Healthcare Professionals*, Wiley-Blackwell, 2023.

[4] See also: https://www.cognizant.com/us/en/insights/perspectives/in-life-sciences-the-metaverse-opportunity-knocks-wf1135812 [accessed on 20 May 2023]; https://www.ey.com/en_ch/technology/how-can-life-sciences-and-healthcare-thrive-in-the-metaverse [accessed on 20 May 2023]; https://www.tcs.com/what-we-do/industries/life-sciences/white-paper/metaverse-healthcare-life-sciences-realize-business-value [accessed on 20 May 2023].

Emirates. The potential of so-called digital twins, or virtual models of real beings or objects, is also being recognised.

The benefits of the metaverse are also acknowledged by pharmaceutical companies that invest in clinical trials. Patient data, which is valuable from the perspective of research in life sciences and healthcare, is another issue of significance. At present, patients are usually not remunerated for providing their data. In the metaverse, NFT tokens could enable the encryption and subsequent transfer of ownership and value of data. Consequently, patients would be able to monetise their data and decide to whom it is shared as NFTs.

The development of the metaverse in medicine is being driven by regulatory pressures, significant shortages in the medical workforce, and a shift towards increasing trust with the patient, who is making numerous decisions. Education and training can be identified as the primary area of metaverse application in medical science. It is worth noting that 3D visualisations allow for the real development and upskilling of medical personnel without causing harm to patients. Training is also possible regardless of geographical, environmental, or cultural barriers. Simulations are often linked to gamification, which in this case takes place without risk. Technological advancements in simulations now allow for the engagement of all the trainee's senses, generating real feelings and experiences. Medical training can be provided not only for healthcare professionals, but also for pharmacists, in the form of visualising drug action and simulating experiences resulting from varied patient conditions. Nowadays, medical universities are training students using the metaverse, for example, in a virtual operating room with a virtual patient.

Another example of the introduction of the metaverse in medicine is the transformation of clinical trials. The metaverse, through the absence of geographical and physical limitations, can render these trials more decentralised and possible within patients' homes. In order to ensure the security and protection of patient data in this regard, NFTs should remain an important element, for instance, in the context of medical records. The metaverse can also facilitate so-called immersive therapies, that is, medical interventions using AR, VR, and MR. These can be applied specifically to cognitive therapies, rehabilitation, as well as psychiatric and psychological treatment. The metaverse may also be used in radiological diagnostics, since medical images are currently visualised on 2D screens. Enhancing diagnostics through 3D will enable better analysis of medical images and allow for the use of interactive and realistic medical experiences. In this context, medical devices are now emerging that use VR to train medical robots through machine learning algorithms.

The metaverse may also contribute to the development of telemedicine, which could be particularly significant given the shortage of personnel and technology in the healthcare industry. In this respect, augmented reality and the provision of medical services, such as diagnosis, consultation, treatment, care, and monitoring, in remote form are becoming increasingly crucial. Consequently, so-called digital twins, which enable simulations in three-dimensional form, may also prove important.

LEGAL ISSUES AND CHALLENGES IN APPLYING METAVERSE TO MEDICINE

INDIVIDUAL FREEDOM IN THE PERSPECTIVE OF THE APPLICATION OF THE METAVERSE IN MEDICINE

The danger of violating freedom and human rights can be identified as the first issue. It should be noted that freedom is linked to the very nature of man, so that it is not determined by the state but is primary in nature.[5] The freedom of the individual lies in the right, in a particular situation, to make choices or act according to their own will, provided that these actions are not prohibited by law.[6] Human freedom does not derive from 'law in the sense of the subject matter, and the law only establishes its limits'.[7] It should also be noted, following L. Garlicki, that the principle of freedom 'is one of the typical metanorms (general clauses) that determine the manner and direction of the interpretation of the entire system of constitutional norms and determine the system of values that the system is intended to serve'.[8]

It is therefore important to consider who in the metaverse will oversee the observance of freedoms and human rights, especially since the metaverse is, by design, global, transnational and supranational, and therefore, what legal order will be in force.[9]

A major threat to individual freedom in the metaverse can be the inequality that exists between metaverse administrators and individuals wishing to use and benefit from metaverse services. This inequality arises specifically from the position and power of the entities administering the metaverse. In order to use the metaverse, it is necessary to conclude an appropriate contract, which is essentially adhesive in nature. This may lead to violations of the autonomy of will and individual freedom.

Dangers may be identified not only in the private-law vertical relationship between the metaverse administrator and the user, but also in the private-law horizontal relationship between individuals using the metaverse, particularly with regard to personal property. A key element may also be the relationship between the state and the metaverse, as well as the question of whether states will exist in the metaverse world.

Threats to individual freedoms in the metaverse may also involve data protection, contractual relations between metaverse administrators and their users, copyright law, criminal law, and international law.

In addition, threats to individual freedom in the metaverse may also arise from new technologies, especially so-called 'artificial intelligence' and information systems. Mention should also be made of the danger of violating the principle of equality and non-discrimination, particularly in the context of so-called 'digital

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5 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej*, Warszawa, 2012, p. 201.

6 W. Skrzydło, S. Grabowska, R. Grabowski, *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warszawa, 2009, p. 643.

7 B. Banaszak, *Konstytucja*…, op. cit., p. 202 [own translation].

8 L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, 2012, p. 94 [own translation].

9 See also: M. Turdialiev, 'Legal Discussion of Metaverse Law', *International Journal of Cyber Law*, 2023, Vol. 1, Issue 3.

exclusion', especially affecting the elderly, the poor, and those living in sparsely urbanised areas, where access to the Internet is sometimes significantly hampered or not possible at all. There is also the key question of who can be a user of the metaverse, especially from the perspective of people with limited or no legal capacity. In this regard, it should be pointed out that when evaluating the implementation of the principle of equality, it is necessary to refer to it in the substantive sense. In this context, the Polish Constitutional Court noted that:

> 'A matter fundamental to the assessment of compliance with the principle of equality is thus the determination of the essential feature on account of which the laws have made a differentiation of the legal situation of their addressees. (…). Thus, it has been repeatedly pointed out that the differentiation of the legal situation of citizens is then unconstitutional if differential treatment is given to similar subjects or situations, and such differences in treatment do not find due constitutional justification. The Constitutional Court has also repeatedly emphasised the relationship between the principle of equality and the principle of justice (…).'[10]

In the search for such justification, the criteria of rationality, proportionality and fairness of the differentiations made were pointed out (…).[11] In other words, any deviation from the injunction to treat similar entities equally must always be based on sufficiently compelling criteria. These criteria must be:

– first, of a relevant nature, i.e. they must be directly related to the purpose and essential content of the provisions in which the controlled norm is contained, and serve to realise this purpose and content, i.e. the differentiations introduced must be rationally justified. They must not be made according to an arbitrary criterion (…);[12]
– secondly, proportional in nature, that is, the importance of the interest to be served by differentiating the situation of the addressees of the norm must be in appropriate proportion to the importance of the interests that will be violated as a result of unequal treatment of similar entities;
– third, must be in some connection with other values, principles or constitutional norms that justify different treatment of similar entities (…).[13]

As a result, therefore, a certain amount of differentiation may exist, but it must depend on objectified criteria and must not lead to 'digital exclusion', for example.

