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CONTROVERSY AND INCONSISTENCY OF REGULATIONS CONCERNING THE CRIMINAL LIABILITY OF THE SO-CALLED SMALL CROWN WITNESS

VIOLETTA KONARSKA-WRZOSEK*

DOI 10.2478/in-2025-0020

Abstract

The author argues for the need to remove the prosecutor's power and give back to the court the autonomy with regard to the competence to decide on the possibility of imposing a lighter punishment on a perpetrator who, while participating in a crime with others, cooperated with law enforcement authorities and fulfilled the conditions for obtaining the status of the so-called small crown witness as referred to in Article 60 § 3 of the Penal Code. The paper also highlights the inconsistencies between Articles 60 § 3, 61 and 57 § 5 of the Penal Code regarding the sentencing of the so-called small crown witnesses. It further points to the legitimacy of repealing the specific conflict rule set out in Article 57 § 5 of the Penal Code, and the advisability of narrowing the grounds justifying the use of waiver of punishment with regard to the small crown witness under Article 61 § 1 of the Penal Code. In this respect, a specific proposal is formulated to amend Article 61 § 1 of the Penal Code in order to ensure rationality and consistency in regulating the criminal-law situation of perpetrators holding the status of small crown witness.

Key words: so-called small crown witness, amendment to the Penal Code of 7 July 2022, draft repeal of amendments, prosecutor's competences, court's competences, extraordinary mitigation of punishment, waiver of punishment, conflict rule in Article 57 § 5 of the Penal Code

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The extensive amendment to the Penal Code by the Act of 7 July 2022 (Journal of Laws, item 2600), which entered into force on 1 October 2023, primarily concerned the statutory and judicial dimensions of punishment. As a result, statutory penalties were significantly tightened, while judicial discretion in sentencing was correspondingly curtailed. This undermined the principle of individualisation of punishment and limited the courts' ability to ensure the rational administration of criminal justice. The amendments also deepened the casuistry of the Penal Code provisions, making them increasingly difficult to interpret, and gave rise to normative and politico-criminal incoherence.[1] This is particularly evident in the provisions of Articles 60 § 3, 57 § 5, and 61 § 1 of the Penal Code, which govern penalties for the so-called small crown witness. As stated in the Explanatory Memorandum to the amendments, the general aim was to strengthen criminal law protection against the most serious categories of offences by tightening liability for crimes committed within organised criminal groups. At the same time, the amendment to Article 60 § 3 of the Penal Code, regulating punishment for small crown witnesses, was intended to align their treatment with that provided for informants under Article 60 § 4, in particular by making extraordinary mitigation of punishment dependent on a motion from the prosecutor.[2]

The draft amendment prepared by the Criminal Law Codification Commission, referred to as the 'remedial bill'[3] concerning changes made to the Penal Code by the amendment of 7 July 2022, provided for their 'repeal', *inter alia*, in the area of provisions concerning the institution of the small crown witness. A parallel amendment prepared by the Ministry of Justice, though narrower in scope, also provides for a return to the previous wording of Article 60 § 3 of the Penal Code,[4] thereby reinstating the mandatory imposition of an exceptionally lenient sentence on a small crown witness irrespective of a prosecutor's motion. This draft also envisages the repeal of Article 57 § 5 of the Penal Code, which established a special conflict rule for a repentant accomplice in situations where grounds for both

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[1] This is a fairly common view among criminal law theorists, see for example R. Zawłocki, 'Nowela „lipcowa" Kodeksu karnego, czyli nowe restrykcyjne prawo karne', *Monitor Prawniczy*, 2023, No. 2, pp. 80–82 and 84.

[2] See Explanatory Memorandum to the draft of the so-called Remedial Act: *Uzasadnienie projektu tzw. ustawy naprawczej datowanej na 14 czerwca 2024 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, KKPK – projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, Sejm print No. 2024, pp. 1 and 31; http://www.gov.pl/web/sprawiedliwosc/projekty-aktów-prawnych [accessed on 16 February 2025].

[3] Draft of the so-called Remedial Act dated 14 June 2024 amending the Penal Code and Certain Other Acts, Criminal Law Codification Commission: *Projekt tzw. ustawy naprawczej datowanej na 14 czerwca 2024 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, KKPK – projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*; http://www.gov.pl/web/sprawiedliwosc/projekty-aktów-prawnych [accessed on 16 February 2025].

[4] See draft of 28 October 2024 of the Act amending the Penal Code Act, the Code of Criminal Procedure Act and Certain Other Acts: *Projekt z dnia 28 października 2024 r. ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw*, document 689991.docm.UD 153; http://legislacja.rcl.gov.pl/projekt 12390959 [accessed on 16 February 2025].

extraordinary aggravation and extraordinary mitigation of punishment applied concurrently.

However, these remain legislative proposals of uncertain future. *De lege lata*, Article 60 § 3 of the Penal Code, as amended by the 2022 Act, remains in force. The original wording of Article 61 §§ 1 and 2 is also still binding, under which courts retain the possibility of waiving the imposition of a penalty, either partially or in full, in respect of small crown witnesses. None of the prepared drafts provide for amendments to this provision. It is therefore appropriate not only to draw attention to the urgent need for legislative change but also to set out the reasons and direction for such reform.

CURRENT LEGAL SITUATION OF AN ACCOMPLICE IN THE COMMISSION OF A CRIME WHO HAS COOPERATED WITH LAW ENFORCEMENT AUTHORITIES

Pursuant to Article 60 § 3 of the Penal Code, effective from 1 October 2023 and amended by the Act of 7 July 2022, the court, at the motion of the prosecutor, shall apply extraordinary mitigation of punishment, and may even conditionally suspend its enforcement, in respect of a perpetrator who acted in concert with others in committing an offence, if he or she discloses to the law enforcement authorities information about the persons involved and the relevant circumstances of its commission (i.e. fulfils the criteria of a small crown witness). The current wording of Article 60 § 3 means that cooperation with law enforcement by a perpetrator who has committed an offence in criminal conspiracy no longer guarantees such a repentant offender an exceptionally lenient punishment by direct force of law. Instead, the court's competence to impose such a sentence is dependent on a prosecutor's motion. By its very nature, this solution is likely to result in a significant reduction in the number of offenders willing to cooperate with law enforcement, thereby adversely affecting the detection of criminal networks and the effective punishment of all those involved – a key objective in combating crime.[5] It should be noted that the prosecutor is not obliged to apply for extraordinary mitigation of punishment for a 'repentant perpetrator' who assists law enforcement authorities in gathering evidence in a case and identifying other accomplices (i.e. in the broader context of the case), even if the perpetrator in question meets all the conditions necessary to obtain the status of the so-called small crown witness. Nowhere in the Act is there a provision that would require the prosecutor to submit such a request. As a result, this has been left to the prosecutor's discretion, which appears to represent an excessive concentration of power in the hands of one of the parties to criminal

[5] Similarly the Iustitia Association of Polish Judges in its Opinion of 27 September 2021 to the draft law (UD 281) enacted on 7 July 2022 – see: *Opinia Zespołu ds. Prawa Karnego Stowarzyszenia Sędziów Polskich IUSTITIA dotycząca projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z dnia 16 września 2021 roku*, pp. 9–10; http://legislacja.rcl.gov.pl/projekt/12351306 [accessed on 16 February 2025].

proceedings and, at the same time, undermines the purpose of introducing the institution of the so-called small crown witness, namely, to break criminal solidarity and to expose all, not merely some, of the perpetrators of a crime,[6] thereby enabling their appropriate punishment. Making the possibility of extraordinary mitigation of punishment by the court conditional on a motion by the prosecutor means that, even if the case file shows that an accomplice meets the criteria required to obtain the status of the so-called small crown witness, the court will not be able to apply extraordinary mitigation on this legal basis when passing sentence, should the prosecutor fail to submit such a request. The court could only apply extraordinary mitigation of punishment on other legal grounds provided for in Article 60 § 1 or § 2 of the Penal Code, if one of the conditions specified therein is fulfilled.

POSSIBILITY OF CONDITIONAL SUSPENSION OF THE SENTENCE OF IMPRISONMENT FOR AN ACCOMPLICE WHO MEETS THE REQUIREMENTS FOR OBTAINING THE STATUS OF THE SO-CALLED SMALL CROWN WITNESS

The suspension of the prison sentence imposed on a perpetrator who meets the requirements to obtain the status of the so-called small crown witness was also made conditional upon the prosecutor's motion in a non-standard situation, i.e. where the court imposes a sentence exceeding one year and the other formal restrictions on the conditional suspension of the sentence, as provided for in Article 69 § 1 of the Penal Code, apply in the particular case. Under the previous legal regime, the initiative to apply this probationary measure could be independent of the prosecution and originate solely from the court. The solutions currently adopted in Article 60 § 3 of the Penal Code, which make the content of court judgments concerning the imposition of penalties dependent on the position of the prosecuting party, in the person of the public prosecutor, infringe the constitutional principle of the separation of powers (see Article 10 § 1 of the Constitution), the principle of the administration of justice by courts laid down in Article 175(1) of the Constitution, and judicial independence, referred to in Article 178(1) of the Constitution. This is because the court is obliged to issue a conviction with extraordinary mitigation of the penalty in accordance with the will and motion of the prosecutor, the submission of which constitutes a *sine qua non* condition for the application of a conditional suspension of the execution of the imposed custodial sentence, without the restrictions provided for in Article 69 § 1 of the Penal Code.[7]

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[6] See Explanatory Memorandum of the Government's Draft Penal Code: 'Projekt kodeksu karnego. Uzasadnienie', in: *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warszawa, 1997, p. 155.

[7] See *Opinia Zespołu…*, op. cit., pp. 10–11 and *Uzasadnienie projektu tzw. ustawy naprawczej…*, op. cit., p. 33; and J. Majewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, pp. 438–439.

REQUIREMENTS FOR COURTS TO WAIVE THE IMPOSITION OF A PENALTY

This absolute subordination of the courts to the prosecutor's will in determining the penalty – with or without the application of extraordinary mitigation of punishment – as well as in the possibility of conditionally suspending the execution of the imposed custodial sentence despite the restrictions specified in Article 69 § 1 of the Penal Code, automatically extends to the courts' ability to exercise their judicial power to refrain from imposing a penalty on an accomplice referred to in Article 60 § 3 of the Penal Code, as provided for in Article 61 of the Penal Code. This provision has not been formally amended, but it must now be interpreted differently. It grants courts – 'as if' on the basis of their discretionary power under the law (see Article 53 § 1 of the Penal Code) – the competence to apply, in the case specified in Article 60 § 3 of the Penal Code, the benefit of waiving the imposition of a penalty, i.e. a more far-reaching reduction of the negative consequences of the offence committed than imposing a penalty with extraordinary mitigation, possibly together with the conditional suspension of the custodial sentence. However, a prerequisite for the court to refrain from imposing a penalty is not only that the accomplice meets the requirements for obtaining the status of the so-called small crown witness as specified in Article 60 § 3 of the Penal Code, but also the submission by the prosecutor of a motion for the application of extraordinary mitigation of punishment to the perpetrator who has chosen to cooperate with law enforcement authorities. The court's ability to exercise its competence to waive punishment for an accomplice depends on the submission by the prosecutor of such a request, as Article 61 § 1 of the Penal Code refers to 'the case specified in Article 60 § 3' of the Penal Code as the second legal basis for applying the institution of waiver of punishment. This means that it is necessary to consider the entirety of the provisions under Article 60 § 3 of the Penal Code, rather than focusing solely on the conditions relating to the perpetrator's acting in concert with others and their conduct after committing the offence. The omission of the condition requiring the prosecutor's prior submission of a motion to apply extraordinary mitigation of punishment would be justified only if Article 61 § 1 of the Penal Code, which authorises courts to waive the imposition of a penalty, referred to 'the perpetrator (accomplice) specified in Article 60 § 3 of the Penal Code', rather than to 'the case specified in Article 60 § 3 of the Penal Code', that is, to the factual situation described therein, which also encompasses the submission of a motion with specific content by the prosecutor. In this instance, therefore, the courts were similarly deprived of the ability to rule at their discretion, as it is the prosecutor – not the court – who effectively determines whether a perpetrator cooperating with law enforcement authorities will receive more lenient treatment. Such an arrangement is difficult to accept.

Under the previous legal regime, pursuant to Article 60 § 3 of the Penal Code, courts were obliged to apply extraordinary mitigation of punishment to an accomplice cooperating with law enforcement authorities. They were also authorised to conditionally suspend the imposed prison sentence, even if it exceeded the limits set out in the general provision of Article 69 § 1 of the Penal Code and irrespective of

the other restrictions provided therein, as well as to apply an even more favourable measure in the form of waiving the sentence. This preserved the principle of judicial discretion in adjudication and affirmed that courts are bound only by the provisions of the Constitution and statutory law. Furthermore, the guarantee function of criminal law was upheld, whereby any person participating in the commission of an offence and meeting the conditions set out in Article 60 § 3 of the Penal Code would be granted the status of the so-called small crown witness and could expect significantly more lenient treatment in sentencing, to be decided exclusively by an independent court.

THE PURPOSE OF NARROWING THE GROUNDS JUSTIFYING THE USE OF THE INSTITUTION OF WAIVER OF PUNISHMENT FOR THE SMALL CROWN WITNESS REFERRED TO IN ARTICLE 60 § 3 OF THE PENAL CODE

This does not mean, however, that the proposed return to the previous legal framework in respect of the provisions governing the legal situation of the so-called small crown witness will be sufficient from the point of view of a rational and coherent regulation concerning the sentencing of such a 'repentant' perpetrator who cooperates with others in the commission of a crime. This concerns the grounds set out in Article 61 § 1 of the Penal Code, which authorise courts to apply more far-reaching leniency to an offender cooperating with law enforcement authorities, through the possible application of the institution of waiver of punishment. It should be noted that requiring courts to impose a penalty on the so-called small crown witness – albeit with extraordinary mitigation – necessitates compliance with the appropriate methods of mitigation specified in Article 60 § 6 of the Penal Code. These methods vary depending on the type of penalty prescribed for a given offence, which reflects a generalised assessment of its degree of social harmfulness. The possibility of waiving punishment in the context of extraordinary mitigation arises only in relation to relatively minor offences. *De lege lata*, under Article 60 § 6(5) and §§ 7 and 7a of the Penal Code, waiver of punishment – albeit incomplete, as it entails the imposition of at least one penal measure, a compensatory measure, or forfeiture – is permitted only in the case of misdemeanours, and only minor ones. Specifically, this applies to convictions for participation in one of the following three categories of misdemeanours: (1) those punishable by imprisonment for a term not exceeding two years; (2) those punishable by an alternative sanction providing for imprisonment of up to two years, restriction of liberty, or a fine; (3) those punishable exclusively by a custodial sentence or sentences. However, the possibility of waiving punishment under Article 61 of the Penal Code has been left entirely to the discretion of the court, without any additional conditions[8] beyond

[8] P. Gensikowski seems to take a different position, cf. P. Gensikowski, 'Odstąpienie od ukarania tzw. małego świadka koronnego', *Prokuratura i Prawo*, 2011, No. 2, p. 24. Cf. on this subject Z. Ćwiąkalski, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Tom I. Komentarz do art. 53–116*, Warszawa, 2016, pp. 213 and 214.

those generally set out in Article 60 § 3 of the Penal Code. This means that courts may, and will continue to be able to, sentence the so-called small crown witness with full or partial waiver of punishment (limited to the imposition of a criminal measure, forfeiture, or compensatory measure), regardless of the type or seriousness of the offence or the form of perpetration. Naturally, courts will be required to take into account the general sentencing principles set out in Article 53 § 1 of the Penal Code. The provision in Article 61 § 1 of the Penal Code, which states that the court may, in relation to an accomplice who meets the conditions of the so-called small crown witness under Article 60 § 3 of the Penal Code, apply the institution of waiver of punishment – particularly where the perpetrator's role in the offence was minor and the information provided contributed to the prevention of another offence – does not impose any restriction on the use of such a far-reaching form of sentence degression, as it merely offers an illustrative example.[9] It is entirely within the court's discretion to determine whether to limit leniency towards the small crown witness to an extraordinary reduction of the sentence or to apply the institution of full or partial waiver of punishment. At this point, the question arises whether such extensive judicial discretion is an appropriate solution, and whether, in the interests of consistency in national case law, it would not be advisable to establish clear statutory criteria that a so-called small crown witness must satisfy in order for the court to refrain from imposing a penalty. Given that the second part of Article 61 § 1 of the Penal Code constitutes an entirely independent legal basis empowering courts to impose a sentence by applying the institution of waiver of punishment – whereby an individual acting in concert with others in committing an offence may bear only minimal negative consequences – it appears that a statutory limitation on its scope of application would be advisable.[10] While the legislator's observation and emphasis on the need for particularly lenient treatment of an accomplice whose role was subordinate and whose information contributed to the prevention of another offence, thereby protecting various legal interests, is entirely justified, these circumstances should be expressly identified as the sole, specific, and alternative grounds entitling courts to apply the institution of waiver of punishment.

Accordingly, the amended wording of Article 61 § 1 of the Penal Code could read as follows: *The court may refrain from imposing a penalty in cases provided for by law and in the case specified in Article 60 § 3, where the perpetrator's role in the commission of the offence was minor or the information provided by him/her contributed to the prevention of another offence*.[11]

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[9] V. Konarska-Wrzosek, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 524. A similar thesis is also formulated by Z. Ćwiąkalski in: Wróbel W., Zoll A. (eds), *Kodeks karny…*, op. cit., p. 214; see also W. Zalewski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Tom I. Część ogólna. Komentarz. Art. 1–116*, Warszawa, 2021, pp. 964–965.

[10] The legitimacy of narrowly applying the institution of waiver of punishment in relation to the so-called small crown witness is also recognised by G. Łabuda, in: Giezek J. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2016, LEX.

[11] I proposed such a legislative amendment as early as 25 years ago, see V. Konarska-Wrzosek, 'Prawnokarne środki walki z przestępczością zawodową i zorganizowaną przewidziane w kodeksie karnym', *Prokuratura i Prawo*, 2000, No. 3, p. 47.

At present, these two distinct conditions must be met cumulatively, and this represents only one of many possible scenarios authorising the court to grant such lenient treatment. Other circumstances considered may not, in fact, be sufficiently compelling to justify refraining from the imposition of a penalty.

The wording I propose for Article 61 § 1 of the Penal Code, which provides a specific legal basis granting courts the power to refrain from imposing a penalty on a perpetrator holding the status of the so-called small crown witness, appears reasonable, appropriate, and consistent with the broader legal framework. Importantly, in terms of creating incentives to report planned criminal activity and thereby contribute to crime prevention, this formulation of the conditions for granting immunity from punishment would not restrict the types of offences, unlike the current rules governing the application of extraordinary mitigation, for which a cooperating perpetrator may be held criminally liable. Nor would it exclude certain categories of perpetrators (e.g. organisers or instigators), whose eligibility for such leniency is generally supported by criminal law doctrine,[12] though opposed by some courts.[13] It must be recognised that even where an individual has played a significant role in committing the offence for which they are being prosecuted, they may nonetheless merit exemption from punishment if they played a crucial role in preventing the commission of another offence, particularly a serious one. Following the proposed amendment to Article 61 of the Penal Code, it would no longer be necessary to interpret the provision in a manner contrary to its literal wording, as is occasionally advocated. Disregarding the fundamental principle of literal interpretation invariably gives rise to serious doubts and undermines legal certainty. Finally, it may be reasonably argued that the proposed amendment would reduce the risk of significant discrepancies in the case law of individual courts across the country, which remains a concern under the current legal regime.

NECESSITY TO REPEAL THE PROVISIONS OF ARTICLE 57 § 5 OF THE PENAL CODE

The need to repeal the conflict rule introduced by the added provision of Article 57 § 5 of the Penal Code arises from its inherent defect, namely its incompatibility with Article 61 of the Penal Code. The latter authorises courts to impose more lenient penalties on small crown witnesses, including partial or complete waiver of punishment. This judicial competence becomes effectively unenforceable in situations where an accomplice in a criminal offence, who has cooperated with law enforcement authorities and obtained the status of the so-called small crown witness, is also subject to any of the statutory circumstances requiring the imposition

[12] See for example A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2010, p. 208; P. Gensikowski, 'Odstąpienie od ukarania…', op. cit., pp. 25–26.

[13] See for example judgment of the Administrative Court in Łódź of 27 June 2016, II AKa 24/16, LEX No. 2278254; see also 'Projekt kodeksu karnego. Uzasadnienie…', op. cit., p. 156.

of an exceptionally severe penalty. Such circumstances include, for example, repeat offending under Article 64 of the Penal Code; commission of the offence as part of an organised group or criminal association (Article 65 § 1); or commission of the offence as part of a continuous act (Article 57b). In such cases, the conflict rule set out in Article 57 § 5 of the Penal Code obliges courts to apply extraordinary mitigation of punishment, without providing for any alternative – most notably, the possibility of waiving the imposition of a penalty altogether. It is difficult to accept the introduction and continued existence in the Penal Code of provisions that are inconsistent with other statutory norms and that, in practice, render inoperative legal mechanisms designed specifically for a particular group of cases – namely, perpetrators who have chosen to cooperate with law enforcement authorities in the investigation of the offence and the group of perpetrators involved, and who, as informants, have also contributed to the prevention of another offence.

CONCLUSION

The legislative amendments proposed in this study concerning the content of Article 57 § 5, Article 60 § 3, and Article 61 § 1 of the Penal Code – which regulate the issue of penalties for the so-called small crown witnesses referred to in Article 60 § 3 – only partially coincide with the changes put forward in the published draft amendments to the Penal Code. Notably, neither the draft prepared by the Criminal Law Codification Commission nor that developed by the Ministry of Justice provides for any amendments to the content of Article 61 § 1 of the Penal Code with regard to the conditions under which a court may refrain from imposing a penalty on a perpetrator who acted in concert with others, informed on them, and disclosed key details of the jointly committed offence. It is not difficult to observe that this provision, in its current form, does not impose any additional conditions for such a conviction with waiver of punishment beyond those required for a conviction with the application of extraordinary mitigation. It is widely argued that the court's competence to waive the imposition of a penalty – which substantially reduces the hardship and legal consequences of a conviction – should be contingent upon the accomplice fulfilling additional requirements. The reference in the current wording of Article 61 § 1 of the Penal Code to the perpetrator's subordinate role in the commission of the offence and the disclosure of information that contributed to the prevention of another offence, presented cumulatively and framed as circumstances that 'particularly' justify refraining from imposing a penalty, is both inappropriate and impractical. From the standpoint of fairness and legislative functionality, it seems entirely justified to propose that these two important factors be formulated as absolute and, at the same time, alternative grounds entitling courts to apply such a far-reaching mitigation in the form of a conviction with complete or partial waiver of punishment.

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FORNICATION AS A NOTION APPLICABLE IN POLISH LAW

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Abstract
This paper concerns fornication as a past and current notion in Polish law. Legal theory, particularly criminal law theory, is reviewed, and legal regulations relating to fornication are analysed. Fornication was a concept present in the Polish Penal Code of 1932 and the Polish Penal Code of 1969. The current Polish Penal Code of 1997 does not include this notion. However, it still appears in other current legal regulations. The main aim of this article is to analyse the comprehensibility of the notion of fornication and to draw conclusions regarding necessary amendments to laws aimed at eliminating this term from Polish legal language. The conclusions presented in this work are original and significant for Polish legal theory and penal law practice.

Key words: fornication, law, criminal law, crime, misdemeanour

INTRODUCTION

The notion of fornication in Polish appears archaic, and there seems little reason to analyse it from the standpoint of contemporary penal law. At most, it could be examined from a historical perspective. Undoubtedly, such a historical approach is essential, yet it is not the only relevant perspective, as the notion of fornication still appears in binding legal acts. Consequently, it is necessary to analyse this concept from both historical and current perspectives and to draw meaningful conclusions

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for the future. Due to limitations of space, only the most significant opinions of legal theoreticians on the issue of fornication are discussed in this article.

Fornication is generally perceived negatively. It is regarded as immoral and contrary to ethical norms and principles of social conduct, particularly in matters of sexuality and decency. The notion of fornication is a legal category concerning human sexual behaviour. The concepts of harlotry and fornication appear in both past and current legal acts and, for the purposes of this study, are treated as synonymous.

'FORNICATION' IN THE POLISH PENAL CODE OF 1932

In the Polish Penal Code of 11 July 1932,[1] Chapter XXXII was entitled 'Fornication'. This chapter covered offences currently recognised as crimes against sexual freedom and decency. These included: committing an act of fornication against a person under 15 years of age or a person wholly or partially deprived of the ability to understand the nature of the act or to control their conduct (Article 203); rape, defined as causing another person to submit to or perform such an act by force, unlawful threat, or deception (Article 204); causing another person to submit to fornication or to perform such an act by exploiting a relationship of dependence or a critical situation (Article 205); incest (Article 206); offering oneself to a person of the same sex for fornication in exchange for gain (Article 207); facilitating the fornication of others for profit (Article 208); deriving financial benefit from the fornication of others (Article 209); inciting another person to engage in professional fornication (Article 210); deporting another person from the country in order to compel them to engage in professional fornication (Article 211); committing an act of fornication in public or in the presence of a minor under the age of 15 (Article 213); distributing magazines, prints, images, or other pornographic materials, as well as preparing, storing, or transporting such items for dissemination (Article 214).

The term 'fornication' had an explicitly moralistic character during the interwar period, and this was recognised by commentators on the Code. Its creator, Juliusz Makarewicz, wrote that:

> 'An act of fornication should be understood as any action aimed at satisfying the sexual drive in a way other than that which is determined by a society well-organised in terms of purity of morals, i.e. through marital copulation. It is just as much fornication to satisfy this drive with animals or persons of the same sex ("fornication against nature") as with a person of the opposite sex, whether in the form of copulation or of another sexual act ("perversions"). Fornication is not a crime in itself according to the Polish Code; it becomes so only by adding a certain factor, whether it is acting without the will or against the will of another person, or acting out of the desire for profit (in the case of fornication involving people of the same sex), or acting in public or with close family members.'[2]

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1 Journal of Laws of 1932, No. 60, item 571.

2 J. Makarewicz, *Kodeks karny z komentarzem*, Lwów, 1932, p. 298.

This approach to the notion of 'fornication' is also discussed by Magda Olesiuk-Okomska in her analysis of sexual and anti-morality crimes contained in the Penal Code of 1932.[3]

Moreover, according to Wacław Makowski:

> 'The morality of sexual life, or sexual morality, has been normalised within existing social institutions, primarily the institution of marriage. Extramarital sexual intercourse is not criminal in itself from the point of view of the law, provided that it does not infringe upon another juridical good. This other legal good may be personal freedom, if it has been violated in any way for sexual purposes, or the so-called moral sense, which is offended by actions within the sphere of sexual relations. In the factual circumstances of offences against established norms of sexual conduct – covered by the general term "fornication" – two objects of the crime may be considered. On the one hand, there is the interest in sexual morality, the public interest connected to the development of the human species; on the other hand, the personal interest of the individual and his freedom to dispose of his sexual life. The latter concept prevails in modern doctrine and legislation, although it also significantly limits the scope of criminal law's interference with relations arising from sexual life. Nonetheless, there may be factual situations to which the public interest attaches specific importance, such as incest.'[4]

Based on the two quotations above, it may be concluded that their authors believed that, in principle, sexual relations within marriage could not constitute fornication. However, this assumption was incorrect, as evidenced by the phenomenon of marital rape. Nonetheless, during the period when the Penal Code of 1932 was in force, the possibility of recognising fornication within marriage was at least disputed and sometimes outright denied.

Kazimierz Sobolewski and Alfred Laniewski adopted a more liberal understanding of this concept, though they still excluded sexual relations within marriage. According to them, 'the concept of "fornication" will include an act that has its source in the sexual drive and at the same time aims at satisfying this drive. This will include both the normal sexual act and *amor lesbicus*, pederasty, and more generally lewd acts'. These authors believed that 'it will be the task of the judge to determine whether a given act bears the hallmarks of a "fornication act" or merely an act of familiarity or caressing, not exceeding the limits permitted within a given social sphere. Such an act of caressing may constitute the essence of a personal insult or an offence under Article 33 of the Law on Petty Crimes'. The aforementioned authors also stated that 'these crimes can be committed even against people professionally engaged in fornication' and that 'both women and men fall under the protection of this chapter because the Code is consistently applicable to "other persons"'. Moreover, 'the Code does not recognise fornication with animals'.[5] These

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[3] M. Olesiuk-Okomska, 'Regulacje kodeksu karnego z 1932 r. w zakresie penalizacji przestępstw konwencyjnych przeciwko wolności seksualnej i obyczajności', *Czasopismo Prawno-Historyczne*, 2023, No. 2, p. 56.

[4] W. Makowski, *Kodeks karny 1932. Komentarz*, Warszawa, 1933, p. 472.

[5] K. Sobolewski, A. Laniewski, *Polski kodeks karny z 11. VII. 1932 r. wraz z prawem o wykroczeniach, przepisami wprowadzającemi i utrzymanemi w mocy przepisami kodeksu karnego austriackiego, niemieckiego, rosyjskiego i skorowidzem*, Lwów, 1932, pp. 106–107.

observations were modern at the time they were formulated, particularly regarding the distinction between 'fornication' and a 'fornication act' or caressing, as well as the recognition of the possibility of harm being caused to a person engaged in prostitution by such an act, and the equal treatment of victims in this respect, regardless of gender.

As Tomasz Szczygieł describes, the issue of 'fornication' featured prominently in the drafting of the Code. Its drafters introduced the term 'fornication against the will', which encompassed, in particular, rape, disgrace, and enslavement to fornication. At the same time, 'fornication' was understood as any act leading to the satisfaction of the sexual drive, also described using terms such as 'lewd acts', 'disgrace', 'fornication', and 'sexual intercourse'. Particular attention was given to 'fornication contrary to nature', which was understood as 'any satisfaction of the sexual drive that is not an act of copulation between people of opposite sexes', including, in particular, homosexuality, bestiality, masturbation, necrophilia, and so-called 'perverse' sexual acts between a man and a woman – that is, acts not typically resulting in fertilisation. The punishment of such acts was eventually abandoned.[6] Interestingly, and worth emphasising, the status of 'perverse' was then ascribed to all sexual contact between men and women that did not involve vaginal intercourse and was not aimed at procreation – particularly when contraceptives were used, with condoms playing a leading role at the time. Therefore, when pre-war individuals engaged in oral or anal sex or other forms of sexual activity that could not result in fertilisation, they risked being considered 'subversive' to the sexual morality of the time. Perhaps due to fear of social ostracism, as well as respect for the morality they adhered to, reinforced by the teachings of the Catholic Church, which advocated for sexual relations oriented towards procreation and viewed other forms unfavourably – society at large refrained from initiating a revolution in this sphere. Such change was experienced only by the most progressive circles, particularly the artistic bohemia of the time and others who stood apart from the dominant sexual morality of the Second Polish Republic.

Finally, the legislator at the time employed three terms concerning 'fornication'. First of all, 'fornication', as such was used as the title of the relevant chapter, and the crimes described therein were referred to as 'fornication'. At the same time, Articles 208 and 209 prohibited facilitating the 'fornication' of others and deriving profits from such 'fornication' out of a desire for gain – likely treating 'fornication' for the purposes of these provisions differently from the general understanding of 'fornication' as reflected in the chapter title, which encompassed all the prohibited acts described therein. Secondly, Articles 210 and 211 distinguished 'professional fornication' as different from the 'fornication' referred to in the provisions mentioned above, with the former undoubtedly to be equated with what is generally understood as prostitution, while the latter was probably akin to it in nature. Moreover, in Articles 203, 204, 205, and 213, the term 'fornication' was also

[6] T. Szczygieł, 'Przestępstwa przeciwko moralności w pracach Komisji Kodyfikacyjnej II Rzeczpospolitej', *Z Dziejów Prawa*, 2017, Vol. 10, pp. 89, 95–96.

used. In these provisions, it was understood to encompass any sexual conduct that met the criteria for the offences described.

Jan Skupiński stated that: 'The term "fornication" signifies a negative assessment of an act involving the satisfaction or arousal of one's own or another person's sexual drive. Without a detailed analysis of this well-known concept, it is only worth noting that the two elements it contains – biological (arousing or satisfying the sexual drive) and ethical (incompatibility with prevailing social morality) – differ in terms of their flexibility. While the biological element is decidedly static, the ethical element is subject to continual change, shaped by periodic shifts in societal morality.' The author further observed that: 'The separation of the concept defining the nature of the offences contained in the chapter title seems to indicate their generic uniformity. However, an examination of the various provisions of Chapter XXXII reveals that, despite their common link to sexual life, a number of these offences differ significantly from each other.' He believed that:

> 'Among the crimes in question, certain groups may be distinguished. The first and most prominent group comprises the provisions of Articles 203, 204, 205, 206, and 213 of the Criminal Code. These crimes are characterised by the fact that the perpetrator is directly involved in committing or attempting to commit a specific act of fornication. In the cases covered by Articles 203, 206, and 213, the perpetrator must personally participate in the act, while in others (Articles 204 and 205), he need not participate himself but merely "cause" the act. Nevertheless, across this group, the perpetrator's conduct is directly linked to a specific act of fornication and involves active participation. (…) The second group consists of the offences set out in Articles 208 to 211. These differ from the first group in that the perpetrator is not personally involved in committing the act of fornication. The perpetrator in this context commits a completely different act – one related solely to the commission of fornication by another person. Thus, the primary difference between the crimes in the two groups mentioned above lies in the fact that the perpetrator's connection to fornication in the second group manifests only indirectly.'

Skupiński further wrote:

> 'It should be noted that these acts relate to fornication in a slightly different sense. First, they are no longer connected with the evaluation of an individual event, i.e. "fornication", but with "fornication" as a broader concept. By this term, we understand a judgment regarding an entire course of conduct – in other words, a certain procedure. Secondly, the offences in the first group concern criminal acts of fornication, which is evident in light of the relevant provisions, while the facts of the second group generally relate to non-criminal fornication (mainly prostitution), and even the potential criminality of the conduct to which these acts are related is irrelevant to the perpetrator's liability. Somewhat on the margins of these two distinct groups stands Article 207, which, on the one hand, seems to lean towards the first group due to the perpetrator's connection with a specific act of fornication, but on the other hand, inclines towards the second group owing to the element of profit motive and its relation to an overall pattern of conduct rather than an individual event. Also peripheral is Article 214 on pornography, which, although related to sexual life, is so loosely connected that it is difficult to classify this offence within the category of fornication-related crimes at all.'[7]

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[7] J. Skupiński, 'Problematyka kodyfikacji przestępstw „nierządu"', *Palestra*, 1960, No. 4, pp. 44–46.

According to Józef Macko, the relevant provisions concerned: 'Crimes against sexual morality, generally referred to as fornication, because prostitution is nothing other than a form of fornication, bearing the characteristics of addiction. Moreover, all forms of fornication, under certain conditions, may directly cause prostitution and its consequences'.[8] This view, especially regarding the causes and consequences of prostitution, seems highly exaggerated – even from the perspective of the time it was formulated. It also contradicts the intention of the legislator of that period, who used the term 'fornication' more broadly than simply as a synonym for prostitution.

As Marian Filar explained, the use of the term 'fornication' in the 1932 Code was the result of a literal translation of terminology from the German Penal Code of 1871 and the Russian Penal Code of 1903, which referred to acts other than coitus, often involving the coercion of a woman into sexual acts. The Polish legislator, by adopting the term 'fornication', intended to create a comprehensive and synthetic concept encompassing the widest possible range of sexual behaviours. This choice was criticised by post-war criminal law scholars, as a result of which the draft of the new Penal Code of 1968 replaced 'fornication' with the term 'sexual intercourse'. However, when this change appeared to be a foregone conclusion, the term 'act of fornication' was ultimately retained during the legislative process.[9] Earlier drafts of the new Penal Code – specifically those from 1956 and 1963 – also abandoned the use of the term 'fornication' in favour of the phrase 'causing the satisfaction of the sexual drive' by prohibited means and against specific categories of people, as noted by Jarosław Warylewski. This professor, an unquestioned authority in the field of sexual crimes, observed that while the broad and imprecise term 'fornication' contributed to the simplicity of the regulations typifying such crimes, it was at the same time a fundamental weakness in this area.[10]

Jan Skupiński likewise assessed positively the rejection of the concept of 'fornication' in the 1956 draft of this legal act. He wrote: 'Rejecting the concept of "fornication" seems most appropriate. It is easy to see that, as regards crimes involving the perpetrator committing an act of a sexual nature – i.e. under the 1932 Penal Code, an "act of fornication" – the introduction of this concept is quite unnecessary. From the notion of "fornication", which appears in the provisions of Articles 203–205 and 213, we are merely to understand the biological nature of the given act, so that once the perpetrator fulfils the further elements of the offence described in one of these articles, the act may be deemed criminal. The fact that this act of satisfying or arousing the sexual drive is described in the Penal Code already implies its negative ethical assessment. Therefore, the ethical element embedded in the concept of "fornication" is the same as that contained in the relevant provision of the Penal Code. The matter differs slightly in Articles 208 and 209, where the term "fornication" is also used. In these cases, it cannot be said that this

[8] J. Macko, *Nierząd jako choroba społeczna*, Warszawa, 1938, p. 58.
[9] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*, Toruń, 1985, pp. 41–42.
[10] J. Warylewski, *Przestępstwa seksualne*, Gdańsk, 2001, pp. 61–62.

label is unnecessary, as a negative ethical assessment of the conduct to which the perpetrator's act relates is an indispensable condition for punishability. However, since the next two articles (210 and 211) refer to "professional fornication", it is worth considering why the legislator did not use this same terminology in the preceding provisions. It seems that the conduct defined in Articles 208 and 209 – referred to as pimping, procuring, and pandering – is inherently and exclusively connected with "professional fornication", that is, prostitution.'[11]

Lech Gardocki considered the title of the chapter 'Fornication' in the 1932 Penal Code to be archaic, even in the 1930s.[12] Andrzej Marek, by contrast, argued that the concept of 'fornication' under that Code encompassed involuntary and extramarital relations, but extended far beyond the societal understanding of 'fornication' as equivalent to prostitution at that time.[13]

During the interwar period, prostitution was widespread, particularly in large cities. Women undertook this occupation primarily due to poverty, often after leaving rural areas to work in urban households as domestic servants. However, many of them ended up working in brothels or soliciting on the streets. As Monika Piątkowska describes, they formed a complex world of prostitution, which included 'handkerchiefs' – girls offering sexual services on the streets for very modest pay that barely covered their basic needs. In a slightly better position were 'hat girls', who waited for clients outside entertainment venues, as well as 'fordanserki', 'kokotki', and 'grandesy' – women working in dance halls and entertainment venues who discreetly 'hunted' for clients. The dangers faced by these clients included theft, blackmail, and syphilis, which were widely 'offered' in brothels and similar establishments.[14] It is therefore not surprising that the authorities of the time sought to control 'fornication'. In 1922, a system of regulations was adopted to address prostitution from a sanitary and, to some extent, public order perspective. This approach was reflected in the regulation issued by the Minister of Public Health, in agreement with the Minister of Internal Affairs, on 6 September 1922 concerning the supervision of fornication.[15] Under this regulation, sanitary and moral commissions were established. According to § 3 of the act, these commissions consisted of the heads of the first-instance administrative authority, district doctors, representatives of the state police, representatives of local government, and delegates from associations or social unions tasked with combating fornication. Their scope of activity, as defined in § 4 of the act, included investigating the causes of fornication, combating sexually transmitted infections, determining the existence of professional fornication, and referring individuals for sanitary examinations. It is worth emphasising that the 'fight against fornication' was explicitly stated in the title of this legal act.

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[11] J. Skupiński, 'Problematyka kodyfikacji…', op. cit., pp. 51–52.

[12] L. Gardocki, *Prawo karne*, Warszawa, 2023, p. 282.

[13] A. Marek, *Prawo karne*, Warszawa, 2003, p. 488.

[14] M. Piątkowska, *Życie przestępcze w przedwojennej Polsce. Grandesy, kasiarze, brylanty*, Warszawa, 2012, pp. 275–286, 321.

[15] Journal of Laws of 1922, No. 78, item 715.

'FORNICATION' IN THE PENAL CODE OF 1969

In the Penal Code of 19 April 1969,[16] when defining sexual offences and their scope, the legislator used the term 'lewd act', as well as other expressions such as 'lascivious act', 'fornication', and 'sexual intercourse', the last of which was used exclusively in the context of incestuous relations. As Igor Andrejew explained, 'sexual intercourse' referred specifically to intercourse with another person, while a 'lewd act' meant any behaviour aimed at arousing or satisfying the sexual drive, and was used particularly to describe conduct involving a child under 15 years of age. 'Fornication', meanwhile, was equated with prostitution. The term 'fornication' caused some confusion, as in the 1932 Penal Code it had been associated with all sexual relations outside of marriage – a notion that no longer aligned with evolving moral standards. Consequently, the term came to refer instead to behaviours that met the legal criteria for specific offences.[17]

Probably not as a continuation of that earlier distinction – namely, that only extramarital sexual relations were considered 'fornication' by definition – but for other reasons, Martyna Jakubowicz sang in her 1982 song *There Is No Free Love in Concrete Houses* that: 'in concrete houses, there is no free love, only marital relations and fornication acts; Casanova is no guest here'. Perhaps, however, such a view was still occasionally held at the time, as part of a strict moral assessment of sexual relations outside marriage. This does not mean, however, that Polish society was prudish in general; it was, in fact, incomparably more liberal about sex than it had been in the interwar period.

The term 'fornication' was used to describe, among others: rape (Article 168); sexual abuse involving helplessness or insanity (Article 169); sexual abuse involving helplessness or a critical situation (Article 170); and committing such acts in the presence of a person under 15 years of age or in public (Article 177). Additionally, 'fornication' appeared in provisions concerning prostitution-related offences: pandering, pimping, and procuring (Article 174).

Under the Penal Code of 1932, Mieczysław Siewierski understood the concept of 'fornication' as 'Covering both the normal act of copulation and other acts aimed at satisfying the sexual drive or arousing excitability through contact with another person's body, such as touching the sexual organs'.[18] This interpretation was retained by commentators on the Penal Code of 1969, particularly by the same Mieczysław Siewierski, as well as Jerzy Bafia and Kryspin Mioduski.[19]

According to Janusz Wojciechowski:

> 'The concept of a "fornication act" should be understood as behaviours aimed at satisfying the sexual drive, consisting in contact with the body of another person. In particular, sexual intercourse as well as other types of bodily contact during which the perpetrator's genitals came into contact with any part of the victim's body, or when the perpetrator touched the victim's genitals with any part of his body.'

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16 Journal of Laws of 1969, No. 13, item 94, as amended.

17 I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa, 1983, p. 392.

18 M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warszawa, 1958, p. 274.

19 J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa, 1987, p. 137.

Wojciechowski believed that lewd acts committed in public, which did not involve such contact – such as exhibitionism – fell outside the scope of a 'fornication act'.[20] However, he was mistaken in asserting that a 'fornication act' necessarily involved contact between the genitals of the perpetrator and the victim. Such acts could also include other forms of sexual behaviour, such as inserting a finger or object into the victim's anus, which is not a genital organ. Nevertheless, an exhibitionist act should not be understood as a 'fornication act', even though it was referred to in Article 177 of the Penal Code of 1969 and punishable on that basis.

Witold Świda understood the term 'fornication' differently – 'in a narrower sense, as natural and degenerate copulation. In a broader sense, it includes all actions aimed at stimulating or satisfying one's own or another person's sexual drive, contrary to social norms in the sexual sphere, and thus also, for example, exhibitionism.'[21] This broader interpretation must be acknowledged, as the legislator, in both Penal Codes, applied the term not only to crimes involving bodily contact between the perpetrator and the victim – such as rape, sexual abuse of helplessness or insanity, and abuse of dependency or critical position – but also to acts of fornication committed in public, such as exhibitionism, which did not involve direct physical interaction.

As noted earlier, the drafts of the new Penal Code proposed abandoning the concept of 'fornication'. For this reason, Marian Filar wrote that: 'It was reborn in the new Penal Code like a phoenix from the ashes.' He was of the view that:

> 'Its interpretation could only be accepted axiomatically, consisting of two factors: biological and evaluative. In the biological sense, it is, generally speaking, an act of a sexual nature; in the evaluative sense, it is an act contrary to sexual morality.'

He further explained:

> 'The evaluative component is essentially empty phraseology, because we learn that this act is contrary to sexual morality – and thus to the general order of social life – solely from the fact that it is included in the Penal Code, where only such acts are found. So, an act is "fornicating" because it is in the Penal Code, and it is in the Penal Code because it is "fornicating"! It is difficult to state the matter more clearly! Therefore, only the biological factor remains "on the battlefield": it is an act related to the sphere of human sexual life. However, this sphere is a dynamic one. So, what part of it falls within the concept of "fornication"? It is certain that normal heterosexual intercourse (copulation) falls within this scope, as it forms the content of a separate, narrower concept: "sexual intercourse". But what beyond that? Although narrower interpretations of this concept have emerged from attempts to give it a reasonable framework under the new Penal Code – complemented by criminological and social considerations – in light of grammatical and logical interpretation, such readings are unfortunately arbitrary. As such, they fall outside the scope of any interpretation recognised in law, apart from one based on "purposefulness". How can it logically be demonstrated, on the basis of the above types of interpretation, that an "act of fornication" under Article 168 of the Penal Code is limited only to physical contact between partners in the form of copulation or its equivalent, when an identical term – "act of fornication" – appears in Article 177, and yet, in established legal practice under

[20] J. Wojciechowski, *Kodeks karny. Krótki komentarz praktyczny*, Rawa Mazowiecka, 1994, pp. 201, 213.

[21] W. Świda, *Prawo karne*, Warszawa, 1982, p. 516.

> this provision, there was never the slightest doubt that its application did not require any bodily contact between two persons? Exhibitionists, for example, were regularly held liable under this provision. In fact, such cases were not only frequent – they could be regarded as typical applications of Article 177. Could the new legislator have intended to use the term "fornication" in two different senses: a narrower one in Article 168, and a broader one in Article 177? From a logical standpoint, such a position would represent a fundamental inconsistency – one that is difficult to attribute to the legislator.'[22]

Therefore, at that time, both perpetrators of rape and exhibitionists were held criminally liable under the concept of 'fornication'.

Anna Gimbut, commenting on crimes related to the exploitation of prostitution under the Penal Code of 1969, considered to what extent the drafters of the Code, who had intended to eliminate the concept of 'fornication' – an intention that ultimately was not realised – had, in referring to 'fornication', meant only prostitution. She noted that the legislator's intent could not be disregarded, particularly because the terms 'fornication' and 'fornication act' should be understood as distinct, a conclusion arising from the fact that the legislator clearly differentiated between them.[23]

As Marian Filar pointed out:

> 'In the Penal Code of 1932, the concept of "fornication" was applied in two senses. Firstly, with the addition of the adjective "professional", it was treated as a synonym for prostitution. Secondly, the concept of "fornication" was used without the adjective "professional", describing sexual intercourse also engaged in by individuals who were not involved in prostitution. The Penal Code of 1969 broke with this duality and introduced the term "fornication", treating it in all cases as equivalent to the former concept of "professional fornication" – i.e. prostitution.' At the same time, this eminent expert on sexual offences advocated for the removal of the term 'fornication' from the Penal Code and its replacement with: 'An objectified biological concept, such as "sexual intercourse", which would include acts of copulation and possibly its surrogates, treated by the perpetrator as equivalent to copulation.' He argued that: 'The term "fornication" is an anachronism, suggesting that certain sexual activities are, by definition, burdened with the mark of fornication and thus carry a pejorative social assessment. Sexual activities, however, are a normal and proper function of the human body and, as such, should not be subject to ethical evaluation. What is subject to such evaluation is the manner in which they are performed.'[24]

With full respect and gratitude to the late Professor, it must be acknowledged that the concept of 'fornication' in the Penal Code of 1969 was indeed outdated. However, it is difficult to fully share his view that only the manner of performing sexual activities may be subject to ethical assessment, while the activities themselves may not. In reality, such activities may also be subject to axiological evaluation – particularly in cases such as paedophilic behaviour, which is assessed negatively regardless of how it is carried out. The same applies to incest, which is commonly

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[22] M. Filar, 'Pojęcie „czynu nierządnego" w kodeksie karnym', *Palestra*, 1973, No. 2, pp. 8–9.

[23] A. Gimbut, 'Wewnątrzkrajowe przestępstwa eksploatowania prostytucji w prawie polskim', *Annales Universitatis Mariae Curie-Skłodowska*, 1973, Vol. XX, pp. 80–81.

[24] M. Filar, 'Przestępstwa w dziedzinie stosunków seksualnych', in: Andrejew I., Kubicki L., Waszczyński J. (eds), *System prawa karnego. O przestępstwach w szczególności*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1989, pp. 165, 229.

viewed as ethically unacceptable, even if its criminalisation is subject to debate on the grounds of personal freedom.

Nonetheless, 'fornication' was primarily synonymous with prostitution, which in the post-war period developed in line with the social and economic conditions of the time. As Michał Antoniszyn and Andrzej Marek noted, in the first years following the end of the war, prostitution expanded rapidly in the Tri-City area and in Szczecin, as well as in other cities, where prostitutes were categorised according to the places in which they worked – 'gruzinki', 'kolejówki', and 'lokalówki'. As early as 1945, the sanitary registration of prostitutes began, and in 1948, on the initiative of the League of Polish Women, a nationwide commission for the fight against prostitution was established. Advisory committees for the fight against prostitution began to be formed at national councils; however, these were liquidated in 1949. The registration of women practising prostitution was then taken over by newly created sections of the Citizens' Militia designated to combat prostitution. In 1952, an abolitionist model for addressing prostitution was adopted in Poland, which led to the dissolution of these special sections. However, due to the rapid increase in prostitution, they were reinstated in 1956. This re-establishment proved useful in the eyes of the authorities at the time, as in the following decades – alongside the country's industrialisation – prostitution continued to grow.[25] In any case, the People's Republic authorities seemed to tolerate its existence, given that even in the 1970s and 1980s TV series *07 Zgłoś się*, Lieutenant Sławomir Borewicz – played by Bronisław Cieślak (the series and its protagonist likely aimed to soften the image of the Citizens' Militia) – frequently had encounters with 'young ladies', meaning that such women appeared in various cases he handled. Borewicz himself also often enjoyed the company of numerous attractive women.

The term 'act of fornication' survived in the Penal Code of 1969 until its repeal on 1 September 1998, which means it remained in force nearly a decade after the collapse of Communist Poland in 1989. It outlasted several political systems. Therefore, it can be argued that there was a certain attachment to the term – an attachment that is still, to some extent, 'cultivated' in Polish criminal law.

'FORNICATION' IN CURRENT LEGAL ACTS

The Penal Code of 6 June 1997[26] does not recognise the concept of 'fornication'. As indicated in its justification:

> 'Guided by the postulates of the doctrine, this Code omits such terms as "fornication" and "lewd act". Instead of these concepts, the Code uses expressions that are less evaluative. It distinguishes between "sexual intercourse" and "other sexual activities".'[27]

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[25] M. Antoniszyn, A. Marek, *Prostytucja w świetle badan kryminologicznych*, Warszawa, 1985, pp. 36–38.

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

[27] *Nowe kodeksy karne z 1997 r. z uzasadnieniami. Kodeks karny. Kodeks postępowania karnego. Kodeks karny wykonawczy*, Warszawa, 1997, p. 196.

The phrase 'fornication' has long been considered both outdated and negatively evaluative, as well as inadequate in relation to its colloquial understanding. If this term is used at all, it is extremely rarely and only applicable to describe prostitution.

Therefore, it is difficult to agree with Bruno Hołyst's view that the expressions 'professional formication' or 'practising formication are accurate descriptors of prostitution in legal language.[28] Legal language, after all, is the language used by lawyers – who refer to 'prostitution', not 'fornication'. Consequently, 'fornication' is no longer an element of legal language as a subset of the specialised professional language.

Nevertheless, it remains part of legal language, i.e., the language used by the legislator. This is the case under the Civil Code of 23 April 1964,[29] the Code of Petty Offences of 20 May 1971[30] and the Act of 9 June 2022 on the Support and Resocialisation of Juveniles.[31]

In the first of these acts, the term 'fornication act' appears, as according to Article 445 § 1: 'In the cases provided for in the preceding article, the court may award the injured party an appropriate sum of money as compensation for the harm suffered' and its § 2 states that 'The above provision shall also apply in the case of deprivation of liberty and in the case of inducing submission to a fornication by means of deceit, rape or abuse of the relationship of dependency.' The category of 'fornication' used in this provision appears to include 'sexual intercourse' and 'other sexual activity'. Moreover, the term 'rape' as used in this provision, should be understood as a method of coercion involving violence and unlawful threats, characteristic of the offence of rape.

Representatives of the civil law doctrine interpret the term 'act of fornication' in various ways. For instance, Adam Olejniczak defines it broadly, stating that it includes: 'not only bodily intercourse in heterosexual or homosexual relationships, but also other behaviours in the sexual sphere of a person, such as sexual acts constituting surrogates for copulation, exposing or touching intimate parts of the body, or photographing a naked person'. At the same time, Olejniczak holds the view that: 'Not every act of fornication towards a minor meets the conditions set out in this provision.'[32] Although he does not elaborate on this point, a literal reading of the provision suggests that, unless the perpetrator's act of fornication involves deceit, rape, or abuse of a relationship of dependence with respect to the minor, it does not provide a basis for compensation. This interpretation would apply in particular where the minor consents to the sexual act.

Earlier, Adam Szpunar expressed his opinion on this concept, noting that: 'The concept of "fornication" is a subject of controversy,' and that: 'The Penal Code uses less evaluative and pejorative terms,' such as 'sexual intercourse' and 'other sexual activities'. At the same time, he emphasised: 'It is indisputable that a "fornication

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28 B. Hołyst, *Kryminologia*, Warszawa, 2016, p. 670.

29 Journal of Laws of 2024, item 1061, as amended.

30 Journal of Laws of 2023, item 2119.

31 Journal of Laws of 2024, item 978.

32 A. Olejniczak, 'Komentarz do art. 445', in: Kidyba A. (ed.), *Kodeks cywilny. Zobowiązania. Część ogólna*, Warszawa, 2010, pp. 488–489.

act" cannot be equated with "sexual intercourse". The matter is quite obvious, for example, in the case of homosexual rape.' He also observed:

> 'There is no doubt that the main preventive and repressive tasks in this respect fall to criminal law. The protection provided by criminal law is of fundamental importance. Civil law may also play a role through its compensatory function, creating the possibility of claiming compensation from the perpetrator for the harm suffered. The protected good here is sexual integrity, which should be understood broadly. Other personal rights of the injured party – such as health, freedom, and honour – are also most often violated in such situations.'[33]

As early as the interwar period, Roman Longchamps de Bérier wrote on this subject, referring to 'moral reparation', which, in his view, should include: 'both reparation for physical suffering and moral harm, and is due to the aggrieved party himself.'[34]

According to Radosław Strugała: 'Inducing, using violence, deceit, or abuse of a relationship of dependency, to submit to a "fornication act" through rape, deceit, or abuse of a relationship of dependency does not have to exhaust the features of any prohibited act under Articles 197 et seq. of the Penal Code.'[35] However, this would be a relatively rare scenario – if imaginable at all – from the perspective of criminal law, within which such acts typically meet the characteristics of prohibited offences.

The second legal act referenced – the Code of Petty Offences of 1971 – contains Article 142, which provides: 'Whoever persistently, by imposing himself or in any other way violating public order, proposes to another person to commit an act of fornication with him, in order to obtain a material benefit, shall be subject to the penalty of arrest, restriction of liberty, or a fine.' The term 'fornication' used in this provision should be interpreted as referring to prostitution.

This interpretation has been and continues to be accepted by scholars of petty offences law. For example, Arnold Gubiński stated that: 'The regulation contained in this provision aims to ensure that the behaviour associated with prostitution does not exceed the boundaries accepted by society. It does not target prostitution as such, but the excesses committed by those who practise it.'[36] Andrzej Marek argued that: 'This provision creates a basis for combating scandalous and disturbing manifestations of prostitution, which as such is not punishable.'[37] Marek Bojarski added: 'The offence under Article 142 of the Code of Petty Offences is not directed against prostitution *per se*, but penalises such manifestations of prostitution as simultaneously disturb public order.'[38] Thus, while the provision refers to a 'fornication act', legal scholars consistently interpret it as referring to prostitution. Given the archaic nature of the

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[33] A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Bydgoszcz, 1999, pp. 172–173.

[34] R. Longchamps de Berier, *Zobowiązania*, Lwów, 1939, p. 294.

[35] R. Strugała, 'Komentarz do art. 445', in: Gniewek E., Machnikowski P. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2019, p. 991.

[36] A. Gubiński, *Prawo wykroczeń*, Warszawa, 1989, p. 335.

[37] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2002, p. 139.

[38] M. Bojarski, Z. Świda, *Podstawy materialnego i procesowego prawa o wykroczeniach*, Wrocław, 2002, p. 181.

term 'fornication', it is not surprising that authors writing on petty offences law instead use the term 'prostitution'.

However, there are also indications that the term used is 'fornication act', as exemplified by Tadeusz Bojarski's formulation, according to which: 'The provision of Article 142 of the Code of Petty Offences penalises offering oneself to commit a fornication act specifically.' [39] Similarly, Krzysztof Wala argues that the subject of this offence cannot be assumed to be solely a person engaged in prostitution. Nonetheless, its perpetrator is most often someone practising such conduct. According to his interpretation of Article 142 of the Code of Petty Offences, 'fornication' refers to: 'any conduct within the broadly understood scope of sexual life, i.e. both sexual intercourse and other sexual activities which, based on accepted cultural patterns, constitute the intimate sphere of every human being. Therefore, their exposure – whether through performance or proposition – may constitute a violation of public decency.'[40] This interpretation should be accepted, as linking this offence exclusively with prostitution would be both unjustified and overly restrictive. Jarosław Janikowski shares this view, rightly pointing out that the offence can also be committed by: 'a person leading a morally upright life who, under the influence of intoxicants, engages in conduct constituting this offence.'[41]

As Marek Mozgawa explains, the term 'fornication' used in this provision was inherited from the Penal Code of 1969. In contrast, the Penal Code of 1997 employs the concepts of 'sexual intercourse' and 'other sexual activities'. Therefore, under Article 142 of the Code of Petty Offences, it is possible to interpret the term as covering 'sexual intercourse', 'other sexual intercourse' (in the sense used previously), as well as 'other sexual activities'.[42] Such a provenance explains its presence in the Code of Petty Offences, which dates from the same period as the former Penal Code, but does not justify its continued use. Accordingly, it should be proposed that Article 142 of the Code of Petty Offences be amended to replace the term 'fornication' with 'prostitution', as is already the case in Articles 202 and 203 of the Penal Code of 1997. Legal language ought to be consistent across the legal system, and consequently, the same conduct should be defined using the same terminology in various legal acts. However, this proposal is sensible only if the aim is to criminalise solely the offering of sexual services by prostitutes. If the intended scope is broader, then Krzysztof Wala's proposal is more appropriate – namely, to replace the term 'fornication' in this provision with 'sexual act', a term that includes both 'sexual intercourse' and 'other sexual activity'.[43]

Julia Kosonoga-Zygmunt also supports the unification of the conceptual framework between the Code of Petty Offences and the Penal Code. Nevertheless,

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[39] T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warszawa, 2009, p. 227.

[40] K. Wala, *Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej*, Warszawa, 2019, pp. 349, 360.

[41] J. Janikowski, 'Wykroczenie proponowania czynu nierządnego', *Prokuratura i Prawo*, 2017, No. 4, p. 1114.

[42] M. Mozgawa, 'Uwagi na temat wykroczenia z art. 142 k.w.', in: Mozgawa M. (ed.), *Prostytucja*, Warszawa, 2014, pp. 123–124.

[43] K. Wala, *Wykroczenie nieobyczajnego*…, op. cit., p. 350.

in the title of the study where she addresses this issue, she still uses the phrase 'proposing to commit a fornication act' for financial gain as a description of one of the offences.[44] In the opinion of Jarosław Janikowski: 'Sexual behaviour that does not conform to socially accepted standards is defined as acts of fornication.' However, it appears that this usage reflects everyday language more than precise legal terminology.[45] With all due respect to the author of these words, I do not believe that such a term is used in everyday language – let alone in legal language – to describe this type of behaviour. For example, I doubt that anyone would say that the perpetrator of rape committed an 'act of fornication'. Nor do I believe that the actions of prostitutes who attempt to attract passers-by by displaying their physical attributes while standing by the roadside – behaviour that is sometimes, and incorrectly, treated as constituting all the elements of the offence discussed in Jarosław Janikowski's article – would be referred to using this term.

The term 'fornication' also appears in the Act on the Support and Rehabilitation of Juveniles of 2022. Article 4 of this Act lists 'fornication' as one of the manifestations of juvenile demoralisation, repeating the term from its predecessor, the Act of 26 October 1982 on Proceedings in Juvenile Cases,[46] which likewise, in Article 4, treated 'practising fornication' as a circumstance indicating the demoralisation of a minor. While the use of this term in the older of these acts may be explained by the time of its drafting, its incorporation into a legal act in 2022 must be regarded as incomprehensible – perhaps explicable only by legislative carelessness, rather than by any recognisable linguistic tradition in this area. It is quite possible that even minors engaging in statutory 'fornication' have no idea that their activity was once described using such terminology. What is certain, however, is that it is no longer referred to in this way, either in general usage or in the language they themselves use.

Accordingly, Agnieszka Kilińska-Pękacz is right to state, in the context of underage prostitution, that: 'practising fornication' is an archaic phrase, because nowadays the term 'prostitution' is in use.'[47] Representatives of criminal law and its auxiliary sciences – especially criminology – when referring to the demoralisation of minors, no longer use the term 'fornication', but rather 'practising prostitution', as do Jan Widacki and Magdalena Grzyb,[48] or they speak simply of 'prostitution', as in the approach of Waldemar Cisowski.[49] However, references to 'practising fornication' as a behaviour indicating juvenile demoralisation are still present in the literature – for example, in the study by Janina Błachut, Andrzej Gaberle,

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[44] J. Kosonoga-Zygmunt, 'Proponowanie dokonania czynu nierządnego w celu uzyskania korzyści materialnej', *Ius Novum*, 2022, No. 4, pp. 35, 41.

[45] J. Janikowski, 'Wykroczenie proponowania…', op. cit., p. 108.

[46] Journal of Laws of 2018, item 969, as amended.

[47] A. Kilińska-Pękacz, 'Prostytucja nieletnich', in: Krajewski R. (ed.), *Postępowanie z nieletnimi i młodocianymi. Wybrane zagadnienia teorii i praktyki*, Bydgoszcz, 2017, p. 65.

[48] J. Widacki, W. Dadak, M. Grzyb, A. Szuba-Boroń, *Kryminologia*, Warszawa, 2022, p. 258.

[49] W. Cisowski, 'Przestępczość nieletnich', in: Łabuz P., Malinowska I., Michalski M. (eds), *Kryminologia*, Warszawa, 2020, p. 168.

and Krzysztof Krajewski.[50] Regardless of individual doctrinal interpretations, the statutory 'practice of prostitution' ultimately refers to as it is currently understood.

Based on Article 4 of the 2022 Act on the Support and Rehabilitation of Juveniles, Adam Balicki states:

> '"Fornication" should be understood as any action that aims to satisfy the sexual drive, using deception, threat, or any form of violence, against a person unable to defend themselves, exploiting an employment relationship, targeting someone incapable of recognising the act, or taking advantage of another person's forced situation. For a minor under 15 years of age, pimping, incest, and fornication are also prohibited. A manifestation of fornication indicating the demoralisation of a minor will therefore be any act of satisfying the sexual drive performed by a minor against another person in the circumstances indicated above.'[51]

In his opinion, it is not only the engagement in prostitution by a minor, but any sexual behaviour on their part that fulfils the elements of a prohibited act that constitutes 'practising fornication'. This view, however, cannot be accepted – both due to the nature of the concept of demoralisation itself, and because such behaviour would then constitute a punishable act, forming an independent basis for proceedings against the minor, separate from demoralisation. Moreover, such an approach aligns more closely with the understanding of an 'act of fornication' characteristic of the Penal Codes of 1932 and 1969, rather than with contemporary interpretations, in which 'fornication', if it is understood at all, is recognised in the context of prostitution rather than in any broader sense.

Undoubtedly, it is necessary to call for the removal of the term 'fornication' from the 2022 Act on the Support and Rehabilitation of Juveniles, and its replacement with 'prostitution' or another term synonymous with it – ideally using the expression 'prostitution'. This change would serve two purposes: first, to align the language of the Act with contemporary Polish usage; and second, to promote coherence within the legal system, where – by principle – the same terms should not bear multiple meanings.

CONCLUSION

'Fornication' is a well-established conceptual category, having been present in Polish law for over ninety years. While the legislator no longer uses this term in the Penal Code of 1997 – unlike in the Penal Code of 1932 and the Penal Code of 1969 – the notion still appears in the Civil Code of 1964, the Code of Petty Offences of 1971, and the Act on the Support and Rehabilitation of Juveniles of 2022. This is striking, as in the latter two acts the term should have been replaced accordingly. While its presence in older laws may be explained by legislative inertia, its use in 2022 Act is difficult to justify, except perhaps, as a result of a lack of basic legislative diligence.

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[50] J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk, 2006, p. 318.

[51] A. Balicki, 'Komentarz do art. 4', in: Drembkowski P., Kowalski G. (eds), *Ustawa o wspieraniu i resocjalizacji nieletnich. Komentarz*, Warszawa, 2023, pp. 43–44.

Therefore, an amendment in this area is necessary to preserve the semantic coherence of the legal system and, ultimately, to eliminate the terms 'fornication' and 'fornication act' from legal language as completely archaic expressions – obsolete not only in legal usage but also in contemporary colloquial language. Even if a segment of society continues to assess sexual behaviour in a more conservative or less liberal spirit than the majority, it is highly unlikely that such conduct would today be referred to as 'fornication'. This applies equally to prostitution, which is no longer described using the terms 'fornication' or 'fornication act', but rather through more modern synonyms. Nevertheless, it was previously identified with 'fornication'.

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OFFENCE UNDER ARTICLE 244C OF THE POLISH PENAL CODE AS AN EXAMPLE OF DISPROPORTIONATE CRIMINAL LIABILITY FOR DEBT

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Abstract

The subject of the article is an original presentation of the crime specified in Article 244c of the Penal Code. Based on the amendment to the Penal Code of 2022, which entered into force a year later, a new type of crime was introduced under Article 244c of the Penal Code. Pursuant to it, a perpetrator who avoids implementing a compensatory measure in favour of the injured party or a person closest to them is subject to imprisonment. The rationality of this solution raises fundamental doubts, as it ignores other regulations provided for in the Penal Code, as well as the fact that the person to whom a compensatory measure has been awarded may pursue it through civil enforcement.

Key words: compensation, evasion, liability for debts, enforcement

INTRODUCTION

The Act of 7 July 2022 amending the Penal Code Act and Certain Other Acts[1] introduced a new type of offence under Article 244c of the Penal Code regarding evasion of performance of a compensatory measure. This approach exemplifies a radically unjustified penalisation of behaviour related to strictly civil-law relationships and leads to the penalisation of debt. The provision was introduced

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1 Act of 7 July 2022 amending the Penal Code Act and Certain Other Acts, Journal of Laws of 2022, item 2600.

recently and has yet to be discussed by experts (except for one research article), which justifies a detailed presentation of the problem. The present article demonstrates the scope of penalisation under the new Article 244c of the Penal Code. It provides arguments for immediate abrogation through an amendment or a judgment of the Constitutional Tribunal.

MOTIVES AND SCOPE OF PENALISATION UNDER ARTICLE 244C OF THE PENAL CODE

According to Article 244c § 1 of the Penal Code, whoever evades the performance of a compensatory measure awarded by the court to an injured party or a person closest to them in the form of an obligation to redress damage, compensate for harm, or pay vindictive damages for an indictable offence, shall be subject to imprisonment from three months to five years. Nevertheless, § 2 excludes punishment for the offence as long as the perpetrator fully performs the compensatory measure within 30 days following the first interrogation as a suspect. The offence is prosecuted at the request of the injured party (§ 3). The introduced offence draws on a previously drafted Article 244c of the Penal Code in the Act of 13 June 2019,[2] which did not come into force because the Constitutional Tribunal ruled the Act unconstitutional as a whole.[3] The wording of the draft Article 244c of the Penal Code of 2019 differed slightly from the provision currently in force.[4]

Legal sciences experts agree that the new provision is intended to protect the administration of justice.[5] This is because it is located in Chapter XXX of the Penal Code, titled 'Crimes against the Administration of Justice'. The generic subject matter of protection (generic legal interest) of a given prohibited act is, in principle, derived from the title of the Penal Code chapter in which the given offence type is located.[6] The protective objective of the sanctioned norm under Article 244c § 1 of the Penal Code is to guarantee proper enforcement of the court's judgment regarding the

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[2] Act of 13 June 2019 amending the Penal Code Act and Certain Other Acts, not published in the Polish Journal of Laws.

[3] Judgment of the Constitutional Tribunal of 14 July 2020 Kp 1/19, OTK-A 2020/36.

[4] Draft wording of Article 244c of the Penal Code in the Act of 13 June 2019: '§ 1. Whoever evades the performance of a compensatory measure referred to in Article 46 ordered by the court in the form of an obligation to redress damage, provide compensation for harm, or pay vindictive damages for an indictable offence shall be subject to imprisonment from three months to five years.
§ 2. The perpetrator of the offence defined in § 1 shall not be punished if they have performed the compensatory measure in whole:
(1) no later than within 30 days following the first interrogation as a suspect; or
(2) no later than within the time specified in § 3.
§ 3. If it is impossible or very difficult for the perpetrator to pay the entire amount due under the compensatory measure within the time limit specified in § 2(1), the prosecutor may grant the perpetrator a suitable time limit, not longer than 12 months, to perform this obligation.'

[5] I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1262.

[6] M. Filipczak, in: Kulesza J. (ed.), *Prawo karne materialne. Nauka o przestępstwie, ustawie karnej i karze*, Warszawa, 2023, p. 201.

awarded compensatory measure.[7] In previous legal circumstances, offences under Chapter XXX of the Penal Code led only to the penalisation of a failure to conform to strictly specified types of punitive measures (Article 244), failure to appear at a specific location or Police division in relation to a 'stadium ban' (Article 244a), or failure to conform to obligations ruled in relation to a preventive measure (Article 244b). Due to the 2015 amendment,[8] the obligation to redress damage, compensate for harm, and vindictive damages are no longer punitive measures but, *de lege lata*, compensatory measures.[9] This way, the new Article 244c of the Penal Code penalises behaviour that had previously been outside the domain of criminal law. This was pointed out by the initiator of the bill in the explanatory memorandum:

> 'the axiology of the protected values should also include evasion of performance of a compensatory measure in the form of the obligation to redress damage, provide compensation for harm, or pay vindictive damages awarded by the court in favour of an injured party or a person closest to them for an indictable offence (draft Article 244c of the Penal Code)'.[10]

However, Ł. Pilarczyk aptly noted that

> 'Apparently, the legislator intends to treat redressing damage as a punitive measure. Hence the readiness to penalise a failure to perform it. In contrast, the Penal Code does not consider redressing damage to be a punitive measure. It is evident not only from a different label but also the fact that no sentencing directives are applied when it is awarded. Instead, civil law provisions are employed (as explicitly follows from Article 46 § 1 of the Penal Code)'.[11]

This suggests the completely misguided motivation of the legislator, which fails to consider the subsidiary role of criminal law in governing social interactions.

Contrary to the situations described above, in the case of an offence under Article 244c of the Penal Code, the perpetrator's behaviour additionally harms the individual interest of the injured party awarded the compensatory measure. Therefore, the personal interest of that person is under the protection of Article 244c of the Penal Code, as it is intended to protect also their economic rights stemming from the previous offence.[12] Thus, such a person qualifies as an injured party under Article 49 § 1 of the Code of Criminal Procedure, also in criminal proceedings of the type discussed here. Indeed, their request is necessary to initiate criminal proceedings because the offence under Article 244c § 1 of the Penal Code is prosecuted based

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[7] I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny*…, op. cit., p. 1260.

[8] Act of 20 February 2015 amending the Penal Code Act and Certain Other Acts, Journal of Laws of 2015, item 396.

[9] T. Dukiet-Nagórska, in: Dukiet-Nagórska T. (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warszawa, 2020, p. 279.

[10] Sejm print No. 2024, 9th term of the Sejm, p. 79.

[11] Ł. Pilarczyk, 'Przestępstwo uchylania się od wykonania środka kompensacyjnego (art. 244c Kodeksu karnego) – ocena zasadności wprowadzenia regulacji', *Prawo w Działaniu*, 2023, No. 55, p. 190.

[12] M. Mozgawa, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz,* Warszawa, 2023, p. 977; M. Banaś-Grabek, in: Gadecki B. (ed.), *Kodeks karny. Art. 1–316. Komentarz*, Warszawa, 2023, p. 761.

on a complaint (Article 244c § 3 of the Penal Code). Therefore, the offence directly concerns the awarded party or their closest person. The latter applies when the injured party was represented by their closest persons in the original proceedings when the compensatory measure was awarded (Article 52 § 1 of the Code of Criminal Procedure). Article 244c § 1 of the Penal Code requires that the measure be awarded to the closest persons. As a result, a situation where the compensatory measure was awarded to the injured party and then inherited by the closest persons does not involve criminalisation. In this case, the prerequisite that the measure is awarded to the closest person is not satisfied, and the legislator intends to protect the persons awarded the compensatory measure. The arguments are invalid in the case of general succession. It should be noted that Article 244c § 1 of the Penal Code does not protect other persons to whom the court might award such an obligation under Article 52 § 1 of the Code of Criminal Procedure, namely a deceased injured party's dependants who were not their closest persons.

The fact that the offence also protects the individual interest of the person awarded the compensatory measure has one further highly relevant consequence. Considering that Article 244c § 1 of the Penal Code concerns an injured party or their closest person, awarding vindictive damages in favour of entities other than the injured party or their closest person falls within the scope of potential criminalisation. Furthermore, there are many circumstances where vindictive damages may be awarded; these can include awards to the Victim and Post-Correction Aid Fund under Article 47 §§ 1, 2a, and 3 of the Penal Code, or to the National Fund for Environmental Protection and Water Management under Article 47 § 2 of the Penal Code. Other examples include vindictive damages awarded under related legislation, such as drug addiction vindictive damages under Article 70(4) of the Act on Drug Addiction Prevention[13] or vindictive damages for animal protection under Article 35(5) of the Act on Protection of Animals.[14]

The substantive scope of the offence under Article 244c § 1 of the Penal Code directly specifies that it concerns only the compensatory measure in the form of the obligation to redress damage, compensate for harm, or pay vindictive damages. The grounds for awarding these measures are provided in relevant provisions in Chapter Va of the Penal Code: Article 46 § 1 of the Penal Code regarding the obligation to redress damage or compensate for harm and Articles 46 § 2 of the Penal Code and 47 § 2 of the Penal Code regarding vindictive damages. In addition to Chapter Va of the Penal Code, Article 57a § 2 of the Penal Code also provides a basis for awarding vindictive damages to the injured party. In this case, the vindictive damages are a compensatory measure,[15] and may constitute a legally protected interest under Article 244c of the Penal Code. Beyond the Penal Code, special acts also provide for awarding vindictive damages to injured parties, such as Article 79(1)(3) of the Act on Copyright and Related Rights.[16] If vindictive damages awarded under such special

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13 Act of 29 July 2005 on Drug Addiction Prevention, Journal of Laws of 2023, item 1939.

14 Act of 21 August 1997 on Protection of Animals, Journal of Laws of 2023, item 1580.

15 W. Wróbel, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53–116*, Warszawa, 2016, p. 99.

16 Act of 4 February 1994 on Copyright and Related Rights, Journal of Laws of 2022, item 2509.

laws are compensatory in nature, their evasion may give rise to criminal liability under Article 244c § 1 Penal Code). However, Article 244c § 1 of the Penal Code provides an exhaustive list of three compensatory measures to which it applies. The elements of the description of a prohibited act must meet the criterion of sufficient specificity. They must not be construed extensively, and no analogies unfavourable to the perpetrator may be employed.[17] Consequently, where there is doubt as to whether a particular behaviour falls within the scope of penalisation, the criminal law norm must not be interpreted in a manner detrimental to the perpetrator.[18] Therefore, the prohibited act in question does not apply to legal costs awarded to the injured party acting as an auxiliary prosecutor. It should also be noted that Article 46 § 1 Penal Code *in fine* prevents the awarding of lifetime compensation to the injured party. Accordingly, evading payment of lifetime compensation awarded under civil-law provisions for tort also entails no criminal liability. In light of the above, Article 244c § 1 of the Penal Code employs a category of substantive criminal law in the form of a compensatory measure, granting criminal-law protection only to claims resulting from a conviction. By contrast, other claims of the injured party awarded in civil proceedings regarding the same act are not protected under Article 244c § 1 of the Penal Code.

In final notes on the subject matter of the offence under Article 244c § 1 of the Penal Code, one should note a significant statutory limitation. According to the literal wording of the provision, evading performance of a compensatory measure is limited to those awarded in relation to an indictable offence (*ex officio* prosecution). The science of criminal law categorises offences into those prosecuted through public indictment, upon a complaint of the injured party, and through private indictment.[19] Still, procedural law defines 'prosecution' slightly differently:

> 'The criminal procedure in Poland employs two primary modes of prosecution: public prosecution leading to public indictment, with some variations, i.e. prosecution upon complaint or consent, and private prosecution, with subsidiary action as a supplemental option for the former.'[20]

This is evident in Article 10 § 1 of the Code of Criminal Procedure, which sets out the prosecuting authority's obligation to initiate and conduct preparatory proceedings, and the public prosecutor must file and support charges of an offence prosecuted *ex officio*. Thus, *ex officio* prosecution is synonymous with public prosecution and encompasses offences where only the public prosecutor is competent, regardless of whether prosecution occurs unconditionally or upon complaint of the injured party.[21] As a result, compensatory measures of the same

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[17] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna,* Kraków, 2013, p. 118.

[18] J. Długosz, *Ustawowa wyłączność i określoność w prawie karnym*, Warszawa, 2016, p. 337.

[19] J. Lachowski, A. Marek, *Prawo karne. Zarys problematyki*, Warszawa, 2021, p. 99.

[20] T. Grzegorczyk, in: Hofmański P. (ed.), *System prawa karnego procesowego. Zagadnienia ogólne. Tom I. Cz.* 2, Warszawa, 2013, p. 291.

[21] M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I*, Warszawa, 2020, p. 86.

type awarded for the same offence under private prosecution[22] are not protected under Article 244c § 1 of the Penal Code. Such differentiation in criminal protection between claims arising from public indictment and those from private indictment is unfounded. The bill offered no rationale in this regard. This raises concerns as to why the legislator would treat the same claims of the injured party under private indictment differently. Courts may award vindictive damages or remedies in privately prosecuted cases as well, and often do, given the nature of offences against reputation (defamation, insult) and minor bodily harm. This legislative decision clearly lacks logical justification and exemplifies the penalisation of the evasion of a compensatory measure without coherent reasoning.

ACTUS REUS AND *MENS REA*

The most controversial aspect, which suggests weak justification for introducing the offence into the Penal Code, relates to the act defined as 'evading' and its *mens rea*. The dictionary defines 'to evade' as 'to avoid something or someone, especially in a dishonest way';[23] 'to avoid the performance of';[24] or 'to escape by contrivance or artifice from'.[25] In the context of the Penal Code, the act of evading is already a feature of another offence, namely, the non-payment of maintenance under Article 209 § 1 of the Penal Code. Accordingly, the terms should be construed as having identical meanings, following the rule of contextual interpretation.[26] Literature concerning Article 209 § 1 of the Penal Code explains that

> 'The very fact of non-performance of the obligation referred to in Article 209 is not tantamount to evasion. If an offence under Article 209 is suspected, one must always investigate the causes of the alleged perpetrator's failure to perform the maintenance obligation. Some may be beyond their control (such as serious illness necessitating hospitalisation). Evasion of the obligation to provide for the maintenance of a person entitled to it occurs when the obligor fails to perform the obligation in bad faith despite being objectively able to perform it'.[27]

This interpretation remains valid despite subsequent amendments to Article 209 of the Penal Code,[28] as the act of non-payment of maintenance remained

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[22] These include offences under Article 157 § 4 of the Penal Code (slight bodily harm), Article 212 §§ 1 and 2 of the Penal Code (defamation), Article 216 §§ 1 and 2 of the Penal Code (insult), and Article 217 § 1 of the Penal Code (battery).

[23] Definition of 'evade', *Cambridge Dictionary*, Cambridge University Press & Assessment; https://dictionary.cambridge.org/pl/dictionary/english/evade [accessed on 13 November 2024].

[24] Definition of 'evade', *Merriam-Webster.com Dictionary*, Merriam-Webster; https://www.merriam-webster.com/dictionary/evade [accessed on 13 November 2024].

[25] Definition of 'evade', *Oxford English Dictionary*, Oxford University Press; https://www.oed.com/search/dictionary/?scope=Entries&q=evade [accessed on 13 November 2024].

[26] L. Morawski, *Zasady wykładni prawa*, Toruń, 2010, p. 119.

[27] J. Jodłowski, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, Warszawa, 2016, p. 915.

[28] Act of 23 March 2017 amending the Penal Code Act and the Act on Aid to Persons Entitled to Maintenance, Journal of Laws of 2017, item 952.

unchanged.[29] Case law indicates that evasion of an obligation takes place when the obligor 'expresses an adverse mental attitude towards performing their obligation, which leads to them purposefully failing to perform it despite being able to because they do not want to perform it or choose to ignore it'.[30] Therefore, just as in the case of failure to pay maintenance, it holds true for the offence under Article 244c § 1 of the Penal Code that 'evasion requires demonstrating that the perpetrator was objectively able to provide the means of maintenance but failed to do so'.[31] Hence, the mere fact of non-payment of claims awarded in a criminal case to an injured party (or their closest person) does not amount to a constituent element of the offence. It is thus necessary to investigate the reason for this omission. This means that the offence under Article 244c § 1 of the Penal Code can only be committed with intent. It is only right to assume that the intent can be direct intent (*dolus directus*) or legal intent (*dolus eventualis*), as in the case of a failure to pay maintenance. This is because the perpetrator must be aware of the judgment constituting the source of their obligation and must either be unwilling to perform it or consciously ignore it.[32]

The introduction of the offence under Article 244c § 1 of the Penal Code is another sign of an irrational approach by the legislator who disregarded the fact that 'compensatory measures are of an entirely different nature than punitive measures, especially regarding their enforcement'.[33] The *ratio legis* for introducing the offence seems unfounded. The offence under Article 244c § 1 of the Penal Code is formal in nature, which means the evasion of performing the compensatory measure constitutes an offence. Indeed, when awarded in a criminal case, the measures constitute a civil-law claim of the injured party that may be pursued through enforcement, where the judgment is the enforcement order. It should be noted that penalisation of such behaviours was controversial even at the time when the offence of non-payment of maintenance was introduced, especially after the 2017 amendments when the basic type from Article 209 § 1 of the Penal Code became a formal offence. J. Jodłowski noted that

> 'A solely general evaluation of the change in Article 209 should first note that Article 209 in its current form indeed introduces liability for debt. This would be in stark conflict with Article 1 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that "no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation." The separation of the perpetrator's behaviour and the financial situation of the injured party by eliminating one feature of the offence, namely putting the injured party at risk of being unable to meet

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[29] J. Kluza, 'Jedność czynu w odniesieniu do przestępstwa niealimentacji', *Monitor Prawniczy*, 2022, No. 6, pp. 303–304.

[30] Judgment of the Supreme Court of 10 May 2023, II KK 135/23, LEX No. 3563358; see also judgment of the Supreme Court of 24 November 2022, IV KK 405/22, LEX No. 3557040.

[31] Judgment of the Supreme Court of 19 October 2022, II KK 255/22, LEX No. 3513055.

[32] P. Bogacki, M. Olężałek, *Kodeks karny. Komentarz do nowelizacji z 7.7.2022 r.*, Warszawa, 2023, p. 513.

[33] S. Herzog, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, margin number 1 to Article 244c § 1 of the Penal Code, Legalis.

basic livelihood needs, may lead to a conclusion that the amendment of Article 209 was not aimed at protecting the family and child care.'[34]

M. Małecki, in turn, emphasised that:

'The role of criminal law is to stigmatise the grossest and most reprehensible violations of norms of conduct that affect legal interests rather than to govern social interactions through mechanisms for satisfying financial claims in place of – or as an alternative for – procedures provided by other branches of law. Criminal legislation should not replace restitution mechanisms provided for in other laws with criminal law provisions. Furthermore, it should not restrict a person's freedoms and rights with a criminal-law provision when this is not necessary to protect important constitutional values in a country with a sound rule of law (Article 31(3) of the Constitution of the Republic of Poland)'.[35]

Nevertheless, penalisation of non-payment of maintenance is grounded in the protection of the interests of the family and the beneficiary since, as J. Jodłowski put it,

'It is impossible to justify a belief that a deterioration of the financial standing of a family caused by the obligor failing to fulfil their maintenance obligation does not affect the interests of the family in a broad sense even if it does not put them at risk of being unable to meet basic livelihood needs. In this context and in a sense, the motivation for penalising non-payment of maintenance (regardless of the specific circumstances) will always be to protect the family and child care.'[36]

This is not the case for the offence under Article 244c § 1 of the Penal Code, and the above-mentioned comment by M. Małecki applies to this offence in full. According to Article 1 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms,[37] 'no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.' It should be noted, though, that the Article 'does not apply to obligations under public or private law'.[38] A similar regulation is provided for in Article 11 of the International Covenant on Civil and Political Rights.[39] However, in this case, the injured party's civil-law claims are based on a criminal court judgment rather than a contractual obligation. Nevertheless, the provision of Article 244c § 1 of the Penal Code remains clearly disproportionate considering the legislator's objective. Still, regarding Article 11 of the Covenant, the literature demonstrates that:

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[34] J. Jodłowski, in: Wróbel W., Zoll A. (eds), *Kodeks karny*…, op. cit., p. 902.

[35] M. Małecki, 'Przestępstwo niealimentacji w perspektywie zmian (uwagi do rządowego projektu nowelizacji art. 209 k.k. z 28 października 2016 r.)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2016, No. 4, p. 40.

[36] J. Jodłowski, in: Wróbel W., Zoll A. (eds), *Kodeks karny*…, op. cit., p. 903.

[37] Protocols No. 1 and 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Paris on 20 March 1952 and drafted in Strasbourg on 16 September 1963, Journal of Laws of 1995, No. 36, item 175/2.

[38] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2021, p. 1089.

[39] International Covenant on Civil and Political Rights opened for signature at New York on 19 December 1966, Journal of Laws of 1977, No. 38, item 167, hereinafter 'the Covenant'.

> 'Its prohibition applies to private contractual obligations rather than offences of non-performance of public interest obligations resulting from statutory provisions or a decision of the court. Such obligations include maintenance.'[40]

Although the compensatory measure does not originate from a contractual obligation, it is also not governed by public law. It is a civil-law claim from a prohibited act. In this way, the provision of Article 244c § 1 of the Penal Code indeed starts to resemble the penalisation of debt. The Iustitia Association of Polish Judges noted this problem in their bill opinion. They believed the provision to lead to a 'penalty spiral' because previously sentenced perpetrators 'by evading the obligations under Article 46 § 1 of the Penal Code will shortly become repeated offenders with the full attention of law enforcement authorities without any reasonable justification for this scheme'.[41] Another doubt concerns conformity of the provision with Article 31(1) of the Constitution of the Republic of Poland. As demonstrated above, the type of offence discussed here concerns only claims of the injured party (or their closest person) originating from a criminal-law sentence, as evident from the reference to a compensatory measure. Therefore, the status of such a perpetrator is worse than that of a perpetrator who was ordered to redress damage or compensate for harm under the judgment of a civil court. The Polish Ombudsman pointed out this problem, emphasising the differentiation between people in the same position, which is baseless under Article 31(3) of the Constitution of the Republic of Poland.[42] The same applies to a situation where the obligation to redress damage or compensate for harm is awarded to an injured party as a probative measure under Article 67 § 3 of the Penal Code. In this context, it is not a compensatory measure and not subject to criminalisation under Article 244c § 1 of the Penal Code.[43]

The disproportionality of the new Article 244c of the Penal Code is due to the legislator having completely disregarded the fact that the interests of the injured party awarded a compensatory measure are already sufficiently protected by criminal law. The explanatory memorandum for the bill of 2019 with a similar Article 244c of the Penal Code indicates that:

> 'Currently the legislator penalises non-performance by the convict of other decisions regarding their relationship with the injured party, such as periodic vacation of a residential unit occupied together with the injured party or restraining orders. Simultaneously, the non-performance of such penal measures may be evaluated through criminal-law conse-

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[40] K. Sękowska-Kozłowska, in: Wieruszewski R. (ed.), *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, Warszawa, 2012, p. 256.

[41] *Opinion of the Criminal Law Division of the Iustitia Association of Polish Judges on the Bill of 16 September 2021 amending the Penal Code Act and Certain Other Acts*, p. 16; https://legislacja.rcl.gov.pl/docs//2/12351306/12815612/12815615/dokument525810.pdf [accessed on 14 August 2025].

[42] Ombudsman's letter, II.510.1043.2021.PZ, p. 35; https://legislacja.rcl.gov.pl/docs//2/12351306/12815618/12815621/dokument525804.pdf [accessed on 14 August 2025].

[43] J. Zagrodnik, *Opinia w sprawie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z dnia 16 września 2021 r.*, p. 25; https://legislacja.rcl.gov.pl/docs//2/12351306/12815612/12815615/dokument525808.pdf [accessed on 14 August 2025].

> quences of the prohibited act in relation to which they are awarded (such as enforcement of a conditionally suspended imprisonment, Article 75 § 2 of the Penal Code). The same applies to a compensatory measure that affects the actual and legal situation of the injured party regarding the accused's performance of their obligations under a final judgment to the same or even greater (*pro futuro*) extent. Therefore, there is no reason for weaker criminal-law protection against non-performance of a compensatory measure than in the case of penal measures against the accused ordering them to perform specific behaviour towards the injured party.'[44]

The legislator employed the same arguments in 2022. Nevertheless, the purpose of penalising non-compliance with penal measures related to the injured party, as referred to in Article 244 of the Penal Code, is clearly distinct and is aimed at ensuring the injured party's safety. By contrast, Article 244c § 1 of the Penal Code plainly fails to serve this purpose. In addition, according to Article 300 § 2 of the Penal Code, a perpetrator is penalised when they prevent or diminish the satisfaction of the creditor in order to prevent enforcement of a decision by a court or another state authority by removing, concealing, disposing of, transferring, destroying, actually or superficially encumbering, or damaging their assets that have been foreclosed or are at risk of foreclosure or by removing forfeiture marks. The literature offers some doubts about whether this type of offence concerns non--business entities,[45] but it is true that 'the legislator neither differentiates between protected debts regarding their source nor indicates the relationship between the debt and commercial activity.'[46] Therefore, Article 300 § 2 of the Penal Code protects 'also the propriety (certainty, security) of civil-law transactions in the remaining scope, particularly legitimate claims of creditors against dishonest actions of debtors seeking to prevent satisfaction of the claims'.[47] Hence, purposeful actions of a debtor against the performance of a compensatory measure awarded in a criminal court can be penalised under Article 300 § 2 of the Penal Code. As a result, the introduction of a separate type of offence under Article 244c § 1 of the Penal Code penalising the very fact of evading the performance of a compensatory measure is unfounded.

CONCLUSION

In summary of the foregoing deliberations, it must be emphasised that the newly introduced offence under Article 244c § 1 of the Penal Code gives rise to serious concerns regarding the proportionality of penalising the conduct regulated by the legal norm. The rationale for introducing the prohibited act provided in the bill is insufficiently detailed and unconvincing. The injured party (or their closest person)

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[44] Sejm print No. 3451, 8th term of the Sejm, p. 41.

[45] See, for example, G. Łabuda, in: Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, pp. 1457–1458.

[46] A. Gałązka, in: Grześkowiak M., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 1604.

[47] J. Majewski, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.*, Warszawa, 2023, p. 773.

may enforce the performance of a compensatory measure from a criminal court judgment in civil law proceedings. Only where the obligee prevents the enforcement may such conduct be punishable under Article 300 § 2 of the Penal Code. Criminal liability for evading the performance of a compensatory measure is also dubious because this liability resembles a kind of liability for debt. Therefore, the entire Article 244c of the Penal Code should be repealed either through amendment or by a court faced with such an indictment by addressing the Constitutional Tribunal with a legal question regarding the constitutionality of the provision. Regardless of these controversies, the wording of Article 244c § 1 of the Penal Code reveals significant shortcomings, as evasion of the performance of a probative or compensatory measure in favour of people other than the closest persons of the injured party – which is potentially permissible under Article 52 § 1 of the Code of Criminal Procedure – falls outside the scope of criminalisation.

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HEALTH CONDITION OF THE ACCUSED AS A CIRCUMSTANCE PRECLUDING PROSECUTION

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Abstract

The article addresses the issue of discontinuation of proceedings due to the health condition of the accused that permanently prevents them from participating in the proceedings – based on the provision laid down in Article 17 § 1 subsection 11 of the Code of Criminal Procedure (CCP) – as a circumstance precluding prosecution. The research thesis is that the health condition of the accused may constitute grounds for discontinuing proceedings under this provision. A dogmatic legal approach and case law analysis are used to examine the issue. The doctrine and case law allow for this possibility, recognising that the poor health of the accused, due to its permanent nature, precludes the issuance of another substantive ruling concluding the proceedings. In opposition to this view, it is argued that the health condition of the accused may represent a factual obstacle preventing the conduct of proceedings and therefore provides grounds for their suspension (Article 22 § 1 CCP). Due to the strong polarisation of views on this issue, and the almost uniform case law of the Supreme Court, which holds that the health condition of the accused constitutes grounds for suspending proceedings, it is necessary for the legislature to intervene and add subsection 10a to Article 17 § 1 CCP, listing circumstances precluding prosecution, to include the health condition of the accused that permanently prevents participation in the proceedings.

Key words: serious illness, inability to participate in a proceeding, factual circumstances, legal circumstances, the accused, health condition of the accused, discontinuation of the proceeding, suspension of the proceeding

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INTRODUCTION

The catalogue of circumstances that constitute obstacles to conducting criminal proceedings, as set out in Article 17 § 1 of the Code of Criminal Procedure (CCP), is not exhaustive in nature. This is evident from the content of subsection 11, which provides for 'another circumstance precluding prosecution'. In the linguistic sense, the term refers to an event that prevents the initiation of prosecution, and the word 'another' excludes from its scope the circumstances previously listed in subsections 1 to 10 therein. From a procedural point of view, it refers to refraining from initiating a preparatory proceeding, or to discontinuing such a proceeding or trial. This premise is subsidiary in nature and applies only when there are no other grounds for discontinuing a criminal proceeding.[1] Such a general definition of the reasons for refusing to initiate or for discontinuing a proceeding raises doubts as to whether the phrase encompasses the health condition of the accused when it permanently prevents him or her from participating in the proceedings.[2]

NATURE OF CIRCUMSTANCES PRECLUDING PROSECUTION

The content of the specific circumstances listed in Article 17 § 1(1)–(10) CCP indicates that they are both legal and factual in nature. Therefore, these circumstances are rightly classified as (1) factual and (2) legal.[3] The former concern the sphere of facts; thus, they involve the absence of a factual element, for example, the non--commission of an act.[4] The latter include circumstances that are legal in nature and are set out in the Code of Criminal Procedure (Article 17 § 1), in other statutes, for example Article 62a of the Act of 29 July 2005 on Counteracting Drug Addiction,[5] or in international agreements.

In the context of the above classification, the question arises whether another circumstance that precludes prosecution must be exclusively legal in nature, or may also be factual. The answer to this question is of key importance in considering whether the health condition of the accused, which clearly belongs to the factual sphere, may justify the discontinuation of proceedings. The wording of Article 17 § 1(11) CCP provides no legal basis for limiting such other circumstances to those

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[1] Supreme Court ruling of 16 July 2024, I KO 12/24, LEX No. 3736066.

[2] Code of Criminal Procedure of 1928, Article 3 *in fine*, provided for the non-initiation of a proceeding or its discontinuation in the event of the occurrence of 'another circumstance precluding prosecution'. In the doctrine, an incurable mental health condition of the accused was considered to be within the scope of the term (L. Peiper, *Komentarz do kodeksu postępowania karnego*, Kraków, 1932, p. 16).

[3] R.A. Stefański, in: Stefański R.A. (ed.), *System Prawa Karnego Procesowego. Postępowanie przygotowawcze*, Vol. X, Warszawa, 2016, p. 1328.

[4] R.A. Stefański, 'Podstawy i przyczyny umorzenia postępowania przygotowawczego', *Prokuratura i Prawo*, 1966, No. 2–3, pp. 11–12; S. Steinborn, in: Grajewski J. (ed.), *Prawo karne procesowe – część ogólna*, Warszawa, 2011, pp. 160–161.

[5] Journal of Laws of 2023, item 1939, as amended; thus, also in judgment of the Appellate Court in Warsaw of 8 October 2014, I AKa 263/14, LEX No. 1527246.

that are solely legal. It refers to circumstances other than those listed in subsections 1–10, which, as already noted, are both legal and factual in nature.[6]

In the literature and case law, however, circumstances precluding prosecution under Article 17 § 1(11) CCP are generally limited to legal ones. It is expressly stated that all legal obstacles preventing the initiation or continuation of proceedings fall within the meaning of 'other circumstances that preclude prosecution' as used in Article 17 § 1(11) CCP.[7] These include: abolition,[8] *quasi*-safe conduct (Article 589 §§ 1 and 2 CCP),[9] a co-punished act,[10] the consumption of a public complaint,[11]

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[6] D. Krakowiak, 'Trwała niezdolność oskarżonego do udziału w postępowaniu jako „inna okoliczność wyłączająca ściganie" (art. 17 § 1 pkt 11 k.p.k.)', *Prokuratura i Prawo*, 2020, No. 10–11, p. 75.

[7] J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Vol. I, Warszawa, 2017, p. 338; M. Rogalski, in: Artymiak G., Rogalski M. (eds), *Proces karny. Część ogólna*, Warszawa, 2012, p. 206; the Supreme Court ruling of 29 January 2025, I KK 473/24, LEX No. 3821920; the Supreme Court ruling of 27 February 2025, II KK 310/23, LEX No. 3839988; the Supreme Court ruling of 20 November 2024, IV KK 420/24, LEX No. 3781471l; the Supreme Court ruling of 31 March 2016, II KK 313/15, *OSNKW*, 2016, No. 7, item 44; the Supreme Court ruling of 17 December 2015, III KK 200/15, Lex No. 2068069; the Supreme Court ruling of 20 January 2010, IV KK 329/09, *OSNwSK*, 2010, No. 1, item 119; the Supreme Court ruling of 2 October 2007, II KK 177/07, LEX No. 567690; ruling of the Appellate Court in Katowice of 2 April 2014, II AKz 131/14, LEX No. 1487179; ruling of the Appellate Court in Katowice of 16 April 2014, II AKz 151/14, LEX No. 1487272; ruling of the Appellate Court in Łódź of 15 July 2009, II AKz 417/09, LEX No. 519615.

[8] J. Tylman, 'Warunki dopuszczalności postępowania karnego (przesłanki procesowe)', in: *Nowa kodyfikacja karna. Kodeks postępowania karnego*, Vol. 14, Warszawa, 1998, p. 45; L. Wilk, 'W sprawie uregulowania i stosowania łaski generalnej', *Palestra*, 2002, No. 5–6, p. 34; the Supreme Court judgment of 14 September 1983, V KRN 197/83, *OSNKW*, 1984, No. 3–4, item 40 with approving comments by M. Cieślak, Z. Doda, *Kierunki orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (lata 1984–1985)*, Warszawa, 1987 (Biblioteka Palestry), p. 39.

[9] T. Grzegorczyk, 'Zapewnienie świadkowi, biegłemu lub oskarżonemu nietykalności w procesie karnym', *Prokuratura i Prawo*, 1996, No. 9, pp. 27–32; D. Drajewicz, '*Quasi*-list żelazny', *Prokuratura i Prawo*, 2013, No. 11, pp. 146–158; M. Jachimowicz, '*Quasi* list żelazny', *Gazeta Sądowa*, 2006, No. 1, pp. 24–25.