DATA PROTECTION IN THE PERSPECTIVE OF THE APPLICATION OF THE METAVERSE IN MEDICINE

One of the most important legal challenge is the issue of protecting personal data in the metaverse. In this regard, a problematic issue is the number and scope of personal data that will be placed in the metaverse space. The origins of legal regulations related

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[10] Constitutional Tribunal ruling of 28 November 1995, K 1/95, *OTK ZU*, No. 3/1995, p. 183.
[11] Constitutional Tribunal ruling of 3 September 1996, K 10/96, *OTK ZU*, No. 5/1996, p. 281.
[12] Constitutional Tribunal ruling of 12 December 1994, K 3/94, *OTK*, 1994, part II, p. 141.
[13] For example, Constitutional Tribunal ruling of 23 October 1995, K 4/95, *OTK*, 1995, part II, p. 93; Constitutional Tribunal judgment of 16 December 1997, K 8/97, *OTK*, 1997, No. 5–6, item 70. See also judgment of the Supreme Court of 5 May 2010, I PK 201/09.

to the issue of personal data can be tracked back to the 1970s;[14] however, at the time, the issue was addressed in two ways – by creating piecemeal regulations as well as comprehensive ones (as an example, one can point to the Data Protection Act of 1970 of the German state of Hesse).[15] The need to develop and expand the protection of personal data was related to the ongoing computerisation of various areas of life and the creation of computerised systems,[16] capable of recording as well as processing numerous data, and consequently the emergence of *de facto* databases.[17] The lack of an adequate legal response would lead to the unlimited collection and processing of personal data. Consequently, this would create the danger of violating not only the right to privacy but also the very essence of human freedoms and rights.[18]

Legal protection of personal data occurs under international, EU, and individual country laws, but among these regulations, it is worth mentioning Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),[19] which holistically protects personal data within the European Union Member States. The introduction of the Regulation has allowed for full harmonisation within the European Union of the protection of personal data. It is worth noting that the Regulation does not apply only to European Union Member States but, in its scope, also applies to entities that provide services within the European Union.[20] Based on Article 3(1) of the Regulation, it 'applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not', and Article 3(2) states that the Regulation 'applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.'

Treating the metaverse as a real world in a virtual space can lead to a situation in which essentially all data about an individual will be stored and processed in the metaverse world. Some of this data will probably be provided on a mandatory basis

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[14] J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz*, 5th edn, Warszawa, 2011, p. 25.

[15] Ibidem, p. 25; W. Kilian, 'Ochrona danych w przedsiębiorstwach', in: Wyrzykowski M. (ed.), *Ochrona danych osobowych (zbiór referatów wygłoszonych na poświęconej problematyce ochrony danych osobowych konferencji naukowej w dniach 27–28 II 1998 r.)*, Warszawa, 1999, pp. 99 et seq.

[16] J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona…*, op. cit., p. 26.

[17] See also U. Seidel, *Datenbanken und Persönlichkeitsrecht*, Köln, 1972.

[18] J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona…*, op. cit., p. 27.

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1.

[20] M. Krawczyk, 'Ochrona danych osobowych w Internecie', in: Surma A., Chodźko E. (eds), *Współczesne wyzwania cyfryzacji – przegląd i badania*, Lublin, 2019, p. 190.

and some on an optional basis. It is therefore necessary to minimise the amount of data provided obligatorily as much as possible, because, as for the data provided optionally, the principle of *volenti non fit iniuria* can be applied.

The problem, moreover, will be data that is not posted knowingly and directly, but rather data that is transferred unknowingly and indirectly, usually as a result of posting data knowingly and directly. In terms of data protection, applicable law will again be an important element, especially since, for example, EU regulations are very restrictive in this regard, in contrast to other legal orders. It should also be noted that nowadays personal data is a modern commodity, and from the perspective of metaverse administrators, as well as entities doing business there, it is relevant and valuable (it also has a quantifiable value). Another problem is also the so-called metadata, which is created as a result of the activities of a particular user. Metaverse administrators can also extract data from a user's software.

The danger of a breach of personal data protection comes not only from metaverse administrators collecting and processing data, but also from other social network users and even cybercriminals. It should also be pointed out that in the medical field we are dealing with personal data that is particularly sensitive, as it relates to health, for example, which makes the case for ensuring the highest possible level of protection even stronger. It should further be noted that the metaverse world will be processing and collecting vast amounts of data, on a scale that may even exceed the scope of so-called Big Data,[21] which currently dominates the sphere of the Internet and social media.

PROTECTION OF PERSONAL RIGHTS IN THE CONTEXT OF METAVERSE APPLICATIONS IN MEDICINE

The protection of personal property poses another challenge. More broadly, not directly in relation to the metaverse, but with regard to the issue of violation of personal property on the Internet, the following views in legal doctrine can be identified:

– a distinction can be made between personal property that can be violated or threatened on the Internet;[22]

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[21] See D. Boyd, K. Crawford, 'Critical questions for big data in Information', *Communication & Society*, 2012, Vol. 15, Issue 5, pp. 662–679; H.U. Buhl, M. Röglinger, F. Moser, J. Heidemann, 'Big Data. Ein (ir-)relevanter Modebegriff für Wissenschaft und Praxis?', *Wirtschaftsinformatik*, 2013, Vol. 55, Issue 2, pp. 63–68; R. Reichert, 'Big Data', in: Beyes T., Metelmann J., Pias C. (eds), *Nach der Revolution. Ein Brevier digitaler Kulturen*, Berlin, 2017, pp. 177–185; M. Schermann, H. Krcmar, H. Hemsen, V. Markl, Ch. Buchmüller, T. Bitter, T. Hoeren, 'Big Data – An Interdisciplinary Opportunity for Information Systems Research', *Business & Information Systems Engineering*, 2014, Vol. 6, Issue 5, pp. 261–266; D. Klein, P. Tran-Gia, M. Hartmann, 'Big Data', *Informatik Spektrum*, 2013, Vol. 36, pp. 319–323; V. Marx, 'The big challenges of big data', *Nature*, 2013, Vol. 498, pp. 255–260.

[22] P. Modrzejewski, 'Sposoby naruszania dóbr osobistych w Internecie – zagadnienia wybrane', *Studia Prawnoustrojowe*, 2019, No. 44, p. 295; J. Sadomski, *Naruszenie dóbr osobistych przez media*, Warszawa, 2003, p. 26.

– there are personal goods that can only be violated or threatened in the real world – such as the integrity of the home;[23]
– in principle, all personal property can be violated or threatened on the Internet.[24]

As regards the metaverse, it should be pointed out that any personal good can, in principle, be violated or threatened there. The issue of protection of personal rights in common law has the character of general norms, an open catalogue of legally protected goods, and is susceptible to dynamically changing circumstances in political, legal, social, economic, and cultural life.

A significant challenge to personal property in the metaverse is its global nature, which can significantly undermine the effectiveness of asserting one's rights and claims, and makes it necessary to develop effective redress mechanisms at the international level. In this regard, the Internet judiciary, which is already well known in China, for example, may also come to the fore.

The peculiarities of the metaverse mean that, in addition to the traditional forms of violating personal rights through, for example, insulting, posting compromising photos of others, writing untruths about others, or unlawfully using someone's name or creativity, other forms of violating personal rights can be identified. These may include: spamming, cookies,[25] data retention, personality profiling, phishing,[26] hacker attacks,[27] impersonation of a particular entity, sniffing, the Heartbleed bug, deep links, and cloud computing. The peculiarities of the metaverse can lead to violations of the same personal rights but in other forms (specific to the virtual space), as well as to the emergence of new forms of violations of personal rights. In principle, any personal good can be violated in the metaverse. These violations can be committed by both public and private law entities, especially administrators and users of the metaverse. Violations can occur in situations of hacking attacks or unauthorised access to a social network user's account. Nowadays, violations of personal rights can also result not only from the activities of IT systems controlled by individuals but also through the operations of so-called 'artificial intelligence'.

One of the most important challenges is to ensure security in the metaverse world, especially data security, as it will be of particular importance in the virtual world. Technical security should protect against hacking attacks and cybercrime in the broadest sense. Particular attention should be paid to the security of both sensitive and health data.

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[23] P. Modrzejewski, 'Sposoby…', op. cit., pp. 295–296. See P. Waglowski, *Ochrona dóbr osobistych i danych osobowych*, Warszawa, 2009, p. 4.

[24] P. Waglowski, *Ochrona…*, op. cit., pp. 4–5; P. Modrzejewski, 'Sposoby…', op. cit., p. 296.

[25] M.R. Siebecker, 'Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?', *Southern California Law Review*, 2003, Vol. 76, No. 4.

[26] J.A. Chaudhry, S.A. Chaudhry, R.G. Rittenhouse, 'Phishing Attacks and Defenses', *International Journal of Security and Its Applications*, 2016, Vol. 10, No. 1

[27] K. Anderson, *Hacktivism and politically motivated computer crime*, Portland, 2008; M.T. Simpson, *Hands-on ethical hacking and network defense*, Boston, 2013.