[10] The Supreme Court judgment of 13 June 2007, III KK 432/06, LEX No. 296722; the Supreme Court judgment of 16 November 2009, IV KK 98/09, LEX No. 553725; the Supreme Court resolution of 26 September 2002, I KZP 23/02, *OSNKW*, 2002, No. 11–12, item 98; judgment of the Appellate Court in Katowice of 25 June 2015, II AKa 192/15, LEX No. 1785768; judgment of the Appellate Court in Kraków of 13 November 2014, II AKa 203/14, LEX No. 1711349; judgment of the Appellate Court in Katowice of 10 February 2005, II AKa 22/05, LEX No. 147209 with a critical gloss by P. Gensikowski, *Prokuratura i Prawo*, 2007, No. 7–8, pp. 210–216; judgment of the Appellate Court in Lublin of 16 February 2001, II AKa 248/00, LEX No. 49842 with an approving gloss by M. Kulik, *Prokuratura i Prawo*, 2001, No. 10, pp. 108–117; judgment of the Appellate Court in Lublin of 16 October 2013, II AKa 192/13, LEX No. 1388875; judgment of the Appellate Court in Katowice of 19 February 2015, II AKa 513/14, LEX No. 1770354 with partly critical glosses by M. Kulik, LEX/el., 2016, and K. Nazar, *Prawo w Działaniu*, 2015, No. 23, pp. 398–404.

[11] T. Grzegorczyk, 'Wygaśnięcie prawa oskarżyciela publicznego do oskarżenia', *Problemy Praworządności*, 1980, No. 2, p. 14; the Supreme Court resolution of 26 September 2002, I KZP 23/02, *OSNKW*, 2002, No. 11–12, item 98; the Supreme Court ruling of 28 October 2009, I KZP 21/09, *OSNKW*, 2010, No. 1, item 1 with an approving gloss by M. Rogalski, *Orzecznictwo Sądów Polskich*, 2011, No. 1, pp. 1–4; the Supreme Court judgment of 9 October 2008, V KK 252/08, *OSNwSK*, 2008, item 1992.

limited extradition, which includes a prohibition on prosecution and conviction for an offence not covered by the extraditing state's consent for the purpose of conducting judicial proceedings against that person, and committed before the date of rendition (Article 596 CCP),[12] and limitations resulting from the scope of rendition within the execution of the European Arrest Warrant (EAW), for example where a person is surrendered to Poland under an EAW concerning offences other than those being prosecuted, and who has not submitted a declaration of waiver of the principle of special protection, in accordance with Article 607e § 3(7) CCP.[13] Other examples include the application of disciplinary measures under military regulations (Article 658 § 1 CCP), and the voluntary disclosure to the prosecuting authority of all relevant information concerning persons involved in the commission of Nazi crimes, communist crimes, crimes committed by Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich, as well as other crimes against peace, humanity, or war crimes against Polish nationals between 8 November 1917 and 31 July 1990, as well as the circumstances of their commission, provided that this information makes it possible to initiate proceedings against a specific individual (Article 45(6) of the Act of 18 December 1998 on the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation).[14]

Such circumstances are also understood to include a pardon in the form of individual abolition.[15] However, this approach is flawed, as such a pardon is

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[12] J. Zagrodnik, in: Zagrodnik J. (ed.), *Kodeks postepowania karnego. Komentarz*, Warszawa, 2024, p. 152; M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I. Articles 1–424, Warszawa, 2024, p. 138; M. Kurowski, *Rezygnacja z oskarżania w toku postępowania sądowego w polskim procesie karnym*, Warszawa, 2019, pp. 94–97; S. Milczanowski, 'Uwagi na temat zasady specjalności jako przesłanki ekstradycyjnej', in: Bogunia L. (ed.), *Problemy prawa karnego*, Vol. XXV, Wrocław, 2009, pp. 129–145; M. Płachta, 'Glosa do wyroku SA w Warszawie z dnia 14 listopada 2000 r., II AKa 336/00', *Palestra*, 2002, No. 3–4, p. 250; the Supreme Court judgment of 30 October 2019, V KK 309/19, LEX No. 3562389; the Supreme Court judgment of 3 September 2009, V KK 141/09, *OSNKW*, 2010, No. 2, item 15; the Supreme Court judgment of 25 June 2008, IV KK 179/08, LEX No. 438417; the Supreme Court ruling of 29 August 2006, V KK 193/06, LEX No. 196965; judgment of the Appellate Court in Katowice of 11 February 2013, II AKa 268/12, *Biuletyn Sądu Apelacyjnego w Katowicach*, 2013, No. 3, item 25; the Supreme Court judgment of 17 December 1999, IV KKN 366/99, *Prokuratura i Prawo* – supplement, 2000, No. 6, item 11.

[13] C. Kulesza, in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 76; M. Hotel, 'Ograniczenia w ściganiu za przestępstwa inne niż podstawa przekazania określona w europejskim nakazie aresztowania', *Palestra*, 2014, No. 11–12, pp. 46–54; M. Wąsek-Wiaderek, 'Problemy stosowania zasady specjalności wobec osób przekazanych w trybie europejskiego nakazu aresztowania', in: Ślebzak K. (ed.), *Studia i Analizy Sądu Najwyższego*, Vol. 7, Warszawa, 2014, pp. 302–336; the Supreme Court ruling of 30 January 2019, V KK 7/19, LEX No. 2615128; the Supreme Court judgment of 9 May 2011, V KK 135/11, LEX No. 794538; the Supreme Court judgment of 8 December 2008, V KK 354/08, LEX No. 486535; the Supreme Court judgment of 9 May 2011, V KK 135/11, LEX No. 794538 with an approving gloss by W. Kosior, *Prokuratura i Prawo*, 2017, No. 1, pp. 156–166; ruling of the Appellate Court in Katowice of 11 February 2015, II AKz 815/14, LEX No. 1665570.

[14] Journal of Laws of 2023, item 102, as amended.

[15] K.T. Boratyńska, Ł. Chojniak, W. Jasiński, *Postępowanie karne*, Warszawa, 2012, p. 46.

inadmissible. Its application would conflict with the principle of a democratic state governed by the rule of law, as it would constitute a far-reaching interference by one of the highest state authorities in the domain of the judiciary, and would violate the principles of substantive truth, the presumption of innocence, and the principle of legalism, which is a cornerstone of Polish criminal procedure.[16]

The lack of a complaint by an authorised prosecutor is also incorrectly treated as such a circumstance. This situation may arise due to the absence of an accusing party, for example as a result of the death of a natural person who filed a subsidiary indictment or a private complaint, where no authorised entity succeeds to the rights of the deceased.[17] This ground falls wihtin the scope of Article 17 § 1(9) CCP, which expressly provides for the lack of a complaint by an authorised prosecutor.[18]

The lack of a European Union Member State's request for the extradition of its citizen, despite clear evidence that the state in question is aware of extradition proceedings pending against that person in another European Union state for the purpose of extraditing them to a non-EU state to face justice or to enforce a sentence or detention order, does not constitute such a circumstance.[19]

The inclusion of factual circumstances within the scope of Article 17 § 1(1) CCP is rejected. It is emphasised that long-term factual reasons cannot constitute grounds for issuing a decision based on that provision, and that the appropriate solution should be sought in the suspension of proceedings under Article 22 § 1 CCP).[20]

It is pointed out that 'other circumstances precluding prosecution' do not include the defendant's absence from the country or any information regarding their stay in the United States,[21] the erroneus attribution of an act to a perpetrator when the act does not meet the elements of a prohibited act,[22] the existence or non-existence of a specific civil law claim,[23] an allegation of a violation of substantive law,[24]

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[16] J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks*…, op. cit., pp. 330–333 and the literature referred to therein; the Supreme Court resolution of 31 May 2017, I KZP 4/17, *OSNKW*, 2017, No. 7, item 37 with a critical gloss by A. Rozpędowski, *Gdańskie Studia Prawnicze*, 2019, No. 1, pp. 145–153, a partly critical gloss by R. Zawłocki, *Wojskowy Przegląd Prawniczy*, 2018, No. 2, pp. 117–136, a critical gloss by M. Masternak-Kubiak, *Przegląd Sejmowy*, 2017, No. 6, pp. 238–246, and approving comments by R.A. Stefański, 'Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2017 r.', *Ius Novum*, 2019, No. 3, pp. 85–89; A. Sakowicz, in: Kosonoga J. (ed.), *Studia i Analizy Sądu Najwyższego. Przegląd Orzecznictwa za rok 2017*, Warszawa, 2018, pp. 533–541.

[17] J. Zagrodnik, in: Zagrodnik J. (ed.), *Kodeks*…, op. cit., p. 152.

[18] Thus, also T. Grzegorczyk, in: Jeż-Ludwichowska M., Lach A. (eds), *System Prawa Karnego Procesowego. Dopuszczalność procesu*, Vol. 4, Warszawa, 2015, p. 380.

[19] C. Kulesza, in: Dudka K. (ed.), *Kodeks*…, op. cit., p. 75; the Supreme Court ruling of 5 April 2017, III KO 112/16, *OSNKW*, 2017, No. 8, item 47.

[20] Ruling of the Appellate Court in Katowice of 2 April 2014, II AKz 131/14, LEX No. 1487179.

[21] Ruling of the Appellate Court in Katowice of 2 April 2014, II AKz 131/14, LEX No. 1487179 with a critical gloss by D. Krakowiak, LEX/el., 2015.

[22] The Supreme Court ruling of 1 February 2024, III KZ 49/23, *OSNK*, 2024, No. 6, item 32.

[23] The Supreme Court ruling of 29 November 2022, III KO 78/22, LEX No. 3559467.

[24] The Supreme Court ruling of 18 May 2022, V KK 135/22, LEX No. 3439096.

doubts as to whether a crime was committed,[25] and the establishment of an additional tax liability.[26]

The health condition of the accused is cited as a factual circumstance, which is discussed in more detail below.[27]

CLASSIFICATION OF THE HEALTH CONDITION OF THE ACCUSED AS ANOTHER CIRCUMSTANCE PRECLUDING PROSECUTION

Many publications do not include serious illness of the accused as another circumstance precluding prosecution.[28] Nevertheless, there are both supporting and opposing opinions in the literature and case law. This discrepancy is closely connected to the previously discussed views on the nature of circumstances precluding prosecution, leading to the discontinuation of proceedings under Article 17 § 1(11) CCP.

Such a possibility is accepted, based on the view that a long-term serious illness, which, in light of current medical knowledge, is incurable, constitutes grounds for discontinuation of proceedings. At the same time, it is noted that advances in medical science which may eventually lead to a cure do not undermine this conclusion. It is argued that the same reasoning applies to liability for an offence under Article 156 CC, where a serious incurable illness is likewise a constitutive element.[29] It is further argued that the accused's chronic inability to participate in trial proceedings, resulting from a persistent serious illness, ultimately blocks the process and makes the issuance of a judgment inadmissible. Therefore, the nature of this obstacle corresponds to other procedural obstacles listed in Article 17 § 1 CCP.[30] Utilitarian arguments are also cited in support of this view, including that conducting proceedings against a person who is permanently incapable of

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[25] The Supreme Court ruling of 17 May 2010, IV KK 74/10, *OSNwSK*, 2010, No. 1, item 981.

[26] The Supreme Administrative Court judgment of 30 October 2007, I FSK 880/06, LEX No. 416791.

[27] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz Art. 1–424*, Vol. I, Warszawa, 2008, pp. 152–153; J. Zagrodnik, in: Zagrodnik J. (ed.), *Kodeks*…, op. cit., p. 152; A. Sakowicz, in: Sakowicz A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 29; the Supreme Court ruling of 17 August 2023, V KZ 27/23, LEX No. 3603306; the Supreme Court ruling of 19 October 2021, II KK 430/21, LEX No. 3335558.

[28] E.g., F. Prusak, *Postępowanie karne. Warunki dopuszczalności procesu i czynności procesowe*, Warszawa, 2002, pp. 102–104; C. Kulesza in: Kruszyński P. (ed.), *Wykład prawa karnego procesowego*, Białystok, 2012, pp. 119–120; P. Starzyński, in: Kulesza C., Starzyński P., *Postępowanie karne*, Warszawa, 2017, p. 62; J. Tylman, in: Grzegorczyk T., Tylman J., *Polskie postępowanie karne*, Warszawa, 2022, pp. 252–253.

[29] T. Grzegorczyk, *Kodeks*…, op. cit., pp. 152–153; J. Zagrodnik, in: J. Zagrodnik (ed.), *Kodeks*…, op. cit., p. 152; A. Sakowicz, in: Sakowicz A. (ed.), *Kodeks*…, op. cit., p. 29; M. Kurowski, in: Świecki D. (ed.), *Kodeks*…, op. cit., p. 138; D. Krakowiak, 'Trwała niezdolność…', op. cit., pp. 75–76; A. Piaseczny, in: Olężałek M. (ed.), *Prawo karne procesowe dla sędziów prokuratorów, obrońców i pełnomocników*, Warszawa, 2024, p. 162; the Supreme Court ruling of 19 October 2021, II KK 430/21, LEX No. 3335558.

[30] D. Krakowiak, 'Trwała niezdolność…', op. cit., pp. 75–76.

participating in trial due to a health condition with no prospect of recovery is both pointless and wasteful. Such cases often result in proceedings lasting many years, until either the statute of limitations expires or the accused dies.[31] Based on a systemic interpretation, it is noted that Article 17 § 1(1) and Article 22 CCP appear in Section I, 'Introductory provisions', and that the legislator distinguishes between conditions for the admissibility of trial (Article 17 § 1 CCP) and suspension of proceedings (Article 22 § 2 CCP), which applies to obstacles that only temporarily hinder the course of a trial. Accordingly, if factual and legal circumstances that temporarily impede trial are grounds for suspension, then factual and legal circumstances that permanently and unconditionally hinder procedural activities must be grounds for discontinuation. Moreover, this stance is also supported by the purpose of defining conditions for the admissibility of criminal proceedings, which is to prevent situations where proceedings are conducted even though the issuance of a judgment in the case is not possible. If the health condition of the accused is so poor that they will never be able to participate in a trial, continuing proceedings *in absentia* would create a fiction of justice. An accused person who cannot defend themselves and is unaware of their situation, for example due to dementia, may be be easily proven guilty.[32]

The weak point of this stance lies in the fact that its supporters have failed to develop a general definition of an illness that would constitute a circumstance precluding prosecution, and it is inconsistently specified as:

– the health condition of the accused that shows no prospect of improvement, which not only temporarily prevents the conduct of proceedings against him or her, but also excludes the possibility of conducting them in the future;[33]
– a cerebrovascular accident, dementia in the course of a degenerative disease of the central nervous system, etc.;[34]
– an irreversible serious illness of the accused, or a permanent and irreversible deterioration of the accused's health condition.[35]

Examples of such illnesses include a long-term non-pharmacological coma, a state following serious damage to the central nervous system that completely precludes independent functioning and the ability to communicate, and a placement in a hospice.[36]

Opponents of the admissibility of applying Article 17 § 1(11) CCP to serious health conditions of the accused argue that such a condition constitutes a factual obstacle preventing the conduct of proceedings, and thus provides grounds for suspending the proceedings under Article 22 § 1 CCP).[37] It is stated that 'other

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[31] A. Piaseczny, in: Olężałek M. (ed.), *Prawo karne procesowe*…, op. cit., p. 162.

[32] D. Krakowiak, 'Trwała niezdolność…', op. cit., p. 76.

[33] T. Grzegorczyk, *Kodeks*…, op. cit., pp. 152–153; J. Zagrodnik, in: Zagrodnik J. (ed.), *Kodeks*…, op. cit., p. 152; A. Sakowicz, in: Sakowicz A. (ed.), *Kodeks*…, op. cit., p. 29; the Supreme Court ruling of 19 October 2021, II KK 430/21, LEX No. 3335558.

[34] D. Krakowiak, *Glosa do wyroku SA z dnia 2 kwietnia 2014 r., II AKz 131/14*, LEX/el., 2015.

[35] D. Krakowiak, 'Trwała niezdolność…', op. cit., pp. 78 and 82.

[36] T. Grzegorczyk, *Kodeks*…, op. cit., p. 153.

[37] C. Kulesza, in: Dudka K. (ed.), *Kodeks*…, op. cit., p. 75; J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks*…, op. cit., p. 338; P. Misztal, in: Świecki D. (ed.), *Meritum. Postępowanie*

circumstances precluding prosecution' must be distinguished from obstacles giving rise to the suspension of proceedings (Article 22 § 1 CCP).[38] It is emphasised that the terms 'mental illness or other serious disease' used in this provision also encompass the most serious illnesses and terminal conditions associated with the final phase of life, but they do not provide grounds for recognising the occurrence of 'another circumstance precluding prosecution' within the meaning of Article 17 § 1(11) CCP.[39] This argument has been challenged, with the counterpoint that such an interpretation violates the prohibition against interpreting legal provisions in a manner that renders certain phrases redundant (*per non est*), because Article 22 § 1 CCP refers to a temporary illness, as indicated by the phrase: 'a proceeding shall be suspended for the duration of the obstacle'.[40]

The Supreme Court found that:

> 'A mental illness of the accused during a proceeding constitutes grounds for suspending it if it prevents the accused from participating in the proceeding, i.e. if, despite the participation of counsel for the defence, he is unable to control his behaviour during the proceeding, i.e. to properly understand the meaning of procedural activities and make meaningful statements; however, this inability of the accused to participate in the proceeding due to his current mental health condition may only constitute grounds for suspending the criminal proceeding under Article 22 CCP, and only for the duration of this impediment. Discontinuation of the proceeding could take place if the circumstances indicated in Article 31 § 1 CCP were indeed present, but at the time of the commission of the act.'[41]

> 'Since the legislator did not distinguish between illnesses of greater or lesser severity (in accordance with one or another criterion) within the concepts of Article 22 § 1 CCP, the interpreter is not authorised to introduce such distinctions (*lege non distinguente*). As a result, if Article 22 § 1 CCP lists serious health conditions that prevent the conduct of a trial and these include the most serious cases, i.e. terminal illnesses that result in the suspension of a proceeding, they cannot necessarily be a reason for precluding a trial, i.e. a negative procedural premise leading to discontinuation of the proceeding under Article 17 § 1(11) CCP. The opposite reasoning would imply irrationality on the part of the legislator, who would allow the same circumstance to be treated as a reason for suspending a proceeding and, at another time, as a reason for discontinuing it, depending on the discretion of the authorised procedural body.'[42]

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karne, Warszawa, 2019, p. 192; the Supreme Court ruling of 31 March 2016, II KK 313/15, *OSNKW*, 2016, No. 7, item 44 with approving gloss by M. Kulik, *Studia Iuridica Lublinensia*, 2017, No. 2, pp. 187–198; the Supreme Court ruling of 27 February 2025, II KK 310/23, LEX No. 3839988; the Supreme Court ruling of 20 January 2010, IV KK 329/09, *OSNwSK*, 2010, No. 1, item 119; the Supreme Court judgment of 18 May 1979, IV KR 92/79, *OSNPG*, 1979, No. 11, item 156; ruling of the Appellate Court in Katowice of 2 April 2014, II AKz 131/14, LEX No. 1487179; ruling of the Appellate Court in Katowice of 15 July 2009, II AKz 417/09, LEX No. 519615.

38 P. Misztal, in: Świecki D. (ed.), *Meritum*…, op. cit., p. 192.

39 The Supreme Court ruling of 31 March 2016, II KK 313/15, *OSNKW*, 2016, No. 7, item 44.

40 D. Krakowiak, 'Trwała niezdolność…', op. cit., p. 76.

41 The Supreme Court ruling of 20 January 2010, IV KK 329/09, *OSNwSK*, 2010, No. 1, item 119; the Supreme Court judgment of 18 May 1979, IV KR 92/79, *OSNPG*, 1979, No. 11, item 156.

42 The Supreme Court ruling of 27 February 2025, II KK 310/23, LEX No. 3839988.

CIRCUMSTANCES RELATED TO THE HEALTH CONDITION OF THE ACCUSED JUSTIFYING DISCONTINUATION OF THE PROCEEDING

In addressing the above-presented stances and the arguments cited in support of them, it is necessary to analyse the grounds for suspending proceedings under Article 22 § 1 CCP, insofar as they relate to the health condition of the accused. The provision refers to a mental illness or another serious disease. Article 11 § 1 *in principio* CCP states that the illness must be long-term and must prevent the conduct of a trial; both requirements must be met concurrently.[43] A long-term obstacle to a trial is one whose cessation is difficult to determine or is so distant that it exceeds a reasonably permissible adjournment period.[44] The phrase 'the proceeding shall be suspended for the duration of the obstacle' in Article 22 § 1 *in fine* CCP means that the suspension is for a defined period, the length of which depends on the reason for the suspension. This leads to the conclusion that the illness in question is not permanent, but rather transient, although it is expected to be long-term, meaning it lasts for an extended time. In any case, the period must be foreseeable in the long term. It is an obstacle that delays the trial but does not prevent the issuance of a substantive judgment.[45]

The situation is different when the accused is permanently unable to participate in proceedings due to a mental illness or another serious medical condition. It is true that, by means of *argumentum a maiori ad minus* reasoning, one could argue that if suspension may be applied in cases of serious illness that prevents proceedings for a period, it should be even more justified where the inability is permanent. However, this reasoning is not valid in light of the final wording of Article 22 § 1 CCP, which, as demonstrated above, implies that suspension is only applicable for a specified period. Moreover, the essence of suspension is the temporary cessation of proceedings. The word 'suspension' itself means, *inter alia*, 'stopping something for some time'.[46]

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[43] The Supreme Court ruling of 5 June 2024, I ZSK 4/23, LEX No. 3738748; the Supreme Court seven judges' resolution of 28 September 2006, I KZP 8/06, *OSNKW*, 2006, No. 10, item 87 with approving comments by R.A. Stefański, 'Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2006 r.', *Wojskowy Przegląd Prawniczy*, 2007, No. 2, pp. 135–137; the Supreme Court judgment of 8 December 1978, Rw 447/78, *OSNKW*, 1979, No. 5, item 59; judgment of the Appellate Court in Szczecin of 16 June 2014, II AKa 70/14, LEX No. 1532181; ruling of the Appellate Court in Rzeszow of 3 March 1992, II AKz 12/92, *OSA*, 1993, No. 10, item 60.

[44] S. Waltoś, 'Zawieszenie postępowania w świetle przepisów nowego kodeksu postępowania karnego', *Palestra*, 1970, No. 12, p. 36; Z. Gostyński, *Zawieszenie postępowania w nowym ustawodawstwie karnoprocesowym*, Warszawa, 1998, p. 30; B. Janusz-Pohl, P. Mazur, 'Zawieszenie postępowania przygotowawczego a prawnie chroniony interes pokrzywdzonego w polskim procesie karnym', *Ius Novum*, 2009, No. 3, p. 71; the Supreme Court ruling of 16 May 2024, II KZ 17/24, LEX No. 3715651; the Supreme Court ruling of 26 September 2006, SNO 50/06, LEX No. 568997; the Supreme Court judgment of 8 December 1978, Rw 447/78, *OSNKW*, 1979, No. 5, item 59; ruling of the Appellate Court in Krakow of 9 January 2019, II AKz 675/18, LEX No. 2707541.

[45] W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Vol. I, Bydgoszcz, 1999, p. 162.

[46] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 49, Poznań, 2004, p. 35.

PROPOSALS FOR RESOLVING THE PROBLEM

Due to the inadmissibility of suspending proceedings in cases where a mental or other serious illness permanently prevents the accused from participating and thereby impedes the continuation of proceedings, the position of those supporting discontinuation under Article 17 § 1(11) CCP should be accepted, as their arguments are compelling. However, this does not fully resolve the issue. Firstly, there remains a polarisation of opinions in both the literature and case law, and it is unlikely that the issue can be resolved by a resolution of the Supreme Court concerning an abstract legal issue (Article 83 of the Act of 8 December 2017 on the Supreme Court),[47] as it is highly probable that the Court will maintain its current position, which holds that the health condition of the accused provides only grounds for suspension of proceedings. Secondly, the health conditions referred to in this context are defined inconsistently, which does not facilitate the application of the relevant provision.

Maintaining a situation in which a long-term illness prevents the conduct of proceedings and results in their suspension leads to the need for unnecessary actions by the head of the department, who is obliged to exercise ongoing supervision over suspended cases during the suspension period (§ 80(1)(7) of the Regulation of the Minister of Justice of 17 June 2019: Rules and regulations of common courts)[48] as well as by the prosecutor, who is obliged to verify at least once every six months whether the reasons for suspension still persist (§ 214 of Regulation of the Minister of Justice of 7 April 2016: Rules and regulations of the internal organisational units of the prosecution service).[49]

In this situation, it is suggested that the issue be expressly regulated in the Code of Criminal Procedure by adding subsection 10a to Article 17 § 1, with the following wording: '10a) the health condition of the accused permanently prevents him from participation in the proceeding'. This would refer to an irreversible, permanent health condition that prevents the accused from participating in the proceedings. There is no need to specify the underlying cause of this inability, such as an illness or, more precisely, a mental or serious incurable illness, since the decisive factor for discontinuation would be the permanent inability to participate in the proceeding.

The recognition of a permanent inability to participate in the proceeding by a procedural body should be based on an expert opinion. The Supreme Court has rightly stated:

> 'Before formulating any categorical assessment of a particular person's health condition for the purpose of a criminal proceeding, it is necessary to strive to gather the most comprehensive and up-to-date evidence possible, which would allow the adjudicating court to properly assess this condition. In such cases, obtaining expert medical opinions that are the latest ones, in relation to the moment of determining the health condition of the accused, is a primary goal.'[50]

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47 Journal of Laws of 2024, item 622.

48 Journal of Laws of 2024, item 867, as amended.

49 Journal of Laws of 2025, item 753.

50 The Supreme Court ruling of 21 October 2010, V KO 90/10, *OSNwSK*, 2010, No. 1, item 2065.

CONCLUSIONS

1. Article 17 § 1(11) CCP contains a general clause concerning a refusal to initiate or discontinue a proceeding based on another circumstance precluding prosecution. As a result of this premise, discrepancies have arisen in the literature and case law regarding the admissibility of discontinuingproceedings due to the accused's illness, defined in various ways, that permanently prevents participation in the proceedings.

2. While allowing for such a possibility, it is argued that the permanent inability of the accused to participate in a trial, resulting from an irreversible serious illness, ultimately blocks the course of the proceedings and prevents the issuance of a judgment in the case. Therefore, the nature of this obstacle corresponds to other procedural obstacles listed in Article 17 § 1 CCP.

3. In opposition to this view, it is emphasised that the accused's health condition constitutes a factual obstacle that prevents the conduct of proceedings and therefore constitutes grounds for suspension of proceedings under Article 22 § 1 CCP. The terms 'mental or another serious illness' in this provision also include the most serious and terminal conditions associated with the final phase of life.

4. The application of Article 22 § 1 CCP is not justified in such cases, as it refers to a mental or other serious illness that is long-term in nature and temporarily prevents the conduct of a trial. It does not apply where the accused is permanently unable to participate in proceedings for these reasons.

5. Neither position fully resolves the issue, due to the significant polarisation of opinions in the literature and case law. Moreover, the proponents of applying Article 17 § 1(11) CCP do not provide a precise definition of the illnesses involved.

6. As a result, the *de lege ferenda* conclusion is that the issue should be expressly regulated in Article 17 § 1 by adding subsection 10a, with the following wording: 'the health condition of the accused permanently prevents him from participation in the proceeding'.

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FACTORS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

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Abstract

The Commission for the Codification of Criminal Law is currently working on amendments to the Code of Criminal Procedure. Its aim is to define a new model of pre-trial proceedings that enhances their effectiveness. The shape of the pre-trial model is not accidental; it results from the consideration of numerous factors, both extra-normative (such as national crime levels in the country and criminalisation trends) and normative (such as the role of the prosecutor in pre-trial proceedings). This article critically examines the key factors influencing the optimal model of pre-trial proceedings, thereby outlining a clear direction for future regulations.

Key words: criminal trial, pre-trial model

INTRODUCTION

The work of the Criminal Law Codification Commission has been accompanied by an ongoing debate concerning the structure of preparatory proceedings in the modernised criminal process and the role of the prosecutor therein. From the outset – specifically since the adoption of the Code of Criminal Procedure (CCP) in 1928 – it appears that Polish legislators have lacked a clear vision regarding the design of preparatory proceedings and the appropriate procedural model. The Codification Commission responsible for drafting this Code highlighted the existence of two competing needs within the justice system: on one hand, the need to expedite the adjudication process; on the other, the necessity of properly preparing evidence. According to the Commission, these two objectives are in constant tension, making

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it extremely difficult to devise an effective model for preparatory proceedings.[1] This problem remains unresolved to this day. One need only consider the amendments to Article 297 § 5 CCP – which defines the scope of evidence in preparatory proceedings and has been amended four times to date – to illustrate the point.[2]

There is no doubt that the structure of preparatory proceedings, as with the criminal process as a whole, depends on a variety of factors that must be taken into account for the process to function effectively and to fulfil its intended purpose. The aim of this study is to identify the factors that influence the model of preparatory proceedings and must be considered by the legislator when drafting the relevant provisions, so that the proceedings are as effective as possible and contribute to achieving the goals of the criminal process. The study does not aim to describe the model of preparatory proceedings as such.

THE CONCEPT OF A PROCEEDINGS MODEL

As S. Waltoś has observed, a model consists of elements within a system that distinguish it from other systems. While a system refers to the entirety of criminal procedural rules in force at a given time in a particular jurisdiction, characterised by coherence, order and completeness, a model identifies only those elements that are essential to the system apart from others.[3]

When we refer to a 'model' *in abstracto*, we mean either a target framework that describes an ideal system (i.e. the one we wish to achieve) or a pattern derived from analysis of an existing system. As noted by I. Dąmbska, 'a model is at times a starting point for homothetic operations aimed at constructing a new explanatory theory, and at other times a tool for logically controlling specific new formal structures.' Based on this understanding, Dąmbska distinguishes between model--patterns and model-mappings.[4] For the purposes of this discussion, a model-pattern may be equated with a *de lege ferenda* model, whereas a model-mapping corresponds to a *de lege lata* model. A model-pattern is thus an ideal construct – a theoretical assumption not yet incorporated into the existing legal order, but intended to be so following its approval by the legislator.

The *de lege lata* model of preparatory proceedings has been the subject of extensive academic analysis, beginning with the foundational 1968 monograph by S. Waltoś 'Model postępowania przygotowawczego na tle prawnoporównawczym (The Model of Preparatory Proceedings in a comparative law perspective), followed

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1 *Uzasadnienie projektu ustawy postępowania karnego przyjętego przez Komisję Kodyfikacyjną dnia 28.IV.1926 r.*, Warszawa–Lwów, 1926–1927, p. 326.

2 Amendments to Article 297 § 5 of the Code of Civil Procedure were introduced by the acts of: 1 July 2003 (Journal of Laws of 2003, No. 17, item 155; Article 1); 12 July 2007 (Journal of Laws of 2007, No. 64, item 432; Article 2); 1 July 2015 (Journal of Laws of 2013, item 1247; Article 1); and 15 Aprile 2016 (Journal of Laws of 2016, item 437; Article 1).

3 S. Waltoś, *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa, 1968, pp. 9 and 13.

4 I. Dąmbska, 'Pojęcie modelu i jego rola w naukach', *Filozofia Nauki*, Year XXIII, 2015, No. 2(90), pp. 143–144.

by numerous articles and culminating in the 'System Prawa Karnego Procesowego' (System of Criminal Procedure Law).[5] These publications outline the existing model, highlighting its shortcomings to varying degrees. There is now a pressing need to formulate an ideal model that could serve as the basis for substantial reform, as recent amendments to the Code of Criminal Procedure have failed to achieve the intended goal to accelerate proceedings.

NON-NORMATIVE DETERMINANTS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

The factors that determine the structure of preparatory proceedings are diverse. Both normative and non-normative elements shape not only preparatory proceedings but criminal proceedings in general. These elements are interdependent and interact with one another. In designing a model for preparatory proceedings, non-normative factors must be considered first, since the law is not an end in itself but a tool for regulating social relations, which are primary in relation to legal norms.

The level of crime in a given country is undoubtedly one of the non-normative factors that must be taken into account when defining the model of criminal proceedings and preparatory proceedings as such. Unlike civil law, substantive criminal law does not enforce itself but is operationalised exclusively through procedural provisions. When drafting the Code of Criminal Procedure, the legislator must ensure that all crimes reported within a given year can be prosecuted within that same timeframe. For example, if procedural law allows for the adjudication of only 500,000 crimes out of one million reported offences, judicial and law enforcement authorities will be unable to address them in a timely manner. This inevitably results in a backlog of unresolved cases in prosecutors' offices and courts, leading to excessive delays that contravene Article 6(1) of the European Convention on Human Rights.

The assessment of crime levels as a determinant of the preparatory proceedings model is further influenced by prevailing trends in criminalisation – that is, the classification of particular conduct as criminal. This includes both the introduction of new offences and the continued enforcement of existing ones.[6] If the legislator relies excessively on criminal law as a tool for addressing social problems, neglecting its role as a last resort and failing to consider whether such problems could be resolved through administrative, civil or labour law, this will lead to an increase in the number of crimes, as new types will add to the existing ones. This, in turn, will lead to a rise in crime levels in general.

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[5] Collective work edited by R.A. Stefański, *System Prawa Karnego Procesowego. Tom X. Postępowanie przygotowawcze*, Warszawa, 2016.

[6] See L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa, 1990, p. 7.

Another relevant factor is the state's criminal policy, which reflects the strategic, tactical and operational approach to preventing and combating crime.[7] It is important to stress that a rational criminal policy must be free from *ad hoc* policies aimed at consolidating power, which give rise to penal populism. Depending on the chosen policy, the legislator may adopt varying approaches, for instance, insisting that all crimes, irrespective of their gravity and social harmfulness, be prosecuted (the principle of legality), or allowing the authorities to focus on serious crimes while disregarding minor ones (the principle of opportunism).

As part of its criminal policy, the legislator also determines the primacy of certain penalties and punitive measures for specific categories of crimes. For example, Article 58 § 1 of the Penal Code prioritises non-custodial over custodial penalties where a choice is available and the offence is punishable by imprisonment for no more than five years. In such cases, imprisonment may be imposed only if no other sanction can fulfil the objectives of punishment. This approach serves to reduce excessive punitiveness and to rationalise criminal policy.[8]

The structure and organisation of law enforcement agencies is also a significant factor. The more specialised an authority is, if its remit is limited to conducting preliminary investigations and prosecuting crimes, the more effective its operations are likely to be. By contrast, the tasks assigned to the Police under Article 14(1) and (2) of the Police Act are broad and varied.[9] They include operational, reconnaissance, investigative, administrative and regulatory duties aimed at detecting and preventing crimes, fiscal offences and misdemeanours; locating individuals sought by law enforcement or judicial authorities; and finding persons whose whereabouts are unknown due to circumstances necessitating the protection of life, health or freedom. The Police also carry out tasks at the request of a court, prosecutor, state administration bodies, or local government bodies, as specified in separate legislation.[10] This extensive scope of responsibilities – compounded by staffing issues – means that the Police often struggle to fulfil their duties effectively. It must therefore be acknowledged that any changes to the Code of Criminal Procedure affecting the model of preparatory proceedings must be accompanied by a comprehensive reform and specialisation of the Police. Such reform requires significant time and financial investment, but it is essential.

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[7] J. Zagrodnik, 'Zasadnicze tendencje we współczesnej polityce kryminalnej w zakresie zwalczania drobnej przestępczości', *Państwo i Prawo*, 2016, No. 6, pp. 60–78.

[8] Cf. I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th edn, Warszawa, LEX/el., 2023, Article 58; https://sip.lex.pl/#/commentary/587715680/740498/konarska-wrzosek-violetta-red-kodeks-karny-komentarz-wyd-iv?keyword=polityka%20kryminalna&unitId=passage_1552 [accessed on 1 April 2025]; judgment of the Administrative Court in Kraków of 20 November 2003, II AKa 306/03, KZS 2004/1, item 29.

[9] Act of 6 April 1990 on the Police (Journal of Laws of 2024, item 145, consolidated text).

[10] For example, pursuant to Article 15zzzn(1) of the Act of 2 March 2020 on Special Measures Related to the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (Journal of Laws of 2024, item 340, consolidated text), the Police ascertain violations of the isolation obligation.

NORMATIVE FACTORS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

Although criminal proceedings may conclude at the preparatory stage if they are discontinued, this stage is only one part of the broader process. Except in cases of private prosecution, preparatory proceedings are a mandatory preliminary phase.[11] Preliminary proceedings encompass activities intended to prepare the jurisdictional phase and, under current law, are extrajudicial in nature, although some actions remain within the court's remit.[12] This observation, while obvious, is necessary to indicate that the model of preparatory proceedings cannot be shaped in isolation from the overall model of criminal justice. The legislator must determine the structure of the criminal process and identify which stage should be given priority. In particular, it is necessary to clarify the relationship between the trial before the court of first instance and the preparatory proceedings. If the main trial is recognised as the principal forum for examining the case and presenting evidence upon which the court will base its judgment, this would allow for a streamlined preparatory phase, reducing the scope of gathering and securing evidence in the case. For instance, in such an ideal model, where the court is required to hear the witness as a source of evidence during the trial in full accordance with formal requirements, it would be sufficient during the preparatory stage to question the witness and record the interview informally in an official note or memorandum. Duplication of witness testimony at both stages would thus be avoided, shortening the duration of both the preparatory and the overall proceedings. Conversely, if law enforcement authorities are required to conduct a full and formal evidentiary process during the preparatory stage, the role of the court would be marginalised, reduced to merely repeating that process or, in extreme cases, issuing judgments based solely on the case file without direct engagement with the sources of evidence. While the legislator may adopt either an adversarial or inquisitorial model, it is constrained by the need to uphold human rights and to provide stronger procedural safeguards for the accused.

The need to integrate the model of preparatory proceedings with the criminal process as a whole also relates to the objectives of criminal proceedings outlined in Article 2 § 1 CCP. As K. Woźniewski rightly observes, 'the principle of material truth applies at all stages of criminal proceedings (pre-trial, jurisdictional and enforcement), covering all investigative activities (including operational and reconnaissance activities), binding on all courts and court clerks, and binding on all pre-trial authorities.'[13] The duty to fulfil the aims of criminal proceedings extends beyond the objective of securing accurate criminal responses; it encompasses all the

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[11] Even in expedited proceedings conducted under Chapter 54a CCP, the investigation remains rudimentary in nature. Cf. Article 517c CCP.

[12] A. Gerecka-Żołyńska, 'Konstrukcja procesu karnego', in: Gerecka-Żołyńska A., *Internacjonalizacja współczesnego procesu karnego w Polsce*, Warszawa, 2009; https://sip.lex.pl/#/monograph/369206478/230313 [accessed on 23 April 2025].

[13] K. Woźniewski, 'Zasada trafnej reakcji karnej – art. 2 § 1 pkt 1 k.p.k. po nowelizacji z dnia 27 września 2013 roku', *Gdańskie Studia Prawnicze*, 2015, No. 1, pp. 425–434. See also judgment of the Supreme Court of 17 January 2019, IV KK 33/18, LEX No. 2613548.

aims set out by law. Accordingly, the tasks of preparatory proceedings defined in Article 297 CCP must be aligned with these overarching aims.

Another essential consideration is the division of functions within preparatory proceedings. Criminal procedure doctrine traditionally distinguishes three main functions: prosecution, indictment and control.[14] In an ideal model, these functions should be allocated to separate authorities to enhance their effectiveness. However, an analysis of the current Code of Criminal Procedure reveals that these functions are often exercised concurrently by different bodies, with overlapping responsibilities.

Regarding the function of prosecution, Article 298 § 1 CCP provides that preparatory proceedings are conducted or supervised by the public prosecutor and, to the extent provided by law, by the Police. In specific cases, these powers are granted to other authorities.[15] Thus, a number of entities are involved in preparatory proceedings. Furthermore, under Article 298 § 2 CCP, courts also carry out certain activities during the preparatory phase. These include not only supervisory actions, but also actions clearly falling within the scope of prosecution – such as examining minor witnesses under Articles 185a and 185b CCP, imposing pre-trial detention, issuing safe conduct orders, and examining a witness *in articulo mortis* under Article 316 § 3 CCP.[16]

The prosecutorial function is primarily fulfilled by the public prosecutor, who initiates and supports indictments and motions under Articles 324, 335 § 1 and Article 336 CCP. However, this function is also exercised, within their respective competences, by other authorities operating under specific laws or under the Regulation of the Minister of Justice of 22 September 2015 on the authorities authorised, alongside the Police, to conduct investigations and to bring and support charges before the court of first instance in cases in which investigations have been conducted, as well as the scope of cases assigned to these authorities.[17]

The function of control within preparatory proceedings has likewise been delegated to various entities. The courts perform this role, for instance, by adjudicating complaints against decisions to discontinue proceedings or against preventive measures. The public prosecutor also exercises a supervisory role, though the scope of this function varies. Article 326 § 1 CCP authorises the public prosecutor to supervise preparatory proceedings that he does not personally conduct. In addition, the public prosecutor may also oversee the preliminary verification proceedings under Article 307 CCP. The second type of prosecutorial supervision

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[14] K. Dudka, H. Paluszkiewicz, *Polski proces karny*, Warszawa, 2024.

[15] Under Article 312 CCP, the authorities authorised to conduct investigations include the Border Guard, the National Revenue Administration, the Internal Security Agency, the Central Anti-Corruption Bureau, and the Military Police, as well as bodies authorised to conduct investigations under specific provisions (e.g. the Act of 13 October 1995 – Hunting Law, consolidated text: Journal of Laws 2023, item 1082), or under the Regulation of the Minister of Justice of 22 September 2015 on authorities authorised, alongside the Police, to conduct investigations and on authorities authorised to bring and support prosecution before the court of first instance in cases where an investigation has been conducted, as well as the scope of cases assigned to those authorities (Journal of Laws of 2018, item 522, consolidated text).

[16] See also: A. Baj, 'Udział stron w niepowtarzalnych czynnościach dowodowych postępowania przygotowawczego', *Prokuratura i Prawo*, 2018, No. 10, pp. 165–191.

[17] K. Dudka, H. Paluszkiewicz, *Polski proces*…, op. cit.

concerns proceedings that have been definitively discontinued: these may be resumed (Article 327 § 1 CCP), reopened (Article 327 § 2 CCP), or exceptionally reopened by the Prosecutor General (Article 328 CCP). Furthermore, prosecutors supervise discontinued preparatory proceedings by granting access to completed proceedings, as provided by Article 156 § 5b CCP. This provision, introduced by the Act of 20 April 2021, amending the Penal Code and Certain Other Acts, is widely criticised for disproportionately strengthening the prosecutor's authority.[18] Previously, access to closed files was governed by the Act on Access to Public Information.[19] The government in power at the time, which had instrumentalised the Public Prosecutor's Office in an authoritarian manner to fight the democratic opposition, sought at all costs to prevent journalists and opposition figures from accessing proceedings against 'representatives of the authorities' that had been discontinued or refused initiation, as such access would have affected the image of the ruling party in the media. Transferring to the Prosecutor's Office the unjustified right to grant access to closed preliminary investigation files was intended to block the disclosure of files 'above the heads' of the Public Prosecutor's Office through the Act on Access to Public Information. This is exactly what happened. As the Provincial Administrative Court in Szczecin pointed out in its judgment of 12 March 2025 (I SA/Sz 777/24), the provisions of the Act on Access to Public Information do not apply when they are incompatible with the provisions of specific acts that regulate the rules and procedure for access to public information in a different manner. Such specific provisions include Article 156 §§ 1, 5, and 5b CCP. These norms apply to all individuals, not just parties to criminal proceedings, and pertain to documents which constitute public information and are contained in the files of pending or completed preparatory proceedings. As such, they qualify as special provisions within the meaning of Article 1(2) of the Public Information Act, which therefore does not apply to them.[20]

As this analysis demonstrates, the prosecutor performs all three functions – prosecution, indictment, and control – within preparatory proceedings. While this may enhance effectiveness, it also significantly influences legislative design. This is reflected, for example, in Article 46 § 2 CCP, which provides that where preparatory proceedings take the form of an investigation, the absence of the public prosecutor does not preclude the commencement of the trial. In practice, it is now rare to see a prosecutor in court for such cases. Given that a defendant's participation in the trial is a right rather than an obligation (except in cases where the court requires it), criminal trial begins to resemble an inquisitorial model, in which the court assumes all three procedural functions – prosecution, defence, and adjudication (decision-making).

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18 Journal of Laws of 2021, item 1023.
19 Journal of Laws of 2022, item 902, consolidated text.
20 LEX No. 3850870.

CONCLUSION

It appears that the time for superficial amendments to the Code of Criminal Procedure concerning preparatory proceedings has passed. What is now required is a comprehensive reform, one that establishes a consistent procedural model aimed at enhancing prosecutorial effectiveness while preserving the procedural rights of suspects. Such a model is achievable, provided it is constructed with due regard to the normative and non-normative factors outlined above – and perhaps others that may yet be identified.

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PETTY OFFENCE RECIDIVISM IN THE LIGHT OF ARTICLE 38 OF THE MISDEMEANOUR CODE

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Abstract
The article addresses the issue of petty offence recidivism in the light of Article 38 of the Misdemeanour Code (MC), with particular emphasis on the legal conditions for its occurrence and legal consequences. The author characterises the concept of special multiple recidivism (Article 38 § 1 MC), as well as a specific form of the so-called road traffic offence recidivism (Article 38 § 2 MC), introduced by the Act of 2 December 2021 amending the Road Traffic Law and Certain Other Acts. The analysis carried out aims to better understand the role of recidivism in the petty offence law system and to indicate possible directions for legislative changes in the context of existing interpretative and practical difficulties.

Key words: petty offence recidivism, road traffic offence recidivism, similarity of offences, final and binding punishment, extraordinary aggravation, detention, fine

INTRODUCTION

Petty offence recidivism poses a significant problem both from the perspective of criminal policy and the effectiveness of repressive measures provided for by the legislator. In the Polish misdemeanour law system, the issue of recidivism is regulated in Article 38 of the Misdemeanour Code (MC). Despite proposals put forward in the doctrine to repeal the provision, as it constitutes an unnecessary

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imitation of the solution in the Criminal Code,[1] the legislator has not decided to do so. On the contrary, a mechanism of extraordinary aggravation of penalty for road traffic offence recidivism has been introduced recently.

The current wording of Article 38 MC was introduced with the entry into force of the Act of 2 December 2021 amending the Road Traffic Law and Certain Other Acts.[2] In addition to the already existing content, designated as § 1, a new form of extraordinary aggravation of penalty for road traffic offences was added in § 2.

A repeated petty offence under Article 38 § 1 MC constitutes special recidivism, as it requires the repeated commission of an intentional misdemeanour similar to the previously committed one. It also qualifies as multiple recidivism due to the fact that similar intentional petty offences have already been penalised twice. The solution is aimed at tightening repression against perpetrators who persistently commit similar offences and do not show signs of effective rehabilitation. The ineffectiveness of the penalties applied thus far is intended to justify the imposition of the harshest measure, i.e. detention.[3]

In turn, Article 38 § 2 MC provides for special recidivism, although not multiple recidivism, even though it also results in the aggravation of the penalty. It applies only to a driver of a mechanical vehicle who commits the same enumerated misdemeanour against road safety and order within two years of the last final and binding punishment. Meeting the requirements of the directive laid down in Article 38 § 2 MC results in the mandatory imposition of a fine of no less than double the minimum statutory penalty.

Further consideration is given to the characteristic features of petty offence recidivism in the light of Article 38 MC, with particular emphasis on the conditions for its occurrence and its legal consequences. The analysis is aimed at a better understanding of the role of recidivism in the misdemeanour law system and at indicating possible directions for legislative changes.

RECIDIVISM CIRCUMSTANCES

PREVIOUS PUNISHMENT FOR A PETTY OFFENCE

The basic legal basis for the application of Article 38 MC is the requirement of previous punishment for a petty offence. In accordance with Article 38 § 1 MC, at least two previous penalties for similar intentional offences are required. In turn, Article 38 § 2 MC applies to a driver of a mechanical vehicle punished for an offence specified in Article 86 §§ 1a and 2, Article 86b § 1, Article 87 § 1, Article 92 § 2, Article 92a § 2, Article 92b, Article 94 § 1 or Article 97a MC. The legislator used

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1 Thus, A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2004, p. 114; with approval by M. Melezini, in: Melezini M. (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, Warszawa, 2016, p. 438.

2 Journal of Laws of 2021, item 2328.

3 A. Marek, *Prawo wykroczeń*…, op. cit., p. 112.

the term 'punishment' in the provision without stipulating that it refers to double punishment. The basis for extraordinary aggravation of the penalty provided for in Article 38 § 1 MC is therefore validated even if the perpetrator has been punished for a similar petty offence only once. The condition for prior punishment should be understood identically in both regulations under analysis.

The essential part of the issue related to the circumstance discussed has already been explained in detail in the doctrine. In particular, it should be considered undisputed that: a single previous punishment for a petty offence is not a sufficient basis for imposing a detention sentence;[4] a conviction for a petty offence combined with a waiver of the imposition of a penalty does not constitute punishment for an offence;[5] for the purpose of Article 38, it is inadmissible to take into account a penalty that has been expunged in accordance with the rules laid down in Article 46 § 1 MC;[6] the conditions for extraordinary aggravation of punishment are not met if at least one of the acts committed by the perpetrator in the past constituted a crime;[7] Article 38 MC is not applicable in the case of partial decriminalisation specified in Article 50 of the Act of 27 September 2013 amending the Act: Code of Criminal Procedure and Certain Other Acts,[8] and in Article 2a MC;[9] the transformation of a penalty does not change the fact that we are still dealing with a final and binding conviction for a crime.

However, there is no uniform assessment of whether the scope of application of the extraordinary aggravation of punishment also applies to perpetrators fined in penalty notice proceedings. Case law consistently holds that a fine cannot constitute a basis for determining recidivism. Only a final and binding court judgment, not a fine imposed in a penalty notice proceeding, can constitute grounds for determining special multiple recidivism laid down in Article 38 MC allowing for extraordinary aggravation of punishment.[10] This stance also prevails in the doctrine.[11]

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[4] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa, 2016, p. 227; see the Supreme Court judgment of 8 November 2007, II KK 247/07, LEX No. 340549.

[5] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2016, p. 227; thus also I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2021, Article 38, thesis 3.

[6] Cf. T. Grzegorczyk, in: Jankowski W., Zbrojewska M., Grzegorczyk T., *Kodeks wykroczeń. Komentarz*, LEX, 2013, Article 38, thesis 3.

[7] What draws attention is the fact that Article 38 MC omits recidivism of similar crimes or petty offences, which must be taken into account in determining a penalty to the perpetrator's disadvantage as an incriminating circumstance (Article 33 § 4 (5)). This approach to recidivism is disapproved of by T. Bojarski, in: Bojarski T. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2020, Article 38, thesis 1.