CONCLUSION

The idea of the metaverse fundamentally changes the approach to functioning in virtual space. The very idea of the existence of parallel virtual worlds, which are essentially duplicates of the real world, still seems abstract; however, it is in fact partially accessible. The existence of the metaverse world can be observed in various areas of life. It is also perceptible in the life sciences, and in this area particularly in medicine and health sciences. This raises major challenges in the legal field, since the metaverse world operates parallel to the real world, so the primary problem is determining the applicable law. Another issue is the danger of infringement of individual rights and freedoms, which may result from the dominant position of metaverse administrators, as well as the danger of so-called 'digital exclusion'. An important element is the digital security in the age of cybercrime, as well as the protection of personal data and personal property, and the role of artificial intelligence. Adaptation of the law in this regard concerns not only international law or civil law, but also administrative, criminal, economic, and EU law.

The dangers indicated above are only the most glaring, particularly from the perspective of medicine. Irrespective of the fact that these issues are international in nature, they will ultimately have to be addressed by the national legislature. The state, as an administrative apparatus, has relatively broad powers to interfere with this activity, but at the same time must bear in mind the need to be proportionate when doing so, as well as to uphold individual freedoms and rights. Regardless of the public law perspective, and therefore administrative and criminal law, a key element should also be interference at the civil law level, through, for example, the introduction of a specific contract for the use of services in the metaverse world, which would protect users of this form of activity in the sphere of the broader Internet.

Notwithstanding the above considerations, it should also be pointed out that a change in culture, customs, and society's attitudes towards the virtual world is necessary in this respect. This is an element that will evolve over time. In addition, a person using the metaverse world must not become dependant on the virtual world, which should serve only to assist in normal functioning. The virtual world will never replace the real world, because at best it will only faithfully imitate it. Contrary to appearances, the example of medicine demonstrates this very well, as a surgeon will not perform an operation in the virtual world. Moreover, one may ask whether the virtual world of the metaverse will ever match the beauty of the real world?

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ADMISSIBILITY OF CORRECTION OF A JUDGMENT IN NON-CONTENTIOUS PROCEEDINGS, IN PARTICULAR IN LAND AND MORTGAGE REGISTER PROCEEDINGS

MAŁGORZATA SEKUŁA-LELENO*

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Abstract

The study analyses the question of admissibility of correcting judgments issued in non-contentious proceedings, in particular those concerning land and mortgage registers. Doubts regarding the nature of corrections of entry errors are clarified and the legal nature of the decisions in this matter is assessed.

From the perspective of the considerations regarding the admissibility of correcting judgments in land and mortgage related proceedings, attention is also drawn to the significance of the action for reconciliation of the content of the land and mortgage register with the actual legal status and to issues concerning the admissibility of correction of a judgment by a court referendary.

Key words: register entry, correction of errors in the register entry, rectification, land and mortgage register proceeding, court referendary

INTRODUCTION

Examination of cases in non-contentious proceedings is an exception to the general principle expressed in Article 13 § 1 of the Code of Civil Procedure (CCP), in accordance with which the court hears cases in a trial. According to Article 13 § 2,

* LLD, Assistant Professor at the Department of Law and Civil Procedure of Lazarski University in Warsaw (Poland), member of the Supreme Court Research and Analyses Office, e-mail: malgorzata.sekula@lazarski.pl, ORCID: 0000-0001-5015-9018

the provisions regulating trial proceedings shall apply accordingly to other types of proceedings regulated in the CCP, unless special provisions regulating these proceedings stipulate otherwise. Pursuant to the generally accepted principles of the 'appropriate' application of the provisions, some of them shall be applicable directly, without any modifications, others shall take into account the structure, essence and distinctiveness of the proceedings in which they are applied, and still others shall not be applicable at all.[1]

The non-contentious procedure is one of the two procedural modes existing in Polish civil procedure law, alongside the contentious procedure, the function of which is to examine and resolve a legal dispute and thus protect the subjective rights of the parties to this dispute.[2]

In light of Article 350 § 1 CCP in conjunction with Article 13 § 2 CCP, the court may rectify a decision adjudicating on the merits of the case issued in non-contentious proceedings only in the event of inaccuracies, clerical or calculation errors, or other obvious mistakes.[3] It is assumed in case law that the purpose of rectifying a decision is to 'remove the inconsistency between the actual will and the knowledge of the court as well as the material collected and their expression in writing resulting from technical imperfection of the wording of the court's decision, presenting the court's stance in an incorrect form or in an inaccurate, and therefore incomplete and imprecise manner'.[4]

Due to the differences that occur in this respect in land and mortgage register-related proceedings, the issue of admissibility of correction of a judgment issued within this proceeding is analysed.[5] For this purpose, an attempt is made to clarify

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[1] Cf. the Supreme Court ruling of 9 December 1975, I CO 9/75, *OSNCP*, 1976, No. 10, item 219 with a commentary by W. Siedlecki, 'Przegląd orzecznictwa', *Państwo i Prawo*, 1977, No. 12, p. 122, and justification of the Supreme Court resolution of 15 September 1995, III CZP 110/95, *OSNC*, 1995, issue 12, item 177; J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Tom 1. Postępowanie rozpoznawcze. Artykuły 1–124*, 6th edn, Warszawa, 2023, LEX/el., http://lex.sn.pl/#/commentary/587935734/733174 [accessed on 6 December 2024].

[2] Judgment of the Constitutional Tribunal of 3 July 2007, SK 1/06, *OTK-A*, 2007, No. 7, item 73.

[3] See the Supreme Court rulings of 25 March 1968, II PZ 21/68, unpublished, 30 April 1970, II CZ 31/70, unpublished; 10 October 1978, IV CR 144/78, unpublished; 3 July 2003, I CZ 17/03, unpublished; A. Zieliński, in: Zieliński A. (ed.), *Komentarz do kodeksu postępowania cywilnego*, Warszawa, 2012, p. 62; the Supreme Court ruling of 30 April 1997, III CKU 22/97, *OSNC*, 1997/9, item 139.

[4] Thus, the Supreme Court ruling of 26 January 2018, II CZ 91/17, cf. M. Rzewuski, 'Sprostowanie usterki wpisu w księdze wieczystej. Glosa do postanowienia SN z dnia 26 stycznia 2018 r., II CZ 91/17', *Glosa*, 2019, No. 1, p. 75; the Supreme Court ruling of 13 June 2013, V CZ 28/13, LEX, No. 1375536.

[5] The land and mortgage register-related proceedings are regulated in the provisions of Articles 626^1–626^{13} CCP, supplemented by the provisions of the Act on the Land and Mortgage Registers of 16 July 1982, Journal of Laws of 2023, item 1984; Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in an IT System of 14 February 2003, Journal of Laws, No. 42, item 363; and regulations: of 20 August 2003 on the mode of transferring the content of the land and mortgage register to the land and mortgage register maintained in an IT system, on founding and maintaining land and mortgage registers in the computerised systems, and of 17 September 2001 on maintaining land and mortgage registers and document collections, Journal of Laws, No. 102, item 1122; as well

doubts concerning the nature of the correction of errors in the register entry, and the legal nature of the judgment in this matter is assessed.

First of all, it should be emphasised that the characteristic feature of an entry in the land and mortgage register, in contrast to other registration proceedings, is that this entry is a judgment. Therefore, it constitutes a departure from the general principle expressed in Article 516 CCP, in accordance with which court judgments in non-contentious proceedings are issued in the form of rulings, unless a special provision stipulates otherwise. Undoubtedly, entries in this register should not contain errors.

Thus, in hearing a petition within this proceeding, the court is obliged not only to examine the status of the land and mortgage register in the context of the submitted request, but also the task of the court maintaining the land and mortgage register is to ensure the correctness of the entries made, regardless of whether they were appealed against or not. Thus, it is the court's task to examine the formal and substantive correctness of the entries.[6] It should be highlighted that an entry in the land and mortgage register in land and mortgage-related proceedings is a judgment in which the court decides on the legal status of real property. Therefore, the entry cannot be burdened with any errors.[7]

THE ISSUE OF RECTIFICATION IN LAND AND MORTGAGE REGISTER PROCEEDINGS: NATURE OF ERRORS RECTIFICATION

The issues of rectification in land and mortgage register proceedings primarily concern the correction of errors in the register entry, which cannot cause the content of the land and mortgage register to become inconsistent with the actual legal status.

In accordance with Article 626^{13} § 2 CCP, in land and mortgage register-related proceedings, any corrections to the register entry that cannot cause inconsistency between the content of the land and mortgage register and the actual legal status are made *ex officio*. It should be noted that this provision constitutes the equivalent

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as the Regulation of the Minister of Justice – Rules and regulations of common courts of 18 June 2019 (consolidated text, Journal of Laws of 2022, item 2514, as amended).

6 Cf. the Supreme Court ruling of 16 February 2012, IV CSK 272/11, LEX No. 1215294. H. Ciepła: 'Pojęcie stanu prawnego nieruchomości', in: Ciepła H., Brzeszczyńska S., *Obrót nieruchomościami w praktyce notarialnej, sądowej, egzekucyjnej, podatkowej z wzorami umów*, Warszawa, 2018, LEX/el.

7 E. Jefimko, 'Postępowanie wieczystoksięgowe jako szczególny rodzaj postępowania nieprocesowego (zagadnienia wybrane)', *Przegląd Sądowy*, 2002, No. 10, p. 55; A. Oleszko, *Obrót cywilnoprawny w praktyce notarialnej i wieczystoksięgowej*, Zakamycze, 2003, p. 127; S. Rudnicki, *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu w sprawach wieczystoksięgowych. Komentarz*, Warszawa, 2010, p. 466; A. Oleszko, 'Uzgodnienie stanu prawnego nieruchomości w zakresie podstawy dokonanego wpisu prawa własności w księdze wieczystej', *Rejent*, 2007, No. 1, p. 9; T.E. Kowalik: 'Wpis w księdze wieczystej', in: Kowalik T.E., *Zakres kognicji sądu w postępowaniu wieczystoksięgowym*, Warszawa, 2020; H. Ciepła, E. Bałan-Gonciarz, *Ustawa o księgach wieczystych i hipotece*, Warszawa, 2011, p. 65; T. Henclewski, 'Podstawy ujawnienia wzmianki w księdze wieczystej', *Monitor Prawniczy*, 2010, No. 4, pp. 238–239. P. Mysiak, *Postępowanie wieczystoksięgowe*, Warszawa, 2012, p. 254.

of Article 350 CCP within land and mortgage register procedure and excludes its application in the scope of rectification of errors in the land and mortgage register entry.[8] As rightly pointed out in the literature, although Article 626[13] § 2 CCP excludes the application of Article 359 CCP in land and mortgage register procedure for the rectification of errors in the register entry, it nonetheless fulfils the function of this provision, however, only in relation to entries.[9] Therefore, Article 350 CCP will be appropriately applied in land and mortgage register procedure (pursuant to Article 13 § 2 CCP) in the event of obvious errors made in decisions issued in these proceedings.[10]

From the perspective of the analysis within the scope of this paper, it should be stated that the hypotheses of Article 350 § 1 CCP and Article 626[13] § 2 CCP overlap in terms of the types of irregularities they address, i.e. they include inaccuracies, clerical and calculation errors, or other obvious mistakes subject to rectification.[11]

However, the differences concern the types of judgments to which they may apply and in which such irregularities may appear. Thus, in the event of such irregularities occurring in the content of an entry, rectification will be made on the basis of Article 626[13] § 2 CCP, whereas in the case of judgments that are not entries, Article 350 § 1 CCP will constitute the basis for rectification.[12]

It is irrelevant whether the entry was made in writing or as an electronic record. The technique for correcting entry errors is articulated in §§ 13 and 14 of the Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001.[13]

It is rightly pointed out in the literature that the possibility of editing in a computer programme has rendered § 13(2) of the Regulation of 17 September 2001, pursuant to which errors in the content of entries found before they are signed shall be corrected by crossing out the incorrect text with a black line or by crossing out and entering the correct text between the lines in place of the crossed out text, generally irrelevant.

In accordance with § 14 (1) of the Regulation of 17 September 2001, the entry on the correction of errors in the register entry, as referred to in Article 626[13] § 2 CCP,

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[8] Cf. the Supreme Court ruling of 21 January 2003, III CZ 128/02, unpublished, and of 26 January 2018, II CZ 91/17, unpublished.

[9] E. Jefimko, 'Postępowanie wieczystoksięgowe…', op. cit., p. 53; H. Ciepła, E. Bałan-Gonciarz, *Ustawa o księgach…*, op. cit., p. 219; A. Maziarz-Charuza, *Postępowanie wieczystoksięgowe. Komentarz*, Warszawa, 2008, pp. 154–155; A.J. Szereda, in: Marciniak A. (ed.), *Kodeks postępowania cywilnego*, Vol. 3, Warszawa, 2020, p. 1186; the Supreme court ruling of 21 January 2003, III CZ 128/02, LEX No. 77078; the Supreme court ruling of 26 January 2018, II CZ 91/17, LEX No. 2439957, with a gloss by M. Rzewuski, 'Sprostowanie usterki…', op. cit., pp. 75–78. The Supreme Court ruling of 20 March 2009, II CZ 15/09, LEX No. 738343.

[10] The Supreme Court ruling of 21 January 2003, III CZ 128/02, LEX No. 77078; thus, also H. Ciepła, E. Bałan-Gonciarz, *Ustawa o księgach…*, op. cit., pp. 219–220; K. Markiewicz, in: Ereciński T., Lubiński K. (eds), *System Prawa Procesowego Cywilnego. Tom IV. Postępowanie nieprocesowe. Część I*, Vol. 2, Warszawa, 2021.

[11] M. Rzewuski, 'Sprostowanie usterki…', op. cit., pp. 75–78. E. Jefimko, 'Postępowanie wieczystoksięgowe…', op. cit., p. 53.

[12] E. Jefimko, 'Postępowanie wieczystoksięgowe…', op. cit., p. 53.

[13] Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001, Journal of Laws of 2001, No. 102, item 1122, as amended.

shall be made immediately after they are noticed, simultaneously with the issuance of a decision on the rectification of those errors, i.e. without waiting for the decision to become final.

According to § 14(2) of the Regulation of 17 September 2001, the record of a correction made, together with references to the reference number of the entry being corrected, is placed in the appropriate section and column in which the entry is disclosed, including the reference number of the provision constituting the basis for the correction.[14]

In turn, in the computerised register, in accordance with § 97 of the Regulation of the Minister of Justice on Founding and Maintaining Land and Mortgage Registers in the Telecommunications Systems of 15 February 2016,[15] corrections of the entry errors referred to in Article 626^{13} § 2 CCP shall be made immediately after they are noticed. At the same time as the decision on the correction of entry errors is issued, appropriate changes shall be made in the relevant fields. If the correction is made in sections I-Sp, II or IV, the fields to which the correction applies shall be indicated, and it shall be disclosed that the correction is in the field 'type of change': 1.11.1.7 in section I-Sp, 3.4.1.7 in section III, or 4.4.1.15 in section IV.[16]

What is important is that, once the entry has been made, i.e. the moment it is recorded in the central database of the land and mortgage registers (pursuant to Article 626^{8} § 2 CCP), the correction of the error already requires the issuance of a decision on the correction of errors in the entry.[17]

The above-described method for correcting an entry error applies to decisions issued in accordance with Article 626^{13} § 2 CCP, but it may also be applied if the entry correction is made under the provision of Article 350 § 1 CCP. Of course, the above considerations concern the correction of an entry error noticed by the court at the time of examining a complaint against a court referendary's ruling.

However, it is not excluded that a court referendary may correct an error in the entry if it is noticed before a complaint against their ruling is filed. In such a case, Article 626^{13} § 2 CCP is applied accordingly.[18]

In correcting the entry error, the court should proceed with particular caution, limiting its interference to the most obvious mistakes, because the correction must not in any case lead to a change in the ruling.[19] Furthermore, in its case law, the Supreme Court

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[14] Cf. judgment of the Voivodeship Administrative Court in Szczecin of 17 March 2021, II SA/Sz 899/20, LEX No. 3168130.