[8] Journal of Laws of 2013, item 1247, as amended.

[9] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2016, p. 228; also see the Supreme Court judgment of 14 February 2018, IV KK 519/17, LEX No. 2450269.

[10] The Supreme Court judgment of 13 September 2017, IV KK 55/17, *KZS*, 2018, No. 3, item 7; similarly in the Supreme Court judgment of 23 October 2024, V KK 323/24, Legalis No. 3136090.

[11] T. Bojarski, J. Piórkowska-Flieger, in: Michalska-Warias A., Bojarski T., Piórkowska-Flieger J., *Kodeks wykroczeń. Komentarz aktualizowany*, LEX, 2024, Article 38, thesis 1; I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38, thesis 3.

The issue, however, seems to be more complex. Undoubtedly, a fine is not a judgment (Article 32 § 1 of the Misdemeanour Procedure Code (MPC)) and, moreover, it does not constitute a determination of guilt and punishment, as such determination can only be contained in a sentence. It should be noted, however, that unlike the provisions of the Penal Code (PC) laying down the consequences of recidivism (Articles 64–64a PC), Article 38 MC does not contain a requirement for the perpetrator to have been previously convicted of a petty offence, but merely requires that he/she be punished for a petty offence, which may result from either a prior conviction for a petty offence or the conclusion of the misdemeanour proceeding by imposing a fine. The requirement that the perpetrator be previously found guilty of a misdemeanour in a final and binding court judgment cannot be inferred from the condition for a former penalty for a petty offence imposed on the perpetrator twice.[12]

Moreover, the provisions of substantive and procedural misdemeanour law indicate that the legislator distinguishes between punishing the offender and convicting them. The legislator uses the term 'convicted' only in one provision of the Misdemeanour Code (Article 57 § 1(2)), which clearly distinguishes conviction for a crime from punishment for a petty offence.[13] In turn, in accordance with the provisions of the Misdemeanour Procedure Code, the legislator repeatedly uses the concept of 'conviction' in relation to punishment for a petty offence within the meaning of the Misdemeanour Code.[14] On the other hand, a number of provisions of Part IX, Chapter 17 MPC use the term 'punished' to describe a person who has been fined.[15] In the Penalty Execution Code (PEC), although the legislator distinguishes punishment in relation to the imposition of a penalty for a petty offence (Article 86 § 1, Article 99 § 2 PEC), persons convicted of crimes and punished for petty offences are uniformly referred to as 'convicted' (Article 242 § 1a PEC).[16] In turn, the Act of 24 May 2000 on the National Criminal Register[17] uses the term 'persons sentenced for petty offences to detention' (Article 1(2)(7)), due to the fact that detention can only be adjudicated in a court judgment of conviction. Finally, Article 46 § 1 MC uses the concept of punishment (and not conviction), which is related to the statutorily defined status of a person who has been imputed the commission of a petty offence and a penalty has been imposed on them for this offence.[18]

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[12] Thus, rightly, A. Jezusek, 'Glosa do wyroku Sądu Najwyższego z dnia 13 września 2017 r., sygn. IV KK 55/17', *Prokuratura i Prawo*, 2018, No. 6, p. 160.

[13] S. Kowalski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Legalis, 2023, Article 46 MC, thesis 4.

[14] See e.g. Article 57 § 3, Article 60 § 1 (1) and (2), Article 82 § 5 (2) and (3), Article 114 § 2a or Article 119 § 1 MPC.

[15] See e.g. Article 96 § 1b–1bc or Article 98 MPC; cf. W. Jankowski, 'Kilka uwag na temat nadzwyczajnego zaostrzenia kary, w związku z uprzednio popełnionymi czynami karalnymi w sprawcach o wykroczenia', *Policja. Kwartalnik Kadry Kierowniczej Policji*, 2011, No. 4, pp. 22 et seq.

[16] S. Kowalski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 46 MC, thesis 4.

[17] Consolidated text, Journal of Laws of 2024, item 276.

[18] On the basis of this regulation, divergent stances are presented as to whether this regulation should apply only to acts that are subject to court proceedings and penalties imposed by the court in such proceedings, or also to fines imposed in penalty notice proceedings.

The linguistic interpretation of Article 38 MC supports the recognition that the phrase referring to punishment for petty offences encompasses punishment for petty offences in court proceedings, as well as for petty offences in extrajudicial penalty notice proceedings. If the legislator had intended to limit the scope of application of the regulation provided for in Article 38 MC to punishment in a court proceeding, a different expression should have been used in the provision, e.g. 'convicted of a petty offence'.[19]

INTENTIONAL OR UNINTENTIONAL PETTY OFFENCES

The condition for multiple recidivism recognition, as referred to in Article 38 § 1 MC, is that it also be determined that the two previous petty offences, as well as the third one, were committed intentionally. The commission of even one of these offences unintentionally eliminates the possibility of applying this provision. It is rightly pointed out in the literature that the requirement of committing an intentional offence applies to a perpetrator's specific act. Therefore, it does not only concern petty offences that can be committed only intentionally. A perpetrator of a misdemeanour classified as both intentional and unintentional may also be held liable under Article 38 § 1 MC, provided that he committed the act intentionally.[20]

In turn, the legislator did not use the term 'intentional' in Article 38 § 2 MC; thus, it can be concluded that the petty offences specified in this provision can also be committed unintentionally. This form of recidivism is generally based on two intentional offences, two unintentional offences, or one intentional offence and one unintentional offence. However, it should be pointed out that in one of the types of offences referred to in the provision, the legislator departs from the principle of equivalence of intentionality and unintentionality adopted under the misdemeanour law (see Article 5 MC), requiring intentionality. This is the case with the petty offence under Article 92 § 2 MC, the perpetrator of which fails to comply with a signal from a person authorised to control road traffic ordering the vehicle to stop 'in order to avoid a check'. This means that this offence can only be committed intentionally, and only direct intention tinged with the purpose of the action is taken into account.[21]

The application of recidivism to unintentional acts raises doubts about the very nature of this concept. Recidivism is intended to serve a preventive and educational purpose, acting as a deterrent to individuals who, despite their previous punishment, knowingly commit a successive offence. Imposing a double fine for an unintentional offence simply because the former one was also a road traffic misdemeanour leads to disproportionate punishment in relation to the degree of culpability. The automatic

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[19] Thus also P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, thesis 2; cf. A. Jezusek, 'Glosa do wyroku…', op. cit., p. 160.

[20] M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks wykroczeń. Komentarz,* LEX, 2009, Article 38 PC, thesis 4.

[21] K. Wala, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 92 MC, thesis V.2.

nature of more severe punishment also raises doubts. The current structure of Article 38 § 2 MC requires that a fine of no less than double the minimum amount be imposed, regardless of whether the perpetrator committed the misdemeanour intentionally or unintentionally.

SIMILARITY OF PETTY OFFENCES

The condition for the application of Article 38 § 1 MC is the commission of at least three offences that are similar within the meaning of Article 47 § 2 MC. The third one committed by the perpetrator must be similar to the previously committed ones.[22] It must be agreed that the lack of similarity between the two acts for which the perpetrator was previously punished, as well as the lack of similarity between the third prohibited act and those for which he was punished, prevents the application of Article 38 § 1 MC.[23]

The criteria used for the purpose of misdemeanour law to determine whether a given petty offence is similar to another one or a crime are laid down in Article 47 § 2 MC. The similarity criteria were modelled on the criteria for similarity of crimes laid down in Article 115 § 3 PC.[24] Article 47 § 2 MC lists: the classification of petty offences, or of a petty offence and a crime, as belonging to the same type; the use of violence or the threat of its use; and the aim of obtaining financial gain.

In turn, in the content of Article 38 § 2 MC, the legislator did not use the term 'similar'. Instead, two significant restrictions were introduced: one subjective and one objective in nature. The subjective one stems from the stipulation that the provision applies only to 'drivers of mechanical vehicles', while the objective one is limited to strictly specified types of prohibited acts. This specific form of the so-called road traffic recidivism will only occur if the person punished for an enumerated offence against traffic safety and order commits 'the same petty offence' within two years of the last legally binding punishment.[25]

Article 38 § 2 MC refers to the driver of a mechanical vehicle. The concept of a mechanical vehicle is not defined by statute, and the provisions of the Road Traffic Law[26] do not use this term. However, the statute defines the term 'motor vehicle', which is a vehicle equipped with an engine, with the exception of mopeds, rail vehicles, bicycles, bicycle strollers, electric scooters, personal transport devices, and wheelchairs (Article 2(32) RTL). Every motor vehicle is a mechanical vehicle, which does not mean that the two concepts are identical. The concept of a mechanical

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[22] The Supreme Court judgment of 18 May 2005, II KK 118/05, *OSNwSK*, 2005, No. 1, item 978.

[23] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa, 2023, Article 38 MC.

[24] For more on the issue see P. Daniluk, *Przestępstwa podobne w polskim prawie karnym*, Warszawa, 2013, and the literature referred to therein.

[25] T. Bojarski, J. Piórkowska-Flieger, in: Michalska-Warias A., Bojarski T., Piórkowska-Flieger J., *Kodeks wykroczeń*…, op. cit., Article 38, thesis 1.

[26] Act: Road Traffic Law of 20 June 1997, consolidated text, Journal of Laws of 2024, item 1251, as amended.

vehicle under the provisions of the Criminal Code and the Misdemeanour Code should be interpreted independently. A mechanical vehicle is any vehicle that, by its design, is propelled by mechanical force derived from an engine.[27] It is rightly pointed out that such an engine does not have to be an internal combustion one, as electric motors can also be used.[28]

The term 'mechanical vehicle' covers a wide range of vehicles. In case law, mechanical vehicles include vehicles equipped with an engine propelling them (automobiles, agricultural machinery, motorcycles, railway locomotives, aircraft, helicopters, watercraft, and others), as well as rail vehicles powered by electric traction (trams and trolleybuses). Other, non-mechanical, vehicles include horse drawn carriages, bicycles, sailing vessels, and gliders.[29] A moped designed for road travel solely with the use of an engine is a mechanical vehicle within the meaning of the Criminal Code and the Misdemeanour Code regardless of its technical parameters.[30] A problematic issue is raised, *inter alia*, in the case of the status of an electric scooter, defined as an electrically powered, two-axle vehicle with a handlebar, without a seat or pedals, designed to be ridden by a rider (Article 2(47b) RTL). Thus, an electric scooter is not a motor vehicle. However, there is no legal definition based on criminal law statutes indicating whether an electric scooter is a mechanical vehicle. It is rightly pointed out in the literature that an electric scooter becomes a mechanical vehicle when it is not propelled by the muscular power of the person riding the vehicle, but solely by the power of the electric drive. The determination will be based on the speed of the vehicle, including the exclusion of the possibility that the speed resulted from the muscular power of the driver or movement on a slope.[31]

As has been rightly noted in the doctrine, the manner in which the subjective scope of the directive in Article 38 § 2 MC is defined does not entirely align with the subjective scope of the offences listed therein. The enumerated classifications of prohibited acts make use of the concepts of 'driver', 'traffic participant or another person on a public road, in a residential area or a traffic zone', and even the impersonal term 'who'. Article 38 § 2 MC, however, refers exclusively to a 'driver

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[27] See the Supreme Court judgment of 11 February 2021, II KK 227/19, LEX No. 3187491; E. Kunze, 'Pojęcie pojazdu mechanicznego w polskim prawie karnym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1978, No. 2, pp. 38 et seq.

[28] M. Leciak, in: Daniluk P. (ed.), *Kodeks wykroczeń…*, op. cit., Warszawa, 2016, pp. 600–601.

[29] Thus, the Supreme Court judgment of 25 October 2007, III KK 270/07, *OSNwSK*, 2007, No. 1, item 2320.

[30] The Supreme Court (7) resolution of 12 May 1993, I KZP 9/93, *OSNKW*, 1993, No. 5–6, item 27.

[31] This view was expressed on the basis of the typifying provisions of Chapter XXI of the Criminal Code; thus P. Zakrzewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 920. A different view was expressed by the Supreme Court, which assumed that 'an electric scooter equipped with a motor with parameters similar to the power of a motor of an electrically assisted bicycle, which retains all the normal construction characteristics enabling its normal operation as a scooter, i.e. movement by pushing with the leg, is not a mechanical vehicle within the meaning of the provisions of the Criminal Code'; see the Supreme Court judgment of 22 February 2023, III KK 13/22, *OSNKW*, 2023, No. 11–12, item 49, p. 25.

of a mechanical vehicle',[32] which limits the scope of application of the increased amount of a fine.

The term 'driver' is legally defined in Article 2(20) RTL, according to which a driver means a person who drives a vehicle or a combination of vehicles, as well as a person who leads a column of pedestrians, rides on horseback, or drives animals individually or in droves. As indicated in the literature, this definition emphasises actual activities, and not meeting the requirements for their performance. A driver is a natural person who influences the movement and manoeuvres of the persons, animals or devices specified in the provision.[33] Pursuant to the provisions of the Misdemeanour Code, the functional feature of 'driving a vehicle' occurs rarely, as in Article 86a MC ('Who, driving a bicycle, electric scooter or personal transport device') and in Article 97a MC ('and also a driver of a vehicle who violated the prohibition'). In other cases, in which the legislator refers to activities related to setting the direction and speed of vehicles, the Misdemeanour Code uses the verb 'to drive'.

The feature has been extensively explained in criminal law doctrine.[34] The verb 'to drive' [in Polish: *kierować*], in a dictionary definition means 'to lead or send someone or something somewhere' or 'to regulate the action or movement of something with the use of some device' or 'to give a vehicle a specific direction'.[35] In spite of this, it is assumed in criminal law literature and case law that driving a vehicle should not be equated with operating it. It is pointed out that the semantic scope of the term 'operates' is broader, because it does not only encompass the driver's conduct, the primary activity within the vehicle's driving team, but also activities of some other participants of the driving team.[36] Operating a vehicle means setting it in motion, steering it, setting its speed and braking in a manner consistent with the vehicle's design.[37] Driving should be understood as the act of setting the direction and pace of travel with the use of the appropriate power source for the vehicle.

In addition, for the application of the analysed extraordinary aggravation of a fine, there must be individual identity of the act committed by a driver of a mechanical vehicle with the petty offence for which he was previously punished.[38] The use of the phrase 'commits the same petty offence' should be considered inadequate. In the case of recurrence, it is not the same, but a similar or identical petty offence.[39]

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[32] K. Łucarz, 'Remarks on the Tightening of Liability for Certain Traffic Offences', *Ius Novum*, 2024, No. 2, p. 63.

[33] R.A. Stefański, *Prawo o ruchu drogowym. Komentarz*, Warszawa, 2024, p. 76.

[34] See R.A. Stefański, *Wykroczenia drogowe. Komentarz*, Kraków, 2005, pp. 237 et seq.

[35] E. Sobol (ed.), *Nowy słownik języka polskiego PWN*, Warszawa, 2002, p. 319.

[36] K. Buchała, 'Glosa do wyroku SN z 13 lutego 1969 r., V KRN 9/69', *Państwo i Prawo*, 1970, No. 5, pp. 832–833.

[37] The judgment of the District Court in Kielce of 10 December 2013, IX Ka 1523/13, LEX No. 1717640.

[38] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń…*, op. cit., Article 38 MC, thesis 4.

[39] Rightly, K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 64.

TIME REQUIREMENT FOR A SUBSEQUENT OFFENCE

The regulation provided for in Article 38 § 1 MC may only apply to a perpetrator who, having been punished twice for similar intentional offences, commits a third similar offence within two years of the last punishment. However, it is not clear at what point in time this punishment should be measured, i.e. whether the term 'punishment' should be understood as the moment of issuance of a conviction sentence or a fine, the date on which these became final and binding, or perhaps the execution of the imposed penalty. The doubts are even more justified if one takes into account the wording of the added Article 38 § 2 MC. The regulation may be applicable to a perpetrator driving a mechanical vehicle who commits a second petty offence within two years of the last final and binding punishment. Therefore, within the scope of the basis provided for in Article 38 § 2 MC, there is no doubt that the time of committing the second offence is linked to the time of the previous penalty for the first offence measured from the date the conviction or penalty notice became final and binding.

In turn, divergent views are expressed regarding Article 38 § 1 MC. According to the first of them, which relies on teleological interpretation, since Article 38 MC applies to a perpetrator who repeatedly breaks the law and has already been subjected to the actual impact of a penalty, punishment should be understood as the execution of all or part of the previously imposed penalty. This refers to the last penalty, i.e. the one closest to the perpetrator's repeated breach of the law.[40] A different view links the time of the third petty offence commission to the time of the last former penalty for the petty offence measured from the date the conviction became final and binding.[41] Also according to the Supreme Court:

> 'Article 38 MC, which allows for the imposition of a custodial penalty for a petty offence that does not carry such a penalty under the provision penalising the given conduct, requires that the accused be punished at least twice for similar offences and commit the current offence within two years of the last punishment. The penalties must be final and binding, because only then can they be considered legally punishing the given person, and, as final convictions, they should be issued before the person commits another similar petty offence'.[42]

Before the introduction of § 2 to Article 38 MC, the lack of the indication of the final and binding status of the punishment as a condition for the imposition of a custodial penalty was not so flagrant. *De lege lata*, the question arises about the validity and purpose of such differentiation of the grounds for recidivism. Although

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[40] M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 6.

[41] T. Grzegorczyk, in: Grzegorczyk T. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2013, Article 38 MC, thesis 2; similarly P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, thesis 5; I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 5.

[42] The Supreme Court judgment of 8 November 2007, II KK 247/07, LEX No. 340549; the Supreme Court judgment of 22 February 2023, I KK 399/22, LEX No. 3555279.

the literal interpretation of Article 38 § 1 MC may suggest that it concerns any punishment, the functional, constitutional and systemic arguments support the two-year period being measured from the final and binding status of the penalty in the same way as in the case of § 2. To maintain the consistency of the entire Article 38 MC, the same moment should also be adopted in § 1 as the starting point for the limitation period for recidivism. Differentiating this requirement and adopting the requirement for finality only for the so-called road traffic recidivism, but not for the aggravated penalty provided for in § 1, would be systematically inconsistent and grossly unfair.

ISSUE OF STATUTORY PENALTY

The extraordinary aggravation of punishment provided for in Article 38 § 1 MC applies to prohibited acts punishable by a less severe penalty than detention, i.e. the limitation of liberty, a fine or a caution. The use of the phrase 'even if', as is rightly pointed out in the doctrine, means that the measure regulated therein also applies to prohibited acts carrying the penalty of detention for up to 14 days.[43] In such cases, however, one can speak of an extraordinary aggravation of punishment only when the detention penalty is adjudicated for a longer period than that provided for in the violated provision, i.e. when the provision does not allow for such a penalty of up to 30 days, but for a shorter period (e.g. Article 52, Article 96a § 2 MC).[44]

The regulation provided for in Article 38 § 2 MC applies to acts carrying a simple penalty of a fine, as well as acts carrying an alternative sanction.

LEGAL CONSEQUENCES OF MEETING THE CONDITIONS UNDER ARTICLE 38 MC

Meeting the conditions laid down in Article 38 § 1 MC creates the possibility of extraordinary aggravation of punishment by adjudicating a detention penalty, even if the misdemeanour carried a less severe punishment.[45] The court may impose a detention penalty in accordance with the rules laid down in Article 19 MC (up to 30 days), both when the given misdemeanour does not carry a detention penalty at all, as well as when this penalty is provided for, but for a shorter period, e.g. 14 days. The provision of Article 38 § 1 MC, if the reasons indicated therein actually exist, does not oblige the court to impose the detention penalty on the accused.

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[43] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38, thesis 6; W. Radecki, in: Bojarski M., Radecki W., *Kodeks wykroczeń. Komentarz*, Legalis, 2019, Article 38, thesis 2.

[44] T. Grzegorczyk, in: Grzegorczyk T. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 3.

[45] The Supreme Court judgment of 18 May 2005, II KK 118/05, *OSNwSK*, 2005, No. 1, item 978.

The use of the word 'may' makes the directive of the provision optional. The court must each time decide, taking into account the evidence collected, the purposes of the penalty, and the sentencing guidelines, whether to punish the accused with a detention penalty pursuant to Article 38 § 1 MC or to impose a penalty based on the sanction for the breached provision if it is deemed a sufficient response to the misdemeanour committed.[46]

Meeting the criteria for the so-called road traffic recidivism regulated in Article 38 § 2 MC obliges the court to adjudicate a fine of no less than twice the minimum statutory penalty. It is rightly pointed out that in the case of acts carrying only a fine, the analysed basis for extraordinary aggravation of the penalty results in the imposition of a fine higher than the minimum statutory penalty limit. In turn, in the case of acts carrying an alternative penalty in which a fine is provided for, the analysed basis for the extraordinary aggravation of the penalty results in the imposition of a fine higher than the minimum statutory penalty limit only if the adjudicating body deems it purposeful to impose such a penalty.[47]

It is rightly noted in the literature that there is an automatic mechanism of doubling the minimum limit of statutory punishment that is similar to the solutions for recidivism laid down in the Criminal Code of 1969, which have been widely criticised in the literature. It is also argued that the adopted solution violates the principle of equal treatment of repeated perpetrators of petty offences. Unlike under Article 38 § 2 MC, pursuant to Article 38 § 1 MC, the imposition of a detention penalty on the perpetrator, despite meeting the criteria laid down in the provision, is left to the court's discretion. Consideration of the symmetry of legal solutions would also require, in this case, abandoning the mandatory application of the extraordinary aggravation of the fine.[48]

PROCEDURAL ISSUES

The circumstance of committing a petty offence meeting the criteria of recidivism referred to in Article 38 MC should each time be reflected in the grounds for conviction for a petty offence. However, in the grounds for a given penalty, Article 38 § 1 MC or Article 38 § 2 MC should be referred to if the court actually applies the extraordinary aggravation of punishment provided for in the aforementioned provisions.[49] If the criteria for recidivism under Article 38 § 1 MC are met, when adjudicating a detention penalty, the court must cite this provision also in the grounds for the

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[46] Thus, rightly, the Supreme Court in judgment of 13 September 2017, IV KK 55/17, *OSNKW*, 2018, No. 2, item 12.

[47] See P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2023, Article 38.

[48] Thus, rightly, K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 63.

[49] Much the same as pursuant to Article 64 PC; see e.g. the Supreme Court judgment of 24 August 2000, IV KKN 325/00, LEX No. 51397; the Supreme Court judgment of 11 October 2011, V KK 234/11, LEX No. 1044075; the Supreme Court judgment of 16 December 2014, V KK 305/14, LEX No. 1583245.

penalty, because a detention penalty is not provided for in the statutory punishment under the special part of the Misdemeanour Code or a provision of the non-statutory misdemeanour law, or a detention penalty is provided for but for a shorter period than the one adjudicated. Similarly, in the case the criteria laid down in Article 38 § 2 MC are met, when imposing a fine, the court must cite this provision in the grounds for adjudicating this penalty.[50]

The order issuance procedure is essentially the basic mode of adjudicating in misdemeanour cases. Therefore, it is important to determine whether Article 38 MC is applicable in such proceedings. In accordance with Article 93 § 1 MPC, the court may issue an order-judgment at a sitting without the parties' participation in cases concerning a misdemeanour in which a reprimand, a fine, or limitation of liberty is a sufficient penalty. In order issuance proceedings, it is absolutely inadmissible to adjudicate a detention penalty, even for a minimal period. Adjudicating such a penalty in the order issuance proceeding would constitute a flagrant breach of Article 93 § 1 MPC, which would clearly have a significant impact on the content of the issued judgment. If the court is convinced that it is purposeful to impose such a penalty for the misdemeanour committed, it should refrain from adjudicating in the order issuance mode and refer the case for hearing under the ordinary procedure.[51] The contempt of Article 93 § 1 MPC will also occur in a situation where the court, in the case of a correctly described recidivism in the motion for punishment, applies the aggravated penalty under Article 38 § 1 MC and imposes a detention penalty on the accused.

A negative condition for the application of an order issuance proceeding also occurs when the court assumes that the perpetrator's act meets the criteria of recidivism under Article 38 MC in a situation where such a finding was not included in the motion for punishment, regardless of whether this is reflected solely in the adopted legal classification of the penalty or also in the description of the act, which should always include such a finding. Failure to refer such a case for hearing in the ordinary mode will always result in the violation of the provision of Article 93 § 1 MPC.[52]

However, the application of the directive under Article 38 § 2 MC in the order issuance proceeding should be deemed admissible, but only if the findings regarding the criteria have been taken into account in the motion for punishment and do not raise any doubts.

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[50] Thus, rightly, P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, margin number 16.

[51] See the Supreme Court judgments of: 8 May 2013, II KK 338/12, Legalis; 1 October 2014, II KK 39/14, Legalis; 24 August 2016, IV KK 263/16, Legalis; 28 November 2013, IV KK 367/13, Legalis; 24 August 2016, IV KK 263/16, Legalis; 23 November 2016, V KK 328/16, Legalis; 12 February 2019, II KK 191/18, Legalis; 14 February 2019, IV KK 364/18, Legalis; of 16 June 2020, III KK 9/20, Legalis; 31 August 2021, V KK 286/21, Legalis; 13 December 2021, II KK 567/21, Legalis; 25 January 2023, II KK 558/22, Legalis; 19 October 2023; V KK 420/23, Legalis; 8 November 2023, V KK 427/23, Legalis.

[52] Thus, the Supreme Court in its judgment of 13 September 2017, IV KK 55/17, Legalis No. 1704903.

PRACTICAL ASPECTS

Some practical difficulties in the application of the regulation provided for in Article 38 MC are recognised in the doctrine due to the lack of central registration of persons punished for petty offences. Under current law, the National Criminal Register retains data on persons sentenced to detention for the commission of petty offences.[53] A proposal has even been made to repeal the regulation provided for in Article 38 MC, as it constitutes an unnecessary imitation of a measure of the Criminal Code, which fails to recognise that petty offences are less harmful acts and are not classified as crimes. Moreover, due to the lack of central registration of persons punished for petty offences, the application of Article 38 MC may be haphazard, which in turn violates the principle of equality before the law.[54]

To improve the application of the regulation provided for in Article 38 MC, it is important to establish a register of misdemeanours as a collection of data within the National Police Information System (*Krajowy System Informacyjny Policji* – KSIP). It contains information about perpetrators of petty offences against property referred to in Article 119 § 1, Article 120 § 1, Article 122 §§ 1 and 2 and Article 124 § 1 MC, persons suspected of committing them, and those charged and punished for these misdemeanours. The information is collected and processed in an electronic database of perpetrators of misdemeanours, called the 'misdemeanour register', maintained in the telecommunications system by the Chief Commander of the Police.[55] In addition, for road traffic petty offences, there is a special register of drivers breaching traffic regulations, maintained in electronic form in the Police telecommunications systems. The data contained in the register may include important information on the violation of traffic regulations and the total number of penalty points assigned to the drivers, as well as the violations that were not assigned penalty points. It is intended to prevent situations where the perpetrators of petty offences are subject to inappropriate punishment, resulting from the court's biased judgment regarding their previous conduct constituting a violation of road safety regulations. The justification for the Bill of 23 March 2017 amending the Act: the Criminal Code and some other acts, which introduced this requirement, states that:

> 'Offences against road traffic safety constitute specific prohibited acts that are not usually committed by perpetrators of typical criminal acts, e.g. theft, robbery, assault etc. Therefore, it is very common for these acts to be committed by persons who are not listed in the National Criminal Register and have a good reputation in their place of residence, but who have already committed numerous serious road traffic misdemeanours, e.g. driving under the influence of alcohol, failing to stop for a roadside check or speeding, which resulted in confiscation of a driving licence and the withdrawal of the right to drive vehicles. Adjudicating in a criminal case, the court is usually unaware of these circumstances because,

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[53] See Article 1(2)(7) of the Act on the National Criminal Register, consolidated text, Journal of Laws of 2024, item 276.

[54] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2002, p. 114.

[55] See Article 20f of the Act of 6 April 1990 on the Police, consolidated text, Journal of Laws of 2024, item 145, as amended.

in accordance with the data obtained from the National Criminal Register, the perpetrator has no criminal record'.[56]

In spite of the above, the registration of penalties for misdemeanours is incomplete. It is rightly pointed out in the literature that for the proper application of Article 38 MC, it is desirable to expand the catalogue of data related to petty offences retained in the National Criminal Register to include information on all perpetrators legally punished, regardless of the type of penalty imposed or the procedure applied. It is all the more important because the regulations under Article 38 MC are general in nature.[57] While fully approving of this stance, one may also propose the introduction of an equivalent provision to Article 213 § 1b of the Code of Criminal Procedure into the Misdemeanour Code.[58] The above-mentioned provision establishes an obligation to collect information from the central register of drivers violating road traffic regulations maintained by the Police, concerning the accused in cases of crimes against safety (Chapter XXI of the Penal Code) committed in land traffic.

CONCLUSION

The concept of petty offence recidivism, regulated in Article 38 MC, constitutes an important tool to punish perpetrators more severely if they commit misdemeanours repeatedly, despite having been previously punished. The measure serves a preventive function and, to some extent, allows for individualisation of a penal response in situations where standard measures prove to be ineffective. The so-called road traffic recidivism, covering situations of repeated traffic offences, e.g. driving a vehicle under the influence of alcohol (Article 87 § 1 MC), constitutes a particularly important area of practical application of Article 38 MC.

However, the current wording of Article 38 causes certain interpretative and practical difficulties. It seems reasonable to consider *de lege ferenda* changes – in particular, the introduction of organisational solutions (e.g. an appropriate register of petty offences), as well as clarification of the criteria for applying the classification of petty offence recidivism. To maintain the consistency of the discussed regulation, Article 38 § 1 MC should explicitly state that the two-year statute of limitation for recidivism runs from the date of 'final and binding punishment', and not, as currently, from 'punishment'. The current differentiation in this requirement is incomprehensible and unjustified. The application of the so-called road traffic recidivism to unintended acts also raises doubts. These are all the more justified because its adoption results in a mandatory increase in the fine, regardless of whether the perpetrator committed the misdemeanour intentionally or unintentionally. Considering the symmetry of legal solutions would also require that the mandatory application of extraordinary aggravation be abandoned in this case.

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[56] Justification for the governmental Bill amending Act: the Criminal Code and Certain Other Acts, 7th term of the Sejm (print no. 1231).

[57] P. Gensikowski, in: Daniluk P. (ed.), *Reforma prawa wykroczeń. Tom 1*, Warszawa, 2019.

[58] K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 64.

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INFLUENCE OF DIGITALISATION IN AIR TRANSPORT ON PASSENGER RIGHTS: CASE STUDY

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Abstract

A European airline is completely eliminating paper boarding passes, accepting only mobile passes that require the use of an application. This means that passengers must use exclusively electronic passes, without the option to print them. But can such digital advancements be imposed against passengers' wishes? On the one hand, digitalisation simplifies the check-in process and reduces airline operational costs. On the other hand, however, many passengers still rely on paper boarding passes, making this change potentially challenging for some. Thus, is it possible to achieve the right balance between digitalisation and passengers' rights? Is the complete digitalisation of the ticketing system, at the expense of passengers' freedom of choice, legally justified? The purpose of this article is to assess the legality of such a policy in terms of its compliance with consumer protection provisions, the provisions of 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 (GDPR), as well as relevant provisions of aviation law.

Key words: digitalisation in air transport, air passengers' rights, personal data protection, cybersecurity

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INTRODUCTION

Digitalisation in air transport can lead to improved efficiency and safety, reduced check-in times, increased passenger convenience, and cost savings, including lower ticket prices. Air carriers, airports, service providers and aviation authorities worldwide are investing in digital solutions to optimise flight operations.[1]

Areas of aviation digitalisation include automated passenger data processing, such as biometric authentication,[2] AI-based smart airports, e-gates and automated border control, blockchain technology for secure data management, and cybersecurity measures to protect confidential passenger information. Airlines also use predictive analytics to optimise flight routes, reduce delays, and minimise fuel consumption. Furthermore, ground handling is becoming increasingly automated. Drones and robotic vehicles are assisting in runway inspections, refuelling, and cargo handling.

The next stage of digitalisation in aviation will likely include autonomous aircraft powered by artificial intelligence, the hyper-personalisation of passenger experiences through AI and big data, and the use of quantum computers for ultra-fast data processing in air traffic management.

Aviation service providers, particularly airlines and airports, must balance technological progress with regulatory compliance, while at the same time addressing passengers' concerns about privacy.

This gives rise to a number of questions. Does digitalisation affect the quality of service provision? Does it increase the risk of breaches of passenger data protection? And is it at all possible to achieve an appropriate balance between digitalisation and the rights of air passenger?

Airlines' use of passengers' personal data speeds up identification but can also lead to biometric abuse, identity theft, use of data for commercial purposes without consent, and a lack of control over personal data within international systems.

Civil aviation is one of the most complex and technologically advanced industries, where security is of key importance.[3] However, with progressive digitalisation, it is becoming increasingly vulnerable to cyber threats, especially as newly introduced systems are integrated with earlier generations of IT infrastructure, which were

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[1] See, *inter alia*, M. Miłosz, M. Bąbol, *Współczesne technologie informatyczne: zagrożenia i ochrona aplikacji internetowych*, Lublin, 2014; J. La, I. Heiets, 'The impact of digitalization and intelligentization on air transportation system', *Aviation*, 2021, Vol. 25, No. 3, pp. 159–170; D. Jarach, 'The digitalisation of market relationships in the airline business: the impact and prospects of e-business', *Journal of Air Transport Management*, 2020, Vol. 8, No. 2, pp. 115–120; Y. Liu, R. Law, 'The adoption of smartphone applications by airlines', in: Cantoni L., Zhieng X. (eds), *Information and Communication Technologies in Tourism*, Heidelberg, 2013, pp. 47–57; I. Heiets, J. La, W. Zhou, S. Xu, X. Wang, Y. Xu, 'Digital transformation of airline industry', *Transportation Research Procedia*, 2022, Vol. 92.

[2] *Inter alia*, facial recognition, fingerprint scanning, and iris recognition, which replace traditional boarding passes and identity verification, as well as self-service kiosks and mobile boarding passes.

[3] For more see: R. Abeyratne, *Convention on International Civil Aviation: A Commentary*, Cham, 2014; P.S. Dempsey, *Public International Air Law*, Montreal, 2008; M. Żylicz, *Prawo lotnicze międzynarodowe, europejskie i krajowe*, Warszawa, 2011; E. Jasiuk, R. Wosiek, *Legal conditions of international cooperation for the safety and efficiency of civil aviation*, Warszawa, 2019.

not designed with specific consideration of telecommunications vulnerabilities.[4] In addition, these systems are continually modified to handle increasing air traffic, potentially resulting in some currently used systems becoming susceptible to cyberattacks.[5] A cyberattack on aviation systems can lead to serious consequences, such as operational disruptions, breaches of passenger data protection, and even threats to flight safety. The most important aspects of cybersecurity in aviation include protecting air traffic control (ATC) systems, securing passenger and airline data, safeguarding airport infrastructure and onboard systems, and preventing hacker attacks on communications and navigation systems.[6]

In 2023, air navigation support systems failed in countries characterised by complex airspace structures and heavy air traffic. In January, a temporary outage occurred in the NOTAM information exchange system provided by the US Federal Aviation Administration (FAA), resulting in the grounding of all air traffic in the United States for over an hour and a half – for the first time since the 9/11 attacks.[7] In August of the same year, the British flight planning system provided by NATS[8] experienced a failure, causing delays and cancellations of hundreds of flights. Although cyberattacks were ruled out in both cases, these incidents highlighted the issue of cybersecurity vulnerabilities. This is due to the fact that such risks may arise from interconnectivity with third-party systems and infrastructure, as well as cyberattacks themselves. An analysis of existing legal solutions concerning civil liability for damage caused by cyberattacks has been undertaken in the literature, identifying three main types of damage. It is indicated that the first type may involve damage resulting from a flight delay or cancellation. Secondly, a cyberattack may lead to an aircraft accident or even the death of a passenger. Lastly, damage may also arise from breaches of personal data protection regulations.[9]

Apart from issues related to cyberattacks, concerns also arise regarding the protection of privacy and personal data when using AI solutions, chatbots, biometric identity controls, and similar technologies.

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[4] EY Polska, *Podstawowy poziom cyberdojrzałości w transporcie*, 5 October 2022; https://www.ey.com/pl_pl/news/2022/10/dojrzalosc-cyberbezpieczenstwo-transport-2022 [accessed on 26 September 2023].

[5] P. Kasprzyk, A. Konert, 'Wyzwania regulacyjne w zakresie cyberbezpieczeństwa w lotnictwie cywilnym', in: Brodowski L., Kuźniar D. (eds), *Wokół problematyki państwa jako podmiotu prawa międzynarodowego. Księga jubileuszowa profesor Elżbiety Dyni*, Rzeszów, 2024.

[6] On the issues of cybersecurity in unmanned aviation see also: M. Gregorski, 'Regulacje dotyczące bezzałogowych statków powietrznych w prawie Unii Europejskiej w kontekście międzynarodowym', *Studia Europejskie*, 2017, No. 2; P. Kasprzyk, *Bezzałogowe statki powietrzne. Nowa era w prawie lotniczym. Rozwój regulacji prawnych dotyczących bezpieczeństwa lotnictwa bezzałogowego*, Warszawa, 2021; A. Konert, *Bezzałogowe statki powietrzne. Nowa era w prawie lotniczym. Zagadnienia cywilnoprawne*, Warszawa, 2020.

[7] B. Rokus, 'FAA says unintentionally deleted files are to blame for nationwide ground stop', *CNN Business*, 19 January 2023; https://edition.cnn.com/2023/01/19/business/faa-notam-outage/index.html [accessed on 26 September 2023].

[8] UK Civil Aviation Authority, *Regulator to launch independent review of NATS technical failure*, 6 September 2023; https://www.caa.co.uk/newsroom/news/regulator-to-launch-independent-review-of-nats-technical-failure/ [accessed on 26 September 2023].

[9] P. Kasprzyk, A. Konert, 'Wyzwania regulacyjne…', op. cit.

Due to the complexity of the subject, the analysis in this article is limited to a specific case: a European airline completely eliminating paper boarding passes and accepting only their mobile version, which requires the use of an app. This means that passengers must use exclusively electronic passes, with no option to print them. Can such digital progress be implemented against passengers' will?

The main hypothesis is as follows: digitalisation in air transport has a significant impact on passenger rights. To further refine the study, the following sub-hypothesis is identified: achieving complete digitalisation of the ticketing system is not possible without restricting air passengers' rights and freedoms. This article analyses the lawfulness of the practice of compelling passengers to use only electronic boarding passes. Accordingly, the main research question concerns the legality of imposing on passengers the obligation to use solely mobile boarding passes, including through an airline app. Numerous additional research questions arise in this context. Does this obligation infringe consumer rights? Can it be considered an abusive clause? Does it violate passenger accessibility rights? Does it contravene the provisions of the GDPR? Finally, can an airline deny boarding despite the passenger holding a paper boarding pass?

A formal-dogmatic method, consisting mainly of the analysis of EU legal norms and Polish law, is the principal research method used in this article. In addition, a case study approach is applied. The article examines the practice of the air carrier that was the first in the world to introduce the so-called paperless policy.

The legal grounds regulating air transport, including passenger rights, within both international and EU law, are widely discussed in the scientific literature. Key studies, such as those by Abeyratne, Dempsey, and Żylicz,[10] provide a solid foundation for understanding international conventions and the European legal framework for passenger protection. Rossi Dal Pozzo offers a detailed analysis of the EU regulations on air passenger' rights, while Fox and Domingo explore the evolution of these rights in the context of contemporary market challenges.[11] From a technological perspective, Heiets et al. and La and Heiets examine the impact of digitalisation on the air transport system, with particular focus on automation and smart management systems.[12] Jarach, in turn, analyses the digitalisation of market relations and the impact of e-business on airline operations.[13] Research into cybersecurity and personal data protection is a significant supplement, which is particularly important in relation to the introduction of digital boarding passes and

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[10] See R. Abeyratne, *Convention on International…*, op. cit.; P.S. Dempsey, *Public International…*, op. cit.; M. Żylicz, *Prawo lotnicze międzynarodowe…*, op. cit.; M. Żylicz, *Prawo lotnicze. Komentarz*, Warszawa, 2016.

[11] F. Rossi Dal Pozzo, *EU Legal Framework for Safeguarding Air Passenger Rights*, Cham, 2015; S.J. Fox, L.M. Domingo, 'EU Air Passengers' Rights Past, Present, and Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study)', *Journal of Air Law and Commerce*, 2020, Vol. 85, Issue 2.

[12] I. Heiets, J. La, W. Zhou, S. Xu, X. Wang, Y. Xu, 'Digital transformation…', op. cit.; J. La, I. Heiets, 'The impact of digitalization…', op. cit.

[13] D. Jarach, 'The digitalisation of market relationships…', op. cit.

mobile applications.[14] The works of Artigot i Golobardes also address key issues related to procedural challenges associated with the enforcement of passenger rights, while Kunert-Diallo focuses on consumer protection in the context of jurisdiction and conflict of laws.[15]

This article distinguishes itself through its use of a case study centred on the paperless policy introduced by one of the largest European airlines, Ryanair. Despite the growing body of literature on digitalisation in aviation, there is a lack of detailed analysis concerning the practical consequences of implementing digital policies from the perspective of passenger rights, particularly with reference to specific air carriers. The Ryanair case study enables a demonstration of how technological changes affect accessibility, the protection and enforcement of consumer rights, and the real-world operational environment. This perspective bridges the gap between legal theory and the practice of the aviation market in the digital era, especially in relation to new challenges such as ensuring personal data security, transparency in check-in processes, and accessibility of services for diverse passenger groups.

DIGITALISATION POLICY: A CASE STUDY

INTRODUCTION

The European airline Ryanair plans to introduce the mandatory use of mobile boarding passes and completely eliminate their printed counterparts, becoming the first airline in the world to adopt a fully paperless policy. The check-in fee will be eliminated, and the journey is intended to become smoother and more convenient. Previously, passengers had two options: they could use a mobile boarding pass on their smartphone via an app, or print it at home and use a paper version during the journey. An alternative was also available at the check-in desk, where passengers could obtain a printed boarding pass by paying an additional fee of EUR 55.

The introduction of the so-called 'paperless policy' raises several questions and concerns, such as: What happens if a passenger does not own a smartphone? What are the consequences if the phone's battery runs out? What if the device is broken, lost or stolen? Even if the carrier retains booking details in its system in the event of the phone loss or technical problems and deems it sufficient for the passengers to identify themselves at the boarding gate using an identity document, it remains unclear how passengers will proceed through the initial security check, especially if there is no check-in desk where a boarding pass can be printed and collected. Furthermore, some destinations still require a printed boarding pass. Certain international airports do not yet accept mobile boarding passes, for example,

[14] K. Gorzkowska, A. Piechocki, 'Cyberbezpieczeństwo systemów sztucznej inteligencji', *Prawo Nowych Technologii*, 2023, No. 2; P. Kasprzyk, A. Konert, 'Wyzwania regulacyjne…', op. cit.

[15] M. Artigot i Golobardes, 'Spain: Defeating Passengers Rights through Procedural Rules', in: Bobek M., Prassl J. (eds), *Air Passengers Rights. Ten Years On*, Oxford–Portland Oregon, 2016, pp. 205–222; A. Kunert-Diallo, *Prawa pasażerów w transporcie lotniczym*, Warszawa, 2025.

Turkish airports (with the exception of Dalaman Airport) and Tirana Airport. To fully implement digitalisation, these airports would need to modernise their systems, as they currently rely on manual inspection of printed tickets and are not equipped with digital ticket inspection devices.

The legality of requiring airline passengers to use only electronic boarding passes depends on several factors, including national legislation, the provisions of aviation authorities, and airline-specific regulations.

The central research question therefore concerns the legality of the practice of requiring passengers to use solely a mobile boarding pass, including through a mobile app, is legitimate. It is necessary to assess whether such a policy complies with consumer protection law, the GDPR, and aviation law.

CONSUMER RIGHTS PROTECTION

In general, air carriers have discretion in determining the method by which boarding passes are used.[16] At present, most airlines prefer electronic boarding passes (provided via apps or e-mails) and encourage passengers to use them for reasons of convenience, efficiency, and environmental sustainability. If an air carrier offers electronic boarding passes, it may specify this requirement in its General Conditions of Carriage (GCC). Accordingly, an airline may require passengers to use only mobile boarding passes, provided this is explicitly stated in the GCC. By purchasing a ticket, passengers indicate that they have read and accepted the terms and conditions set out in the GCC, which then form part of the contract.[17] However, does this suffice to establish that the carrier's practice complies with consumer protection law?

One of the fundamental rights of consumers is the right to information. Airlines must ensure that passengers are informed about the available options regarding their boarding passes, including whether paper passes are still permitted. It is therefore essential to inform them appropriately.

National courts in several countries have found charging passengers an additional fee for printing boarding passes at the airport is unlawful. For instance, in 2011, Barcelona's Commercial Court ruled that a clause requiring Ryanair passengers to pay a EUR 40 fee for printing a boarding pass at the airport was abusive.[18] The judge held that such a fee was 'abusive' and ordered Ryanair to pay EUR 285.55 in compensation to the complainant. A boarding pass is a travel document, and

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[16] A. Konert, *Odpowiedzialność cywilna przewoźnika lotniczego*, Warszawa, 2010; A. Kunert-Diallo, 'Kolizje praw i jurysdykcji rozstrzygane na korzyść konsumentów usług przewozu lotniczego na przykładzie wybranych orzeczeń', *Palestra*, 2004, No. 11–12; M. Artigot i Golobardes, 'Spain: Defeating Passengers Rights…', op. cit.

[17] See A. Kunert-Diallo, *Prawa pasażerów…*, op. cit.; J. Raciborski, *Usługi turystyczne przepisy i komentarz*, Warszawa, 1999; M. Żylicz, *Prawo lotnicze…*, op. cit., 2016.

[18] Commentary on the judgment of the Court of Appeal of Barcelona of 5 October 2011 in the case of *Don Santos v. Ryanair Ltd*, case No. AC 20111562, decision No. 390/2011; https://iftta.org/news/spain-court-of-appeal-of-barcelona-regards-ryanairs-boarding-pass-printing-policy-lawful/ [accessed on 26 February 2025].

imposing an additional fee violates the provisions of the 1999 Montreal Convention. The court held that passengers should not be required to pay for a document that is necessary for travel, and that such a clause contravenes the Montreal Convention, as the cost is not comparable to optional services such as checked baggage.[19]

The Supreme Court in Austria also considered a case concerning an additional fee for printing a boarding pass at the airport, this time involving the airline Laudamotion. The judges described the carrier's practice as unreasonable and held that including the information only in the 'useful information' section of its regulations was insufficient. The optional fee was not displayed automatically but was instead hidden within the fare details. The court found that, in principle, a check-in fee would not be prohibited, provided it was clearly and unambiguously indicated. However, the EUR 55 fee was deemed excessive and unjustified. The judgment also noted that competitors charged significantly lower fees – if any at all – and that Laudamotion's check-in fees often exceeded the cost of the actual ticket.[20]

Finally, the German Competition Commission filed a lawsuit against Ryanair concerning the controversial EUR 55 check-in fee. In case No. Az 3-06 O 7/20, the Frankfurt Regional Court ruled at first instance in favour of the plaintiff. In the justification of the ruling, it was stated that Ryanair is obliged under both the Air Transport Services Regulation and the Unfair Competition Act to disclose check-in fees at the booking stage. Merely providing this information in the general conditions of carriage is insufficient, as such costs must be clearly and transparently specified. Information about the option of online check-in two days before departure – whether provided via e-mail or at the check-in desk – was held to be inadequate.[21]

The Court of Justice of the European Union (CJEU) has also addressed the issue of the 'final price' that must be indicated to passengers at the time of purchasing a ticket. In Case C-28/19,[22] *Ryanair v. Italian Competition and Market Authority* (Autorità Garante della Concorrenza e del Mercato – AGCM), the Court examined whether Ryanair engaged in unfair commercial practices while indicating air fares in the system of online booking. According to AGCM, the prices displayed failed to include certain elements classified by Ryanair as optional costs, including the passengers' online check-in fees, VAT applied to fares and optional supplements for domestic flights, and administrative fees for payments made by credit cards other than those approved by Ryanair. AGCM argued that these costs were, in fact, mandatory and were applied to consumers during the booking process, thereby increasing the actual fare. The preliminary ruling request submitted to the Court asked whether Article 23(1) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the

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19 Judgment of the Court of Appeal of Barcelona of 5 October 2011 in the case of *Don Santos v. Ryanair Ltd*, case No. AC 20111562, decision No. 390/2011.

20 Judgment of the Supreme Court in Vienna of 27 February 2020 in the case of *Laudamotion GmbH*, case No. 8 Ob 107/19x; https://www.kosesnik-langer.at/wp-content/uploads/2020/05/VKI-Laudamotion-Urteil-OGH.pdf [accessed on 26 February 2025].

21 The Frankfurt Regional Court judgment of 12 January 2021 in the case No. Az 3-06 O 7/20 related to Ryanair; https://www.lareda.hessenrecht.hessen.de/perma?d=LARE210000408 [accessed on 26 February 2025].

22 OJ C 164, 13.5.2019, p. 12.

operation of air services in the Community[23] should be interpreted as meaning that passengers' online check-in fees, VAT on fares and optional supplements for domestic flights, and administrative fees for certain credit card payments fall within the category of 'unavoidable and foreseeable price supplements' under the second sentence of that provision, or rather within the category of 'optional price supplements' as referred to in the fourth sentence.