[15] Journal of Laws, item 312, as amended.

[16] J. Ignaczewski, P. Siciński, '3.3. Sprostowanie omyłki', in: Ignaczewski J., Siciński P., *Komentarz do wpisów w księgach wieczystych*, Warszawa, 2013.

[17] A. Maziarz-Charuza, 'Podstawa faktyczna i sposób rozstrzygnięcia skargi', in: Maziarz-Charuza A., *Skarga na orzeczenie referendarza sądowego w postępowaniu wieczystoksięgowym*, Kraków, 2006, LEX/el.; Supreme Court ruling of 5 Decemeber 1980, III CRN 133/ 80, *OSNC*, 1981, No. 6, item 115 with a gloss by W. Siedlecki, 'Glosa do postanowienia SN z 5 grudnia 1980 r., III CRN 133/80', *Państwo i Prawo*, 1982, issue 12, p. 100.

[18] Thus, A. Maziarz-Charuza, 'Podstawa faktyczna…', op. cit., p. 192.

[19] The Supreme Court ruling of 13 November 2024, III USK 355/23, LEX No. 3784360; and Supreme Court judgments: of 6 March 2019, I CSK 87/18, LEX No. 2630624; of 10 November 2017, V CSK 41/14, *OSNC*, 2018, No. 10, item 101; and the Supreme Court ruling of 19 January 2018, I CSK 176/17, LEX No. 2482574.

emphasises that the institution of judgment correction may not be used to eliminate substantive errors in case ruling and must not lead to a change in the decision.[20]

In addition, as rightly pointed out in the literature, the right to correct an error should not be made dependant on the scope of the complaint. It should be noted that the correction of an obvious error does not change the essence of the entry, which is why it may be done *ex officio* and at any time, even in relation to a valid entry, as it serves to maintain the authority of the justice system.[21]

RECTIFICATION VERSUS ACTION FOR RECONCILIATION BETWEEN THE CONTENT OF THE LAND AND MORTGAGE REGISTER AND THE ACTUAL LEGAL STATUS

From the perspective of the analysis concerning the admissibility of the correction of a ruling in land and mortgage register proceedings, it is necessary to take into account the significance of a claim for reconciliation of the content of the land and mortgage register with the actual legal status.

First of all, the view should be approved that making an entry in the wrong section d o e s n o t c a u s e a d i s c r e p a n c y b e t w e e n t h e l e g a l s t a t u s d i s c l o s e d i n t h e r e g i s t e r a n d t h e a c t u a l l e g a l s t a t u s. It should be pointed out that, already under the Mortgage Law of 1818, it was considered that the mortgage register, which was the equivalent of today's land and mortgage register, constituted one whole (Articles 14 and 17 of the Mortgage Law of 1818). Therefore, when checking whether any rights encumbered the property, it was not enough to state that these rights were recorded in the appropriate section of the register, but it was also necessary to ensure that entries in other sections of the register had not introduced any significant changes. It seems that this principle should still be considered applicable, although with the formalised IT system of maintaining land and mortgage registers, it will be much more difficult to make such a mistake. One example would be the erroneous placement of a claim for establishment of a mortgage in section III, like all other claims, instead of section IV, which, as is known, is intended only for entries concerning mortgages.[22]

Next, it should be borne in mind that the jurisdiction of the land and mortgage register court is limited solely to the examination of the content and form of the petition, the documents attached, and the content of the land and mortgage register. The Supreme Court's case law indicates that land and mortgage register proceedings cannot be used to resolve legal disputes or serve as a basis for a decision, because the appropriate path for this is a trial. As the Supreme Court explained: 'The contentious procedure is by its nature better suited to resolving disputes, and the action regulated in Article 10 of the Land and Mortgage Register Act is in this

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[20] Judgment of the Supreme Court of 6 March 2019, Case No. I CSK 87/18, LEX No. 2630624.

[21] Thus, A. Maziarz-Charuza, 'Podstawa faktyczna…', op. cit., p. 191.

[22] J. Ignaczewski, P. Siciński, 'Struktura księgi wieczystej i jej elementy', in: Ignaczewski J., Siciński P., *Komentarz do wpisów w księgach wieczystych*, Warszawa, 2013; S. Rudnicki, *Ustawa o księgach*…, op. cit., footnote to Article 25.

case a way to bring the legal status disclosed in the land and mortgage register into compliance with the actual legal status.'[23]

Therefore, in the event of an inconsistency between the legal status of the real property disclosed in sections II, III and IV of the land and mortgage register and the actual legal status, a person whose right is not entered, is entered incorrectly, or is affected by an entry of a non-existent encumbrance or restriction, may request the removal of the inconsistency in accordance with Article 10(1) of the Land and Mortgage Register Act (LMRA). An action for the removal of an inconsistency between the legal status of the real property disclosed in the land and mortgage register and the actual legal status may be brought only by a person authorised to submit a petition for an entry in the land and mortgage register – these will therefore be persons indicated in Article 626^2 § 5 CCP, i.e. the owner of real property, the perpetual usufructuary, a person in whose favour the entry was made, or the creditor, if they hold a right that may be entered in the land and mortgage register.[24] In addition, in accordance with Article 10 LMRA, the court cannot take action *ex officio*.

It is worth citing the Supreme Court ruling of 17 November 2006, V CSK 284/2006, in which the Supreme Court indicated that an inconsistency between the legal status disclosed in the land and mortgage register may result, *inter alia*, from the entry of a right with a scope different from the actual one. As a result of disclosure in the land and mortgage register, such a right benefits from the presumption of existence and, importantly, in the scope in which it was entered (Article 3(1) LMRA). Thus, the claim for removal of an inconsistency between the legal status of real property disclosed in the land and mortgage register and the actual status serves to overturn the presumption of credibility of land and mortgage registers. On the other hand, the condition for the application of Article 626^{13} § 2 CCP is the correction of such errors in the entry that cannot cause an inconsistency between the legal status of the land and mortgage register and the actual legal status. Therefore, the institution regulated in Article 626^{13} § 2 CCP cannot replace an action to determine the content of the land and mortgage register in conformity with the actual legal status.[25]

At the same time, it should be borne in mind that the action provided for in Article 10(1) LMRA, which is aimed at changing the legal status disclosed in the content of the land and mortgage register, cannot, by its nature, concern entries in section I-O. Section I-O of the land and mortgage register is not intended for entries of rights, but for entering actual data concerning the number, area, location and manner of use of the real property. The content of entries in this section should be consistent with the data from the real property cadastre; these entries are not subject to the presumption of truthfulness under Article 3 LMRA and may be corrected in accordance with Article 626^{13} § 2 CCP *ex officio* or upon request or, in the event of inconsistency between the data in the real property cadastre and the designation

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[23] Thus, the Supreme Court ruling of 27 July 2010, II CSK 122/10, LEX No. 607251.

[24] I. Heropolitańska, 'Niezgodność treści księgi wieczystej', in: Heropolitańska I., *Prawne zabezpieczenia zapłaty wierzytelności*, Warszawa, 2014, LEX/el.

[25] II CZ 91/17, LEX No. 2439957.

of the real property in section I-O of the land and mortgage register, on the basis of Article 27 LMRA.[26]

This provision, as *lex specialis* in relation to Article 626[13] § 2, concerns the correction of the designation of the real property in section I-O and implements the postulate of a strict connection between the data covered by the content of entries in this section and the data of the land and building cadastre. These defects do not cause inconsistency between the content of entries in the land and mortgage register and the actual legal status, and the data of the land and building cadastre are the starting point.

The opinion prevailing in the Supreme Court case law, that the inadmissibility of a cassation appeal is inadmissible in this type of cases, should be endorsed.[27] As explained, an entry correcting the designation of the real property in the land and mortgage register based on the data from the real property cadastre does not prejudge the right of ownership, is not covered by the guarantee of public faith in land and mortgage registers, and does not cause the content of the land and mortgage register to be inconsistent with the actual legal status. The correction provided for in Article 27 LMRA serves only to implement the postulate of a close connection between the data contained in section I-O of the land and mortgage register and the data from the real property cadastre. An authorised person may at any time request a correction of the data concerning the designation of the real property, which also supports the view that the ruling on this correction does not have the nature of a resolution ending the proceedings in the case.[28]

Therefore, as doctrine and case law rightly assume, entries in section I-O of the land and mortgage register do not establish the legal status of the real property. However, in a situation where, as a result of undisclosed changes in the legal status, the land and mortgage register includes a separated part of real property to which the right is held by a person other than the one entered, and that part constitutes a distinct, separate real property within the meaning of Article 46 § 1 CC, the defectiveness of the land and mortgage register does not concern the data contained in section I-O, but the erroneous entry in section II. In such a case, the application of the public faith in the land and mortgage register is not excluded. As the Supreme Court explained, in such a case, 'the entry/deletion of the designation disclosed in section I-O of a given land and mortgage register must be perceived as one concerning the rights of the person entered in section II of that land and mortgage register and the rights of a third party not previously disclosed in the

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[26] Cf. the Supreme Court ruling of 15 April 1997, I CKN 26/97, LEX No. 30900.

[27] Cf. the Supreme Court rulings: of 13 January 1998, II CKN 529/97, *OSNC*, 1998, No. 7–8, item 128, 17 December 2001, IV CKN 1369/00, unpublished, and of 13 November 2014, V CZ 74/14, unpublished.

[28] The Supreme Court ruling of 21 March 2018, V CZ 12/18, LEX No. 2495974; the Supreme Court ruling of 8 July 2003, IV CZ 74/03, unpublished; the Supreme Court ruling of 13 January 1998, II CKN 529/97, *OSNC*, 1998, No. 7–8, item 128; P. Borkowski, J. Trześniewski-Kwiecień, in: Ereciński T., Lubiński K. (eds), *System Prawa…*, op. cit.; H. Ciepła, E. Bałan-Gonciarz, *Ustawa o księgach…*, op. cit., p. 219; A. Maziarz-Charuza, *Skarga na orzeczenie…*, op. cit., p. 144. See P. Siciński, 'Zgodność oznaczenia nieruchomości w księdze wieczystej prowadzonej w systemie informatycznym z danymi katastralnymi', *Nowy Przegląd Notarialny*, 2004, No. 1, pp. 26 et seq.

land and mortgage register, and cannot be the result of a correction pursuant to Article 626[13] § 2 CCP or Article 27 LMRA, but requires reconciliation in accordance with Article 10 LMRA.'[29]

NATURE OF RECTIFICATION OF THE ENTRY ERRORS

In the context of Article 626[13] § 2 CCP, doubts may also arise, *inter alia*, regarding the nature of the rectification of entry errors. There appears to be agreement that rectification is not an entry but is made on the basis of a ruling.[30] Undoubtedly, the ruling on rectification is appealable, though the debate concerns the type of appeal available if the court makes the correction. According to the first view, an appeal may be lodged against the given decision, treated as a ruling on the merits of the case.[31] In this respect, it is argued that rectification is of a substantive nature and constitutes one of the rulings concluding the proceeding.[32] The second view holds that the ruling on the removal of the entry error in the land and mortgage register proceedings constitutes the equivalent of the procedural regulation under Article 350 CCP, and therefore a complaint remains the appropriate means of appeal.[33]

Case law indicates that a judgment issued based on Article 626[13] § 2 is not a resolution of a proceeding concerning the subjective rights related to the land and mortgage register system; it does not have the attribute of a ruling ending the proceeding within the meaning of Article 519[1] CCP, and therefore it is not subject to a cassation appeal.[34] As a result, the ruling issued pursuant to Article 626[13] § 2 CCP is not a ruling on the merits of the case within the meaning of Article 519[2] § 1 CCP.[35]

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[29] Thus, the Supreme Court ruling of 17 November 2006, V CSK 284/06, LEX No. 607575; A. Maziarz-Charuza, *Postępowanie wieczystoksięgowe*…, op. cit., p. 153.

[30] E. Jefimko, 'Postępowanie wieczystoksięgowe…', op. cit., pp. 55–56.

[31] Cf. J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 3. Postępowanie rozpoznawcze*, 5th edn, Warszawa, p. 438; K. Flaga-Gieruszyńska, in: Zieliński A. (ed.), *Komentarz do kodeksu postępowania cywilnego*, Warszawa, 2012, Article 626-13, margin number 2.

[32] J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 3. Postępowanie rozpoznawcze*, 5th edn, Warszawa, 2016, p. 482, allows for an appeal and points to the controversial nature of the issue regarding the admissibility of a cassation appeal; in turn, E. Gniewek, *Księgi wieczyste. Art. 1–582 KWU. Art. 626[1]–626[13] KPC. Komentarz*, Warszawa, 2017, p. 632, argues that this constitutes a decision on the merits of the case concluding the proceeding; similarly, T. Czech, *Księgi wieczyste i hipoteka. Komentarz*, Warszawa, 2014, p. 446; M. Kućka, in: Pisuliński J. (ed.), *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu wieczystoksięgowym. Komentarz*, Warszawa, 2014, p. 447.

[33] S. Kostecki, in: Rylski P. (editor-in-chief), Olaś A. (editor of part III), *Kodeks postępowania cywilnego. Komentarz*, 2nd edn, Warszawa, 2023; see A. Antkiewicz, in: Szanciło T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2023, Article 626[13], margin number 21; J. Zawadzka, in: Pisuliński J. (ed.), *Ustawa o księgach wieczystych i hipotece. Komentarz*, Warszawa, 2014, p. 1367; T. Demendecki, in: Jakubecki A. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. 4, Warszawa, 2012, p. 819; H. Ciepła, E. Bałan-Gonciarz, *Ustawa o księgach*…, op. cit., p. 220.

[34] See the Supreme Court rulings: of 21 January 2003, III CZ 128/02, LEX No. 77078, of 23 October 2013, IV CZ 67/13, LEX No. 1388477, and of 26 January 2018, II CZ 91/17, LEX No. 2439957.

[35] See the Supreme Court ruling of 20 March 2009, II CZ 15/09, unpublished.

Case law also states that a ruling of the court of second instance concerning the correction of a judgment, or a judgment issued in a non-contentious proceeding on the merits of the case that substantively alters that judgment, is subject to appeal by means of a cassation complaint.[36] It is worth mentioning the Supreme Court's position that if the court of second instance issues a ruling on the rectification of a judgment, but in fact changes the substance of that judgment, then such a ruling is subject to an appellate measure.[37] It is also worth referring to the judgment of 4 November 2010, IV CSK 188/10,[38] in which the Supreme Court explained that if the ruling of the court of second instance concerning the rectification of a judgment in fact changes the substance of that judgment, it is subject to appeal not by means of a complaint, but by means of an appeal or a cassation complaint, unless a cassation complaint is not available in the case.

With regard to the above issues, it should be noted that, as a result of the addition of Article 394 § 1(5[1]) CCP,[39] a complaint against a ruling of the court of first instance on the rectification or interpretation of a judgment, or their refusal, has acquired a devolutive nature, meaning it can be lodged with the court of second instance. Therefore, the legislator has included rulings on the rectification or interpretation of a judgment, or the refusal thereof, among the decisions that do not conclude proceedings in the case but can be appealed before the court of second instance. Such a conclusion may also be drawn from a systemic interpretation.

Formerly, it had a horizontal nature (it was available to a different composition of the court of first instance). This resulted from Article 394[1a] § 1(8), which was repealed as part of the amendment to the Code of Civil Procedure of 2023. The change in the regulations in this field should be assessed positively, because devolutive appeals ensure greater procedural guarantees, and therefore it should be a rule that a complaint against the ruling of the court of first instance may be lodged with the court of second instance.[40]

However, it should be noted that the provisions of the Code of Civil Procedure do not provide for a further complaint to the court of second instance. There is no such provision, either in the chapter on court sessions (Articles 148–163 CCP), or in the chapter on complaints (Articles 394–398 CCP). In such circumstances, taking into account the principle adopted in the Code of Civil Procedure, according to which a complaint against a ruling that does not conclude a proceeding may be lodged only in cases provided for by statute, it should be considered that such a complaint is inadmissible.[41] Therefore, it should be assumed that a cassation appeal is not

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[36] Cf. judgment of the Supreme Court of 4 November 2010, IV CSK 188/10, *OSNC*, 2011, No. 7–8, item 86.