According to the Court, pursuant to Article 23(1) of Regulation (EC) No 1008/2008, the final price to be paid by the customer for air services must always be indicated, inclusive of all air fares referred to in Article 2(18) of that Regulation, as well as applicable taxes and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. The third sentence of Article 23(1) of Regulation (EC) No 1008/2008 stipulates that the offer must include at least airport charges and other charges, surcharges or fees, such as those related to security or fuel, where they have been added to the air fare. The Court explained that taxes and charges, surcharges and fees referred to in the second and third sentences of Article 23(1) of Regulation (EC) No 1008/2008 must not be included within the air fare itself, but must be shown separately (CJEU judgment of 6 July 2017, *Air Berlin*, C-290/16, para. 36). It is also clear from paragraph 35 of the *Air Berlin* judgment that the various components comprising the final price to be paid, within the meaning of the second sentence of Article 23(1) of Regulation (EC) 1008/2008, must be indicated from the first time the air service price is displayed. In addition, the fourth sentence of Article 23(1) of Regulation (EC) No 1008/2008 provides that information about optional price supplements must be communicated in a clear, transparent, and unambiguous manner at the start of any booking process, and that their acceptance by the customer must be on an 'opt-in' basis. In this regard, paragraph 14 of the CJEU judgment of 19 July 2012, *ebookers.com Deutschland*, C-112/11, clarifies that the concept of 'optional price supplements' refers to supplements which are not unavoidable – unlike the final price referred to in the second and third sentences of Article 23(1) of Regulation (EC) No 1008/2008 – and which relate to services that supplement the air service itself but are neither compulsory nor necessary for the carriage of passengers. Consequently, the customer must be given the choice to accept or decline them. The Court has held that Ryanair is obliged to indicate, in its online offers for passenger carriage, from the very first display of the price, the air fare and, separately, all unavoidable and foreseeable taxes, charges, surcharges, and fees. Optional price supplements must also be indicated in a clear, transparent, and unambiguous way at the start of the booking process.[24]

In light of the above, it is worth considering whether including information about the requirement to use a mobile boarding pass solely within the GCC gives the carrier a disproportionate advantage over the consumer. In other words, could

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[23] OJ L 293, 31.10.2008, p. 3.

[24] The CJEU case law provides that the price to be paid for the insurance of the cost of flight cancellation by the passenger or carriage of checked-in luggage should be treated as optional price supplements within the meaning of the fourth sentence of Article 23(1) of Regulation (EC) No 1008/2008 (see CJEU judgment of 18 September 2014 in the case of *Vueling Airlines*, C-487/12, para. 39).

this be considered an abusive clause? Such clauses are unlawful and non-binding, as they infringe the rights and protections granted to consumers by law.

It is necessary to adopt the view that requiring the use of mobile boarding passes exclusively may exclude passengers who face barriers in accessing or using digital technology (e.g. those without internet access or smartphones). Denying passengers a choice and obliging them to use mobile apps leads to the digital exclusion of certain social groups and may be regarded as discriminatory. As a result, this practice may constitute a violation of the legal guarantees afforded to consumers.

Accessibility regulations

Passengers with disabilities or special needs may require specific accommodations, including the option to use paper boarding passes. In 2022, 27% of people in the European Union had some form of disability, meaning that one in four EU citizens had some degree of impairment.[25] Legal frameworks such as the Americans with Disabilities Act (ADA) in the United States[26] and Regulation (EC) No 1107/2006 in the European Union[27] require airlines to ensure equal access to services for persons with reduced mobility or special needs. Directive 2019/882, known as the European Accessibility Act (EAA),[28] aims to create an environment in which accessibility to products and services is not a privilege but a condition for equal participation in society, regardless of physical or mental ability. Its primary objective is

> 'to contribute to the proper functioning of the internal market by approximating laws, regulations and administrative provisions of the Member States as regards accessibility requirements for certain products and services by, in particular, eliminating and preventing barriers to the free movement of certain accessible products and services arising from divergent accessibility requirements in the Member States'.

The Directive is also linked to the Convention on the Rights of Persons with Disabilities, ratified by the European Union on 23 December 2010, and is related to 'The European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe', adopted by the European Commission. According to Article 4 of the Directive, Member States shall ensure that economic operators only place on the market products and only provide services that comply with the accessibility requirements set out in Annex I therein. For example, there is a requirement that the user interface must include features, elements and functions that enable persons

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[25] PARP. Grupa PFR, *Dyrektywa 2019/882, czyli o równym dostępie do przestrzeni publicznej*, 16 April 2024; https://www.parp.gov.pl/component/content/article/86206:dyrektywa-2019-882-czyli-o-rownym-dostepie-do-przestrzeni-publicznej [accessed on 8 April 2025].

[26] Americans with Disabilities Act of 1990; https://www.eeoc.gov/americans-disabilities-act-1990-original-text [accessed on 28 April 2025].

[27] Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; http://data.europa.eu/eli/reg/2006/1107/oj [accessed on 28 April 2025].

[28] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services; http://data.europa.eu/eli/dir/2019/882/oj [accessed on 28 April 2025].

with disabilities to access, perceive, operate, understand, and control the product properly.

Forcing passengers to use only electronic boarding passes may be perceived as discriminatory if certain groups – such as people who do not own smartphones or older persons who may find it difficult to access or use technology, are faced with such a disadvantage. Therefore, such a practice may constitute a violation of the guarantees provided to consumers under accessibility regulations.

GDPR

Uniform rules for the protection of personal data are set out in Regulation (EU) No 2016/679 of the European Parliament and of the Council (GDPR). These rules also apply to the activities of air carriers, who process passengers' data at various stages of travel: from ticket booking, through check-in, to boarding pass issuance and boarding.[29] Data such as the ticket number (Electronic Ticket – ETKT), loyalty programme number, or barcode[30] contain a significant amount of information. Based on these, it is possible to obtain the reservation number, which makes it possible to log in to the travel confirmation – the so-called ITR (Itinerary Receipt) – containing all the passenger's personal data: document numbers and series, and sometimes even a phone number, address, and proof of payment with amounts paid. The air carrier must ensure that electronic boarding passes, which are often accessed via apps or e-mail links, comply with these privacy regulations. The controller is responsible for ensuring that personal data are processed lawfully and that all activities in this regard are carried out in accordance with recitals 1 and 2 and Articles 13–21 of the GDPR. The controller is also required to maintain records of these activities. In accordance with Article 5(1)(c), personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed ('data minimisation'). Thus, the air carrier is obliged to ensure that all data collected from passengers are 'adequate' – that is, necessary and essential to fulfil the stated purpose. Who is therefore permitted to scan boarding pass codes, and who is allowed access to them? Losing control over personal data presents a risk of unauthorised use. Unfortunately, excessive data collection by controllers is frequently unjustified.

Many passengers have filed notices and complaints with the Personal Data Protection Office (UODO) regarding the manner in which Ryanair processes their personal data, expressing concerns that the airline's data collection and usage practices are inappropriate. The air carrier has, *inter alia*, introduced an additional passenger verification procedure as part of the check-in process, involving the

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[29] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 – General Data Protection Regulation (GDPR), OJ L 119, 4.5.2016, p. 1.

[30] The barcode or QR code, depending on the air carrier, contains the following data: reservation number (PNR), ticket and fare basis information, loyalty programme details (e.g. membership card number), travel route, departure date, class, and seat number.

random selection of customers booking tickets to have their ID scanned and their face displayed on a computer or smartphone screen.[31]

Moreover, Ryanair has introduced a controversial policy requiring passengers who book tickets via third-party platforms, rather than directly through the airline's official website, to provide biometric data. The Irish Data Protection Regulator is currently conducting an inquiry into Ryanair's use of facial recognition technology as part of its remote customer identity verification process.[32] In light of the above, can requiring passengers to use electronic methods raise concerns regarding the security of their personal data? On the one hand, passengers should be given the option to use a paper alternative if they are concerned about data privacy. On the other hand, it is worth considering whether the personal data provided by a passenger differ depending on whether a paper or electronic boarding pass is used. The answer should be negative. Therefore, the issue that may raise concerns is whether passengers are required to provide *more* data when forced to use only the carrier's app, and, if so, how these data are processed. The provisions regulating the requirements for mobile apps must clearly specify what personal data are processed by the app, as well as who has access to them and under what conditions. Moreover, personal data must be processed in a manner that ensures appropriate security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (Article 5(1)(f) GDPR). It could be argued that requiring passengers to use apps may actually enhance privacy protection. Data may, in fact, be more secure in an app than on a paper boarding pass. Experience shows that passengers are often unaware of the consequences of posting images of their boarding passes on social media. Data obtained in this way can be used, for example, to conclude a loan agreement or to fraudulently claim compensation from an airline for a delayed or cancelled flight.[33]

In the event of the violation of the GDPR provisions, a passenger may seek compensation under Article 82 of the Regulation, which stipulates that any person who has suffered material or non-material damage as a result of an infringement of the Regulation shall have the right to receive compensation from the controller or processor for the damage suffered (paragraph 1). Any controller involved in the processing shall be liable for the damage caused by processing that infringes the Regulation. A processor shall be liable for damage only where it has failed to comply with obligations specifically directed at processors under the Regulation, or where it has acted outside or contrary to the lawful instructions of the controller (paragraph 2).

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[31] eTravel, *UODO bada proces przetwarzanie danych osobowych przez Ryanair*, 26 September 2023; https://www.etravel.pl/pl/aktualnosci/960/uodo-bada-proces-przetwarzanie-danych-osobowych-przez-ryanair [accessed on 4 April 2025].

[32] UODO, *Procedura weryfikacji pasażerów linii Ryanair. UODO reaguje*, 28 August 2023; https://uodo.gov.pl/pl/138/2815 [accessed on 4 April 2025].

[33] See M. Walków, 'Polacy wrzucają ich zdjęcia do sieci. UODO ostrzega: te dane mogą ułatwić wyłudzenie', *money.pl*, 16 February 2025; https://www.money.pl/gospodarka/polacy-wrzucaja-ich-zdjecia-do-sieci-uodo-ostrzega-te-dane-moga-ulatwic-wyludzenie-7124442559716160a.html [accessed on 4 April 2025].

AVIATION LAW: DENIED BOARDING

The European Parliament and the Council, having regard to the proposals from the Commission,[34] adopted Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. The Regulation applies to passengers departing from an airport located within the territory of a Member State, and those departing from an airport located in a third country to an airport situated in the territory of a Member State, provided the operating air carrier of the flight concerned is a Community carrier[35] (unless the passengers received benefits or compensation and were offered assistance in that third country).[36]

In accordance with Article 3(2)(a) of Regulation (EC) No 261/2004, the Regulation applies on the condition that, firstly, passengers have a confirmed reservation on the flight concerned, and secondly, they present themselves for check-in on time. The exception to this is flight cancellation, as referred to in Article 5 of the Regulation. Although the Regulation does not define the concept of a 'confirmed reservation', the term 'reservation' is defined in Article 2(g) as 'the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator'. As for the concept of 'other proof' within the meaning of Article 2(g), the CJEU has held that if a passenger possesses such proof issued by the air carrier or tour operator, it is equivalent to a 'reservation' within the meaning of this provision (CJEU judgment of 21 December 2021, *Azurair and Others*, C146/20, C188/20, C196/20, and C270/20, para. 42, Legalis). These concepts should be interpreted broadly in order to ensure the high level of passenger protection referred to in recital 1 of Regulation (EC) No 261/2004.[37]

In the event of denied boarding, passengers are entitled to the following rights:

(a) the right to reimbursement of the ticket price within seven days or the right to re-routing to the final destination (under comparable transport conditions, at the earliest opportunity);
(b) the right to meals and refreshments in reasonable relation to the waiting time;
(c) the right to hotel accommodation where necessary (e.g. in the case of a stay of one or more nights);
(d) the right to transport between the airport and the place of accommodation;
(e) the right to two telephone calls, telex or fax messages, or e-mails;
(f) the right to receive compensation amounting to:
    · EUR 250 – for all flights of 1,500 kilometres or less;

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[34] COM(2001) 784 final and DOCE C 103 E/225 of 30.4.2002. Also see, *inter alia*, A. Kunert-Diallo, *Prawa pasażerów*…, op. cit.; F. Rossi Dal Pozzo, *EU Legal Framework*…, op. cit.; S.J. Fox, L.M. Domingo, 'EU Air Passengers' Rights…', op. cit.

[35] The European Union air carrier means an air transport undertaking that holds a valid operating licence granted by a Member State in accordance with provisions of Council Regulation (EEC) No 2407/92 of 1992 on licensing of air carriers (Article 2(c)).

[36] Article 3 of the Regulation.

[37] Cf. the CJEU judgment of 6 March 2025, case No. C-20/24.

- EUR 400 for flights between 1,500 and 3,500 kilometres;
- EUR 600 for flights over 3,500 kilometres.

Within the scope of the research analysed in this article, it is necessary to consider the consequences a passenger may face if an airline denies them boarding for not having a mobile boarding pass. Conversely, what would happen if the passenger presented a boarding pass in paper form (e.g. a printed screenshot)? Would they then be entitled to compensation? Failure to present a boarding pass (e.g. due to theft or smartphone malfunction) may be interpreted as failure to present a 'confirmed reservation'. Since the two conditions set out in the Regulation are cumulative in nature, a passenger cannot be deemed to have presented themselves for check-in merely by holding a confirmed reservation for a given flight, and vice versa.[38] In such circumstances, the carrier may refuse boarding without being obliged to pay compensation to the passenger. One can imagine a hypothetical scenario in which a son books a ticket through his application and provides his father with a printed screenshot of the ticket. The father then begins his journey with only this paper printout. Could the carrier deny him boarding? If the provisions of the Regulation are interpreted literally, it appears that the requirement to present proof of a confirmed reservation would be met. In that case, a passenger who presents themselves for check-in at the appropriate time and place but is denied boarding may be entitled to compensation of EUR 250, 400, or 600, depending on the flight distance.

In the context of this analysis, it is worth noting that work is currently underway in the European Union to revise Regulation (EC) No 261/2004, which constitutes the primary legal act governing air passenger rights. On 5 June 2025, the EU Council reached a political agreement on a comprehensive update of Regulation (EC) No 261/2004. The reform seeks to adapt the Regulation to the evolving realities of the aviation market, including the increasing role of digital services, process automation, and rapidly developing booking and passenger communication channels.

The proposed changes include, *inter alia*, clarifying air carriers' obligations to provide information, new rules on compensation, and streamlining complaint procedures. The amendment also proposes increasing the delay thresholds: for EU internal flights and those up to 3,000 kilometres, from three to four hours, and for longer routes, to six hours. Corresponding changes to compensation amounts are also planned (EUR 300 instead of 250 for shorter flights, and EUR 500 instead of 600 for longer ones). At the same time, the catalogue of 'extraordinary circumstances' is being revised – for example, technical faults will no longer be automatically excluded from the right to compensation.[39] The ongoing legislative process confirms the relevance of the issues addressed in this article and highlights the need for further research into the impact of digitalisation on the protection of passenger rights. In particular, it will be important to monitor how future changes in EU law respond to the challenges and risks associated with digital transformation in air transport.

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[38] Ibidem.

[39] European Parliament, Revision of Regulation 261/2004, procedure 2013/0072(COD), status: 'tabled', negotiations between the Commission, the Parliament and the Council of the European Union; https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-common-rules-on-compensation-to-passengers?utm_source=chatgpt.com [accessed on 21 July 2025].

CONCLUSION *DE LEGE FERENDA*

The transition to digital aviation is transforming the way in which all entities involved in the air transport process operate. This transformation affects every stage – from booking and selling flight tickets, through check-in, security checks, and baggage handling, to air traffic management and aircraft maintenance. Many airports now employ facial recognition systems and self-service bag drop kiosks, and some actively encourage passengers to use digital boarding passes to speed up the process. At Zayed International Airport in Abu Dhabi, biometric data are being used with the aim of ultimately allowing passengers to travel through the airport without presenting a single document. The International Air Transport Association (IATA) and its partners have demonstrated that the industry is ready to facilitate air travel through the use of digital documents. This has been proven through the so-called proof-of-concept (PoC) initiative. In this pilot project, two travellers used e-wallets containing their digital passports, company IDs, and loyalty programme credentials to access personalised offers, book flights, obtain visas, verify travel documents, check in, and receive boarding passes. Biometric identification enabled the passengers to navigate airport procedures in real time without having to present their documents multiple times. The successful test journey involved seven verifiable credentials (an e-passport copy, live biometric image, visa copy, company ID, loyalty programme membership, purchase order, and boarding pass), two e-wallets, and a trust register for issuer verification.

The benefits of digitalisation can be substantial, both for service providers and passengers. These include cost savings, increased operational efficiency, improved decision-making, lower maintenance costs, enhanced security, faster travel, and an overall better passenger experience. However, the challenges associated with digitalisation in air transport are often linked with privacy concerns, potential infringements of biometric data, and the digital divide affecting non-tech-savvy travellers. Other issues include overreliance on algorithms, possible bias in AI-driven decision-making, high implementation costs, and cybersecurity threats. Various public entities at international, EU, and national levels are responsible for preventing cyber threats. It is therefore essential that these bodies strengthen the security of aviation network systems and take appropriate action. A fresh examination of existing legal frameworks is needed, as current regulations do not adequately protect victims of such attacks.[40] The human factor remains one of the weakest links in the security system. Regular training for airline staff, air traffic controllers, and ground personnel is essential to ensure effective protection.

With regard to the research hypotheses, firstly, the arguments presented in this article indicate that the digitalisation of air transport has a significant impact on passenger rights. Secondly, achieving an appropriate balance between digitalisation and passenger rights is of crucial importance. This balance requires aligning

[40] See the four proposals with regard to responsibility for cyberattack prevention: P. Kasprzyk, A. Konert, 'Wyzwania regulacyjne…', op. cit.

technological innovation with the principles of fairness, privacy, accessibility, and accountability. But how can such a balance be achieved?

Firstly, the right to privacy and personal data protection must be respected. The implementation of rigorous data protection measures, in accordance with instruments such as the GDPR, will ensure transparency in the collection, use, and storage of data. Secondly, it is important to recognise that although digital tools enhance efficiency, they may also exclude passengers who face barriers to accessing or using technology. This may apply to elderly passengers, persons with disabilities, or those without access to the internet or smartphones. Such individuals may encounter difficulties with online check-in, e-tickets, and app-based services. Providing passengers with no alternative and compelling them to use digital tools (for instance, exclusively mobile boarding passes) exacerbates the digital divide and may result in discrimination on the basis of age or disability.

If a passenger is unable to use an electronic boarding pass due to a lack of access to a smartphone, communication difficulties, or other legitimate circumstances, airlines should offer an alternative – such as issuing a paper boarding pass at the check-in desk. Failure to do so may lead to claims of discrimination and breaches of consumer rights. Thirdly, passengers must be guaranteed the right to information, particularly in the event of disruptions such as flight delays or cancellations. The use of AI-powered chatbots for basic enquiries is a positive development, but airline or airport representatives should remain available to provide more comprehensive assistance. Fourthly, biometric data must be securely stored and used solely for the intended purposes, in full compliance with aviation security and data protection regulations. Finally, passengers must be assured of the right to compensation and access to redress mechanisms where appropriate.

To conclude, in order to achieve a balance between digitalisation and passenger rights airlines must adopt a passenger-centric approach that prioritises inclusivity and transparency. Digitalisation should enhance accessibility, not create new barriers. By combining cutting-edge technologies with robust ethical standards and accountability frameworks, airlines can ensure that digital transformation strengthens, rather than undermines, passenger rights.

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ENTITIES PERFORMING PUBLIC ADMINISTRATION AS ADDRESSEES OF ACTS OR IMPERIOUS ACTIVITIES IN THE FIELD OF PUBLIC ADMINISTRATION

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Abstract

The subject of this article is the analysis of acts and activities referred to in Article 3 § 2(4) of the LPAC, from a subjective perspective – namely, the entity they concern, which is also an entity performing public administration. This type of analysis is heuristically valuable for the following reasons: firstly, at both ends of the administrative-legal relationship to which the act or activity pertains, there are entities performing public administration. Secondly, the concepts of 'right' and 'obligation', as used in Article 3 § 2(4) of the LPAC, have a well-established meaning within the doctrine of administrative law. The question therefore arises: how should these terms be interpreted when analysing Article 3 § 2(4) of the LPAC?

Key words: administrative right, obligation, action, act

INTRODUCTION

According to Article 3 § 2(4) of the Act on Administrative Court Procedure,[1] the control exercised by administrative courts over public administration activities includes ruling on complaints concerning acts or activities within the scope of public administration, other than those specified in paragraphs 1–3, which affect rights or obligations arising from legal provisions. This excludes acts or activities undertaken

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[1] Act of 30 August 2002 – Law on Proceedings before Administrative Courts; consolidated text, Journal of Laws of 2024, item 935, hereinafter referred to as 'LPAC'.

within administrative proceedings governed by the Code of Administrative Procedure,[2] proceedings under Sections IV, V and VI of the Tax Ordinance,[3] proceedings referred to in Section V, Chapter 1 of the Act of 16 November 2016 on the National Fiscal Administration,[4] and proceedings to which the provisions of these acts apply. Defining the acts or activities referred to in this provision has given rise to numerous controversies in both doctrine and judicial decisions. These range from debates over the validity of dividing such forms into acts and activities,[5] to questions concerning the effects they produce. It is generally accepted that the criteria for classifying specific conduct as so-called 'other acts and activities' are imprecise. The phrase 'other acts or activities in the scope of public administration concerning rights or obligations resulting from legal provisions' is often described as enigmatic and controversial.[6] The cited provision contains a legal definition of acts or activities, which simultaneously forms part of the enumeration of public administration activities subject to the jurisdiction of administrative courts, as set out in Article 3 § 2 LPAC. For comparison, it is worth noting that the decisions and provisions listed in Article 3 § 2 LPAC are formally defined, *inter alia*, in the Code of Administrative Procedure and the Tax Ordinance. Their constitutive elements and classification have long been addressed in academic doctrine and case law – these decisions were already subject to judicial review during the interwar period. The history of acts or activities as forms subject to such review is, by contrast, much shorter, dating back only to 1995.[7]

The subject of this article is the analysis of acts and activities from a subjective perspective – namely, the entity they concern, which is also an entity performing public administration. Examining acts and activities from this perspective is heuristically valuable for the following reasons: at both ends of the administrative-legal situation to which the act or activity pertains,[8] there are entities performing public administration. As Z. Kmieciak points out, one party enforces the law concerning the act or activity,[9] while the other is its 'beneficiary'. Examples of

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[2] Act of 14 June 1960 – Code of Administrative Procedure; consolidated text, Journal of Laws of 2024, item 572, hereinafter referred to as 'CAP'.

[3] Act of 29 August 1997 – Tax Ordinance; consolidated text, Journal of Laws of 2023, item 2383, hereinafter referred to as 'the Tax Ordinance'.

[4] Act of 16 November 2016 on the National Revenue Administration, consolidated text, Journal of Laws of 2023, item 615, as amended.

[5] A. Skoczylas, 'Glosa do uchwały NSA z dnia 4 lutego 2008 r., I OPS 3/07', *Orzecznictwo Sądów Polskich*, 2008, No. 7–8, item 89; B. Adamiak, 'Z problematyki właściwości sądów administracyjnych (art. 3 § 2 pkt 4 p.p.s.a.)', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2006, No. 2, p. 7.

[6] J. Zimmermann, 'Prawo do sądu w prawie administracyjnym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2006, Issue 2, pp. 307 et seq.

[7] Article 16(1)(4) of the Act of 11 May 1995 on the Supreme Administrative Court, Journal of Laws No. 74, item 368, as amended.

[8] Following J. Boć, by the term 'administrative-legal situation' I understand any social situation of a given entity, the constituent elements of which have been shaped in law, directly or indirectly, due to a specific factual event, cf. J. Boć, in: Boć J. (ed.), *Prawo administracyjne*, Wrocław, 2005, p. 378.

[9] According to Z. Kmieciak, in cases where certain rights or obligations arise by virtue of the law itself, there is no application of the law, but merely its execution, i.e. the initiation of

acts or activities which, according to case law, concern the rights or obligations of an entity performing public administration include: information on the refusal to grant financial assistance to a local government unit;[10] post-inspection order issued by a provincial environmental protection inspector towards a local government unit;[11] recommendations made by a provincial conservator of monuments to a local government unit;[12] dismissal of a protest against a negative assessment of a project funding application;[13] result of a tax audit carried out with respect to a local government unit;[14] action by the Prime Minister in approving the final list of tasks selected for funding from the local government road fund;[15] failure to take into account a simplified road traffic organisation project; and ordering substantive changes to that project.[16] Secondly, the concepts of 'right' and 'obligation' used in Article 3 § 2(4) LPAC already have a well-established meaning within the doctrine of administrative law. The question therefore arises: how should these terms be understood when interpreting Article 3 § 2(4) LPAC? Is it justified to adopt the meanings developed in the doctrine of administrative law, or should they be interpreted in a specific manner, tailored to the characteristics of an entity performing public administration? Doctrine and case law have identified the constitutive elements of acts or actions. According to T. Woś, they must meet the following criteria: (1) the act or action cannot be of the nature of a decision or order issued in jurisdictional, enforcement or security proceedings, and must not be appealable under Article 3 § 2(1)–(3) LPAC; (2) the act or action must be external in nature; (3) it must be addressed to an individual entity; (4) it must be of a public law character; (5) it must 'concern' rights or obligations resulting from legal provisions.[17]

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factual actions that allow for the achievement of the purpose of the legal norm, cf. Z. Kmieciak, 'Efektywność sądowej kontroli administracji publicznej', *Państwo i Prawo*, 2010, No. 11, p. 29.

[10] Judgment of the Regional Administrative Court in Łódź of 29 March 2023, ref. No. III SA/Łd 28/23; judgment of the Regional Administrative Court in Szczecin of 24 November 2022, ref. No. I SA/Sz 542/22.

[11] Judgment of the Regional Administrative Court in Kraków of 5 October 2022, ref. No. II SA/Kr 887/22.

[12] Judgment of the Supreme Administrative Court of 7 December 2012, ref. No. II OSK 521/21.

[13] Judgment of the Supreme Administrative Court of 12 April 2018, ref. No. I GSK 1907/18.

[14] Judgment of the Supreme Administrative Court of 11 April 2014, ref. No. II GSK 160/14.

[15] Order of the Supreme Administrative Court of 14 July 2020, ref. No. I GSK 486/20 – the order was issued with a dissenting opinion, which expressed the view that approval of the final list of tasks does not fall within the jurisdiction of the administrative courts.

[16] Judgment of the Regional Administrative Court in Białystok of 21 October 2014, ref. No. II SA/Bk 619/14.

[17] T. Woś, in: Woś T. (ed.), Knysiak-Molczyk H., Romańska M., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, 6th edn, Warszawa, LEX, 2016, thesis 47; similarly: A. Kabat, in: Dauter B., Kabat A., Niezgódka-Medek M., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, 9th edn, Warszawa, LEX, 2024, theses 24–32. In turn, J. Chmielewski indicates three additional features, which essentially serve as a supplement or further specification of those already mentioned. These are: both direct and indirect basing of the right or obligation on a legal provision; basing the acts (activities) in question on provisions that do not require authoritative specification; and the potential repeatability of such acts (activities) – J. Chmielewski, 'Glosa do wyroku WSA w Białymstoku z 21.10.2014 r., II SA/Bk 619/14', *Orzecznictwo Sądów Polskich*, 2015, No. 11, pp. 1512 et seq.

In the following analysis, I will verify these features from the perspective of the entity performing public administration as the 'beneficiary' of such acts or activities. I will omit the first and third criteria, as they are not particularly relevant to the subject of this study. This is because the *differentia specifica* consisting in the fact that entities performing public administration are the addressees of acts or activities does not, in my view, affect the assessment of these two elements. By entities performing public administration, I refer to public administration in both the objective and subjective sense, along with the inherent diversity entailed by this dual understanding.

PUBLIC LAW NATURE

One of the features of acts or actions is their public law nature,[18] which should be understood in relation to the nature of the actions undertaken by the entity performing public administration. Acts and actions undertaken by such entities are subject to judicial review – public administration bodies in the systemic or functional sense – i.e. entities that are not government administration bodies or local government bodies, but which, either on the basis of special provisions or under an agreement transferring competences, are appointed to deal with matters falling within the scope of public administration.[19] Additionally, such acts may be undertaken by authorised employees of these bodies.[20]

The management of public property is directed towards the implementation of public tasks specified in legislation. The activities of public administration concerning state and municipal property are based on norms of administrative law, to which civil law regulations apply accordingly. Actions taken by the administration in relation to public property constitute the exercise of public administration, despite the fact that they may produce civil law effects.

It is generally accepted that the concept of 'within the scope of public administration' does not encompass legal actions undertaken by public administration that are of a purely civil law nature – i.e. actions which produce effects solely within the domain of civil law relations.[21] It is emphasised that the admissibility of legal action is determined by the criterion of the exercise of competences in authoritative forms.[22]

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[18] J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa, 2006, pp. 29 and 30; A. Kabat, in: Dauter B., Kabat A., Niezgódka-Medek M., *Prawo o postępowaniu*…, op. cit., p. 24; T. Woś, H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu*…, op. cit., p. 60.

[19] T. Woś., H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu*…, op. cit., p. 60; M. Bogusz, 'Glosa do wyroku NSA z dnia 20 listopada 2008 r., I OSK 611/08', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2009, No. 3; M. Bogusz, 'Pojęcie aktów lub czynności z zakresu administracji publicznej dotyczących przyznania, stwierdzenia albo uznania uprawnienia lub obowiązku wynikających z przepisów prawa w rozumieniu art. 16 ust. 1 pkt 4 ustawy o NSA', *Samorząd Terytorialny*, 2000, No. 1–2, pp. 177 et seq.

[20] M. Bogusz, 'Pojęcie aktów…', op. cit., pp. 177 et seq.

[21] T. Woś, H. Knysiak-Molczyk, M. Romańska, op. cit., p. 60; J. Borkowski, B. Adamiak, *Metodyka pracy sędziego w sprawach administracyjnych*, Warszawa, 2009, p. 55.

[22] J. Borkowski, B. Adamiak, *Metodyka pracy*…, op. cit., p. 55.

Within legal doctrine, the public law nature of a case is associated with the exercise of competences assigned to the administration, and even with the possibility of undertaking actions based on so-called task norms.[23] Actions undertaken by entities performing public administration, which amount to declarations of will in civil law relations, do not possess this public law character. In performing its tasks, public administration – particularly local government – acts both as a bearer of *imperium* conferred by the state and as an entity holding property, i.e. *dominium*. Public law corporations carrying out public tasks and therefore possessing the attribute of public law subjectivity are, irrespective of this status, vested with legal personality necessary for independent participation in civil law relations.[24]

The public law nature of an act or activity is therefore not determined by the fact that it is carried out by an entity performing public administration, but by its subject matter. This distinction also appears to be clear from the perspective of safeguarding the right to a court: civil law activities, in the event of a dispute, may be subject to review by a common court in various procedural contexts, such as assessment of the effectiveness of a submitted declaration of will, or assessment of the existence or non-existence of a legal relationship, for instance in an action for a declaratory judgment. Moreover, a dispute between two entities performing public administration in the context of civil law relations does not fall within the jurisdiction of administrative courts, which, under Article 184 of the Constitution, exercise judicial control over public administration, but only in relation to the legal forms of its operation as defined by positive legislation.[25]

THE EXTERNAL NATURE OF AN ACT OR ACTIVITY

The external nature of an act or activity means that it is addressed to an entity that is neither organisationally nor officially subordinate to the body issuing it. The external nature of an act is regarded by most administrative law doctrines as a constitutive feature of an administrative decision.[26] The external nature of a decision is defined by its basis in generally applicable legal provisions and its direction to an entity that is independent of public administration within the framework of a given legal relationship.[27] A further relevant feature is the legal effect the decision has on the situation of organisationally independent entities.[28] The absence of a link of

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[23] K. Klonowski, 'Kontrola sądowoadministracyjna „innych aktów lub czynności z zakresu administracji publicznej dotyczących uprawnień lub obowiązków, wynikających z przepisów prawa" z art. 3 § 2 pkt 4 p.p.s.a.', *Przegląd Prawa Publicznego*, 2012, No. 5, p. 53.

[24] H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Warszawa, 1998, p. 123.

[25] P. Szustakiewicz, *Komentarz do Konstytucji RP*, Articles 184 and 185, Warszawa, 2022, passim.

[26] M. Masternak, *Czynności materialno-techniczne jako prawna forma działania administracji publicznej*, Toruń, 2018, p. 439.

[27] Ibidem.

[28] A. Wiktorowska, 'Kierunki zmian w teorii prawnych form działania administracji', in: Zimmermann J. (ed.), *Koncepcja systemu prawa administracyjnego*, Warszawa, 2007, p. 376.

organisational dependence or official subordination indicates the external nature of the act.[29] Pursuant to Article 3 § 3 CAP, matters falling within the so-called internal sphere of administration are excluded from the Code's scope of application.[30] These include matters arising from the official subordination of employees of state bodies and other state organisational units (Article 3 § 3(2) CAP).

The above comments on the meaning of the external nature of an administrative decision should also apply to acts or activities. This is justified by the similarity in systemic features of the compared forms of public administration activity, including: authoritativeness, reliance on generally applicable legal provisions, and the individual nature of the act.[31] The aforementioned external nature of an act implies the ability to affect the legal situation of an organisationally independent entity. Internal acts, carried out in the context of administration, may be modified and reviewed by the administration itself under internal procedures. Influence over an organisationally subordinate entity is exercised through two types of acts: general acts (orders, instructions, circulars) and individual acts (official orders). Where acts or actions are undertaken within the framework of official or organisational subordination, there is no requirement for judicial review. Their verification is conducted under the rules and norms of organisational subordination applicable between entities performing public administration. The binding force of internal acts applies to entities situated within the framework of organisational subordination, and may extend across entire organisational structures and to subordinate employees (including officers).

The concept of 'organisational subordination' is understood as a legally defined type of relationship (or bond) between two entities performing public administration. The characteristics of such a relationship should be determined based on legal provisions regulating the relationship between the entities in question.[32] This includes forms such as hierarchical subordination, systemic-legal bonds, and functional subordination. In administrative law doctrine, various forms of mutual interaction between administrative entities are distinguished, beginning with the strongest organisational form – management – and extending through supervision, control, authority and integration, coordination, and cooperation.[33] Each of these forms possesses its own specific features. The scope of this publication does not permit

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[29] J. Świątkiewicz, 'Zakres kontroli Naczelnego Sądu Administracyjnego (w świetle orzecznictwa sądowego)', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1984, Issue 1, pp. 23–30; E. Ochendowski, *Prawo administracyjne*, Toruń, 1999, p. 166; J. Starościak, *Prawo administracyjne*, Warszawa, 1977, p. 230. This feature of an administrative decision is also indicated in the definition proposed by the expert team appointed by the Commissioner for Human Rights in Article 5(1)(1) of the draft Act – General Provisions of Administrative Law, *Biuletyn RPO*, 2008, No. 60, p. 54.

[30] I. Lipowicz, *Pojęcie sfery wewnętrznej administracji państwowej*, Katowice, 1991, p. 86.

[31] According to M. Jaśkowska, the concept of acts or activities should also be applied to acts of a general nature, see: M. Jaśkowska, 'Właściwość sądów administracyjnych (zagadnienia wybrane)', in: Zimmermann J. (ed.), *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego, Zakopane 24–27 września 2006 r.*, Warszawa, 2007, p. 587.

[32] See order of the Supreme Administrative Court of 7 September 2017, ref. No. II OSK 1790/17, LEX No. 2348658.

[33] J. Zimmermann, *Prawo administracyjne*, Warszawa, 2020, pp. 215–222.

a broader presentation of their particularities. These relationships can be categorised as organisational and functional. Organisational relationships refer to links between organisational units involving a direct and decisive influence by a higher-level unit on staffing in a lower-level unit, and the authority to assess and review the activities of the lower-level unit based on the criterion of purposefulness. Functional relationships, on the other hand, refer to all legal relationships between entities of public administration arising from the performance of public administrative tasks.[34]

The norms of an internal act cannot be addressed to an individual, nor can they shape the legal situation of an entity outside the organisational structure subordinate to the body issuing the act. The implementation of an internal norm cannot produce effects upon a citizen, as it cannot authorise or oblige the subordinate entity (as the addressee of the internal norm) to directly influence citizens' behaviour.[35] According to Article 5(1) LPAC, cases 'resulting from organisational superiority and subordination in relations between public administration bodies' are excluded from the jurisdiction of administrative courts.

To distinguish between external and internal acts or activities, it is not sufficient to establish whether the addressee is or is not an entity performing public administration. The external nature of an act is determined by the type of legal relationship existing between the entities and the nature of the right or obligation to which the act or activity relates. Assessing this relationship requires an analysis of the legal provisions governing it. Given the complexity of constitutional and substantive law provisions, and the diversity of legal solutions they entail, it is difficult to identify a clear demarcation line between forms of cooperation between administrative entities to which acts or activities may definitively be assigned the character of externality or internality. Nevertheless, a certain regularity may be observed: the more developed the legal framework governing mutual interaction between two administrative entities, the greater the likelihood of the existence of organisational subordination, and thus, of the internal nature of the acts or activities concerned.

RIGHT OR OBLIGATION AS THE SUBJECT OF AN ACT OR ACTION

It is generally accepted that acts or actions must be based on provisions of generally applicable law that simultaneously define rights or obligations.[36] Such rights or obligations must arise from a provision of generally applicable law, which is a consequence of the constitutional order and the prohibition – expressed in the

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[34] R. Michalska-Badziak, in: Duniewska Z., Jaworska-Dębska B., Michalska-Badziak R., Olejniczak-Szałowska E., Stahl M. (eds), *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warszawa, 2000, pp. 202–204.

[35] S. Wronkowska, 'System źródeł prawa w nowej Konstytucji', *Biuletyn RPO. Materiały*, Warszawa, 2000, Issue 38, p. 89, cited in: A. Kidyba (ed.), *Skarb Państwa a działalność gospodarcza*, Warszawa, Lex/el., 2014.

[36] A. Kabat, in: Dauter B., Gruszczyński B., Kabat A., Niezgódka-Medek M., *Prawo o postępowaniu…*, op. cit., pp. 23 and 25.

Constitution – on establishing generally applicable norms in domestic legal acts. As already noted, the addressees of domestic legal norms are limited to entities that are organisationally subordinate to the authority issuing those acts. Domestic legal acts cannot regulate matters reserved for statutory provisions, regulations, or local legal acts. Consequently, they cannot interfere with the rights or freedoms of entities that are organisationally independent of the administration. Article 93(2), second sentence, of the Constitution of the Republic of Poland provides that domestic legal acts do not constitute grounds for decisions or similar authoritative determinations concerning citizens, legal persons, or other entities. At the same time, it should be acknowledged that the source of a right or obligation need not be a regulation that is doctrinally classified as public law. The division between substantive and procedural regulations is also irrelevant. According to the interpretative principle *lege non distinguente nec nostrum est distinguere* – where the statute does not differentiate between the types of universally binding acts from which a right or obligation may be derived – it is not for the interpreter to introduce such a distinction. Furthermore, the line between substantive and procedural acts is inherently blurred, as most normative acts contain elements of both.

THE CONCEPT OF RIGHT

A right is defined as the ability of an entity to obtain, from the state or other entities exercising public authority, actions that place it in a favourable and legally protected position.[37] An administrative right, in turn, is the ability to obtain or remain in a situation that obliges the administrative apparatus to take action in order to confer a benefit upon an individual.[38] A right does not require protection through the imposition of additional obligations. Rather, the protection of a right takes institutional form, namely, the ability to compel the relevant authorities to undertake enforcement actions on behalf of the entitled entity.[39]

Rights in administrative law constitute a heterogeneous category. They may arise directly from the law (*ipso iure*), or from an act of applying the law based on provisions of generally applicable legislation.[40] By their nature, administrative rights are assigned to a specific entity and only to that entity. With few exceptions,

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[37] D.R. Kijowski, 'Uprawnienia administracyjne', in: Wróbel A., Hauser, R., Niewiadomski Z. (eds), *System prawa administracyjnego. Tom 7. Prawo administracyjne materialne*, Warszawa, 2017, p. 250.

[38] Ibidem, pp. 250–251.

[39] S. Wronkowska, *Analiza pojęcia prawa podmiotowego*, Poznań, 1973, p. 34.

[40] The following typology of administrative rights has been proposed in the doctrine:
– rights strictly linked to the personal status of an individual;
– rights to conduct business and other gainful activities;
– rights to perform assigned tasks and functions within the scope of public administration;
– rights to receive support from public funds;
– property rights;
– rights to use public facilities and goods;
– rights to compensation for damage caused by administrative action; cf. D.R. Kijowski, 'Uprawnienia administracyjne…', op. cit., p. 253.

they are not transferable by legal act to other entities.[41] The personal nature of an administrative right means that, in principle, the granting of such a right to one entity does not preclude the granting of an analogous right to another.[42] According to D.R. Kijowski, the concept of administrative rights should apply to both natural persons and legal persons.[43]

THE CONCEPT OF OBLIGATION

According to P. Przybysz, an administrative obligation is a distinct type of obligation. It may be defined as a requirement to undertake a specific action, imposed by an order of a state body acting within the limits of its competence and issued in the appropriate legal form. The order relates to a matter regulated by generally binding provisions of administrative law.[44]

W. Jakimowicz links the concept of legal obligation to the category of legal situation, understood as a situation designated by applicable legal norms, in which generically defined entities are clearly and directly instructed to undertake specific conduct in particular circumstances. The mere prohibition or command of specific conduct by a legal norm is sufficient for that conduct to be regarded as the subject of an obligation.[45] An obligation may arise directly from a substantive legal norm or be specified by an individual administrative act. According to this author, procedural regulation may serve as the source of obligations only within specific proceedings, and thus only within a defined time frame. Obligations resulting from such regulation concern legal relationships governed by administrative law.[46] W. Jakimowicz further notes that obligations imposed upon authorities constitute a category of administrative law obligations, whereas obligations imposed on entities whose conduct is directed toward an administrative authority are public law obligations, arising within relationships characterised by public law subjectivity.[47]

According to L. Klat-Wertelecka, the concept of an administrative law obligation, within the discipline of administrative law, applies solely to obligations imposed on administered entities, not on those exercising administrative authority. Obligations imposed on public administration bodies take the form of tasks and competences. The author states that the content of an administrative law obligation consists of three elements: identification of the entity upon which the duty to act is imposed;

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41 Exceptions include, for example, the transfer of a land development decision to another entity, based on an administrative decision transferring the administrative right resulting from the original decision.

42 M. Wincenciak, *Przedawnienie w prawie administracyjnym*, Warszawa, 2019, p. 251.

43 D.R. Kijowski, 'Uprawnienia administracyjne…', op. cit., p. 251.

44 P. Przybysz, 'Obowiązek administracyjny – pojęcie, rodzaje, konkretyzacja', *Organizacja – Metody – Technika*, 1990, No. 8–9, p. 14.

45 W. Jakimowicz, 'Obowiązek administracyjny w egzekucji administracyjnej', in: Niczyporuk J., Fundowicz S., Radwanowicz J. (eds), *System egzekucji administracyjnej*, Warszawa, 2004, pp. 129–131.

46 Ibidem, p. 132.

47 Ibidem.

specification of the type of behaviour required; and the determination of the time for its performance.[48]

According to P. Szreniawski, an obligation exists at a specific point in time and also becomes due at a specific time. The author considers that the moment from which the obligation becomes due may be identified as the point at which it becomes possible to request its performance, so that, in the event of refusal, it becomes permissible to apply to the enforcement body to initiate execution of the obligation.[49]

Obligations of administered entities, including those arising directly from provisions of generally applicable law, may be subject to administrative enforcement (Article 3 § 1 of the Act on Administrative Enforcement Proceedings).

TASK NORM AS A LEGAL BASIS FOR THE RIGHT OR OBLIGATION OF THE ENTITY PERFORMING ADMINISTRATION

Task norms are defined as norms that mandate the pursuit of a specific goal – the goal of the norm-maker, rather than that of the norm's addressee. A distinguishing feature of such norms is that they do not prescribe a specific method of conduct or course of action to achieve the goal, but merely indicate the goal to be attained.[50] Task norms are addressed to entities performing public administration by assigning them a task, which typically formulated in connection with the overall objectives of administrative activity. The definition of the task – and, in turn, the definition of the administrative entity's objective – imposes upon that entity an obligation either to carry out the assigned task or to accomplish the intended aim.[51] Thus, a task norm gives rise to a task framed in general terms. It cannot, however, serve as a source of competence for an entity performing public administration. It does not authorise the entity to take action by undertaking a specific conventional legal act, because defining a task is not equivalent to conferring the authority to act in a particular legal form.[52] The purpose established by task norms is not implemented through a single action, but rather through a series of individual or multiple actions, whether legal or factual in nature.[53]

As already indicated, a task norm does not constitute a basis for competence on the part of a public administration body, because competence to act in a specific form must be expressed directly. The structure of a task norm, by contrast, establishes only a general area of administrative activity in relation to the intended purpose of that activity. This statement appears less self-evident in the reverse situation,

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[48] L. Klat-Wertelecka, 'Przedawnienie obowiązku administracyjnoprawnego', *Opolskie Studia Administracyjno-Prawne*, No. VII, Opole, 2010, p. 18.

[49] P. Szreniawski, *Obowiązek w prawie administracyjnym*, Lublin, 2014, p. 80.

[50] T. Gizbert-Studnicki, A. Grabowski, 'Normy programowe w konstytucji', in: Trzciński J. (ed.), *Charakter i struktura norm konstytucji*, Warszawa, 1997, p. 97.

[51] J. Zimmermann, *Prawo administracyjne*…, op. cit., p. 65.

[52] K. Defecińska, *Spory o właściwość organu administracji publicznej*, Warszawa, 2000, p. 8.

[53] J. Filipek, 'Elementy strukturalne norm prawa administracyjnego', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze*, Warszawa–Kraków, 1982, Vol. 99, p. 65.

namely, where an entity performing public administration, relying on the area of activity assigned to it under a task norm, demands that a competent authority undertake a specific act or activity. Can a task norm serve as the source of a right or obligation for an entity performing public administration? Can the mere fact of exercising public administration within a given area or sector of social life justify a demand for the undertaking of a specific act or activity? In a simplified sense, it could be argued that the task norm may serve as the basis for the legal interest of the entity performing public administration in obtaining an act or action. Unlike competence – which cannot be presumed – the entity carrying out the task could rely on the task norm as the source of its authorisation. However, it should be noted that such a request for the performance of an act or activity would only be effective if it were possible to reconstruct a competence norm – i.e. to identify the authority competent to undertake the act or activity. The absence of a substantive norm establishing the right or obligation (other than the task norm itself) renders the reconstruction of a competence norm impossible.

COMPETENCE NORM AS A LEGAL BASIS FOR THE RIGHT OR OBLIGATION OF AN ENTITY PERFORMING PUBLIC ADMINISTRATION

Competence norms authorise bodies to act in specific categories of administrative matters within a defined area.[54] In the sphere of internal administrative relations, competence norms may serve as a sufficient legal basis for the operation of a public administration body without the need to refer to other legal norms.[55] A competence norm is characterised by the following features: it is addressed to an administrative body, and it defines both the type and scope of activities that entitle the body to undertake an act.[56] The competence arising from the norm entails the body's obligation to act under specific conditions, using the form prescribed by law.[57] Competence is vested in public administration bodies, not in the addressees of administrative actions.[58] The competence of an authority is defined as both the ability and the duty to act either in a clearly defined legal form or in the form assigned to that authority.[59] The administrative body is not the recipient of the conduct of the administered entity, which exercises its rights or obligations not in relation to the administrative body itself, but under its supervision.[60] The conduct of a body acting under a competence norm is always an obligation of that body, regardless of whether the rights or obligations being exercised concern a private individual or a public entity (e.g. the State or a local government unit). The legal doctrine emphasises that an authority's competence should not be equated with

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54 J. Zimmermann, *Prawo administracyjne*…, op. cit., p. 65.
55 Ibidem, p. 66.
56 W. Jakimowicz, *Wykładnia w prawie administracyjnym*, Zakamycze, 2006, p. 405.
57 J. Boć, *Prawo administracyjne*…, op. cit., p. 145.
58 W. Jakimowicz, *Wykładnia w prawie*…, op. cit., p. 408.
59 J. Zimmermann, *Polska jurysdykcja administracyjna*, Warszawa, 1996, p. 36.
60 W. Jakimowicz, 'Obowiązek administracyjny…', op. cit., p. 132.

administrative power.[61] A similar distinction should be made in relation to the concept of obligation. The sources of public administration obligations are twofold. The first category comprises competence norms, which serve as an independent basis for the functioning of the administrative apparatus – most often in matters concerning so-called internal administration – or competence norms typical of authoritative administrative relations within the state–citizen relationship. The second category consists of norms that establish an administrative obligation in the strict sense. Examples include: a post-inspection order issued by the provincial environmental protection inspector to a commune,[62] or a recommendation issued by the provincial conservator of monuments to a commune.[63]

CLOSING REMARKS

The analysis of court decisions indicates that the acts or actions referred to in Article 3 § 2(4) LPAC may be divided into three categories: those which may concern only entities independent of the administration (such as acts or actions addressed solely to natural persons); those which may concern only entities performing public administration; and those which may apply to all categories of entities. A review of case law shows that acts in the second category most often concern local government units, which reflects the systemic principles currently in force. Local government possesses both legal personality and public-law subjectivity. Local government bodies serve as organs of a legal person and, simultaneously, as public administration authorities. As organs of public law corporations, they undertake, among other things, activities typical of civil law relations, which are non-authoritative in nature. However, when acting on the basis of *imperium*, they operate in authoritative forms prescribed by law. Article 165 of the Constitution establishes the principle of the independence of local government units. This means, *inter alia*, that local government units are granted legal personality and possess the right of ownership (Article 165(1)). Article 165(2) provides for judicial guarantees of this independence. According to the Constitutional Tribunal, the exercise of rights by a local government unit is carried out autonomously, within the limits set by law. The commune's exercise of the rights granted to it is aimed at fulfilling public tasks. In assessing judicial protection of local government independence, the Constitutional Tribunal held that such protection should not be equated with the constitutional right to a court. The function of Article 165(2) of the Constitution is to guarantee the proper performance of public tasks by local government, while the right to a court serves to protect the constitutional freedoms and rights of the individual.[64]

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[61] D.R. Kijowski, 'Uprawnienia administracyjne…', op. cit., p. 251.

[62] Judgment of the Regional Administrative Court in Kraków of 5 October 2022, ref. No. II SA/Kr 887/22.

[63] Judgment of the Supreme Administrative Court of 7 December 2012, ref. No. II OSK 521/21.

[64] Order of the Constitutional Tribunal of 23 February 2005, Ts 35/04, *Orzecznictwo Trybunału Konstytucyjnego – Zbiór Urzędowy*, 2005, No. 1B, item 26.