[37] Judgment of the Supreme Court of 4 November 2010, IV CSK 188/10, LEX No. 672688; judgment of the Supreme Court of 6 February 2018, IV CSK 60/17.

[38] *OSNC*, 2011, No. 7–8, item 86 with a commentary by Z. Strus, 'Przegląd orzecznictwa', *Palestra*, 2011, No. 1–2, p. 124.

[39] Act of 4 July 2019 amending Act – Code of Civil Procedure and Certain Other Acts, Journal of Laws, item 1469, as amended.

[40] M. Dziurda, in: *Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023 roku*, Warszawa, 2023, Article 394, http://lex.sn.pl/#/commentary/587934181/731621 [accessed on 6 January 2024].

[41] K. Flaga-Gieruszyńska, A. Zieliński, *Kodeks postępowania cywilnego. Komentarz*, Warszawa, 2024 – Article 394; see the Supreme Court ruling of 7 October 1966, I CZ 104/66, Legalis.

available against the appellate court ruling on rectification of errors in the entry in the land and mortgage register pursuant to Article 626[13] § 2 CCP.[42]

Summing up this thread, although there is currently no doubt that the ruling of the court of first instance on the correction of a judgment is appealable by means of a complaint, such a nature cannot be attributed to the judgments of appellate courts, and for that reason a party cannot appeal in any way against a ruling on the correction of a judgment issued by the court of second instance. Exceptionally, however, it is admissible to appeal against the ruling on the correction of a judgment issued by the court of second instance by means of a cassation appeal, provided that there was an actual interference in the substantive sphere of the judgment, and thus contrary to the essence of rectification, which can only serve to correct obvious clerical errors and inaccuracies.

At the same time, just on the margin of present considerations, special attention should be drawn to the fact that correcting the basis of an entry and supplementing the content of an entry in the land and mortgage register by means of filling in an empty space in the land and mortgage register are two completely different activities.[43] Two judgments illustrate this problem very well.

In one of them, i.e. the Supreme Court ruling of 20 March 2009, II CZ 15/09,[44] the grounds for entry that had been formerly disclosed in the land and mortgage register were corrected. The rectification consisted in entering the correct court rulings instead of the incorrectly cited ones. The Supreme Court stated that, in the light of Article 626[13] § 2 CCP, the correction of a defect in the land and mortgage register entry concerning the citation of the grounds for making the entry is not excluded in cases where the entry was made in compliance with the actual legal status. Approving of this stance, the Supreme Court rightly explained in its ruling of 5 December 2008, III CZP 121/08, LEX No. 490497, that 'for determining the actual legal status of the real property, it is irrelevant whether the grounds for an entry that has become final and binding were correct. However, what is important is whether there were substantive grounds for making the entry and whether this entry is consistent with substantive law.'[45]

However, the situation will be different in the case where, as in the actual status of the case covered by the Supreme Court ruling of 26 January 2018, II CZ 91/17,[46] field 8.C of the land and mortgage register had not been filled in at all by the Regional Court when disclosing the mortgage in section IV of the land and mortgage register. In such a situation, there are no grounds for rectification of any error in the entry, because there is no entry to be corrected, as the field has not been filled in.[47] It is, of course, possible in such a situation to supplement its content, but only upon the appropriate request made by a participant in the proceeding.

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[42] The Supreme Court rulings: of 21 March 2018, V CZ 12/18, Legalis; of 12 January 2018, II CZ 97/17, Legalis; of 21 January 2003, III CZ 128/02, Legalis.

[43] M. Rzewuski, 'Sprostowanie usterki…', op. cit., pp. 75–78.

[44] LEX No. 738343.

[45] The Supreme Court ruling of 5 December 2008, file number III CZP 121/08, LEX No. 490497.

[46] LEX No. 2439957.

[47] Thus, righly: M. Rzewuski, 'Sprostowanie usterki…', op. cit., pp. 75–78.

Therefore, it should be emphasised that the scope of the institution of rectification covers only obvious inaccuracies, clerical or calculation errors, or other mistakes. Their obvious nature means that they must arise as a result of the court's actual and unquestionable will not being appropriately reflected in the judgment; that they are objectively and undoubtedly noticeable in the content of the judgment or result directly from the juxtaposition of this content with the content of the files; and that they arose due to the technical imperfection in the wording of the court's decision, the presentation of the court's position in an incorrect form or in an inaccurate, and therefore incomplete and imprecise manner.[48]

Thus, in this respect, it is necessary to take into account the correct position of the Supreme Court, which clearly draws attention to the need to examine each time the effects of a specific entry on the subjective rights in relation to the land and mortgage register.[49]

ADMISSIBILITY OF RECTIFICATION OF A JUDGMENT BY A REFERENDARY

In the context of the considerations conducted, attention should be paid to an important issue concerning the admissibility of correcting a judgment by a court referendary.

A court referendary [in Polish: *referendarz*] is an independent judicial body performing functions of a judicial nature, but not belonging to the judicial authority and not exercising the administration of justice.[50]

There is a stance developed in the doctrine that the activities entrusted to referendaries are in fact jurisdictional activities, but they do not constitute the administration of justice in the strict sense, because it is the exclusive privilege of courts and independent judges, but should be classified as auxiliary activities of the administration of justice.[51]

In accordance with Article 47^1 CCP, a court referendary may perform activities in civil proceedings in cases specified by statute. However, the provision does not constitute grounds for the performance of specific activities by a referendary, as this always results from a special provision.[52]

The competences of a court referendary in non-contentious proceedings result from Article 509 CCP. In this respect, what should be noted is the generally unlimited competence of a referendary in the examination of cases within the scope of land and mortgage register proceedings and in registration-related matters.

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[48] Cf. judgment of the Supreme Court of 17 June 2014, I CSK 422/13, LEX No. 1532772.

[49] See the Supreme Court ruling of 21 May 2004, V CZ 42/04, *OSNC*, 2005, No. 5, item 93.

[50] Cf. the Supreme Court resolution of 19 September 2002, III CZP 56/02, *OSNC*, 2003, No. 6, item 80; M. Misztal-Konecka, 'Kompetencje referendarza sądowego w cywilnym postępowaniu egzekucyjnym a wymierzanie sprawiedliwości', *Monitor Prawniczy*, 2017, No. 8.

[51] S. Rudnicki, 'Nowy urząd referendarza sądowego – głos w dyskusji', *Monitor Prawniczy*, 1996, No. 11, p. 395.

[52] P. Rylski: (editor-in-chief), A. Olaś (editor of part III), *Kodeks postępowania cywilnego. Komentarz*, 2nd edn, Warszawa, 2023, Article 47-1 CCP.

Under Article 626[8] §§ 6 and 8 CCP, 'in the land and mortgage register proceeding, an entry in the land and mortgage register is a judgment (…)', and 'an entry in the land and mortgage register signed by a judge or a court referendary is deemed to have been made at the moment of its entry in the central database of land and mortgage registers.' Consequently, the position of a court referendary has been equated with the position of the court examining a specific case. Thus, a referendary has all court powers to examine a case.

Therefore, the possibility of correcting a court referendary's judgment may arise when an error is their's and not the party's. The rectification of a referendary's judgments may take place *ex officio* or at the request of a party, and such a request may be filed at any time regardless of the validity of a given judgment, because the rectifying judgment does not constitute a change or annulment of the judgment. Any entity affected by the judgment has the right to file such a request.

Doubts that may arise in connection with this issue concern the question of which body is competent to perform the activity of rectifying a judgment issued by a court referendary in a proceeding. The problem may concern a payment order, decisions, and rulings that a court referendary may issue.

On the one hand, it is indicated that a court referendary does not have the competence to issue a ruling on the rectification of a judgment in a procedural mode. According to A.M. Arkuszewska, the fact that the legislator has provided for a complaint against a certain type of judgments issued by a court referendary does not mean that it has enabled him to issue them in a proceeding. A court referendary may issue judgments and rulings only in cases expressly specified in the provisions laid down by statute. For this reason, the author believes that only courts are entitled to correct or interpret a judgment issued by a court referendary or to refuse them.