The independence of local government means freedom from arbitrary interference by other public authorities, particularly bodies of government administration. Any interference in the sphere of activity of local government units must comply with the Constitution and statutory provisions, and must be justified by the need to ensure that the activities of local government units conform to the law. In the positive sense, independence means the ability to freely choose the methods for implementing public tasks. The limits of this freedom are defined by the Constitution of the Republic of Poland and by statutes consistent with constitutional norms.[65]

The right to appeal to a court against an act or action concerning an entity performing public administration is not equivalent to the constitutional right to a court enjoyed by individuals, as set out in Article 45(1) of the Constitution of the Republic of Poland. That provision states: 'Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.' Similarly, Article 77(2) of the Constitution provides that: 'Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.' These provisions appear in Chapter II of the Constitution, entitled 'Freedoms, Rights and Obligations of Persons and Citizens'. It therefore seems evident that public administration does not fall within the scope of the term 'everyone' as used in these constitutional provisions.[66] This does not mean, however, that entities performing public administration tasks are excluded from judicial protection. The right of an administrative body to appeal to an administrative court against forms of action undertaken by other public administration bodies may be granted, provided it arises directly from a statutory provision.[67] Moreover, there appear to be no systemic obstacles to granting such a right in cases where the legal position of the entity performing public administration is, in general terms, the same as that of the entity to which the form of administrative action is directed, and where the act in question assigns jurisdiction to the courts in such matters. The ability to be the subject of administrative rights and obligations is determined by the provisions of substantive law. Whether a particular entity possesses such rights or obligations depends on the structure of the relevant substantive legal norms. From a systemic perspective, a necessary condition for participation in legal transactions is the organisational separation of the entity, as provided for by law. Organisational separation, combined with the presence of a legal interest, supports the conclusion that an organisational unit has administrative and legal capacity. It is worth recalling that, pursuant to Article 29 CAP, a local government organisational unit without legal personality may also be a party to administrative proceedings. This provision does not grant party status in all administrative proceedings ending in an administrative decision, but it does allow such a unit to be a party where the provisions of substantive law show that the case concerns its legal interest. Referring

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[65] M. Masternak-Kubiak, in: Haczkowska M. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lexis Nexis, 2014, Article 165.

[66] See judgment of the Constitutional Tribunal of 29 October 2009, ref. No. K 32/08, *Orzecznictwo Trybunału Konstytucyjnego. Seria A*, 2009, No. 9, item 139.

[67] For example, Article 98(3) of the Act on Municipal Self-Government in conjunction with Article 3 § 2(7) LPAC.

to the postulate of systemic coherence in administrative law, it should be assumed that local government organisational units without legal personality may possess administrative capacity in matters referred to in Article 3 § 2(4) LPAC. The capacity to be the subject (addressee) of acts or actions undertaken by the administrative apparatus must be assessed in light of the substantive and systemic legal provisions governing the administrative relationship.

In referring to the concepts of 'right' and 'obligation', as used in Article 3 § 2(4) LPAC, it is important to emphasise that these cannot be equated with competence norms of administrative bodies.[68] The rights and obligations of public administration, in the material sense, arise primarily from the exercise of ownership rights over public property. Therefore, when analysing specific actions or conduct of the administrative apparatus from the perspective of their legal characterisation, the distinction between the *dominium* and *imperium* spheres must be taken into account.

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[68] Cf. order of the Supreme Administrative Court of 8 December 2020, case No. I OSK 2293/20.

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DEPUTIES AND ACCESS TO PUBLIC INFORMATION

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Abstract

The article discusses deputies' information-related rights and obligations. It also analyses administrative courts' judgments in cases concerning access to public information, in which deputies were requesters or addressees of requests. Administrative courts admit the possibility of exercising the right of access to public information by deputies, but without invoking the performance of the mandate. At the same time, deputies are not classified as entities obliged to provide public information. The article presents two theses. Firstly, deputies may exercise their right of access to public information, revealing their special status. Secondly, deputies are entities obliged to provide public information, because they exercise public authority, perform public tasks and manage public property. The theses are justified by the linguistic and functional interpretation of constitutional provisions, as well as the Act on Access to Public Information and the Act on the Performance of the Mandate of the Deputy and the Senator. The paper uses the method of dogmatic and legal analysis and the analysis of Polish administrative courts' case law, and it presents *de lege lata* comments and *de lege* ferenda proposals.

Key words: public information, deputy, performance of the mandate, rights to information, access to public information, obliged entities, public authorities, public tasks public information, deputy, performance of the mandate, rights to information, access to public information, obliged entities, public authorities, public tasks

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INTRODUCTION

Deputies shall be representatives of the nation and shall take an oath to perform their duties diligently and conscientiously.[1] The conditions necessary for the effective performance of parliamentary duties and the protection of the rights arising from the exercise of their mandate are laid down in the Act of 9 May 1996 on the Performance of the Mandate of the MP and Senator.[2] Deputies shall perform their mandate for the well-being of the Nation and are obliged to inform the electorate about their work and the activity of the body to which they have been elected.[3] By virtue of their mandate, they also have special powers. They have the right to obtain information and explanations or to intervene, *inter alia*, in government administration or local government bodies.[4] These powers and obligations raise the question of whether deputies can simultaneously exercise the right of access to public information and whether they themselves are obliged to provide public information. In accordance with Article 61(1) of the Constitution, each citizen shall have the right to obtain information on the activities of organs of public authority, as well as persons discharging public functions. In accordance with Article 2(1) and Article 4(1) of the Act of 6 September 2001 on Access to Public Information,[5] everyone shall have the right of access to public information, and public authorities and other entities performing public tasks are obliged to provide public information.

This article examines deputies' powers and obligations to provide information under the Access Act. It analyses administrative courts' case law concerning access to public information either requested by or from deputies. Administrative courts allow deputies to exercise the right of access to public information, however without invoking their mandate. At the same time, deputies are not classified as entities obliged to provide public information. This is justified by the fact that deputies are not members of public authorities and do not perform public duties. The article presents arguments against this stance. I argue that the linguistic and functional interpretation of constitutional provisions, as well as the Act on the Mandate and the Access Act, lead to the conclusion that deputies may exercise the right of access to public information while disclosing their special status. Deputies may also be classified as entities obliged to provide public information, as they exercise public authority and perform public tasks while managing public assets.

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1 See Article 104(1) and (2) of the Constitution.
2 Journal of Laws of 2024, item 907, hereinafter referred to as 'the Act on the Mandate'.
3 See Article 1(1) and (2) of the Act on the Mandate.
4 See Article 16(1), Article 19(1), and Article 20(1) of the Act on the Mandate.
5 Journal of Laws of 2022, item 902, hereinafter referred to as 'AAPI' or 'Access Act'.

DEPUTIES' INFORMATION RIGHTS BY VIRTUE OF THE PERFORMANCE OF THE MANDATE

As part of their activities, deputies may exercise their powers under the Act on the Mandate and submit requests for information and materials to a specific group of entities, which does not include all public authorities or judicial bodies. In accordance with Article 16(1) of the Act on the Mandate, deputies shall have the right to obtain information and explanations on matters resulting from the performance of parliamentary duties from:
(1) members of the Council of Ministers;
(2) representatives of state bodies and institutions;
(3) representatives of relevant local government bodies and institutions.

It is beyond doubt that members of the Council of Ministers, as well as the Council of Ministers in general, are obliged to provide information. Some doubts may concern other bodies. Firstly, the obligation to provide information applies to representatives of relevant state bodies and institutions. The scope of this concept is broader than that of government administration. The obligation also applies to other state entities that, although outside the structure of government administration, perform public administration tasks. This applies to representatives of the National Council of Radio Broadcasting and Television or the Supreme Chamber of Control, which is organisationally and functionally subordinate to the Parliament. However, there are no grounds for extending this obligation to all public authorities. It would be unjustified, e.g. due to the potential violation of their independence, which might occur in relation to the judiciary or members of the prosecution office.[6]

Pursuant to Article 19(1) of the aforementioned Act, in the performance of their mandate, deputies have the right to obtain information and materials, enter premises where such information and materials are kept, and inspect the activities of:
(1) government administration bodies;
(2) local government bodies;
(3) companies with State Treasury shareholding;
(4) state-owned facilities and enterprises;
(5) local government-owned facilities and enterprises.

The right to request access to or obtain information or materials must be related to the performance of the deputy's mandate, and therefore should apply to information necessary for the performance of parliamentary duties, including duties involving contact with the electorate. The exercise of the right must also be in compliance with the provisions on legally protected confidentiality and must not violate the personality rights of others. These are specific restrictions, only partially overlapping with those on access to public information.[7] Based on this, deputies cannot obtain information, e.g. from private entrepreneurs, commercial

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[6] See P.J. Uziębło, in: Grajewski K., Stelina J., Uziębło P.J., *Komentarz do ustawy o wykonywaniu mandatu posła i senatora*, Warszawa, 2014, LEX, Article 16(3).

[7] Cf. Article 5 AAPI; for more see J. Róg, 'Dostęp posłów i senatorów do informacji o spółce z udziałem Skarbu Państwa', *Przegląd Prawa Handlowego*, 2014, No. 5, pp. 46 et seq.

enterprises without State Treasury shareholding, or professional self-government bodies. Also, the Act does not grant deputies the right to obtain information from judicial authorities: the Supreme Court, as well as common, administrative and military courts, which includes access to files on ongoing proceedings.[8] Deputies' rights are also subject to specific material limitations, such as the connection of the requested information with the performance of the mandate, or the protection of personality rights, and the necessity to maintain legally protected confidentiality. For example, neither the Act on the Mandate, nor the Access Act, nor, all the more, the right to submit parliamentary interpellations, grants deputies access to business secrets. Only limited access to such secrets is granted to deputies who are members of parliamentary investigative committees.[9]

In addition, in accordance with Article 20(1) of the Act on the Mandate, while performing their parliamentary duties, deputies shall have the right to intervene and familiarise themselves with the course of the proceeding in:
(1) government administration bodies;
(2) local government administration bodies;
(3) state-owned facilities or enterprises;
(4) social organisations;
(5) non-state economic units

in order to resolve the matter they submitted on behalf of themselves or the electorate. In this case, apart from the entities listed in Article 16(1) and Article 19(1) of the Act on the Mandate, the legislator also lists social organisations and non-state economic units. The former group includes associations, foundations, political parties, trade unions, employers' organisations, trade chambers and other similar entities. The latter group includes all companies, both capital companies and partnerships, as well as cooperatives and other similar entities, regardless of their capital structure or type of business activity.[10]

DEPUTIES' RIGHTS TO PUBLIC INFORMATION

At the same time, deputies, like any other person, have the right to public information. Neither constitutional nor statutory provisions impose any restrictions in this regard. Therefore, deputies may submit requests for access to entities obliged and listed in Article 4 of the AAPI, and not only to entities indicated in the provisions of the Act on the Mandate. This applies, e.g., to courts or any other bodies of public

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[8] See I. Galińska-Rączy, 'Uprawnienia posłów do uzyskiwania informacji', in: *Status posła. Część I. Wybór ekspertyz prawnych do art. 1–24 ustawy z 9 maja 1996 r. o wykonywaniu mandatu posła i senatora (Dz. U. z 2003 r. nr 221, poz. 2199, ze zm.)*, Warszawa, 2007, pp. 370–371.

[9] I. Galińska-Rączy, 'Opinia prawna w sprawie interpretacji pojęcia „tajemnica handlowa" w kontekście udostępniania posłom informacji na podstawie art. 19 ustawy o wykonywaniu mandatu posła i senatora oraz w ramach interpelacji poselskich', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2013, No. 4(40), p. 243.

[10] P.J. Uziębło, in: Grajewski K., Stelina J., Uziębło P.J., *Komentarz…*, op. cit., Article 20(3), LEX.

authorities and entities performing public tasks. Access-related requests do not have to be related to the performance of the mandate. Deputies cannot be required to demonstrate a legal or factual interest,[11] with the exception of the right to obtain processed information.[12]

Against this background, inconsistent case law has emerged, aiming to distinguish different modes of deputies' activities. In some judgments, courts have held that when deputies submit requests for access and invoke their status, and the questions are closely related to their mandate and parliamentary function, such requests cannot be dealt with based on the Access Act, even if this legal act is referred to. In such a case, deputies do not act as 'anyone' under the Access Act, but as deputies, i.e., public officials exercising the rights provided for in the Act on the Mandate. The provision of Article 1(2) of the AAPI indicates the priority of special procedures, and the procedure provided for deputies is precisely of this nature, thus excluding the general access procedure. However, if the request is not subject to proceedings based on the provisions of the AAPI, there are no grounds for determining that the authority has remained inactive when it fails to respond to the request. This assessment is not changed by the fact that the request was addressed to an obliged entity or that the request may concern public information. The status of deputies requires that their request be processed in accordance with the access to information procedure laid down in the Act on the Mandate, especially if the deputy refers to those provisions in the request.[13] Therefore, there is a risk that a deputy's request may be deemed to imply a specific procedure provided for in the Act on the Mandate, excluding the Access Act. This may significantly limit the deputies' rights to obtain information, and the mere fact of holding the deputy's status would exclude them from the group of persons entitled to request public information. That is why, while distinguishing between the procedures, courts have indicated in their rulings that a deputy's special status does not exclude them from the catalogue of entities that may request access to public information under the general rules laid down in the AAPI. At the same time, however, it has been stipulated that they cannot refer to their specific deputy's status.[14] In such a case, when deputies submit a request for access, they exercise their rights based on the Act on the Mandate. The other legal basis referred to in the request is irrelevant if the mandate is also invoked. Therefore, if the request is submitted by a deputy using parliamentary forms and a parliamentary stamp or providing a deputy's office address for correspondence, such a request, as one related to the performance of a deputy's mandate, requires evaluation in terms of the performance of tasks arising from the mandate.[15] More liberal rulings indicate that if the request is based on the Access Act, the mere

[11] See Article 2(2) AAPI.

[12] See Article 3(1)(1) AAPI.

[13] See judgment of the Voivodeship Administrative Court in Warsaw of 19 June 2019, II SAB/Wa 81/19, *CBOSA*.

[14] See the Supreme Administrative Court judgment of 3 March 2023, III OSK 2330/21, *CBOSA*.

[15] See judgment of the Voivodeship Administrative Court in Gliwice of 11 January 2017, IV SA/Gl 911/16 and of 29 November 2016, IV SA/Gl 852/16; judgment of the Voivodeship Court in Opole of 22 May 2014, II SA/Op 175/14, *CBOSA*.

graphic form of the letter, the Sejm's imprints, or the deputy's designations cannot determine the content of the request. If deputies do not invoke their rights and ask questions that 'anyone' can ask, such a request should be dealt with under the provisions of the AAPI.[16]

The above-mentioned line of case law has practical consequences. Before selecting the procedure for dealing with the request, the obliged entity must determine whether a deputy acts as a natural person exercising the right of access to public information, or as a member of parliament/public official exercising the rights provided for in the Act on the Mandate.[17] Such additional procedural requirements for the obliged entities raise doubts, especially as they may lead to excessive demands concerning the nature of the deputy's request, while the Access Act explicitly prohibits requiring the applicant to demonstrate a legal or factual interest.[18] Moreover, in the case of the issuance of a decision on refusal to provide public information or discontinuation of proceedings, the obliged entities apply Article 64 § 2 of the Act of 14 June 1960: Code of Administrative Procedure.[19] The provision sets out a procedure for remedying formal deficiencies in an application, under penalty of dismissing it without examination. If a deputy fails to clarify their capacity, their application, even if based on the provisions of the Access Act and concerning public information, will remain unanswered. Instead of providing public information, the obliged entity will be able to multiply formal barriers in the form of doubts as to whether the applicant is acting as a deputy or a natural person, i.e. anyone. There is also a risk that deputies may conceal their status. In cases concerning disclosure of public information, the provisions of the CAP are applied only to decisions. In cases that do not require the issuance of a decision, a request for access can be anonymous, so a deputy does not have to provide basic information such as their name, sign the application, or, all the more, invoke the mandate.[20]

SEEMING CONFLICT BETWEEN ACCESS RIGHTS

The discussed formal issues and classification of deputies' requests would not be so significant if the statutory rights under the Act on the Mandate provided for effective mechanisms of their enforcement. However, the procedure for accessing public information is more favourable to deputies and often chosen in practice. Deputies' rights to information provided for in the Act on the Mandate require

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[16] See the Supreme Administrative Court judgment of 15 March 2023, III OSK 2503/21, *CBOSA*.

[17] See judgment of the Voivodeship Administrative Court in Gliwice of 18 January 2017, IV SA/Gl 979/16, *CBOSA*.

[18] See Article 2(2) AAPI.

[19] Journal of Laws of 2024, item 572, hereinafter referred to as 'CAP'. Also see Article 16(2) AAPI.

[20] J. Czerw, 'Dostęp do informacji publicznej w Polsce', *Przegląd Prawa Publicznego*, 2013, No. 11, p. 11.

that the connection between the requested information and the performance of their mandate be demonstrated. This raises numerous interpretation-related problems that result in the withholding of the information. The provisions of the Act on the Mandate also lack procedural regulations. Above all, however, a request for information in accordance with the Act on the Mandate does not initiate an administrative case. Such a request takes the form of a motion referred to in Article 241 of the CAP. Failure to process it merely opens the door for a deputy to initiate a complaint procedure – a general complaint regulated in Article 237 § 2 of the CAP. Complaints and motions protect a deputy's actual interests, and proceedings in such cases are not subject to judicial review. In this respect, only the rules of political, business or disciplinary responsibility may be applied to an entity that fails to respond to a request for information under the Act on the Mandate.[21] The right of access to public information is a subjective public right, and judicial review may lead to a finding of a body's inaction and obliging it to respond to the request. Likewise, in the case of a refusal to provide information, the Act on the Mandate does not provide legal instruments facilitating effective supervision. In the case of access to public information, refusal must take the form of an administrative decision, which is subject to review by administrative courts. The Act on the Mandate does not contain provisions that would allow for the enforcement of deputies' rights, therefore the application of the Access Act is a more effective solution, often recommended in the opinions of the Sejm Research Bureau of the Chancellery of the Sejm of the Republic of Poland.[22] The doctrine also highlights systemic, compensatory and penal regimes for the potential enforcement of representatives' rights to information. However, one should agree with the general conclusion that while there are opportunities for holding a body accountable for failure to fulfil obligations to provide information in relation to deputies' rights, there are no procedures or instruments that would make it possible to exercise these rights.[23] At the same time, the Act on the Mandate does not contain any provisions that constitute *lex specialis* in relation to the provisions of the Access Act. Both these statutes constitute separate bases for obtaining public information. In the case of the Access Act, deputies exercise constitutional rights to information, and they do this within the framework of the constitutionally granted subjective right, while they exercise rights to information as representatives of society within

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[21] See the Supreme Administrative Court judgment of 7 March 2019, I OSK 2911/18; judgment of the Voivodeship Administrative Court in Gliwice of 20 February 2018, IV SA/Gl 1131/17; and ruling of the Voivodeship Administrative Court in Opole of 13 May 2021, II SAB/Op 6/21, *CBOSA*.

[22] See E. Wojnarska-Krajewska, 'Opinia prawna na temat prawa dostępu do informacji i materiałów od organów administracji samorządowej w trybie ustawy o wykonywaniu mandatu posła i senatora i ustawy o dostępie do informacji publicznej', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2014, No. 1(41), pp. 349 and 351; W. Odrowąż-Sypniewski, 'Zakres obowiązków organów samorządu terytorialnego związanych z realizacją poselskiego prawa do informacji (wybrane zagadnienia)', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2017, No. 4(56), p. 178.

[23] B. Wilk, 'Uprawnienia informacyjne posłów, senatorów i radnych jednostek samorządu terytorialnego a dostęp do informacji publicznej', *Przegląd Prawa Publicznego*, 2019, No. 7–8, p. 79.

the framework of competences granted to them.[24] In accordance with Article 1(2) of the AAPI, its provisions are not to violate the provisions of other statutes laying down different rules and modes of access to public information. This does not exclude the possibility of reconciling the Access Act with the Act on the Mandate. It is considered inappropriate to automatically exclude the provisions of the AAPI wherever a deputy exercises other rights to information.

The rights granted to deputies in the Act on the Mandate are even broader in scope than those under the Access Act, primarily with respect to the right to 'obtain materials' (which is a broader concept than 'obtaining information').[25] Therefore, if deputies, invoking their mandate, may exercise more rights to obtain information under the Act on the Mandate, all the more so they may exercise their rights under the Access Act (*argumentum a maiori ad minus*). Moreover, the status of a deputy should be an additional advantage, especially when legal provisions provide for specific conditions for access to information that hinder access for an 'ordinary' citizen. This is the case with public information that is processed, i.e. information requiring collection and additional analysis, conducted 'at the request of' the requester. Processing is evidenced by the need for the obliged entity to generate qualitatively new information based on simple information already in its possession. This may involve additional workload for the authority. That is why, in accordance with Article 3(1)(1) of the AAPI, the right to processed public information is granted only to the extent that it is particularly important to the public interest. The requirement of 'particular importance to public interest' is met when obtaining given information and publicising it is in the interest not only of the requester but also of other citizens. The idea is that the provision of processed information should have a real impact on the functioning of specific public structures in a specific area of social life, and should improve or streamline the performance of public tasks for the common good of a given community. Performance of the mandate of a deputy is a public service, in which one is guided by a shared concern for the common good. In accordance with Article 104(2) of the Constitution, deputies solemnly swear to perform their duties to the Nation diligently and conscientiously. It is therefore inadmissible to limit deputies' rights based on doubts as to whether the information they obtain will actually be used in the public interest. In such a case, refusal to provide public information requires a detailed explanation.[26] Thus, a deputy's status itself should be subject to analysis and argumentation in the course of dealing with the request for processed information, but for this to happen, deputies must disclose their status in the request.

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[24] Ibidem, p. 81.

[25] See E. Wojnarska-Krajewska, *Opinia prawna…*, op. cit., p. 349.

[26] See judgment of the Voivodeship Administrative Court in Gliwice of 23 November 2016, IV SA/Gl 807/16, *CBOSA*.

SIMILARITIES OF LOCAL COUNCILLORS' RIGHTS

As in the case of deputies, councillors at all levels of local government have been granted supervision powers.[27] These rights were introduced by analogy to the rights of deputies and senators, with the only difference that they are limited to the local self-government unit in which the councillor was elected. Therefore, similarly, it is recognised in case law that councillors' rights are not exercised by means of acts or activities subject to administrative court review. Exercising their rights, deputies, senators, and councillors act 'performing their mandate' or 'performing their deputies' or senators' duties', and not in their own name as natural persons subject to rights and obligations, with respect to whom the authority has the right or obligation to authoritatively and unilaterally rule on requests for the provision of information and materials. Therefore, in such cases, the activities of an administrative body are not subject to appeal due to the lack of jurisdiction of an administrative court.[28]

It is noticed in the doctrine that there is a lack of regulations regarding the refusal to provide information requested based on the self-government statutes and, similarly, the Act on the Mandate. One of the views expressed is that the provisions of the Access Act should be adequately applied to all councillors' requests. According to another stance, those provisions should apply only to the extent that the requested information constitutes public information.[29] Also in this case, administrative courts recognise that self-government statutes constitute *lex specialis* in relation to the Access Act. In order to recognise that councillors are subject to a different access procedure, it is sufficient that this procedure, within their status, provides them with access to the information they are interested in. Such a procedure is provided for in the self-government statutes, thus the Access Act is only supplementary in nature.[30] Likewise, in relation to councillors, it is assumed that when a requester acts as an entity holding a special status, the provisions of the AAPI should be excluded, because self-government statutes lay down different rules and procedures for providing information.[31] These observations may analogously apply to deputies, and although courts do not deny representatives the right of

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[27] See Article 23(3b) of the Act of 5 June 1998 on Voivodeship Self-Government, Journal of Laws of 2024, item 566; Article 21(2a) of the Act of 5 June 1998 on County Self-Government, Journal of Laws of 2024, item 107, Article 24(2) of the Act of 8 March 1990 on Commune Self-Government, Journal of Laws of 2024, item 609, hereinafter also referred to as 'Self-Government Statutes'.

[28] Ruling of the Voivodeship Administrative Court in Kielce of 30 April 2020, II SA/Ke 423/20, ruling of the Voivodeship Administrative Court in Warsaw of 18 June 2014, IV SAB/Wa 106/14, *CBOSA*.

[29] See J.J. Zięty, 'Przyczyny odmowy udzielenia radnym gminy informacji o działalności spółki komunalnej', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2021, No. 3(71), pp. 69–70 and the publications referred to therein.

[30] See the Supreme Administrative Court judgment of 4 April 2018, I OSK 1852/16, *CBOSA*. Also see A. Piskorz-Ryń, 'Zasady udostępniania informacji publicznej. Katalog podmiotów zobowiązanych i uprawnionych', in: Wyporska-Frankiewicz J. (ed.), *Dostęp do informacji publicznej na wniosek w praktyce jednostek samorządu terytorialnego*, Warszawa, 2019, pp. 53–57.

[31] See ruling of the Voivodeship Administrative Court in Gorzów Wielkopolski of 8 February 2024, II SA/Go 707/23, *CBOSA*.

access to public information, in some cases they prevent them from invoking their special status when exercising this right. However, it is worth emphasising that the application of the provisions of the AAPI is not consistently excluded when councillors submit requests. This would limit their constitutional rights as citizens. Interested citizens, even those holding public office, do not have to state the purpose for which they need the requested public information, nor do they have to explain whether they perform public functions. The circumstance that the person submitting a request for public information is also a councillor is legally irrelevant.[32]

SPECIAL SITUATION OF DEPUTIES COMBINING FUNCTIONS

In the context of the exercise of the right of access to public information by deputies, attention should be paid to the specific situation of combining the functions of a deputy and a member of the Council of Ministers or a Secretary of State in the government administration. It was emphasised in case law that the Access Act does not authorise a public administration body to request information from another entity obliged under Article 4 of the AAPI. The aim of the Access Act is to inform citizens about the state of 'public affairs', not to obtain information by public administration bodies from other entities.[33] Using the term 'anyone' in Article 1(1) of the AAPI, the legislator clarifies the civil right laid down in the Constitution, indicating that everyone may exercise it under the terms specified in this statute. 'Anyone' should be understood as every person or a private law entity. The word 'anyone' cannot be understood otherwise, given the aim and meaning of the Access Act, adopted to implement the concept of public authority transparency.[34] The aim of the Access Act is to ensure 'public supervision' of public authority bodies, and transparency of their operations. The right to information about public authorities' activities is an important element of public scrutiny of the activities of entities entrusted with public tasks. It is justified to grant such rights exclusively to private law entities, and the term 'anyone' cannot refer to public administration bodies.[35] The provisions of the AAPI are not a legal instrument intended to serve public administration bodies for the exchange of information. In such cases, constitutional provisions and administrative systemic regulations apply. By contrast, the Access Act serves the purpose of enabling public scrutiny of public authorities by society. The spheres of administrative work organisation and public supervision cannot be combined,

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[32] See the Supreme Administrative Court judgment of 23 June 2022, III OSK 4901/21, judgment of the Voivodeship Administrative Court in Poznań of 10 April 2024, II SAB/Po 10/24, *CBOSA*.

[33] Ruling of the Voivodeship Administrative Court in Warsaw of 18 February 2010, II SAB/Wa 197/09, *CBOSA*.

[34] See the Supreme Administrative Court judgment of 30 January 2014, I OSK 1982/13, judgment of the Voivodeship Administrative Court in 13 December 2012, II SAB/Wa 386/12, *CBOSA*.

[35] See judgment of the Voivodeship Administrative Court in Gdańsk of 5 November 2014, II SA/Gd 589/14, *CBOSA*.

because this would lead to legal chaos and destabilisation of administrative functions.[36]

Thus, the Access Act does not provide for authorisation of a public administration body to request information from another obliged entity. Its aim is to inform citizens about public affairs, not to obtain information by public administration bodies from other bodies of that administration. Therefore, government administration bodies are not obliged to provide public information to local self-government bodies, and a commune body is not authorised to request access to, e.g., parliamentary correspondence related to deputies' interventions.[37] Thus, deputies may exercise the rights resulting from access to public information, provided that they act as representatives of their electorate within the scrutiny of public authorities performed by society. A deputy who is a member of the Council of Ministers or a deputy who is a Secretary of State in the government administration should not exercise citizen access rights to obtain information about the activities of other public authorities, because it would be contrary to the objectives of the Access Act. With respect to requests for access addressed to the judiciary, this could also be in conflict with the constitutional principle of separation of powers.

DEPUTIES AS ENTITIES OBLIGED TO PROVIDE INFORMATION

Deputies have the right and obligation to actively participate in the work of the Sejm and the National Assembly, as well as their bodies.[38] The internal organisation and agenda of the Sejm, as well as the procedures for appointing its bodies and their operations, are laid down in the Sejm's Statute.[39] In accordance with this document, the Sejm Chancellery, not deputies, shall provide public information by means of publication of documents and other information in the Sejm Information System.[40] The Access Act explicitly obliges only political parties operating through their bodies to provide public information.[41] At the same time, obliged entities are specified only as examples, and decisive criteria include membership in public authorities and the performance of public tasks.[42] In such circumstances, a question should be asked whether a deputy is an entity obliged to provide public information. Administrative courts adopted a stance that deputies are not such entities. It was argued that deputies do not exercise public authority because they lack statutory rights to enforce specific tasks and objectives. In turn, a public task is any action of

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[36] P. Szustakiewicz, 'Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 28 X 2009, Sygn. akt I OSK 508/09', *Ius Novum*, 2010, No. 2, p. 197.

[37] See I. Galińska-Rączy, 'Udostępnienie przez organ administracji rządowej – w trybie ustawy o dostępie do informacji publicznej – korespondencji w sprawie interwencji poselskiej organowi gminy, którego dotyczy ta interwencja', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2018, No. 3(59), pp. 186–187.

[38] See Article 3 of the Act on the Mandate.

[39] Monitor Polski of 2022, item 990, hereinafter referred to as 'the Sejm's Statute'.

[40] See Article 202a(1) of the Sejm's Statute.

[41] See Article 4(2) AAPI.

[42] See Article 4(1) AAPI.

the administration carried out under statutory provisions. Deputies are not members of public administration within the meaning of the state organisational structure consisting of self-government administration of three levels, central government administration, and state administration not subordinate to the government (e.g. the President, the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the National Council of the Judiciary, the National Bank of Poland). Although Article 61 of the Constitution stipulates that a citizen shall have the right to obtain, *inter alia*, information on the activities of organs of public authority as well as persons discharging public functions, in accordance with paragraph 4 of that provision, the procedure for providing information shall be specified by statute, and regarding the Sejm and Senate, by their rules of procedure. The delegation under Article 61(4) of the Constitution contains the authorisation (obligation) to establish the procedural mode of handling matters of access to public information solely by statute. The catalogue of entities obliged to provide public information is laid down in Article 4 of the Access Act and it is open-ended. The exemplary list of obliged entities under Article 4(1) of the AAPI is preceded by a general definition that these are 'public authorities and other entities performing public tasks', which do not include deputies as individuals.[43]

The Constitutional Tribunal addressed the discussed issue, pointing out that the essence of the problem concerns the restrictive interpretation of Article 4(1) of the AAPI and not the subjective scope of this provision. As court rulings show, the fact that deputies are not obliged to provide information under this statute does not result from the legislator's failure to include deputies in the group of entities obliged to fulfil this obligation, but rather from the interpretation of the provision, in particular the concepts of 'public authorities' and 'entities exercising public authority'.[44] Therefore, this is a matter of legal interpretation. The above legal interpretation excluding deputies from the list of entities obliged to provide public information may raise significant objections.

Primarily, in the light of Article 61(1) of the Constitution, a citizen shall have the right to obtain information on the activities of persons discharging public functions. Such a right shall also include receipt of information on the activities of other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. While the delegation under Article 61(4) of the Constitution authorises the ordinary legislator to specify the procedure for the provision of information, statutory provisions should not be interpreted in such a way that could limit access

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[43] The Supreme Administrative Court ruling of 6 December 2012, I OSK 2843/12; judgment of the Voivodeship Administrative Court in Warsaw of 14 February 2014, II SAB/Wa 522/13; rulings of: the Voivodeship Administrative Court in Rzeszów of 7 September 2011, II SAB/Rz 58/11, the Voivodeship Administrative Court in Warsaw of 29 November 2013, II SO/Wa 92/13, the Voivodeship Administrative Court in Poznań of 23 February 2022, IV SO/Po 2/22, the Voivodeship Administrative Court in Warsaw of 23 November 2022, II SAB/Wa 470/22, the Voivodeship Administrative Court in Gorzów Wielkoposki of 25 August 2023, II SAB/Go 71/23, *CBOSA*.

[44] The Constitutional Tribunal ruling of 9 October 2013, Ts 98/13, *OTK*, Series B, 2014, No. 1, item 57.

to information about constitutionally determined entities. Deputies, as public officials, are undoubtedly persons discharging public functions.[45] Therefore, they should be obliged to fulfil their reporting obligations concerning their activities, which results directly from the constitutional provision. Applying the technique of interpreting a statute in accordance with the Constitution should be given priority, as it corresponds to the presumption of constitutionality of statutes.[46]

At the same time, there is no obstacle to interpreting Article 4(1) of the AAPI in accordance with Article 61(1) of the Constitution. Referring to the concepts of 'public authorities' and 'other entities performing public tasks' used in the statute, one should fully agree that deputies, by virtue of their mandate as representatives, participate in the exercise of state authority.[47] Deputies' tasks are not only to represent (and therefore determine) the will, interests and well-being of the nation, but also, pursuant to Article 4(2) of the Constitution, to exercise power on behalf of the nation. That is why activities undertaken by deputies within the performance of their parliamentary mandate should be treated as the exercise of public authority. From the grammatical point of view, the constitutional phrase 'the duties of public authorities' does not mean the same as 'public tasks' referred to in Article 4(1) of the AAPI. Public tasks have a broader scope and may be characterised by the same features as analogous activities performed by a specific public authority: universality, utility for the public, and achievement or contribution to the achievement of goals deemed desirable or mandated by the Constitution or statutes.[48] Public tasks also mean more than simply tasks of public administration, to which deputies do not belong. This is confirmed by case law, which indicates that the concept of 'public tasks' ignores the subjective element and means that public tasks can be performed by various entities other than authority bodies and without the need to delegate these tasks. 'Public tasks' within this meaning are characterised by universality and utility for the public, as well as contribution to the achievement of goals specified in the Constitution or statutes. The performance of public tasks is always connected with the exercise of fundamental public rights of citizens. Any entity that manages even a small part of public property is obliged to disclose information about it. It can be said that the right to information follows public property, and authorised persons may request information from anyone who manages or uses such property.[49] For this reason, a private joint-stock company repairing a municipal road under a public procurement contract was considered an obliged entity. On another occasion, in

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[45] See Article 115 §§ 13 and 19 of the Act of 6 June 1997, Criminal Code, Journal of Laws of 2024, item 17.

[46] The Constitutional Tribunal judgment of 28 April 1999, K 3/99, *OTK ZU*, 1999, No. 4, item 73.

[47] W. Odrowąż-Sypniewski, 'Zasady udostępniania informacji o posiedzeniach zespołu parlamentarnego', *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2021, No. 4(72), p. 216.

[48] See M. Bernaczyk, 'Konstytucyjne prawo do informacji o działalności posłów i senatorów a zakres podmiotowy ustawy o dostępie do informacji publicznej', *Przegląd Sejmowy*, 2012, No. 3, p. 61.

[49] See the Supreme Administrative Court judgment of 8 October 2019, I OSK 4113/18, *CBOSA*. See critical comments by Ł. Nosarzewski, 'Obowiązek udostępniania informacji publicznej przez podmioty prywatne', *Informacja w Administracji Publicznej*, 2020, No. 2, pp. 49 et seq.

the case of a director of a community culture centre, it was pointed out that bodies within the meaning of the AAPI may include not only bodies performing public administration tasks (i.e. those considered to be typical public administration bodies), but also other entities, even those subject to private law, not belonging to public administration structures.[50]

Deputies not only perform public functions but also manage public funds. They receive public funds and have them at their disposal to perform their mandate. Deputies are entitled to financial resources to cover expenses incurred while performing their mandate in the country (parliamentary allowance).[51] They establish MP's or MP–Senator's offices to support their local activities. For this reason, they are entitled to a lump sum to cover the costs of their offices' operations under the terms and in the amount determined jointly by the Marshal (Speaker) of the Sejm and the Marshal of the Senate.[52] Within this lump sum, deputies determine the remuneration of office staff, who are also entitled to an additional annual salary, a bonus for long-term service, and severance pay, and the funds for these purposes are allocated in the budget of the Chancellery of the Sejm and the Chancellery of the Senate respectively.[53]

In addition, the axiology of access to public information is based on the provision of information on one's own activities by entities to which the law grants *imperium*. Representative democracy involves, on the one hand, delegation of power by the sovereign to representatives, and on the other hand, submission to the authority of those representatives, embodied in the law they enact. The right to information serves to enforce political accountability by voters, and the exclusion of deputies from the obligation to provide public information actually means a limitation of knowledge that underlies conscious and rational electoral acts.[54] Although deputies' basic duties include participation in voting during Sejm sessions and in parliamentary committees, they perform their mandate based on public law, possessing special public rights and obligations, as well as significant limitations on their private activities. Deputies cannot take additional employment or receive donations that could undermine voters' confidence in their performance of the mandate. They are obliged to submit declarations of their financial status and have limited ability to do business.[55] Thus, the representation of the sovereign in the exercise of public authority is a deputy's specific restricted task. These arguments, rooted in the concept of representative democracy, support the view that the exercise of a parliamentary mandate constitutes a unique public task performed by a deputy holding an elected office.[56]

Deputies should also inform the electorate about their work and the activities of the body to which they were elected.[57] In the opinion addressing the issue of

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[50] Ruling of the Voivodeship Administrative Court in Gorzów Wlkp. of 28 March 2024, II SO/Go 3/24, *CBOSA*.

[51] See Article 42(1) of the Act on the Mandate.

[52] See Article 23(1) and (2) of the Act on the Mandate.

[53] See Article 23(5)–(9) of the Act on the Mandate.

[54] For more see M. Bernaczyk, *Konstytucyjne prawo do informacji do informacji…*, op. cit., pp. 63–64.

[55] See Articles 33–35 of the Act on the Mandate.

[56] See M. Bernaczyk, *Konstytucyjne prawo…*, op. cit., p. 64.

[57] See Article 1(2) of the Act on the Mandate.

electioneering, it was pointed out that during the election campaign it is especially difficult for persons holding public office, including deputies, to perform public duties. In the case of deputies, the obligation to inform voters about their work and the activities of the body to which they were elected is not suspended by electoral law.[58] Therefore, from this perspective, the activities of deputies within the framework of the performance of the mandate are treated as public tasks. Also in the context of personal data protection and grounds for their processing, when the condition for disclosing personal data – if it is necessary in order to perform legally defined tasks carried out for the good of the public – was indicated, it was argued that this condition may be used by entities performing public duties in non-authoritative forms, e.g. municipal utilities, the Chancelleries of the Sejm and the Senate, and deputies' offices.[59] Deputies' offices are organisational units operating under the direction of deputies, composed of both material and personnel components (office staff). A lump sum is granted to deputies to 'cover costs connected with the operation of the offices', meaning the operation of both components: material assets and those who operate the material component of the offices, i.e. their staff. The legislator pays the lump sum for office operations to deputies from the State Budget (the Chancellery of the Sejm).[60] Deputies' offices serve to support deputies' local activities and perform tasks assigned by deputies. If one considered that deputies' offices perform public tasks, then deputies, as entities representing their offices, would be obliged entities under Article 4(1)(5) of the AAPI.

It is also important to distinguish between the sphere of deputies' individual activities and their activities performed during plenary sessions or within the framework of the Sejm committees they are members of. Although the Chancellery of the Sejm is obliged to inform about a deputy's activities, it performs organisational, technical and advisory tasks related to the activities of the Sejm and its bodies.[61] Therefore, it provides public information related to the activities of the Sejm and its bodies, and what information the Chancellery has about individual activities of deputies depends on what information they themselves provide to the Chancellery of the Sejm. Only entities possessing public information are obliged to disclose such information.[62] Therefore, there is a gap in the obligations to provide information regarding individual activities of deputies within the framework of the performance

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[58] K. Skotnicki, 'Opinia prawna dotycząca realizacji praw i obowiązków posła i senatora w czasie wyborów', in: *Status posła w opiniach Biura Analiz Sejmowych (2007–2015). Tom 1. Wybór opinii prawnych do artykułów 1–24 ustawy z 9 maja 1996 r. o wykonywaniu mandatu posła i senatora (Dz.U. 2011, nr 7, poz. 29, ze zm.)*, Warszawa, 2015, pp. 9–10.

[59] A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 1999, p. 67. Also, under the GDPR, personal data may be processed if it is necessary for the purpose of the legitimate public interests, which can be identified with the performance of public tasks. See Article 6(1)(f) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

[60] J. Mordwiłko, 'Opinia prawna w sprawie możliwości ubezpieczenia posłów od odpowiedzialności cywilnej związanej z prowadzeniem przez posła biura poselskiego', in: *Status posła w opiniach Biura Analiz Sejmowych…*, op. cit., p. 649.

[61] See Article 199(1) of the Sejm's Statute.

[62] See Article 4(3) AAPI.

of the mandate, which are financed from public funds and encompass specific public tasks resulting from the nature of the representative mandate. The claim that deputies are obliged to provide the electorate with information about their activities based on their own choice and decision and not pursuant to the Access Act is unfounded.[63] This makes deputies' information provision activities towards voters-citizens entirely discretionary, which is unacceptable in a democratic state governed by the rule of law, which is characterised by transparency in public life. Deputies are an emanation of this public life as representatives of the Nation that shall exercise the supreme power. Therefore, deputies, as persons performing public functions, should be directly obliged to provide public information, regardless of the information about them provided by other bodies, including the Chancellery of the Sejm.[64] Deputies belong to public authorities, perform public duties, and within the scope of their mandate, they produce or obtain public information. The construction that gives rise to the right of access to information directly from deputies is already present in the law. The essence of the issue concerns the interpretation of Article 4(1) of the AAPI, and not the subjective scope of the provision. Therefore, the provision of public information by deputies should take place in accordance with the Access Act and be subject to review by administrative courts. Alternatively, deputies' obligations regarding the provision of public information should be formulated in the Act on the Mandate; however, this would require legislative intervention. Access to public information is a tool of public scrutiny of authorities and is a political right. The characteristics of the parliamentary mandate as a free mandate that does not bind deputies by any instructions of the electorate is a guarantee of deputies' legal independence, which cannot mean, however, that these representatives are exempt from accountability to those they represent. Independence from any orders and instructions, which constitutes the essence of the representative mandate, cannot be understood as a release from all dependence of a deputy on voters or a complete elimination of their assessment.[65] Individual obligations imposed on deputies to provide public information would not create dependence on the electorate. Such a dependence does not arise in the case of other entities: public authorities. However, the imposition of this obligation would broaden access to knowledge concerning deputies' activities and influence the formulation of assessments.

CONCLUSIONS

Within the performance of the mandate, deputies may exercise their rights under the Act on the Mandate and submit requests for information and materials to government and self-government administration bodies, as well as companies with State Treasury shareholding, and state-owned and municipal facilities and

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[63] Cf. J.M. Karolczak, 'Opinia prawna dotycząca obowiązku udzielania informacji przez posłów', in: *Status posła w opiniach Biura Analiz Sejmowych…*, op. cit., pp. 35–36.

[64] See I. Kamińska, M. Rozbicka-Ostrowska, in: Kamińska I., Rozbicka-Ostrowska M., *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2016, LEX, Article 4.

[65] See Z. Czeszejko-Sochacki, *Prawo parlamentarne w Polsce*, Warszawa, 1997, p. 63.

enterprises. The established administrative courts' case law confirms that deputies, like all citizens, have the right to public information. At the same time, two modes of deputies' activities are distinguished. When they invoke their status, the request should be dealt with in accordance with the Act on the Mandate. However, when deputies ask questions as 'anyone' and do not reveal their status, the request should be processed pursuant to the Access Act. The differentiation of the procedures is important from the perspective of the rule of law, in particular when deputies simultaneously request information on the grounds of both the Access Act and the Act on the Mandate. However, this may result in additional restrictions on deputies' rights to public information. The inability to effectively exercise the rights under the Act on the Mandate causes the Access Act to often remain the last legal 'tool' of deputies, who have to perform their duties diligently and conscientiously, and above all, effectively. Therefore, *de lege lata*, it is proposed that the provisions of law should be interpreted in such a way that would grant deputies at least the same right of access to public information as 'anyone' has, and the status of a deputy would be legally insignificant for the case. Otherwise, the legal position of deputies would be weaker than that of 'anyone', and this was certainly not the legislator's intention. Deputies should not avoid revealing their status, as it is contrary to the essence of the representative mandate. Deputies may use two separate modes independently of one another, as independent bases for obtaining information. The Act on the Mandate is not *lex specialis* in relation to the Access Act. In accordance with Article 1(2) of the AAPI, efforts should be made to reconcile the Access Act with the Act on the Mandate, and not to exclude the application of one of them. In addition, a deputy's mandate cannot automatically determine the activities of the obliged entity. The legal basis for dealing with deputies' requests should result solely from the substantive content of the request. In case of doubts, the will of the 'host' of the case, i.e. the requester and not the addressee of the request, is decisive.[66]

As part of *de lege ferenda* proposals, deputies' rights of access to public information should be regulated separately in the Act on the Mandate, with possible relevant and supplementary application of the Access Act. It is also advised to introduce judicial review of the fulfilment of duties to provide information towards deputies acting under the Act on the Mandate and to establish formal requirements for a refusal to provide them with information or materials. Stronger deputies' powers should encourage them to exercise their rights to information primarily on the basis of the Act on the Mandate. The Access Act should not constitute a surrogate for ineffective detailed rights. The inadequacy of the Access Act to the political position of deputies, especially those combining their mandate with other functions, may result in doubts as to who must provide deputies with information and to what extent.

At the same time, the Access Act lacks precisely defined entities obliged to provide public information. The current catalogue of these entities is open-ended and exemplary. This problem is highlighted by the fact that the Access Act covers private entrepreneurs fulfilling public procurement contracts, in a situation where

[66] See the Supreme Administrative Court judgment of 7 June 2024, III OSK 1600/23, *CBOSA*.

the catalogue of obliged entities does not include deputies, who are persons performing public functions, fulfilling public tasks and managing public property. Deputies should inform the electorate about their work and the activities of the body to which they were elected. However, they should not do this solely based on their own discretion, but pursuant to the Access Act. *De lege lata*, it is proposed that Article 4(1) of the AAPI should be interpreted in such a way that deputies are included in the catalogue of entities obliged to provide public information. Deputies' obligation to provide public information could also be formulated in the Act on the Mandate, which is to determine conditions necessary for the effective performance of deputies' duties, and thus also obligations to provide information. When deciding on the amendment, the legislator should reconcile these obligations with the tasks of the Chancellery of the Sejm, which provides public information related to the activities of the Sejm and its bodies. Deputies' duties could relate in particular to information concerning their individual activities within the scope of the mandate, which is available to the Chancellery of the Sejm.

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CONSIDERATION OF GENERAL COMPLAINTS FILED IN CONNECTION WITH TAX PROCEEDINGS

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Abstract
This paper addresses the issue of the consideration of general complaints filed during various phases of tax proceedings and closely related to such proceedings. Bearing in mind the priority of jurisdictional proceedings over simplified complaint proceedings, and the prohibition of double-track proceedings, the author presents various possibilities for treating complaints in tax proceedings, particularly those filed by a party to such proceedings. The author demonstrates that general complaints meeting the formal requirements for such measures should be dealt with in tax proceedings, in accordance with the principle of the priority of tax proceedings over simplified complaint proceedings. It is also shown that general complaints may be considered within tax proceedings even if they do not meet the formal requirements for documents handled in such proceedings – provided that any deficiencies can be remedied in accordance with the tax procedure. This applies in particular to instances such as the absence of a signature in the complaint, failure to provide a tax identifier, or omission of a correction to a return (tax declaration). The author further argues that informing third-party complainants about the consideration of a complaint within a tax procedure should always take into account the need to respect both the confidentiality of that specific procedure and fiscal secrecy.

Key words: complaint, complaint proceedings, tax proceedings, complaint in tax proceedings

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INTRODUCTION

The right to lodge complaints and motions (equivalent in other democratic states to the right of petition) is one of the oldest individual rights guaranteed in democratic societies. It constitutes the most common, accessible, and de-formalised way of asserting and defending the rights and interests of an individual or a group.[1] This right belongs to the catalogue of political freedoms and universal rights (to which every human being is entitled), alongside the rights to peaceful assembly and association, including membership in trade unions, farmers' socio-professional organisations, and employers' organisations.[2] Among these three means of exercising rights in summary proceedings – complaint, motion, and petition – the general complaint is the most frequently used.

General complaint proceedings, which embody the constitutional right to complain[3] and serve as an important instrument of social control in a changing administration, constitute a special type of simplified administrative procedure. These proceedings are a form of administrative process in the broad sense (administrative route *sensu largo*), with a code-based, albeit non-jurisdictional, character.[4] Since the legislator has defined the subject of a general complaint relatively broadly,[5] and the list of permissible grounds for its filing is not closed,[6] such complaints are often closely related to jurisdictional proceedings. However, jurisdictional proceedings are governed by completely different rules. The legislator has accounted for this by introducing a form of obligation to consider a complaint with such content within the relevant jurisdictional proceedings; this undoubtedly follows from the prohibition of double-track proceedings.

One of the jurisdictional proceedings in connection with which complaints are lodged is tax proceedings, which exhibit many features distinct from classic administrative proceedings. Therefore, general complaints brought in connection with the conduct of tax proceedings are subject to specific treatment and consideration within those proceedings. The aim of this paper is to demonstrate the specific manner of handling a complaint filed in connection with ongoing tax proceedings

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1 A. Skóra, *Ogólne postępowanie administracyjne. Zarys wykładu*, Elbląg, 2015, p. 122.

2 W.M. Hrynicki, 'Zbieżność zakresów przedmiotowych wniosków i petycji jako pozaprocesowych środków dyscyplinujących organy władzy publicznej', *Administracja. Teoria–Dydaktyka–Praktyka*, 2017, No. 2(47), pp. 39 et seq.; K. Eckhardt, 'Wolności, prawa i obowiązki człowieka i obywatela', in: Buczkowski J. (ed.), *Prawo konstytucyjne RP (Instytucje wybrane)*, Rzeszów–Przemyśl, 2013, pp. 54 et seq.

3 Article 63 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483, as amended).

4 P. Gołaszewski, K. Wąsowski, 'Komentarz do art. 2', in: Hauser R., Wierzbowski M. (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2018, p. 55.

5 Article 227 of the Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2024, item 572), hereinafter referred to as 'the CAP': 'A complaint may concern, in particular, negligence or improper performance of duties by competent authorities or their employees, violation of the rule of law or the interests of complainants, as well as excessive delays or bureaucratic handling of cases.'

6 Judgment of the Provincial Administrative Court in Kraków of 20 June 2017, II SAB/Kr 92/17; order of the Supreme Administrative Court of 4 April 2012, I OSK 717/12.

and, consequently, to prove and present the various possibilities for its consideration within such proceedings. It is assumed that a general complaint filed in connection with ongoing tax proceedings, and meeting the formal requirements of a letter in those proceedings, should be considered within those proceedings in accordance with the principle of the priority of tax proceedings over simplified complaint proceedings. Furthermore, it is also assumed that a general complaint which does not meet the formal requirements for letters handled in tax proceedings, but where the deficiencies can be remedied in accordance with the tax procedure, should likewise be addressed within such proceedings. This applies, for instance, to cases involving the absence of a signature in the complaint, failure to provide a tax identifier, or failure to attach a correction to a return (tax declaration). Additionally, it is assumed that the information provided to third-party complainants regarding the consideration of a complaint in tax proceedings should always take into account the need to maintain both procedural and fiscal secrecy.

The dogmatic-legal method, enriched with comparative elements, was applied to realise the research goal and verify the adopted hypotheses. The subject of this method was the legal provisions specific to the simplified complaint procedure and tax proceedings. The analysis of source provisions is accompanied by a review of the literature and the jurisprudence of administrative courts.

SPECIFICITY OF SIMPLIFIED COMPLAINT PROCEEDINGS

The role and scope of functions performed by contemporary administration are evolving in line with the concept of building a new, democratic state under the rule of law.[7] Regardless of changing circumstances, however, the overriding function of administration remains to serve the state and its citizens – a task that is undeniably multifaceted. As a result, the administration is subject to control, and control itself is a complex function that cannot be fulfilled by a single act but involves a sequence of actions.[8] The complaint is among the most important mechanisms of social control, intended to create opportunities for citizens to examine and evaluate public administration and, consequently, to exert a certain influence on its functioning and the performance of its public tasks.[9] Almost any negative assessment of the activity of an entity established to perform state tasks – or of another entity, such as a social organisation commissioned to perform public administration tasks, along with its employees and officers – may be the subject of a complaint.[10] The effective

[7] J. Blicharz, J. Glumińska-Pawlic, L. Zacharko, 'Szkic o pojęciu administracji publicznej', in: Matan A. (ed.), *Administracja w demokratycznym państwie prawa. Księga jubileuszowa Profesora Czesława Martysza*, Katowice–Warszawa, 2022, pp. 63–72 (68).

[8] L. Zacharko, 'Tradycyjne a współczesne pojęcie kontroli i jej zasięg', in: Ziółkowska A., Gronkiewicz A. (eds), *Administracyjne procedury kontrolne. Wybrane zagadnienia*, Katowice, 2016, p. 11.

[9] J. Jagielski, *Kontrola administracji publicznej*, Warszawa, 2006, p. 141.

[10] M. Jaśkowska, in: Wróbel A., Jaśkowska M. (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2018, p. 1305.

functioning of modern administration requires institutions and procedures that ensure the administered – i.e. the citizens – have an influence on the decisions taken.[11] Consequently, the complaint (petition, motion) procedure constitutes the primary means of protecting factual interests in the current legal order.[12]

A complaint is not a particularly formal measure. Apart from the complainant's given name and surname (or name, in the case of an entity), address, and the allegation forming the basis of the complaint, it need not contain other elements. Except when made orally for the record, a complaint does not have to be signed. Furthermore, a complaint may be lodged not only in the manner prescribed for a classic application, but also by ordinary e-mail or by fax.[13] Complaint proceedings are of a non-jurisdictional nature, to which only a few provisions regulating general administrative proceedings (Articles 36–38 CAP) apply. Even the application of provisions concerning the service of letters or the calculation of time limits in these proceedings is subject to dispute.[14] Nevertheless, it should be assumed that the principle of objectivity and the duty to comprehensively clarify the case underlying the complaint apply in complaint proceedings.[15]

The notice regarding how the complaint has been dealt with is a substantive and technical act of the administration. It does not resolve the issue raised by the complainant but merely informs the complainant whether the allegations were found to be valid and whether any corrective or remedial action has been taken by the authority. The notice is not an administrative act, although it is undoubtedly a manifestation of a commanding form of administrative action, since by indicating whether or not the complaint allegation is well-founded, it represents a form of decision-making. The notice is also not subject to appeal. Lodging an appeal against a complaint notice obliges the competent authority to treat the appeal as inadmissible.[16] The complainant may be dissatisfied with the response received from the complaint-handling body, but that response is not subject to appeal.[17]

Most importantly, complaint proceedings are only applicable where it is not possible to initiate regular jurisdictional proceedings that would resolve the matter raised in the complaint. The preference for regular administrative procedure

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[11] E. Knosala, *Rozważania z teorii nauki administracji*, Tychy, 2004, p. 92.

[12] J. Zimmermann, *Prawo administracyjne*, Warszawa, 2010, p. 421.

[13] §§ 6–7 of the Regulation of the Council of Ministers of 8 January 2002 on the organisation of the receipt and consideration of complaints and motions (hereinafter referred to as 'Regulation on complaints and motions') (Journal of Laws of 2002, No. 5, item 46); more on the subject: W.M. Hrynicki, *Skargi, wnioski, petycje i inne interwencje obywatelskie*, Warszawa, 2022, pp. 68–70.

[14] More on the subject: W.M. Hrynicki, 'Normatywne i praktyczne aspekty załatwiania skarg i wniosków niespełniających wymogów formalnych, zagadnienia wybrane', *Administracja. Teoria–Dydaktyka–Praktyka*, 2017, No. 4(49), pp. 18–38.

[15] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2017, p. 1010.

[16] Judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 3 August 2017, II SA/Go 433/17; order of the Supreme Administrative Court of 14 September 2004, OSK 642/04; order of the Supreme Administrative Court of 18 February 2005, OW 166/04.

[17] Order of the Provincial Administrative Court in Warszawa of 1 June 2009, II SA/Wa 629/09.

(or tax procedure) is justified by significant considerations, namely the need to ensure full procedural rights of the party, the necessity of conducting evidentiary proceedings, and the possibility of challenging the administrative act concluding the proceedings. The intersection between tax procedure – which is regulated differently from general administrative procedure – and simplified complaint proceedings may give rise to ambiguities and uncertainties in the handling of complaints brought in connection with tax proceedings.

SPECIFICITY OF TAX PROCEEDINGS

Tax proceedings constitute a type of regular administrative procedure of special application, the regulation of which is contained in the Tax Ordinance.[18] The aim of these proceedings is, in particular, the assessment of taxes, fees, or other non-tax receivables owed to the state budget or the budgets of local self-governing bodies, in situations leading to the issuance of an administrative act. This applies both to cases in which the legislator has provided in advance for the issuance of such an act to fulfil a tax obligation and to cases where the tax authorities challenge a taxpayer's self-assessment. Tax proceedings, therefore, do not encompass all actions of tax authorities and taxpayers aimed at fulfilling tax obligations, but only those actions of tax authorities directed towards the issuance of a tax decision.[19] Undoubtedly, tax proceedings are the epitome of administrative proceedings in matters of taxation and other selected public charges. They constitute administrative proceedings in the strict sense, and therefore jurisdictional proceedings, as evidenced by the position of the tax authority as both the body conducting the proceedings and the executor of tax duties and rights; by the reciprocal structure of rights and obligations between the tax authorities and the parties to the proceedings; and by the effect of the proceedings, namely the unilateral, authoritative shaping of the legal situation of a party through a decision issued by the tax authority.[20] Since substantive administrative law is not identical to substantive tax law, tax proceedings also possess specific features that distinguish them from general administrative proceedings.[21]

Tax proceedings are the most formalised jurisdictional proceedings among those provided for in the Tax Ordinance,[22] alongside tax inspection and verification activities. The purpose of tax proceedings is therefore to realise the correlation of tax rights and obligations between the entities involved in the tax-legal relationship,

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[18] Act of 29 August 1997 – Tax Ordinance (Journal of Laws of 2025, item 111, as amended).

[19] B. Brzeziński, M. Kalinowski, M. Masternak, *Ordynacja podatkowa – postępowanie. Komentarz praktyczny*, Gdańsk, 1999, p. 9.

[20] A. Huchla, 'Postępowanie podatkowe', in: Borszowski P. (ed.), *Prawo podatkowe z kazusami i pytaniami*, Warszawa, 2018, p. 148.

[21] A. Gorgol, 'Zobowiązania podatkowe i postępowanie podatkowe', in: Wójtowicz W. (ed.), *Zarys finansów publicznych i prawa finansowego*, Warszawa, 2020, pp. 235–236.

[22] D. Strzelec, *Postępowanie podatkowe a postępowanie karne skarbowe. Zasadnicze związki międzygałęziowe*, Warszawa, 2023, p. 75.

namely the tax authority and the taxpayer.[23] This realisation occurs through the formal fulfilment of the intention to impose taxation. On the other hand, the primary purpose of taxation is to obtain the funds necessary to cover public needs. Accordingly, one of the basic tasks of tax proceedings is to facilitate the transfer of funds between the subjects of obligatory legal relations.[24]

In conducting tax proceedings, the tax authority must adhere to a number of general principles, which are not merely recommendations concerning the conduct of tax authorities but constitute binding legal norms – on par with other procedural provisions. A violation of these principles may serve as grounds for an appeal or a complaint before the administrative court.[25] These principles include in particular: the principle of legality, the principle of enhancing trust in tax authorities, the principle of information, the principle of objective truth, the principle of speed and simplicity of proceedings, the principle of active participation of a party in tax proceedings, and the principle of permanence of a final tax decision. Undoubtedly, the general principles of procedure shape the model of a given procedure;[26] however, their scope extends beyond tax proceedings in the narrow sense. There is no reason why the same values should not be protected in other procedures, just as they are in narrowly understood tax proceedings.[27]

Tax proceedings, like classic administrative proceedings, are based on a thorough evidentiary procedure. It should be emphasised that the catalogues of designated evidentiary means in tax proceedings and in general administrative proceedings are distinct. Tax proceedings frequently rely on forms of evidence specific to that procedure.[28] They usually conclude with the issuance of a tax decision. This decision may, for instance, determine the amount of tax liability, grant optional tax reliefs, or adjudicate tax liability enforcement. The phrase 'the decision shall resolve the case on its merits', as used in Article 207 § 2 of the Tax Ordinance, clearly indicates that a decision issued by a tax authority must constitute a resolution of the entire case pending before that authority.[29] Undoubtedly, a tax decision is a manifestation of the tax authority's power.[30] However, it must be stressed that despite the similarity between classic administrative and tax proceedings, the latter exhibit features specific to them, particularly in relation to the implementation of tax obligations and the formalities arising therefrom.

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[23] R. Oktaba, 'Prawo podatkowe – część ogólna', in: Nowak-Far A. (ed.), *Finanse publiczne i prawo finansowe*, Warszawa, 2020, p. 510.

[24] R. Mastalski, *Prawo podatkowe*, Warszawa, 2023, p. 214.

[25] A. Kaźmierski, A. Melezini, D. Zalewski, 'Postępowanie podatkowe', in: Zalewski D., Melezini A. (eds), *Postępowanie podatkowe – 810 wyjaśnień i interpretacji*, Warszawa, 2013, p. 392.

[26] J. Jendrośka, *Polskie postępowanie administracyjne i sądowowadministracyjne*, Wrocław, 2003, p. 34.

[27] H. Dzwonkowski, Z. Zgierski, *Procedury podatkowe*, Warszawa, 2006, pp. 633 et seq.

[28] A. Huchla, 'Postępowanie…', op. cit., p. 156.

[29] B. Dauter, A. Kabat, 'Dowody', in: Babiarz S., Dauter B., Hauser R., Kabat A., Niezgódka-Medek M., Rudowski J., *Ordynacja podatkowa. Komentarz*, Warszawa, 2019, p. 1197.

[30] Z. Ofiarski, *Ogólne prawo podatkowe. Zagadnienia materialnoprawne i proceduralne*, Warszawa, 2013, p. 408.

CLASSICAL CONSIDERATION OF COMPLAINTS LODGED IN CONNECTION WITH TAX PROCEEDINGS

The broad subject-matter scope of a general complaint, together with the peculiarities of tax proceedings – in which taxpayers and payers frequently challenge the actions or decisions of tax authorities – means that the paths of these two procedures sometimes intersect. A general complaint is often confused with, or filed in parallel to, the appeals provided for in tax procedure. While a complaint is not in itself a procedural action within the tax procedure, it may nevertheless become one when it takes on the characteristics of such an action. However, the principle of the primacy of the jurisdictional procedure, and the principle of the one-track nature of proceedings, prohibits both the parallel consideration of general complaints and legal remedies characteristic of the tax procedure, and the substitution of general complaints for the procedural remedies inherent in that procedure. The provisions of Articles 233–236 and 240 CAP establish the priority of jurisdictional proceedings over complaint proceedings, thereby preventing the conduct of two or more proceedings in the same matter at the same time. The principle of one-track examination excludes the possibility of using different or consecutive procedures in parallel for the same matter, and also prevents the evasion of procedural rigour.[31] However, the content of a submitted letter is not always clear enough to explicitly determine the taxpayer's intention. Nonetheless, it must always be remembered that a lodged tax case must first be handled through the proper jurisdictional route, which cannot be replaced by a simplified complaint procedure.

Apart from the possibility of initiating extraordinary procedures,[32] a complaint lodged by a party to tax proceedings shall be examined in the course of the proceedings in which the case is pending.[33] Less frequently, it may lead to the initiation of tax proceedings in an individual case that has not been and is not the subject of ongoing proceedings.[34] Conversely, a complaint lodged by an entity that is not, and cannot become, a party to tax proceedings may give rise to the initiation of tax proceedings only *ex officio* – unless applicable regulations require a party to request[35] the initiation of proceedings, or where the complaint constitutes material to be considered *ex officio* by the authority conducting the tax proceedings, provided the complaint concerns those proceedings.[36]

In general administrative procedure, complaints may in practice be transformed into another legal remedy specific to that procedure[37] and dealt with in accordance with the rules and time limits applicable to it. The consideration of a complaint largely determines the actual settlement of the matter, as the authority examines

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31 J. Borkowski, in: Adamiak B., Borkowski J., *Kodeks postępowania*…, op. cit., p. 1016.
32 Article 235 in conjunction with Article 240 CAP.
33 Article 234(1) in conjunction with Article 240 CAP.
34 Article 233 first sentence, in conjunction with Article 240 CAP.
35 Article 233 second sentence, in conjunction with Article 240 CAP.
36 Article 234(2) in conjunction with Article 240 CAP.
37 E. Iserzon, J. Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*, Warszawa, 1970, p. 305.

the merits of the complaint and determines how the matter in question[38] is to be resolved. Given the nature of tax procedure, it should be examined whether such a relationship exists in the case of complaints lodged in connection with that procedure.

An example of a complaint filed in connection with tax proceedings is a complaint by a party to the proceedings – or its proxy – challenging the evidence proceedings conducted. It should be emphasised that the evidentiary procedure in tax proceedings shares both similarities and differences with that of general administrative proceedings. The aim of the evidentiary procedure in tax matters is to establish findings of fact that correspond to the actual state of affairs, as only such findings can ensure the implementation of the principle of objective truth. Properly conducted evidentiary proceedings ensure, on the one hand, the correct resolution of the case and, on the other, contribute to reducing the costs of the proceedings.[39] Despite the fact that the demand for taking evidence is one of the elements implementing the principle of active participation of a party in tax proceedings,[40] as expressed in Article 123 of the Tax Ordinance, the tax authority often shapes the course of evidentiary proceedings, imposing evidence or shifting the burden of conducting it onto the party.[41] The active participation of a party in tax proceedings is sometimes compelled by the attitude of tax authorities, which fail to uphold the principle of objective truth and attempt to shift as many duties as possible – both documentary and evidentiary – onto the party to the proceedings.[42] This may cause a sense of dissatisfaction, resulting in a general complaint, especially when requests for evidence are informally disregarded. However, it should be borne in mind that the taxpayer's failure to indicate sources of evidence does not relieve the tax authority from its obligation to conduct exhaustive evidentiary proceedings *ex officio*.[43] The tax authority is also obliged to establish circumstances favourable to the party.[44] In such a situation, a complaint submitted by a party to the proceedings – or its proxy – filed in connection with the conduct of tax proceedings may be considered in the relevant decision settling the evidentiary motion. The actual consideration of the complaint allegations will be found in the justification

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[38] J. Lang, 'Wybrane problemy prawnej regulacji wykonywania prawa do składania skarg i wniosków', *Acta Universitatis Vratislaviensis. Prawo CLXXVIII*, Wrocław, 1990, pp. 161–168.

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

[40] B. Dauter, 'Decyzje', in: Babiarz S., Dauter B., Hauser R., Kabat A., Niezgódka-Medek M., Rudowski J., *Ordynacja podatkowa. Komentarz*, Warszawa, 2019, p. 1122.

[41] Cf. judgment of the Provincial Administrative Court in Warszawa of 23 July 2004, III SA 949/03; judgment of the Provincial Administrative Court in Warszawa of 3 August 2006, III SA/Wa 187/05.

[42] D. Strzelec, *Naruszenia przepisów postępowania przez organy podatkowe*, Warszawa, 2009, pp. 131 et seq.

[43] A. Mariański, *Rozstrzyganie wątpliwości na korzyść podatnika. Zasada prawa podatkowego*, Warszawa, 2011, p. 133; judgment of the Supreme Administrative Court External Branch in Łódź of 2 October 2003, I SA/Łd 822/03.

[44] H. Dzwonkowski, J. Gorąca-Paczuska, in: Dzwonkowski H. (ed.), *Ordynacja podatkowa*…, op. cit., p. 1127; judgment of the Supreme Administrative Court External Branch in Katowice of 4 January 2002, I SA/Ka 2164/00.

of that order on evidentiary motions, not in its operative part. Thus, in essence, a general complaint questioning the conduct of the evidentiary proceedings in pending tax proceedings, or requesting the admission of a specific type of evidence, becomes a pleading formally dealt with within the ongoing tax proceedings. The decision issued in the evidentiary matter constitutes a substantive consideration of the complaint allegations, which appears to be consistent with Article 234(1) CAP. It also appears that there are no legal obstacles to such a complaint being settled by means of a simple notice (information letter), provided that this is issued by the authority conducting the proceedings and the complaint was lodged together with a request for evidence, which was resolved by an appropriate decision.

A similar situation arises with a general complaint whose allegations broadly relate to the subject matter of the ongoing tax proceedings (e.g. the existence of a tax liability, the legitimacy of a tax assessment, the application of a specific tax credit or exemption, or the adjudication of tax liability). A complaint of this nature, submitted by a party to the proceedings, should be considered within those proceedings, in accordance with Article 234(1) CAP. The complaint allegations may be addressed, for example, in the justification of the decision concluding the case – but not in the operative part of the decision. This is because the operative part, i.e. the dispositive section of the decision, sets out the entitlement or obligation established therein. It must be formulated in such a way that it clearly indicates the right or obligation imposed[45] on the party. A tax decision is the result of proceedings[46] conducted by the tax authority. In such a decision, the authority should justify that, given certain established facts, a specific legal rule[47] is applicable. Based on this, it must be assumed that a possible way of addressing a complaint submitted by a party or its proxy concerning the subject matter of pending tax proceedings is to discuss it in the justification of the decision concluding those proceedings. This type of indirect consideration is not reflected in the operative part of the tax decision, as the general complaint does not affect it. Addressing the complaint allegations in the justification of the tax decision – when they coincide with the subject matter of the proceedings – may be done without affecting the operative part of the decision, which appears to be in line with Article 234(1) CAP. It also appears that there are no legal obstacles to such a complaint being addressed by the authority conducting the proceedings through a simple notice (information letter), issued independently of the tax decision.

In conclusion, complaints submitted by a party to tax proceedings may be considered, in accordance with Article 234(1) CAP, within a decision settling a request for the taking of evidence, in a decision concluding the proceedings, or through a simple notice (information letter) issued by the body conducting the proceedings – depending on the subject of the complaint and the discretion of the tax authority.

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45 W. Nykiel, W. Chróścielewski, 'Postępowanie podatkowe', in: Koperkiewicz-Mordel K., Chróścielewski W., Nykiel W., *Polskie prawo podatkowe*, Warszawa, 2006, p. 112.

46 H. Dzwonkowski, M. Kurzac, in: Dzwonkowski H. (ed.), *Ordynacja podatkowa. Komentarz*, Warszawa, 2020, p. 1225.

47 A. Mariański, D. Strzelec, 'Uzasadnienie decyzji podatkowej a gwarancje ochrony praw podatnika', *Monitor Podatkowy*, 2006, No. 2, p. 26,

However, it is important that the complaint is considered by the body conducting the tax proceedings, as is the case with complaints filed in administrative enforcement proceedings and considered by the enforcement authority.[48]

NON-OBVIOUS CASES OF CONSIDERING COMPLAINTS MADE IN CONNECTION WITH TAX PROCEEDINGS

Tax proceedings are typically characterised by divergent interests between the party and the tax authority and may thus become a field of various conflicts, occasionally giving rise to general complaints. Setting aside the classical ways of addressing complaints within tax proceedings, the intersection of the rules governing tax procedure and simplified complaint proceedings gives rise to several further important issues. These include, in particular:

(1) the dissimilarity between the formal requirements for a general complaint and those for letters in tax proceedings;
(2) the possibility of initiating tax proceedings when other tax law requirements must be met;
(3) the possibility of informing a complainant who is not a party to the proceedings about the details of those proceedings.

Firstly, a general complaint does not have to be submitted in the manner prescribed for a standard application in a tax case,[49] nor does it require a signature[50] – unlike a formal application lodged in writing or verbally for the record (Article 168 § 3 of the Tax Ordinance). In addition, a general complaint may include only a simple e-mail address, which is not permitted for applications in tax matters (Article 169 § 1b of the Tax Ordinance). The legislator has therefore provided broader formal possibilities for filing general complaints than for letters submitted in tax cases, which may complicate the handling of complaints filed in connection with tax proceedings. If, for example, a complaint from a party to tax proceedings was submitted via ordinary e-mail[51] without a tax identification number or signature, it would be debatable – given the priority of tax proceedings over simplified complaint proceedings – whether it could be examined by the authority conducting the tax proceedings on formal grounds. On the one hand, an application in a tax case that is filed in a manner not prescribed by the Tax Ordinance must be left unprocessed and without notice to the applicant (Article 169 § 1b of the Tax Ordinance). On the other hand, the constitutional right to lodge

[48] More on the subject: W.M. Hrynicki, 'Rozpatrywanie skarg powszechnych w postępowaniu egzekucyjnym w administracji', *Ius Novum*, 2022, Vol. 16, No. 1, pp. 83–102.

[49] Applications shall be submitted in writing or orally for the record. Applications in electronic form shall be submitted to the electronic delivery address or via an account in the tax authority's ICT system (Article 168 § 1 of the Tax Ordinance).

[50] Cf. W.M. Hrynicki, 'Zasadność wezwań w sprawach niepodpisanych skarg, wniosków i petycji – przyczynek do dyskusji', *Acta Iuris Stetinensis*, 2018, No. 3(23), pp. 77–95.

[51] Cf. W.M. Hrynicki, 'Glosa do wyroku Wojewódzkiego Sądu Administracyjnego w Gorzowie Wielkopolskim z dnia 5 września 2018 r. (sygn. akt II SA/Go 508/18)', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2022, No. 1(100), pp. 170–179.

a general complaint permits it to be exercised through all electronic channels, without a tax identification number and without requiring a signature.[52] If it were to be assumed that a complaint relating to tax proceedings must only be lodged in the manner prescribed for tax applications, then any complaint submitted differently would not need to be acted upon (Article 169 § 1b of the Tax Ordinance). However, considering the constitutional nature of the general complaint and its broad function as an instrument of social control, it must be assumed that a complaint lodged via ordinary e-mail (and therefore unsigned) may be treated as a written application that does not meet the formal requirements. In such cases, the complainant should be asked by the competent tax authority to complete the missing elements required by law, with an instruction that failure to do so will result in the letter being left unprocessed. This approach to resolving the under-regulated issue is supported both by the need to realise the constitutional right to lodge a complaint – practically implemented through the priority of the jurisdictional procedure over the complaint procedure – and by the necessity of fulfilling the formal requirements for letters in tax proceedings, where this right can be effectively exercised. Once supplemented with a signature and tax identification number, the complaint – effectively transformed into a pleading – will be examined by the authority conducting the tax proceedings.

However, if a similar complaint from a taxpayer who is a party to tax proceedings were submitted by ordinary e-mail and did not include an address (place of residence or habitual residence, registered office, or place of business) or an address for service within the country, it is doubtful that it could be considered by the authority conducting the tax proceedings. In the absence of an address in the application, Article 169 § 1a of the Tax Ordinance requires that it be left unprocessed, while also prohibiting both the issuance of a summons under Article 169 § 1 of the Tax Ordinance and the issuance of an order to leave the application unprocessed. It should be noted that, in the case of a general complaint, the term 'address' is interpreted more broadly than in applications submitted in tax matters. While § 8(1) of the Regulation on complaints and motions uses the term 'address', which is to be understood broadly (also including an Internet address, such as an e-mail address),[53] Article 168 § 2 of the Tax Ordinance expressly states that the term 'address' shall mean the place of residence or habitual residence, the registered office, or the place of business. This definition removes any doubt, under Article 169 of the Tax Ordinance, as to whether the term 'address' includes an electronic address.[54] Therefore, while under the simplified complaint procedure, complaints that contain, in addition to the complainant's name and the allegation, only an e-mail address instead of a residence address (e.g. permanent residence, temporary stay, etc.) may be examined and disposed of as valid legal remedies for the relevant purpose, applications in tax proceedings that provide only an e-mail address cannot be considered. In the case of general complaints, more lenient formal requirements are envisaged in view of the constitutional right to lodge a complaint, the social

[52] § 5 of the Regulation on complaints and motions.

[53] Cf. W.M. Hrynicki, 'Normatywne i praktyczne aspekty…', op. cit., pp. 18–38.

[54] Ł. Porada, in: Mariański A. (ed.), *Ordynacja podatkowa 2023. Komentarz*, Warszawa, 2023, p. 875.

control function of such complaints, and their broad subject matter. However, in the context of an application in a tax case, an e-mail address is not sufficient. Accordingly, such a complaint cannot be transferred to tax proceedings based on the principle of the priority of tax proceedings over simplified complaint proceedings, because tax proceedings, in a case where the complaint contains only an e-mail address, will not be initiated at all (Article 233 CAP), nor can such a complaint constitute a letter considered in the course of ongoing tax proceedings (Article 234(1) CAP). This could result in the complaint not being processed at all. It appears that such a complaint should be resolved negatively (pursuant to Article 238 § 1 CAP), while at the same time instructing the complainant of the possibility to file an effective letter in ongoing tax proceedings or to submit an application requesting the initiation of such proceedings, depending on the specific circumstances of the case.

As regards the second area of the doubts considered, it should be noted that the initiation of tax proceedings is sometimes subject to various formal legal requirements, which may render initiation ineffective through a general complaint (Article 233, first sentence CAP). These conditions include, in particular, the obligation to submit a tax return or tax declaration, including any necessary corrections, if the request concerns a statement of tax overpayment (Article 75 § 3 of the Tax Ordinance).[55] It is true that one must agree with the position that, upon the request of a party, tax proceedings are initiated by the delivery of the party's motion to the tax authority (Article 165 § 3 of the Tax Ordinance), and that the initiation of proceedings is the automatic consequence, by operation of law, of submitting such a motion.[56] Nevertheless, it must be remembered that a petition in a tax matter must also meet other requirements set out in specific provisions (Article 168 § 2 of the Tax Ordinance). One such special requirement, in the case of a request for a declaration of tax overpayment, is the submission of a corrected tax return (or tax declaration). Issuing an assessment decision regarding a claim for overpayment is closely tied to the mechanisms through which tax liabilities are assessed.[57] It may therefore occur that a general complaint concerning tax assessment – where no tax proceedings are pending or have previously been conducted – may, in fact, lead to tax assessment. This would be the case, for example, where a taxpayer reconsiders their tax assessment and concludes that a different calculation would have resulted in an overpayment, which they present in the form of a general complaint. In such a case, bearing in mind the primacy of tax proceedings over the simplified complaint procedure, consideration should be given to the possibility of addressing such a complaint within the appropriate tax proceedings.[58] Nevertheless, it should be emphasised that, just as in cases involving the absence of a signature on a motion or the absence of a tax identifier, the lack of an appropriate correction to a tax return (or declaration) accompanying a request for confirmation of overpayment obliges the tax authority

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[55] Cf. J. Marciniuk, *Podatek dochodowy od osób fizycznych. Komentarz*, Warszawa, 2017, pp. 1098 et seq.

[56] A. Huchla, 'Postępowanie podatkowe…', op. cit., p. 153.

[57] J. Gorąca-Paczuska, in: Dzwonkowski H. (ed.), *Ordynacja podatkowa. Komentarz*, Warszawa, 2020, p. 601.

[58] Article 233 first sentence, in conjunction with Article 240 CAP.

to call upon the taxpayer to submit the required correction, as a formally necessary element of the request. In this situation, a complaint challenging the taxpayer's self-assessment and requesting confirmation of a tax overpayment (even if only implicitly), without an attached correction to the return (or declaration), could be treated as an incomplete motion. The taxpayer could then be summoned to supplement the complaint with the relevant correction.[59] Accordingly, the principle of the primacy of tax proceedings over the simplified complaint procedure may also apply in the case of a complaint requesting confirmation of tax overpayment, even where the complaint is not accompanied by the legally required correction to the return or declaration, as this formal deficiency can be remedied.

In the context of the first sentence of Article 233 CAP, it should also be noted that the legislator provides two alternative possibilities for the initiation of proceedings to which a general complaint may relate. In this provision, the legislator uses the phrase 'causes the initiation' in relation to potential proceedings, indicating that both automatic initiation based on the complaint itself (where it contains a request for initiation) and initiation *ex officio* are foreseen. If the legislator had intended to allow only one method of initiating proceedings, they would have used a more categorical phrase, such as 'initiates' or 'is the basis for initiation'. Under tax law, it cannot be ruled out that a general complaint challenging, for example, a tax assessment could, within the appropriate tax proceedings, result in a change in the amount of the tax liability. However, if the result were to be an increase in liability, such a complaint could only give rise to tax proceedings initiated *ex officio*. Tax proceedings concerning an upward adjustment of liability may be initiated only by the tax authority, pursuant to Article 21 § 3 of the Tax Ordinance.[60] Another instance where proceedings must be initiated *ex officio* as a result of a general complaint, pursuant to the first sentence of Article 233 CAP, may be a case in which the complainant challenges the form of taxation applied by the tax authority, which is less favourable to the complainant than the form they had chosen. Importantly, the resolution of such a complaint may take the form of either a decision that addresses the substance and form of the complaint (e.g., a decision confirming an overpayment of tax or a decision refusing to confirm such an overpayment), or a decision that formally concludes the case (e.g., a decision discontinuing the tax proceedings), since in both cases the decisions lawfully terminate the proceedings and may be subject to appeal in the next instance as well as to judicial review by administrative courts. However, in most cases, preference should be given to a decision that substantively and formally addresses the taxpayer's claim (in this case, also the complainant's claim). At present, the provisions of the Tax Ordinance do not require the issuance of a decision confirming an overpayment of tax if the accuracy of the corrected return (declaration) is not in doubt (Article 75 § 4 of the Tax Ordinance). In such cases, consideration of a complaint that has effectively become a formal request for confirmation of tax overpayment will be a material and

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[59] Article 233 first sentence, in conjunction with Article 240 CAP and Article 169 § 1 of the Tax Ordinance.

[60] J. Gorąca-Paczuska, in: Dzwonkowski H. (ed.), *Ordynacja podatkowa…*, op. cit., p. 601.

technical action involving the actual return of the overpayment and the termination of the proceedings thus initiated. From a formal point of view, however, the person requesting a tax overpayment via a general complaint should be informed of the legitimacy of the request. There is no legal obstacle to providing such information in the form of a simple written notice. Nor is there any obstacle to issuing a formal decision declaring the tax overpayment in response to the demand expressed in the complaint. Nothing prevents the authority from choosing to address the taxpayer's request by issuing a decision declaring the overpayment. However, the procedure without a formal decision is faster and more cost-effective, which argues in favour of its application.[61]

With regard the third level of the concerns raised, it is necessary to consider the possibility of examining general complaints, submitted in connection with tax proceedings, by persons who are not parties to those proceedings. This may occur both in cases where the matter has not yet been the subject of proceedings – and may potentially initiate them – and in cases where proceedings are already underway. A complaint submitted by a third party (i.e. someone not a party to the proceedings) may only trigger the initiation of tax proceedings *ex officio*, provided that the relevant regulations do not require a party's request – or that of another authorised entity – for initiation.[62] For example, the right to request a declaration of tax overpayment is granted to taxpayers, payers, collectors, former partners of a civil partnership, companies that formed a tax capital group, and representatives of a VAT group.[63] If such a request is submitted by an unauthorised entity, the tax authority will not be able to initiate proceedings *ex officio*. However, there is no obstacle preventing the authority from initiating proceedings to determine the amount of tax liability and, within that framework, to decide on the existence of an overpayment.[64] Setting aside the issue of overpayment determinations, it will always remain at the discretion of the tax authority whether a general complaint in a tax case submitted by a third party will result in the initiation of formal tax proceedings, as reflected in the phrase 'may cause the initiation'[65] used by the legislator. On the other hand, in a case where tax proceedings are already pending, a complaint from a third party constitutes material that the authority conducting the proceedings should consider *ex officio*.[66] However, the legislator does not specify how such *ex officio* consideration should occur, or whether it must be formalised in any specific way. In this under-regulated legal context, it can be assumed that whenever a third-party complaint could lead to the initiation of tax proceedings – or could serve as material in proceedings already underway – it should, in each case, be transferred to those proceedings. Such a complaint may be treated as evidence in

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61 L. Etel, 'Stwierdzenie nadpłaty po nowemu', in: Dowgier R., Popławski M. (eds), *Ordynacja podatkowa. Zmiany w ogólnym prawie podatkowym*, Białystok, 2016, p. 133.

62 Article 233 second sentence in conjunction with Article 240 CAP.

63 Article 75 §§ 1–2a of the Tax Ordinance.

64 L. Etel, 'Stwierdzenie nadpłaty…', op. cit., p. 143.

65 Article 233 second sentence CAP.

66 Article 234(2) in conjunction with Article 240 CAP.

jurisdictional proceedings[67]. In light of Article 236 § 1 CAP, the authority forwarding the complaint merely notifies the complainant of the forwarding, while it is the tax authority that decides whether to initiate tax proceedings, determines their precise scope, and decides how the complaint will be used within those proceedings. Accordingly, it is the authority initiating the proceedings that formally notifies the complainant either of the initiation of the tax proceedings or of the manner in which the complaint is being utilised therein, and also determines the content of such notification. At the same time, it should be emphasised that the specific nature of the tax authority's actions is linked to the existence of both procedural secrecy and fiscal secrecy (Article 293 § 1 et seq. of the Tax Ordinance). Therefore, since a general complaint submitted by a third party may be considered in the course of proceedings, and yet, due to procedural and fiscal secrecy, the complainant cannot be informed of the details of that consideration, a question arises as to what information may be provided to the complainant. It appears that the legislator's intention in such cases is not to allow the complaint to be received and then the complainant to be left without a response, particularly where the complaint has been received by the authority competent to initiate or conduct the relevant tax proceedings, and given the tax authorities' declared commitment to transparency and openness towards taxpayers. However, in view of the obligation to maintain the confidentiality of tax proceedings and fiscal secrecy, any information provided should be of a general nature. It therefore seems that, whether the complaint leads to the initiation of proceedings or is examined within an already pending procedure, the complainant may be notified in terms that are as general as possible.

In summary, the treatment of a general complaint in tax proceedings depends on its formal nature. In accordance with the precedence of tax proceedings over simplified complaint proceedings, such complaints can be redirected to tax proceedings if they meet the conditions of a letter in tax matters, or if their formal deficiencies can be remedied. Remediable deficiencies include the absence of a signature, lack of a tax identifier, and failure to attach a correction to the tax return (tax declaration). In contrast, where a complaint is submitted by a third party – one that is capable of initiating tax proceedings or raising issues related to proceedings already underway – the tax authority, in providing a synthetic response, must take into account the need to maintain procedural and fiscal secrecy.

CONCLUSION AND FINDINGS

To conclude, it is important to emphasise that the distinctiveness of a general complaint submitted in connection with tax proceedings affects the variety of ways it may be considered within those proceedings. A complaint in a tax case is indeed different from complaints submitted in connection with other procedures, such as administrative enforcement proceedings. A general complaint lodged in connection

[67] K. Wojciechowska, 'Dział VIII. Skargi i wnioski', in: Hauser R., Wierzbowski M. (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2018, p. 1367.

with ongoing tax proceedings, and which meets the formal requirements of a letter in such proceedings, should be handled within those proceedings, in accordance with the principle of the priority of tax proceedings over simplified complaint proceedings, and the prohibition on double-track proceedings. Conversely, a general complaint that does not meet the formal requirements for letters handled in tax proceedings may still be considered by the authority conducting the proceedings, provided that the deficiencies can be remedied in accordance with the tax procedure. This applies, for example, to cases where the complaint lacks a signature, a tax identifier, or the required correction to a return (tax declaration). In this respect, the research objective – taking into account the formulated hypotheses – was fulfilled.

A general complaint submitted in connection with tax proceedings can be addressed in various practical ways. When redirected to be dealt with within tax proceedings, the formal requirements applicable to pleadings in tax matters must be observed to effectively consider the claims made. A complaint submitted by a party to the proceedings, which meets these formal requirements, may be considered in an order issued during the course of proceedings or in a tax decision terminating the proceedings. There are no legal obstacles to considering such a complaint in a separate letter prepared by the authority conducting the proceedings.

However, where a general complaint meets the general formal requirements for this type of communication but does not meet the requirements applicable to letters handled in tax proceedings, the principle of the priority of tax proceedings over simplified complaint proceedings requires that it be determined whether such deficiencies can be remedied within the framework of tax proceedings. Remediable deficiencies, pursuant to Article 169 § 1 of the Tax Ordinance, include the absence of the complainant's signature, failure to provide a tax identifier, and failure to attach a required correction to the return (tax declaration). Irremediable deficiencies, on the other hand, include the absence of an address in the letter, which results in the necessity of leaving it unprocessed pursuant to Article 169 § 1a of the Tax Ordinance. Additionally, information regarding the consideration of a complaint submitted by a third party in connection with tax proceedings must respect the confidentiality of the proceedings and fiscal secrecy. It should also be emphasised that not only complaints that directly initiate tax proceedings, but also those that require the tax authority to initiate proceedings *ex officio*, may lead to the initiation of tax proceedings. This interpretation arises from the use of the phrase 'causes the initiation' in Article 233 CAP.

In conclusion, general complaints brought in connection with tax proceedings are varied in nature. Such complaints may be considered within tax proceedings, in line with the principle of the priority of tax proceedings over simplified complaint proceedings and the prohibition on double-track proceedings, even if they do not initially meet the formal requirements for letters in tax proceedings – provided those deficiencies can be remedied in accordance with the tax procedure. Complaints filed by third parties who are not parties to the tax proceedings may be considered only with due regard to procedural and fiscal secrecy.

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CONCEPT OF 'REGULAR REMUNERATION' AND 'EMPLOYEE REMUNERATION' RESULTING FROM THEIR PERSONAL WAGE CLASSIFICATION BASED ON AN HOURLY OR MONTHLY RATE WITHIN THE MEANING OF ARTICLE 151¹ §§ 1 AND 3 LC IN THE LIGHT OF THE SUPREME COURT CASE LAW AND EMPLOYMENT LAW DOCTRINE

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Abstract
The article discusses the principles of calculating remuneration for overtime work under the Polish Labour Code and in light of recent Supreme Court case law. The author analyses the dual structure of compensation for overtime work: regular remuneration and the overtime supplement, highlighting their distinct legal and economic functions. Particular attention is paid to the question of which remuneration components may be included as part of 'regular remuneration' within the meaning of Article 151¹ § 1 of the Labour Code. The article also includes *de lege ferenda* proposals, advocating for a statutory definition of 'regular remuneration' to enhance transparency and ensure the adequacy of the remuneration system.

Key words: overtime work, overtime compensation, remuneration for overtime work, regular remuneration, overtime supplement

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INTRODUCTION

Compensation for overtime work constitutes an important element in the implementation of the principle of consideration for work. In accordance with current law, an employer may compensate employees for work performed beyond standard working hours by paying additional remuneration as specified in the Labour Code or, alternatively, by granting time off. If overtime work is performed on a day off within an average five-day working week, or on a Sunday or public holiday, the employer is obliged first to provide the employee with a day off at another time.

Attention is drawn in the doctrine to the current legislative trend towards the liberalisation of regulations regarding additional remuneration for overtime work. As Ł. Pisarczyk rightly points out, there is a gradual shift towards promoting an alternative form of compensation for overtime work, namely granting employees time off without monetary compensation.[1]

The rules for determining monetary compensation for overtime work are laid down in Article 151[1] of the Labour Code (LC). Basically, an employee is entitled to overtime pay composed of regular remuneration plus a relevant supplement (of 50% or 100%). Exceptionally, for employees who regularly work outside their company premises, the legislator provides for the introduction of compensation in the form of a lump sum.

Remuneration for overtime work does not only serve as pay for extra work but also plays an important compensatory and preventive role. In addition to reciprocating work performed beyond the obligatory level, it compensates for the employee's increased physical and mental effort and the burden of disrupting the established work–rest balance. At the same time, it serves as a systematic mechanism preventing the overuse of overtime work by employers and constitutes an economic incentive to adhere to permissible working time standards.

In this context, remuneration for overtime work can also play the role of an indirect instrument for protecting employees, discouraging employers from permanently overloading employees and encouraging decisions to increase employment in situations requiring greater productivity or production. Therefore, it is an important element in balancing the employer's economic interests with the protection of employees' health, life and well-being.

The main thesis of this paper is that the regular remuneration constituting the basis for calculating a supplement for overtime work should include only those elements of remuneration that are causally related to the actual performance of work in terms of both quantity (time) and quality (function).

The article uses a dogmatic-legal method based on the analysis of the provisions of employment law, in particular Articles 151[1] and 151[1] § 3 LC, as well as the Supreme Court case law and the output of the employment law doctrine.

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[1] See Ł. Pisarczyk, in: Florek L. (ed.), *Prawo Pracy. Komentarz*, Warszawa, 2017, p. 893.

INTERPRETATION OF THE CONCEPT OF 'REGULAR REMUNERATION' IN THE LIGHT OF THE SUPREME COURT CASE LAW

Remuneration for overtime work is complex in nature and comprises two basic elements: the regular remuneration reflecting the pay for the mere fact of performing work beyond the working time standards, and a supplement serving as a compensatory and preventive function.

The rules of monetary compensation for overtime work are thoroughly regulated in Article 151[1] §§ 1 and 2 LC, in accordance with which, apart from regular remuneration, overtime work is subject to a supplement of 100% or 50% (depending on the day or time the work was performed), and its interpretation has been the subject of numerous judgments of the Supreme Court. The interpretation of the concept of 'regular remuneration' is especially important, as its scope is crucial for the proper calculation of pay for overtime work in practice.

The concept of 'regular remuneration' referred to in Article 151[1] § 1 LC has raised interpretation difficulties for years, primarily due to the lack of a legal definition in the provisions of law and the linguistic imprecision of the word 'regular' itself. As a result, the interpretation of the concept in case law and the doctrine is not uniform. Therefore, it is necessary to apply the principles of legal interpretation, including teleological and systemic interpretation, taking into account the protective function of the norms (*pro tutela legis laboris*).

In a situation where an employer compensates an employee for overtime work in monetary form, the employee is entitled to the so-called 'regular remuneration', i.e. the pay received permanently and systematically. In particular, it includes basic pay based on personal wage classification, as well as other fixed remuneration components to which employees are entitled under the wage regulations applicable in the workplace.[2]

The concept of 'regular remuneration' also includes other fixed remuneration components, such as bonuses, provided that they are fixed and do not depend on achieving above-standard work effects that do not result from the fulfilment of duties overtime.[3]

In the light of established case law, the concept of 'fixed' additional remuneration components should be understood as their regular and predictable occurrence in the structure of employees' remuneration. This is not limited to components paid monthly, but may also entail benefits paid in other time cycles, for example annually, provided they are recurring and constitute a characteristic element of the employment relationship, and employees can reasonably assume they will receive them under standard terms of employment. Therefore, the category of 'regular remuneration' may also include an annual bonus or profit bonus paid once a year, provided they are awarded regularly and regardless of whether employees have met additional extraordinary conditions.

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[2] Cf. the Supreme Court judgments of 3 June 1986, I PRN 40/86, *OSNCP*, 1987, No. 9, item 140, of 22 June 2011, II PK 3/11, *OSNP*, 2012, No. 15–16, item 191 with a gloss by P. Prusinowski, *OSP*, 2013 No. 3, item 24 and of 19 March 2019, III PK 32/18, LEX No. 2644631.

[3] Cf. the Supreme Court ruling of 15 February 2012, I PK 156/11, LEX No. 1215264.

According to case law, such fixed remuneration components that may be taken into account when calculating overtime pay include, *inter alia*, a seniority bonus, provided it is derived from statutory or implementing provisions or company sources of law (e.g. collective agreements or remuneration regulations); a function-related responsibility benefit; a benefit for working in harmful conditions; or a fixed non-discretionary bonus.[4] Such components also include a benefit for working at night.

It is assumed in case law that the 'permanence' of a given component is determined not so much by the cyclicality of monthly payments, but by its repeatability, predictability and lack of arbitrariness in its granting. However, when determining additional components of 'regular remuneration', it is irrelevant whether a given component is paid for work actually performed or not. When determining additional components of 'regular remuneration', it is essential that they are characteristic of the employee's regular and systematic remuneration, paid under standard working conditions. This means that a component may be considered part of 'regular remuneration' even if it depends on the amount of work performed, provided that it is paid regularly and the employee can rely on it as a fixed element of their remuneration.

This means that 'regular remuneration' may include not only fixed supplements independent of hours worked (e.g. seniority bonus), but also other components that are regularly awarded and constitute a stable element of the employee's remuneration. It is important that they are predictable and paid at regular intervals, which allows for their classification as 'regular remuneration'.

However, remuneration components that are paid sporadically, irregularly, or depend on meeting specific requirements by an employee (e.g. bonuses for achieving specific sales targets that are not paid regularly) are not included in 'regular remuneration'. The basis for including a given component in 'regular remuneration' is its stability, regularity and predictability in the context of the employee's standard working conditions.

BONUSES AND AWARDS AS ELEMENTS OF 'REGULAR REMUNERATION': QUALIFICATION CRITERIA

For the purpose of including a bonus in regular remuneration for overtime, it is necessary to understand the permanent nature of the bonus as one paid regularly, for example monthly, quarterly, etc., which means that it is not a one-off or occasional benefit. Nor can the bonus depend on meeting particular specific goals or achievements that go beyond the employee's standard duties, especially those performed overtime.

In practice, this means that if a bonus is awarded regularly and is not directly linked to the employee's additional specific achievements, it may be treated as an element of regular remuneration. However, bonuses depending on the employee's

[4] Cf., e.g. the Supreme Court judgment of 26 July 2017, I PK 218/16, LEX No. 2382445.

achievement of specific results, especially those that go beyond standard duties, are not included in regular remuneration within the meaning of the concept.

A bonus is a right – its payment can be claimed before a court. Proper establishment of the bonus system should be done in the remuneration and bonus regulations or in a collective agreement (or possibly in an employment contract). Those documents should include the requirements for obtaining bonuses (specific, verifiable and measurable), bonus reduction factors, circumstances resulting in the termination of bonuses, and bonus amounts.

The difference between an award and a bonus consists in the fact that an award does not depend on meeting any specific conditions and is granted at an employer's absolute discretion. The decisive factor is whether the relevant legal acts (employment contract) provide for specific and objective (verifiable) conditions for acquiring the right to the benefit or conditions leading to its loss or reduction (the so-called reducers). If the conditions (criteria) for granting a benefit are determined in a manner detailed enough to be reviewed, the benefit constitutes a bonus, and meeting them constitutes the employee's right to the bonus.[5]

A long-service award is a benefit that is, by nature, remuneration and a right. Therefore, in fact, it is a bonus the employee is entitled to, not an award.[6] If it has already been granted (and communicated to the employee), it can be claimed before a court. However, this type of award is not part of regular overtime pay, because it is not permanent or regular in nature, but is a one-off or occasional benefit.

In turn, the so-called discretionary bonus is not included in regular (or additional) overtime pay if its payment actually depends on the employer's discretion (and is not, in fact, a statutory bonus).

A discretionary bonus is an optional benefit. An employer independently decides whom to award this bonus to, what for, and in what amount. The decision does not depend on any formal conditions and is not subject to review by employment tribunals. An employee has no right to claim this award despite the fact that the Labour Code specifies general criteria for granting awards. Employees who, through exemplary performance of their duties, by showing initiative at work and improving productivity and quality of work, significantly contribute to the achievement of the company's objectives may be given awards and distinctions (Article 105 LC). However, if a company's internal regulations stipulate that an employee is entitled to a benefit upon meeting specific criteria, then such a benefit is a bonus even if it is called an award.

The Labour Code provides for only two methods of payment for overtime: additional remuneration in accordance with general rules or, in strictly determined cases, a lump sum. Overtime cannot be paid under any other title. An agreement with an employee on overtime compensation in the form of a discretionary bonus does not exempt an employer from the obligation to pay for work actually performed overtime.[7]

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5 See the Supreme Court judgment of 21 June 2007, I PK 3/07.

6 See the Supreme Court judgment of 14 May 2012, I PK 174/11.

7 See the Supreme Court judgment of 18 July 2006, I PK 40/06, *OSNP*, 2007/15-16/212.

INTERPRETATION OF THE CONCEPT OF 'REGULAR REMUNERATION' IN THE LIGHT OF THE DOCTRINE OF EMPLOYMENT LAW

In the context of the concept of 'regular remuneration' under analysis, it should be noted that employment law doctrine has consistently emphasised the limitations arising from an overly formalistic interpretation of the term 'regular remuneration', reduced solely to the criterion of permanence. This perspective, although pragmatic from the point of view of calculation techniques, does not consider the actual function that overtime remuneration should fulfil in the employment law system or the axiological foundations of this benefit. The authors representing the functional--systemic interpretation call for a broader and more adequate understanding of this concept, taking into account not only the regularity of payments, but above all their relationship with the actual workload and the specific nature of duties performed.