T. Wiśniewski[53] presents a different view. According to him, the material scope of a court referendary's competence includes issuing judgments on rectification or interpretation of judgments or their refusal, referred to in Article 394 § 1(5) CCP, since a complaint about the judgment may be lodged in accordance with Article 398[22] CCP. Therefore, these provisions may constitute legal grounds for issuing such judgments by court referendaries, because they are the only ones that clearly concern this issue. At the same time, such interpretation of the indicated provisions of the Code of Civil Procedure does not violate the provisions of Article 47[1] CCP. This approach to the analysed issue suggests that Article 398[22] § 1 CCP provides grounds for extending the competences of a court referendary with regard to these activities; however, we do not find in this position an answer to the question of whether this applies to all proceedings or only to those that a court referendary may conduct entirely independently.

In addition, the postulate of the rationality of the legislator's actions is indicated, and thus, since a court referendary can issue a judgment on their own, then, in accordance with the *argumentum a maiori ad minus*, they can all the more correct it or

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53 T. Wiśniewski, in: Dolecki H., Wiśniewski T. (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2013, pp. 273 et seq.; T. Wiśniewski T., in: Dolecki H., Wiśniewski T. (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2010, p. 231.

subject it to interpretation based on the principles provided for in the provisions of the Code of Civil Procedure.[54] It seems that this is also the judicial practice, although it should be noted that it is not directly reflected in the provisions of the Code of Civil Procedure. Bearing in mind the postulate of a restrictive interpretation of the provisions on the competences of referendaries, one should rather conclude that if the legislator does not directly grant such competences to referendaries, then only the court may perform such an action. Therefore, Article 398^{22} CCP may be applied only to those proceedings that a court referendary may conduct as a whole independently, and such proceedings concerning the substance of the case are not available in the procedure. Thus, the rectification or interpretation of a judgment issued by a court referendary should only be made by way of a ruling issued by the court.[55]

It should also be noted that the legislator, in a manner different from that provided for in Article 626^{13} CCP, based on Article 18 Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in the IT System,[56] allows referendaries to correct any errors that occurred during the migration of the land and mortgage register. As the Supreme Court explained in its rulings, 'it is a special mode, different from the way of rectifying an entry provided for in Article 626^{13} § 2 CCP, because it does not contain a limitation on the possibility of correcting migration related errors *ex officio* only to such defects that cannot cause the content of the land and mortgage register to be inconsistent with the actual legal status.'[57] It should be noted, however, that the correction of migration-related errors applies to situations where they arose as a result of transferring the content of the previous register to its electronic form. If the errors had existed in paper registers and, as a result of their migration, had occurred in the register maintained in the IT system, the grounds for rectification should be Article 626^{13} CCP and not Article 18(1) of the Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in the IT System.

Moreover, it is not possible to exclude such errors in the course of land and mortgage register migration that, in terms of effects, led to the acquisition of rights that were incorrectly disclosed in the land and mortgage register but did not actually exist. However, the issue does not fall within the scope of the court's jurisdiction in the land and mortgage register proceedings, and in such a situation it will be necessary to apply the action provided for in Article 10 LMRA.[58] It is also rightly pointed out in the Supreme Court's case law that the possibility of correcting a migration-related error on the basis of Article 18 (1) of the Act on transferring the content of the land and mortgage register to the land and mortgage register maintained in the IT system

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[54] A.M. Arkuszewska, *Referendarz sądowy w postępowaniu cywilnym*, Warszawa, 2011, p. 231.

[55] Also see K. Markiewicz, in: Gudowski J. (ed.), *System Prawa Procesowego Cywilnego. Tom 3. Środki zaskarżenia. Część I*, Warszawa, 2013, pp. 583 et seq.

[56] Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in an IT System of 14 February 2003, Journal of Laws, No. 42, item 363, as amended.

[57] The Supreme Court ruling of 13 August 2015, I CSK 766/14, LEX No. 1771235; judgment of the Supreme Court of 6 June 2019, II CSK 224/18, LEX No. 2688850.

[58] Cf. the Supreme Court ruling of 13 August 2015, I CSK 766/14, LEX No. 1771235.

'does not cause the exclusion of the application of the guarantee of public faith in the credibility of land and mortgage registers (Article 5 LMRA) in relation to the content of the land and mortgage register maintained in the telecommunications system, provided that at the moment a legal activity is performed the error has not been corrected yet. A contrary conclusion would in fact destroy the essence and purpose of transferring land and mortgage registers from the paper form to the telecommunications system'.[59]

There is one more situation to be considered, in which an entry does not contain a signature.

In accordance with Article 626^8 § 3 CCP, in land and mortgage register proceedings, an entry in the land and mortgage register is a judgment, and therefore it shall be signed by the court bench, which is a judge (Article 509 in conjunction with Article 324 § 3 CCP), or a court referendary (Article 509^1 § 1 CCP). Moreover, § 10(1)(6) of the Regulation[60] specifies that an entry should include 'the first and last name, the position of the judge or court referendary, and their legible signature'. Therefore, in a situation where the entry does not include the signature of the judge or court referendary, it should be assumed that such an entry does not exist. As a result, in such a situation, one cannot speak of any error or defect in the entry that would be subject to correction under Article 626^{13} CCP.[61]

CORRECTION OF ERRORS IN DELETED ENTRIES

The last issue that may still occur in the context of the discussed topic concerns the correction of errors in deleted entries. There is no doubt that deletion is also an entry in the land and mortgage register (Article 626^8 § 7). In addition, Article 3(2) LMRA contains a legal presumption that the deleted right does not exist. The scope of this presumption does not include the reason for deletion, i.e. whether the right has expired or has never come into being.[62] Therefore, it should be assumed that since a deleted entry does not exist, it is not possible to correct errors in deleted entries either. By the way, it should be noted that the IT system also does not provide for such a possibility. Thus, it has been rightly pointed out in the literature that 'the decision to dismiss the petition for such correction should be based on the provisions of a statute and not derived from the imperfection of the system.'[63]

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[59] Similarly, judgment of the Supreme Court of 6 June 2019, II CSK 224/18, LEX No. 2688850.

[60] Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001, Journal of Laws of 2001, No. 102, item 1122, as amended.

[61] A. Oleszko, *Obrót cywilnoprawny*…, op. cit.

[62] Thus, also the Supreme Court in its ruling of 25 April 2012, II CSK 461/2011, *OSNC*, 2013, No. 1, item 8.

[63] A. Stefańska, *Elektroniczna księga wieczysta*, LexisNexis, 2011.

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NOTES ON THE AUTHORS

Radosław Koper	Professor LLD hab. Radosław Koper, Faculty of Law and Administration, University of Silesia (Poland)
Jacek Kosonoga	LLD hab., Professor of Lazarski University, Faculty of Law and Administration, Lazarski University (Poland)
Sławomir Żółtek	LLD, Professor of University of Warsaw, Faculty of Law and Administration, University of Warsaw (Poland)
Blanka J. Stefańska	LLD hab., Professor of Lazarski University, Lazarski University in Warsaw (Poland),
Agata Ziółkowska	LLD, Assistant Professor at the Department of Criminal Law of Nicolaus Copernicus University in Toruń (Poland), reserve corporal
Karol Oleksy	LLD, Department of Criminal Procedure, Faculty of Law and Administration, University of Warsaw (Poland)
Agnieszka Ziółkowska	LLD hab., Professor of the University of Silesia, Faculty of Law and Administration, University of Silesia in Katowice (Poland)
Magdalena Gurdek	LLD hab., Professor of the Humanitas University, Institute of Legal Sciences, Humanitas University in Sosnowiec (Poland)
Bartosz Sierakowski	LLD, Institute of Bankruptcy and Restructuring Law and Research into Insolvency, Lazarski University in Warsaw (Poland)
Adam Kozień	LLD, MBA, Department of Administrative Procedure, Faculty of Law and Administration, Jagiellonian University in Krakow (Poland)
Małgorzata Sekuła-Leleno	LLD, Assistant Professor at the Department of Law and Civil Procedure of Lazarski University in Warsaw (Poland), member of the Supreme Court Research and Analyses Office

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