The Supreme Court case law on the concept of regular remuneration may lead to simplifications that fail to take into account the actual role a given remuneration component plays in the employment relationship. A critical stance in this regard was presented, *inter alia*, by A. Kijowski, who drew attention to the need for a broader perspective on the essence of overtime pay, arguing that

> 'The concept of regular overtime pay includes the basic remuneration resulting from the individual's wage classification, as well as payments constituting an actual increase in that rate, i.e. the function-related responsibility benefit (foreman's supplement), a supplement for working at night, a supplement for working in unhealthy conditions (in accordance with Article 133[1] LC, overtime in such conditions, except for rescue operations or repairing breakdowns, is absolutely impermissible), as well as the so-called bonus for disciplined and active attendance at work. All payments that constitute a hidden increase in basic remuneration should be treated in the same way. However, the afore-mentioned concept of 'regular remuneration' does not include payments under the employment relationship that are determined at a fixed (annual, monthly or daily) amount, and thus in isolation from hours worked (e.g. seniority benefit, in-kind benefits or their monetary equivalents), regardless of their name and legal nature.'[8]

In contract, P. Prusinowski argues that this definition should be based not only on the criterion of permanence, but also on the actual nature of the component as part of the benefit due for work performed.[9] For this reason, the inclusion of a seniority benefit, which, as a loyalty-related one, is not dependent on the number of hours worked, is questioned.

It is argued in the literature that 'regular remuneration' is a periodic and right--related one that constitutes a fixed benchmark for employees, regardless of the variability of their monthly workload. P. Prusinowski criticises the Supreme Court's stance, which treats remuneration as a monolith composed of recurring elements.

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[8] See A. Kijowski, 'Pojęcie normalnego wynagrodzenia za pracę w godzinach nadliczbowych', *Praca i Zabezpieczenie Społeczne*, 1996, No. 10, p. 32.

[9] See P. Prusinowski, 'Normalne wynagrodzenie za pracę w godzinach nadliczbowych', *Praca i Zabezpieczenie Społeczne*, 2013, No. 5, pp. 28–33.

He argues that it is more appropriate to consider the function of Article 151[1] § 1 LC in the system of working time settlement rather than the evaluation of individual remuneration components. He advocates a functional and systemic interpretation of the concept of 'regular remuneration', departing from its simple identification with basic pay or 'fixed' benefits. In his opinion, the concept of 'regularity' does not refer to the recurrence of payment or its fixed nature, but to the proportion between the agreed remuneration and the basic working time. This means that 'regular remuneration' should be understood as *the equivalent of a number of working hours in standard conditions*, regardless of the form of remuneration (monthly pay, commission or piece work rates).[10]

In the employment law doctrine, attention is also drawn to the lack of connection between some remuneration components, such as seniority or family separation benefits, and the actual incidental work performed. They are paid at a fixed rate, regardless of the number of hours worked in a given settlement period. Therefore, it is argued in the literature that these components should be excluded from the basis for calculating the so-called 'regular remuneration' due for overtime, as they are unrelated to the actual workload in a given period.[11]

At the same time, however, the judicature did not revise the previously adopted line of interpretation, maintaining the former one, assuming that the 'permanence' of a given remuneration component is determined not so much by the cyclicality of monthly payment, but by its repeatability, predictability, and lack of arbitrariness in awarding it.

Summing up, the difference in positions presented by the judiciary and employment law scholars is essentially methodological in nature. The doctrine focuses on the functional features of remuneration for work as an equivalent benefit constituting a direct payment for work done at a specific time and place. This approach allows for the formulation of a conclusion that compensation for overtime work, as an extraordinary form of work, cannot be calculated based on remuneration components that are neutral or ambivalent in relation to its time dimension. In other words, these components, due to their lack of connection with the amount of overtime work, should not form the basis for determining the so-called regular remuneration referred to in Article 151[1] § 1 LC.

Doctrinal interpretation finds solid support in the principle of *interpretatio functionalis*, in accordance with which legal concepts should be understood in a way that ensures their consistency with the function they are intended to perform in the legal system. Overtime pay, as a form of compensation for increased workload, should be calculated based on those elements of remuneration that are closely related to the time and conditions of work performed. Otherwise, the compensatory and protective function of Article 151[1] § 1 LC is violated and its interpretation leads to consequences that are inconsistent with the axiology of employment law.

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[10] Ibidem.

[11] See A. Kosut, 'Praca w godzinach nadliczbowych i jej wynagradzanie', *Praca i Zabezpieczenie Społeczne*, 1998, No. 5, pp. 31–32.

It is also justified to invoke the principle of *lex non cogit ad inutilia*, which assumes that legal provisions should not be interpreted in a way that leads to unnecessary or superficial effects. The inclusion of components unrelated to working time, such as a seniority bonus, in regular remuneration leads to remuneration fiction: an employee receives overtime pay with benefits that are not dependent on whether such work has actually been performed. Such an approach poses a threat to the coherence of the remuneration system and violates the fundamental principle of equivalence of benefits in the employment relationship.

In accordance with Article 78 § 1 LC, an employee is entitled to remuneration corresponding to the type of work performed and the qualifications required to do it, as well as taking into account the quantity and quality of work done. This provision confirms the principle of equivalence of work and remuneration, leading to the conclusion that any benefits that are purely loyalty-related in nature, unrelated to work input (e.g. seniority bonuses, long-service anniversary benefits or in-kind ones), cannot constitute the basis for determining the regular remuneration referred to in Article 151^1 § 1 LC.

To sum up, the doctrine's stance is more consistent with the systemic and axiological assumptions of employment law. It addresses the actual purpose of the provision, i.e. compensation for an employee's extra effort, and respects the principle of fair remuneration for work.

CONCEPT OF 'EMPLOYEES' REMUNERATION RESULTING FROM THEIR PERSONAL WAGE CLASSIFICATION DETERMINED BY AN HOURLY OR MONTHLY RATE' REFERRED TO IN ARTICLE 151^1 § 3 LC

Apart from their regular remuneration, employees are entitled to overtime pay. The amount of this supplement varies depending on the circumstances of the work performed:

– 100% of the regular remuneration for each overtime hour of work at night, on Sunday, and on a public holiday that is not a working day for employees in accordance with the applicable work schedule, as well as on a day off granted in exchange for work on a Sunday or public holiday;
– 50% of the regular remuneration for overtime work done on other days (Article 151^1 § 1 LC).

The 100% extra pay is also due for every hour of overtime work that results in exceeding the average weekly working time standard in the adopted settlement period, unless the excess was due to overtime work for which an employee is already entitled to the supplement of 50% or 100% (Article 151^1 § 2 LC).

The basis for calculating overtime pay is usually significantly lower than the basis for calculating regular remuneration. The basis for calculating a supplement for overtime work is employees' remuneration resulting from their personal wage classification determined by an hourly or monthly rate and, in the case where such a remuneration component is not determined in the remuneration terms, 60% of

the remuneration calculated in accordance with the rules for determining annual leave pay.[12]

A supplement for overtime is usually calculated based on the employee's personal wage classification determined by an hourly or monthly rate, and if such a remuneration component is not separated in the remuneration conditions, 60% of the remuneration (Article 151[1] § 3 LC).

The concept of 'employees' remuneration resulting from their personal wage classification determined by an hourly or monthly rate' may raise doubts in its practical application. These result, *inter alia*, from the fact that the Labour Code uses it as an established concept, the content of which cannot be fully reconstructed based on the provisions of the Labour Code itself, without reference to the remuneration determination techniques laid down in pay regulations specified in Chapter 1, Section 3 of the Labour Code (Articles 77[1]–77[3] LC), such as collective agreements, remuneration rules and regulations, or statute implementation regulations.

The concept of an employee's wage classification is associated with the so-called qualification scales, which may also occur under other names (e.g. 'tables of posts', 'qualifications and wage classification'), in which a position or type of work, and the professional qualifications required to perform a specific type of work or hold a specific post, are specified (Article 102 LC), and are assigned a wage category, usually within a determined wage range. Next, in accordance with Article 78 § 2 LC, the so-called tables of basic pay rates specify – also most often within a determined range – monthly or hourly rates of basic pay to which employees assigned to specific categories in the qualification scale are entitled. On the other hand, personal classification of an employee involves establishing the remuneration corresponding to the type of work in an employment contract (or another document constituting the basis of the employment relationship), i.e. indicating the so-called personal classification category, which, in the case of non-ranged remuneration rates in the table of pay rates, results in determining a specific hourly or monthly wage or agreeing on a remuneration rate within a given range.[13]

Until 2007, the personal classification included basic pay and a function-related responsibility supplement. This was confirmed by the Supreme Court rulings (III PZP 42/86 and I PRN 28/85). The Court emphasised that personal wage classification also includes other components, provided they are closely related to the terms and conditions of employment.

In its resolution of 30 December 1986, the Supreme Court stated that 'the employee's remuneration resulting from their personal wage classification referred to in Article 81 §§ 1–3, Article 134 § 1 and Article 144 § 2 LC, apart from the basic pay, also includes a function-related responsibility benefit'.

According to the Supreme Court, the 'personal wage classification' should be understood as remuneration that is fixed and directly related to the employee's function or position held, and not remuneration that is dependent on additional

[12] See Article 151(1) § 3 LC.

[13] See the justification for the Supreme Court resolution of 3 April 2007, II PZP 4/07.

conditions met by the employee, e.g. period of employment, working in harmful conditions, etc.[14]

In its judgment of 16 November 2000,[15] the Supreme Court stated that the phrase 'employee's remuneration resulting from their personal wage classification determined by an hourly or monthly rate' used in the amended provisions of the Labour Code means an hourly or monthly rate of remuneration for work of a specific type or a specific position held. The Supreme Court also indicated that the guaranteed remuneration provided for in Article 81 § 1 LC, to which an employee is entitled in the amount resulting from the employee's personal wage classification determined by an hourly or monthly rate, cannot include any components other than those resulting from the employee's wage classification and that are determined by an hourly or monthly rate. In this regard, the Supreme Court found that both these supplements are not a consequence of the employee's 'personal wage classification', but of a specific job classification. A service supplement depends on the nature, complexity, and results of work. However, the seniority benefit depends on a sufficiently long period of employment, which cannot be treated as related to the employee's personal wage classification.

In its resolution of 3 April 2007,[16] the Supreme Court reinterpreted the concept of personal wage classification rate and ruled that it includes only basic pay. In its stance, the Court held that the concept of an employee's remuneration resulting from their personal classification determined by an hourly or monthly rate, within the meaning of Article 134 § 12 LC, refers to the basic pay agreed on by the parties in the employment contract or another document that is a basis of the employment relationship. Basic pay is the only necessary equivalent of work done by an employee, and is included in every employee's remuneration. It is the main component of remuneration, but can also be its exclusive component. Basic pay is most closely linked to the type of work performed (i.e. work of a specific type or a position held), constituting direct payment for this work and the qualifications required to perform it.

In the judgment of 23 May 2012,[17] the Supreme Court confirmed that a function--related responsibility benefit based on a percentage of the basic pay does not constitute an employee's remuneration resulting from the personal wage classification determined by an hourly or monthly rate within the meaning of Article 151[1] § 3 LC.

Finally, it should be noted that although case law allows for the replacement of a specific benefit (overtime supplement) with another one, this benefit must correspond to the expected workload during this time. A benefit that significantly deviates from the benefit due under general rules is improper, which, consequently, does not deprive the employee of the right to claim compensation.[18]

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[14] See the Supreme Court judgment of 25 April 1985, I PRN 28/85, *OSNCP*, 1986, No. 1–2, item 19.

[15] I PKN 455/00, *OSNAPiUS*, 2002, No. 11, item 268.

[16] II PZP 4/07, *OSNP*, 2007/21-22/307.

[17] I PK 175/11, *OSNP*, 2013, No. 11–12, item 126.

[18] Cf. the Supreme Court judgment of 24 April 1979, I PRN 42/79, *OSNPG*, 1971, No. 11, item 58, p. 21; the Supreme Court judgment of 12 January 1977, I PRN 107/76, *OSNCP*, 1977,

The method of calculating remuneration for overtime work results from the provisions of the Labour Code and the Regulation of the Minister of Labour and Social Policy of 29 May 1996 on the methods of determining remuneration for the period of inactivity and remuneration constituting the basis for calculating compensation, severance pay, compensation supplements to remuneration, and other benefits provided for in the Labour Code.[19]

The provisions of collective agreements, remuneration regulations, or employment contracts may define overtime pay rules that are more favourable to employees than the provisions of the Labour Code. In such cases, the more favourable standards are applicable when calculating employees' remuneration.

CONCLUSIONS

The analysis of the legal nature of benefits to which employees are entitled for work performed beyond the applicable standard working time indicates their dual nature. On the one hand, employees are entitled to the so-called 'regular remuneration', which serves as consideration for work performed. On the other hand, the aim of overtime pay is not only to compensate for the employees' effort but also to prevent abuse of overtime work.

These benefits, although they result from the same factual situation, i.e. overtime work, play different functions. Regular remuneration constitutes payment for work actually performed, and is directly related to the principle of paid employment. However, supplements for overtime work also play a protective function aimed at reducing employees' overload and ensuring an appropriate level of occupational health and safety.[20]

The judicature focuses on the predictability and regularity of payments and adopts a broad definition of 'regular remuneration', which also includes components that are not related to actual workload, such as seniority benefits, family separation supplements, or in-kind benefit equivalents. This interpretation can lead to a disconnection of the basis for overtime pay from its actual equivalent function, which results in the weakening of employee protection and a flattening of the relationship between working time and the benefits due.

De lege lata, in the light of the stance of employment law scholars, the concept of 'regular remuneration' should cover only those components of remuneration that are causally related to the actual workload. Therefore, benefits that do not depend on the amount of work performed, such as seniority benefits, separation supplements, or in-kind benefit equivalents, should be excluded from this category. These are loyalty-related bonuses and not consideration for work, which means they cannot constitute benchmarks for overtime pay calculation. Employers cannot grant (let alone compensate) remuneration for additional working time based on

No. 9, item 171; judgment of the Appellate Court in Warsaw of 29 December 1995, III APr 71/95, *OSA*, 1996, No. 11–12, item 34.

[19] Consolidated text, Journal of Laws of 2017, item 927.

[20] See P. Prusinowski, 'Normalne wynagrodzenie…', op. cit., p. 29.

components that do not depend on actual working time. In other words, benefits unrelated to employees' working time and effort cannot constitute the basis for calculating pay under Article 151¹ § 1 LC, because this would violate both the principle of equivalence of benefits in an employment relationship and the transparency of the remuneration system.

The system of overtime pay should maintain a close relationship with employees' actual workload, both in quantitative and qualitative terms. The current lack of a legal definition of 'regular remuneration' poses a risk of arbitrary interpretation.

De lege ferenda, in light of the above-presented analysis, it seems justified to introduce a statutory definition of 'regular remuneration' in Article 151¹ § 1 LC, in order to increase the transparency of the overtime pay system and to unambiguously exclude components that are not related to the actual workload from the basis for this pay calculation, as they are loyalty-related, social, and compensatory in nature.

In turn, the analysis of the regulation laid down in Article 151¹ § 3 LC indicates that the basis for calculating overtime pay is the remuneration resulting from the employee's personal wage classification determined by an hourly or monthly rate. The judicature has interpreted this formulation – lacking a legal definition – many times. Initially, the Supreme Court allowed for a broad understanding of this category, including, apart from basic pay, also other components directly related to the function performed or position held (such as a function-related responsibility supplement). However, in the later case law, the dominant view became one that limits this basis exclusively to the basic pay specified in the employment contract or in a document establishing the employment relationship.

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IS THERE A LEGAL BASIS FOR CULTURAL NATIONALISM IN THE RETURN OF CULTURAL PROPERTY? MULTILATERAL INSTRUMENTS VERSUS BILATERAL AGREEMENTS

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Abstract

This article traces the emerging norms of legal obligation under international law to return the looted property taken during the colonial period. Return requests are among the primary demands of decolonised states, who bring the issue to international forums. This obligation has been incrementally recognised and further developed in several multilateral instruments adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Institute for the Unification of Private Law (UNIDROIT), the United Nations (UN), and states, along with non-state actors adopting provisions to criminalise the theft of cultural property and to ensure its return as part of available remedies. In parallel with the development of this obligation under international law, the international community has increasingly engaged in bilateral agreements for the return of cultural property. India and the USA, for instance, concluded a Cultural Property Agreement in July 2024. Among several advances and efforts to address existing gaps, the Human Rights Council adopted resolutions in 2018 and 2025 which, while recognising the human rights dimension of cultural rights, further strengthened the multilateral approach to enhanced cooperation for the restoration of stolen, looted, or trafficked cultural property to its country of origin.

Key words: cultural property, UNESCO, restitution, bilateral agreements, colonial occupation, UNIDROIT

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INTRODUCTION

It is hardly surprising that was the decolonised countries that spearheaded the agenda concerning the return of cultural property as an integral part of international law on the protection of cultural property. The strategy was to redesign the legal order to ensure the return of cultural property taken during colonial occupation. The aspect of the return of cultural property taken during that period has recently received significant attention in both Indian and international discourse. It may be useful to begin with four important developments in recent times to set the contemporary scene in its proper perspective. First, Indian media characterised a few incidents involving the return of cultural property as the 'India Moment'; for instance, the return of a 12th-century bronze statue of Buddha by the UK to India in 2018, and the return of an 18th-century idol of Maa Annapurna by Canada to India in November 2021. Geoffrey Robertson, in November 2019, framed the debate under the title 'Who Owns History?', and advocated for an international legal obligation on museums to return looted antiquities.[1] The issue gained increased global attention after French President Emmanuel Macron pledged in 2017 that an obligation of permanent or temporary return of West African cultural artefacts to the region would be a priority during his term in office.[2] Pursuant to this pledge, he appointed a team consisting of Senegalese economist, writer and philosopher Felwine Sarr, and art historian Bénédicte Savoy to produce a report. They held a series of consultations with museum professionals, politicians, traditional authorities in Europe and Africa, artists, and art market experts. In November 2018, the team released their report, which explicitly recognised the inadequacy of existing legal rules concerning stolen colonial cultural property. Their report (Sarr-Savoy report) outlined careful legal and museological procedures by which African nations can identify materials and determine how they might be returned.[3]

Second, the latest session of the 46th World Heritage Committee, held in New Delhi on 24 July 2024, addressed curbing illegal trafficking and the return of unauthorised stolen cultural property. However, ambiguities in the procedures for the return of such property have paved the way for further commercial exploitation. India has called on the international community to pay urgent and immediate attention to revisiting the global issue of repatriation and restitution of cultural property. An exhibition Re(ad)address: Return of Treasures has also been organised to raise awareness about the preservation of cultural property, which embodies national pride and values, and to emphasise the need, relevance, and importance of such property repatriation and restitution. This initiative is the latest in a series

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1 G. Robertson, *Who Owns History?: Elgin's Loot and the Case for Returning Plundered Treasure*, Penguin, 2020.

2 B. Katz, 'French Report Recommends the Full Restitution of Looted African Artworks', *Smithsonian Magazine*, 21 November 2018; https://www.smithsonianmag.com/smart-news/french-report-recommends-full-restitution-looted-african-artworks-180970872/ [accessed on 12 January 2025]; H.R. Godwin, 'Legal Complications of Repatriation at the British Museum', *Washington International Law Journal*, 2020, Vol. 30, No. 1, pp. 144–170.

3 B. Katz, 'French Report…', op. cit.

of discussions over the past few years, including at the G20 meeting in New Delhi, where states were urged to address the nearly 55-year-old gap in international law concerning return requests.

Third, developments in the international legal obligation to return cultural property have progressed further and, in turn, encouraged experimentation with bilateral arrangements that supplement the process of return requests. In the initial years, progress was made towards the conclusion of multilateral treaties governing the protection of cultural property and finding mechanisms for the restitution of such property. However, in recent decades, with the advent of bilateral treaties, multilateral treaties in this context have become less central. In 1983, the United States enacted the Convention on Cultural Property Implementation Act[4] to bring the 1970 UNESCO Convention[5] into effect. The Act empowers the President of the United States to enter into bilateral cooperation treaties to prevent the illicit import of cultural property from nations that request such cooperation from the United States. Importantly, in this context, the US has recently taken an unprecedented step in executing bilateral agreements with several countries, including Algeria, Belize, Bolivia, Bulgaria, Cambodia, Chile, China, Colombia, Costa Rica, Cyprus, Ecuador, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Jordan, Mali, Morocco, Peru, and Turkey.[6] On 26 July 2024, the Republic of India and the Government of the United States of America entered into an unprecedented Cultural Property Agreement (CPA) aiming to prohibit the illicit trafficking of antiquities from India to the US and to repatriate antiquarian objects to their place of origin.[7] As per the terms of the agreement, the United States of America will return to India any object or material identified in the Designated List to be promulgated by the US Government.

Fourth, during India's G20 Presidency, the Indian government identified the 'Protection and Promotion of Cultural Property' as a core concern of the culture sector and also as one of the priorities of the Global South and India. On this occasion, the Indian government reaffirmed its commitment to the cause of repatriating Indian artefacts from various parts of the world. It is worth mentioning that earlier, India's Prime Minister, Shri Narendra Modi, during his visit to the US on 22–23 June 2023, expressed his deep gratitude for the repatriation of 262 Indian antiquities from the United States of America. Importantly, the Indian government rearticulated its official position, claiming that repatriation, as an obligation, has become a part of cultural diplomacy and sustainable development and should not

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4 Available at: https://eca.state.gov/files/bureau/97-446.pdf [accessed on 5 June 2025].

5 Available at: https://www.unesco.org/en/node/66148 [accessed on 12 January 2025].

6 *U.S. and India Sign Cultural Property Agreement*; https://in.usembassy.gov/u-s-and-india-sign-cultural-property-agreement/ [accessed on 12 January 2025].

7 Speaking on the occasion, the Union Minister of Culture and Tourism, Shri Gajendra Singh Shekhawat stated that the CPA is 'another step towards securing India's rich and diverse cultural heritage and invaluable artefacts of our grand history. It is the beginning of a new chapter to prevent the illegal trafficking of cultural property and retrieval of antiquarian objects to their place of origin.' Cf. S. Sinha, 'India and United States of America sign the first ever "Cultural Property Agreement"', *buddhisttimes*, 26 July 2024; https://buddhisttimes.wordpress.com/2024/07/26/india-and-united-states-of-america-sign-the-first-ever-cultural-property-agreement/ [accessed on 6 June 2025].

remain merely a moral imperative.[8] The Prime Minister's 'vision of "Vikas Bhi, Virasat Bhi" and the Viksit Bharat Vision 2047 endorse the endless possibilities of the Cultural Creative Economy to foster vibrant and inclusive ecosystems, unlock new pathways of growth and sustainability and transform our economies and societies while preserving our cultural heritage.'[9]

This article examines the hypothesis of whether an international obligation exists to return cultural property stolen during colonial occupation. It will address the following research questions: do the multilateral and bilateral agreements provide adequate and effective governance for the return of colonial property? Is there a legal basis for cultural nationalism? Does the human rights dimension of cultural rights advance the idea of cultural nationalism?

INTERNATIONAL LAW AND RETURN REQUESTS

Although the norm pertaining to the 'return of cultural property' has existed in international legislation and relations for a long time, its failure to encompass restitution requests arising from colonial occupation has created a gap in international law that has yet to be filled. While the international cultural protection framework addresses the return and criminalisation of illegal trafficking, it neglects the legally distinct but related explicit obligations upon countries that took such valuable cultural objects during colonial or foreign occupation. Therefore, repatriation requests for cultural goods illegally taken from the territories of former colonies remain an international obligation of states. In other words, the duty to return cultural property is still owed to formerly occupied colonies. Following advocacy from states, civil society, and legal commentators, 150 states unanimously adopted the Mondiacult Declaration in 2022 under the auspices of UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin

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[8] In 2022, the Government of India and the Government of the United States of America have agreed to deliberate upon the feasibility of strengthening bilateral ties in accordance to Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. In pursuance of these deliberations, the Ministry of External Affairs (MEA), India, dispatched a diplomatic note to the US counterpart. On 16 March 2023, it received a positive response from the US counterpart in its diplomatic note which suggested establishing a procedures for entering into an agreement. These steps included the determinations regarding the safeguarding of cultural property and international cooperation in the field of the preservation and protection of archaeological and ethnological materials. A Statement of Fact was prepared which included a historical, cultural, and legal context. Along with the possibilities for cooperation. Several meetings and discussions were held with the approbation of both parties. In this deliberation, an NGO 'Antiquity Coalition' has also made key contributions. In its Article I, the CPA, in fact, restricts 'the importation into the United States of certain archaeological material ranging in date from 1.7 million years ago through 1770 CE and certain ethnological material, which may include categories of civic, religious, and royal architectural material, religious material and ceremonial items, and manuscripts ranging in date from 2nd century BCE to 1947 CE'. United States of America may promulgate a list of such items restricting for import in its own territory. Cf. https://www.state.gov/india-24-726, [accessed 21 May 2025].

[9] S. Sinha, 'India…', op. cit.

or its Restitution in Case of Illicit Appropriation (ICPRCP) established in 1978 by Resolution 20 C4/7.6/5 of the 20th session of the General Conference of UNESCO as a permanent intergovernmental body to serve as an administering authority.[10]

The earliest international instruments, the 1899 and 1907 Hague Conventions, set forth the idea that a state maintains sovereignty over its national heritage and wealth, and that the occupying power must refrain from acting as the owner of property, being limited instead to a mere right of usufruct.[11] Historically, the restitution of cultural property formed part of peace settlements among warring states,[12] though some peace treaties permitted the retention of the cultural property as a form of reward.[13]

RATIONALES FOR EXISTING LAWS

Traditionally, the legitimacy of protecting cultural property has depended on the characterisation of the cultural heritage importance to a specific civilisation, nation, and society. Advocates of the protection of cultural heritage offer two competing views, advancing either a cultural nationalism or a cultural internationalism perspective.[14] Cultural nationalists argue that the obligation to return looted cultural property arises from the belief that such property contributes to the fabric of national heritage and 'emphasises national interests, values, and pride'. Therefore, these heritage objects should remain within its countries of origin; this concept is gaining ground in the international obligation to return. Comparatively, cultural internationalists stress the critical importance of preservation and integrity, arguing that such artefacts should belong to the world – put differently, cultural property should be placed in institutions with the greatest resources. According to Merryman, the internationalist approach is based on three principles: preservation, integrity, and access.[15] Van Beurden, on the other hand, suggests three ways in which the internationalist approach is usually defended: universalism-based, preservation-based, and legal arguments, all of which are used as 'arguments against restitution'.[16] To begin with, emphasis is laid on global access to universal heritage, which is seen to trump and override national or community rights to heritage. Often, such arguments reveal their underlying bias, 'since they were

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[10] Report on the activities of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (2022–2023), UNESCO Digital Library; https://unesdoc.unesco.org/ark:/48223/pf0000386212_eng [accessed on 3 June 2025].

[11] G.M. Graham, 'Protection and Reversion of Cultural Property: Issues of Definition and Justification', *The International Lawyer*, 1987, Vol. 21, No. 3 (Summer 1987), pp. 755–793.

[12] Ibidem.

[13] Ibidem.

[14] J.H. Merryman, 'Thinking about the Elgin Marbles', *Michigan Law Review*, 1985, Vol. 83, Issue 8 (1985), pp. 1881–1923.

[15] Ibidem.

[16] S. Van Beurden, 'LOOT: Colonial Collections and African Restitution Debates', *Origins: Current Events in Historical Perspective*; https://origins.osu.edu/read/loot-colonial-collections-and-african-restitution-debates [accessed on 13 January 2025].

constructed around universal access for an audience in the Global North, not the audiences in the Global South'.[17] A second category of arguments focuses on the conservation of collections, essentially encouraging the idea of 'conservation' over the idea of 'accessibility'. This idea is premised on the assumption that 'museum infrastructure in Africa was *de facto* inferior to that in Europe or America'.[18] Third, legally oriented arguments justify allowing museums to continue their holdings as legally acquired (for example through donations), thereby restraining the acts and people demanding their removal from the continent.

This internationalistic position appears to have received legal recognition in the *Temple of Preah Vihear case* between Cambodia and Thailand, in a judgment delivered by the ICJ in 1962,[19] wherein it confirmed the relevance of the principle of *uti possidetis iuris* for retaining cultural property even after the withdrawal of colonial powers. The main issue in this case concerned the delimitation of frontiers between postcolonial Cambodia and Thailand in the area of the Buddhist temple of Preah Vihear. A large temple complex seems to have been built between the tenth and twelfth centuries by the rulers of the Khmer Empire, one of the most powerful political and cultural entities in Southeast Asia. Both Cambodia and Thailand consider themselves heirs of this empire. The temple was rediscovered at the turn of the nineteenth and twentieth centuries, but its cultural and historical value was not taken into account by Siam (the official name of Thailand until 1939) when it demarcated its state borders with French Indochina some years later. The conflict broke out after the decolonisation of Cambodia. With the withdrawal of French forces in 1954, Thailand took advantage of the chaos and occupied the cultural site. Cambodia protested and brought the case before the International Court of Justice (ICJ), seeking resolution of the territorial dispute. In its decision, the ICJ did not explicitly deal with the question of the assignment of the temple to one of the states or succession to the former Khmer Empire, but it examined the technicalities of frontier demarcation between French Indochina, the predecessor of Cambodia, and Thailand. In its 1962 decision, the ICJ found that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia. Consequently, Thailand

[17] Ibidem.

[18] Ibidem.

[19] *Case Concerning the Temple of Preah Vihear (Merits)* Judgment of 15 June 1962, ICJ Reports 1962; on 6 October 1959 Cambodia approached the International Court complaining that 'Thailand had occupied a piece of its territory surrounding the ruins of the Temple of Preah Vihear, a place of pilgrimage and worship for Cambodians, and asked the Court to declare that territorial sovereignty over the Temple belonged to it and that Thailand was under an obligation to withdraw the armed detachment stationed there since 1954.' The court was of the view that 'the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia.' Therefore, Thailand was under 'an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; by seven votes to five, [the Court found] that Thailand [was] under an obligation to restore to Cambodia any [sculptures, stelae, fragments of monuments, sandstone model and ancient pottery] which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities. (…) The temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia.' Cf. the case of Temple of Preah Vihear (*Cambodia v. Thailand*); https://www.icj-cij.org/case/45 [accessed on 2 June 2025].

was under the obligation to withdraw its forces from the area of the temple. The relevant point was that Thailand was obliged to restore to Cambodia the objects (antiquities) removed from the temple or its surrounding area.[20]

In 2013, the ICJ in its *Interpretation of 1962 Temple Vihear case*[21] referred to Article 6 of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, known as the World Heritage Convention (WHC), to which both states are parties. The ICJ observed that 'Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage.'[22] Chechi, however, commented that 'the ICJ obscured the fact that the regime for the protection of cultural heritage in wartime was applicable in the case of the Temple of Preah Vihear.'[23] It is pertinent to mention that Articles 6 and 7 of the WHC emphasise the need for 'a system of international co-operation and assistance in the context of which its signatories adhere to the global commitment of preserving the cultural treasures of "outstanding universal value" located within their territories'.[24]

The question for the international lawyer is how to respond to these developments. The standard literature on analysing this issue generally considers a 'wide variety of legal, ethical and museological-based rationale' encompassing the arguments for the restitution and return of looted cultural property in the context of colonial occupation. Guido Carducci identifies the legal instruments associated with the concepts of return and restitution: while 'return' refers to cases where objects left their countries of origin during colonial times, involving no reparation of injury, by contrast, most 'repatriation' claims depend on museum policies and goodwill.[25] Timothy McKeown, Thomas Hill and Catherine Bell, in their separate papers published in *UTIMUT: Past Heritage – Future Partnerships. Discussions on Repatriation in the 21st Century*, assess 'the advantages and disadvantages of negotiated solutions *versus* imposed solutions'.[26] The authors highlighted that the US intends 'that all museums should produce museum inventories and improve access

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[20] Ibidem.

[21] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia V. Thailand)*; https://www.icj-cij.org/case/151 [accessed on 6 June 2025].

[22] Ibidem.

[23] A. Chechi, 'The 2013 Judgment of the ICJ in the Temple of Preah Vihear Case and the Protection of World Cultural Heritage Sites in Wartime', *Asian Journal of International Law*, 2016, Vol. 6, Issue 2, pp. 353–378.

[24] Ibidem, p. 361.

[25] G. Carducci, '"Repatriation", "Restitution" and "Return" of "Cultural Property": International Law and Practice', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage – Future Partnerships. Discussions on Repatriation in the 21st Century*, Copenhagen, 2008, pp. 122–133; https://www.iwgia.org/images/publications/0028_Utimut_heritage.pdf [accessed on 20 January 2025].

[26] M. Gabriel, 'Introduction: From Conflict to Partnership', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage*…, op. cit., p. 17; see also: C.T. McKeown, 'Considering Repatriation Legislation as an Option: The National Museum of the American Indian Act (NMAIA) & The Native American Graves Protection and Repatriation Act (NAGPRA)', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage*…, op. cit.; T.V. Hill, 'Notes for Remarks', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage*…, op. cit.; C.E. Bell, 'That was then this is now – Canadian Law and Policy on First Nations Material Culture', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage*…, op. cit.

to their collections'. In relation to this, the US 'has passed repatriation legislations such as the 1989 NMAIA (National Museum of the American Indian Act) and 1990 NAGPRA (Native American Graves Protection and Repatriation Act) enabling native peoples to successfully claim back their heritage on legal grounds'. McKeown et al. also demonstrated Canada's state practice, where 'repatriation requests (…) are dealt with through case-by-case negotiations'.[27] Other scholars, such as e.g., George Abungu and Martin Skrydstrup, have taken the approach of 'universality *versus* cultural nationalism' to explain the complexities surrounding the issue.[28]

However, in recent times, it appears that global attitudes are shifting from cultural internationalism to cultural nationalism and calls for initiatives to reshape the international rules governing cultural heritage. While international debates concerning the legal obligation to return cultural property looted during colonial times have evolved significantly over the last ten years, there is still no consensus on extending the scope of this obligation to museums, traders, auction houses, non-state actors, and states. Pott and Sutaarga explain that 'the problem of the return or transfer of cultural objects is rather complex and its solution demands a careful survey of the situation resulting from a historical process. It is wilful alienation of cultural property by the former colonies.'[29]

As existing international law on the protection of cultural heritage has proved inadequate for dealing with the return of cultural property looted during colonial periods, the idea of bilateral arrangements centred on enhanced co-operation has recently gained traction. In fact, a series of international legal instruments to protect cultural property was developed after the Second World War. Some of these legal instruments have been undertaken within UNESCO and UNIDROIT. These include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[30] and its two Protocols;[31] the 1970

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[27] C.T. McKeown, 'Considering Repatriation…', op. cit.; M. Gabriel, 'Introduction: From Conflict…', op. cit., p. 17.

[28] G.O. Abungu, '"Universal Museums": New Contestations, New Controversies', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage…*, op. cit., pp. 122–133; and M. Skrydstrup, 'Righting Wrongs? Three Rationales of Repatriation and What Anthropology Might Have to Say About Them', in: Gabriel M., Dahl J. (eds), *UTIMUT: Past Heritage…*, op. cit., pp. 56–63.

[29] P.H. Pott, M.A. Sutaarga, 'Arrangements Concluded or in Progress for the Return of Objects: The Netherlands-Indonesia', *Museum*, 1979, Vol. XXXI, No. 1, pp. 38–42; cf. C. Scott, 'Renewing the "Special Relationship" and Rethinking the Return of Cultural Property: The Netherlands and Indonesia, 1949–79', *Journal of Contemporary History*, 2016, Vol. 52, Issue 3, pp. 646–668.

[30] 249 UNTS (1954) 240; the Convention entered into force on 7 August 1956. India signed and ratified it on 14 May 1954 and 16 June 1958, respectively. Presently 135 states are parties to this convention; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict is available at: https://www.unesco.org/en/heritage-armed-conflicts/1954-convention, [accessed 12 January 2025].

[31] Its First Protocol entered into force on 7 August 1956. Presently 112 states are parties to the First Protocol. India signed and ratified on 14 May 1954 and 16 June 1958, respectively; cf.: https://www.unesco.org/en/heritage-armed-conflicts/states-parties [accessed on 12 January 2025]. The 1999 Second Protocol entered into force on 9 March 2004. It creates a new category of 'enhanced protection' – for cultural property of the greatest importance for humanity. It contains no mandatory criminal sanctions regime. Presently, 88 states are parties to the Second Protocol.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention);[32] the 1972 UNESCO Convention Concerning the Protection of the World Natural and Cultural Heritage (World Heritage Convention);[33] the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983 Vienna Convention);[34] the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;[35] the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003 UNESCO Convention);[36] the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Convention);[37] and the Council of Europe Convention on Offences relating to Cultural Property (Nicosia Convention), which entered into force on 1 April 2022.[38] These instruments assert the importance of protecting cultural heritage.

Recently, the United Nations (UN) has provided impetus to the emerging obligation of return and restitution of cultural property by adopting resolutions in the UN General Assembly (UNGA) and UN Security Council (UNSC). In 1973, the UNGA adopted the first resolution directly related to the subject of restitution of cultural property. This document, titled 'Restitution of works of art to countries victims of expropriation', was sponsored by 12 African states.[39] Its preamble declared that 'the prompt restitution to a country of its works of art, monuments, museum pieces and manuscripts and documents by another country, without charge (…) [will constitute] just reparation for damage done.' Since then, several resolutions have been adopted by the UNGA on this subject, including a recent one titled 'Return or Restitution of Cultural Property to the Countries of Origin' (RES/76/16

India has yet to become a party to it and appears to maintain a position similar to its stance on not becoming party to Protocols Additional to Geneva Conventions of 12 August 1949.

[32] Available at: https://www.unesco.org/en/node/66148 [accessed on 12 January 2025]. Presently 143 states have ratified the Convention, and India ratified it on 24 January 1977.

[33] Available at: https://whc.unesco.org/archive/convention-en.pdf [accessed on 12 January 2025]. This Convention entered into force on 17 December 1975. As of 18 August 2023, there are 195 States Parties to the Convention. India ratified it on 14 November 1977.

[34] Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf [accessed on 12 January 2025]. This Convention has yet to enter into force.

[35] Available at: https://www.unidroit.org/instruments/cultural-property/1995-convention/ [accessed on 12 January 2025]. At present, 54 states are parties to this convention. India has not ratified it.

[36] Available at: https://ich.unesco.org/en/convention [accessed on 12 January 2025]. Presently, 181 states are parties to this convention, and India ratified it on 9 September 2005.

[37] Available at: https://www.unesco.org/en/legal-affairs/convention-protection-and-promotion-diversity-cultural-expressions?hub=66535#item-2 [accessed on 12 January 2025]. At present, 153 states are parties to it. India ratified on 15 December 2006.

[38] Available at: https://rm.coe.int/council-of-europe-convention-on-offences-relating-to-cultural-property/1680a5dafb [accessed on 12 January 2025]. At present, 6 states are parties to this Convention, with India having yet to become party to it.

[39] UNGA Resolution 3187 of 1973; https://www.worldlii.org/int/other/UNGA/1973/150.pdf [accessed on 20 May 2025].

of 8 December 2021).[40] The UNSC adopted landmark resolutions 2199 (2015),[41] issued under Chapter VII and establishing the direct link between the destruction and looting of cultural heritage and the financing of terrorism, and 2347 (2017).[42] These resolutions focus exclusively on the major issue of the destruction, pillage, and smuggling of cultural property in the course of armed conflicts.

The adoption of these multilateral legal instruments has widened the ambit and scope for the protection of cultural property. Provisions related to special protection, enhanced protection, return of cultural property, international cooperation, and the recognition of illegally exported cultural property as a transnational criminal offence remain key distinguishable features of modern international law on cultural property.

INADEQUACY OF LEGAL FRAMEWORK TO TAKE ACCOUNT OF RESTITUTION AS A RESTRAINING PRINCIPLE IN THE CONTEXT OF STOLEN CULTURAL PROPERTY IN THE PURSUIT OF COLONIAL OCCUPATION

FUNDAMENTAL PRINCIPLES IN THE INTERNATIONAL LEGAL FRAMEWORK

In the last five decades since the 1970 UNESCO Convention, states have faced difficult experiences with return requests, exposing the inadequacies of UNESCO's regime for returning property looted during colonial occupation. This article seeks to identify two different phases of international response to the topic since the end of World War II.

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[40] Resolution adopted by the General Assembly on 6 December 2021 at the 76th session,; https://digitallibrary.un.org/record/3952203/files/A_RES_76_16-EN.pdf [accessed on 20 May 2025].

[41] S/RES/2199 (2015); http://unscr.com/en/resolutions/doc/2199 [accessed on 13 January 2025].

[42] S/RES/2347 (2017); https://docs.un.org/en/S/RES/2347%20(2017) [accessed on 20 May 2025], wherein the Council 'condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artefacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites (…) notably by terrorist groups; (…) encourages Member States to propose listings of ISIL, Al-Qaida and associated individuals, groups, undertakings and entities involved in the illicit trade in cultural property to be considered by the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee'. Cf. also A. Chanaki, A. Papathanassiou, 'The Council of Europe Convention on Offences relating to Cultural Property eventually enters into force: A new tool to the arsenal of international criminal law responses to the trafficking of cultural property', *EJIL:Talk!*, 14 April 2022; https://www.ejiltalk.org/the-council-of-europe-convention-on-offences-relating-to-cultural-property-eventually-enters-into-force-a-new-tool-to-the-arsenal-of-international-criminal-law-responses-to-the-trafficking-of-c/ [accessed on 6 June 2025].

(I) PHASE ONE: CONCEPTUALISATION OF INTERNATIONAL PROTECTION APPROACH

A uniform approach has not been developed by states or other actors (such as UNESCO, museums or collectors) to address return requests. The Hague Regulations of 1907, the first international rules on the laws of war, state that 'the cultural property, regardless of whether it is privately owned, must not be destroyed, damaged, confiscated, seized, or pillaged in any way or form'. It further proposed that violators of these provisions may be prosecuted. While the Hague Regulations of 1907 do not contain any explicit provision concerning the restitution of looted cultural property, Article 3 provides for a duty to compensate. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) lays down two significant principles in the preamble, setting the tone for the cultural internationalism approach.[43] The first is known as 'damage to cultural property is damage to all mankind', and the second as 'cultural heritage is a human experience', both of which support the policy of internationalism. With respect to the first, 'a damage caused to anyone's cultural property is to be considered as a damage to all mankind', and thus 'cultural heritage should be placed under international protection'. The Convention further declares that 'cultural heritage is part of the human experience regardless of where it originated from or where the artefact currently is held'.[44] Importantly, the 1954 Hague Convention places the duty of protecting cultural heritage upon the international community as a whole, a view often justified by museum curators who seek to 'highlight our shared past as a civilisation'.[45] It is considered the foundation of modern international heritage law. Furthermore, the 1954 Hague Convention contains detailed provisions concerning how a State party must safeguard and respect cultural properties (Articles 2 and 4).[46] Specifically, it calls upon the parties not to use cultural property for military purposes or for any purpose likely to expose it to destruction or damage in the event of armed conflict. States parties are under an obligation to train their military forces to respect the Convention's principles and provisions (Article 7).[47] Likewise, there are specific rules for States occupying another country under the Convention, which provides that they 'have a duty to assist local authorities to safeguard and preserve cultural property and to take all necessary measures to ensure its preservation in case the said local authorities are unable to do so'.[48]

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43 The 1954 Hague Convention.
44 Ibidem.
45 Ibidem.
46 Ibidem.
47 Ibidem.
48 Ibidem.

(II) PHASE TWO: IS THERE A LEGAL BASIS FOR CULTURAL NATIONALISM'?

On the other hand, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)[49] takes the cultural nationalism approach. In support of this position, it is argued, first, that 'cultural property constitutes one of the basic elements of civilization and national culture, and (…) its true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting'.[50] Article 4 of the 1970 UNESCO Convention explicitly maintains a cultural nationalism approach as it authorises states to define cultural property.[51] A second rationale expressed in the Convention is that 'cultural heritage can be best understood in the context of its geographic origin.' This expression seems to justify the position of developing countries that suffered huge losses of cultural heritage during the colonial era. It is asserted that 'cultural heritage contributes to building the image of a nation. When people feel that heritage belongs to them, it is thus directly related to their sense of collective identity.'[52] Third, the 1970 UNESCO Convention obligates states to protect cultural heritage within their borders, and therefore provides a justification for the retention of cultural property.[53]

LEGAL ISSUES

Two important aspects – the non-retroactive application of international treaties, and countries of origin – upon which legal positions are yet to be resolved, remain the focus of this article. For instance, the issue of countries of origin can be illustrated in cases where multiple states claim to be the country of origin, competing for the return of the same cultural property. A critical question arises in situations involving competing claims by more than one state. For example, the governments of India, Iran, Pakistan, and Afghanistan (as well as the Taliban) have all claimed ownership of the Koh-i-Noor. Another challenge arises when stolen cultural objects have crossed from one jurisdiction to another jurisdiction having knowledge that it

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49 The 1970 UNESCO Convention.

50 J. Zhang, 'Moving Beyond Cultural Nationalism: Communities as Claimants to Cultural Heritage', *California Law Review* blog; https://www.californialawreview.org/moving-beyond-cultural-nationalism/ [accessed 12 May 2021].

51 'The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) Cultural property found within the national territory; (c) Cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; (d) Cultural property which has been the subject of a freely agreed exchange; (e) Cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.'

52 The 1970 UNESCO Convention.

53 Ibidem.

was stolen property. Further complexity may arise in the International dispute over cultural property when private parties having different nationalities may pursue the claim for same cultural property. The international dimension is particularly noticeable in the case of *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc*.[54] As analysed by Christa Roodt, in this case an art dealer had bought the Kanakaria mosaics, which originated from Cyprus, in the free port area of Geneva airport in 1988. The court, sitting in Indiana, applied Indiana law after assessing and weighing the substantive rules of Swiss and Indiana law.[55] It is generally assumed that 'international and transnational cultural property disputes tend to involve a wide range of parties, both States and non-State actors, such as museums, auction houses or individual dealers, or collectors.'[56]

(I) NON-RETROACTIVE CHARACTER OF LEGAL INSTRUMENTS

It is well established that international legal rules cannot be applied retroactively. Indeed, Article 28 of the Vienna Convention on the Law of Treaties (VCLT) codified the general principle that international treaties do not apply retroactively in order to ensure legal certainty. This principle becomes an obstacle to the return of cultural property.

Although the above-mentioned instruments focus on the protection, respect, and criminalisation of offences concerning cultural property, they do not refer to the return of cultural property looted during colonial times. These instruments are prospective in their application and therefore do not create obligations to return cultural property looted during the colonial period to the countries of origin.

The 1954 Hague Convention and its two Protocols do, however, prescribe important rules for the prohibition of war plunder and a duty of restitution in the context of cultural properties.[57] This section of the paper will highlight the strengths and limitations of the 1954 Hague Convention and its Protocols in relation to their application to cultural property looted during colonial times.[58] One of the significant innovative ideas of the 1954 Hague Convention is its obligation on belligerents to afford a higher tier of special protection to cultural property considered to be of very great importance.[59] Three conditions are required for cultural property to be eligible for, and entitled to, special protection. First, the cultural property must not be used for military purposes; secondly, it must be situated at an adequate distance from military objectives; and thirdly, it must be entered in the International Register of Cultural Property under Special Protection. The 1954 Hague Convention obliges states to refrain from the removal of cultural property. Furthermore, it

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[54] *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc*., 717 F. Supp 1374 (S.D. Ind. 1989) affirmed 917 F2d 278 (7th Cir 1990) No. 89–2809) cert. denied 112 S Ct 377 (1992).

[55] See C. Roodt, 'Restitution of art and cultural objects and its limits', *Comparative and International Law Journal of Southern Africa*, 2013, Vol. 46, No. 3, p. 296.

[56] See A.M. Tanzi, 'The Means for the Settlement of International Cultural Property Disputes: An Introduction', *Transnational Dispute Management*, January 2020.

[57] The 1954 Hague Convention and its two Protocols.

[58] Ibidem.

[59] Articles 8 and 9 of the 1954 Hague Convention.

prohibits and prevents state parties from engaging in any form of theft, pillage, or misappropriation of cultural property.[60] The First Protocol to the 1954 Convention expands the objectives of the Convention by providing detailed provisions against the illegal export, removal, or transfer of ownership of cultural property from occupied territories, and its return. Article I specifically prohibits occupying powers from exporting cultural objects from occupied territories and, in the event such exportation occurs, provides for their restitution.[61]

State's obligations with regard to safeguarding and respecting cultural property within the framework of international humanitarian law were further strengthened in the 1999 Second Protocol to the 1954 Hague Convention, which requires each party to place cultural property under enhanced protection, where the property is considered to be of the greatest importance for humanity. The system of enhanced protection is relatively weak, however, as a waiver may be invoked on the basis of imperative military necessity to permit the use of cultural property for military action.[62] It is important to highlight that China proposed to remove this weakness by inserting a provision aimed at prohibiting collateral damage to cultural property under enhanced protection. This proposal, however, was not included in the Second Protocol.[63] Nonetheless, the Second Protocol introduced significant measures to strengthen both the 1954 Convention and its First Protocol. These include the adoption of a definition of 'military necessity' and the introduction of provisions for criminal responsibility and jurisdiction, which have been considered effective when compared with the 1954 Convention and its First Protocol. The 1999 Second Protocol also includes enforcement provisions requiring member states to comply with the Convention and Protocols.[64] It sets out additional penalties for serious violations and importantly recommends the establishment of a monitoring body, namely the Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict, for the implementation of the Protocol.

The obligations envisaged under the 1954 Hague Convention were not explicitly retroactive owing to the deeply political and acrimonious nature of the issue of removal or plunder and return of cultural property.[65] At the time of the adoption of the 1954 Hague Protocol, it quickly became apparent that its regime would be disappointing for formerly colonised countries seeking the restoration of cultural property. A solution to some of these controversies, particularly the limited obligations under the 1954 Hague Convention and the controvertible retroactivity of the Protocol, was a crucial agenda item for the successful conclusion of the Second Protocol to the 1954 Hague Convention. In fact, the two major state actors, the US

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60 Article 4(3) of the 1954 Hague Convention.

61 The 1954 Hague Convention and its two Protocols.

62 Cf. J.-M. Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict', *ICRC Review of the Red Cross*, 1999, Vol. 81, No. 835, pp. 593–620.

63 Ibidem; cf. J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, World Heritage Series, Paris, 2009, p. 295.

64 The 1954 Hague Convention and its two Protocols.

65 First and Second Protocol to the 1954 Hague Convention.

and the UK, were not especially keen to advance the restitution agenda under the 1954 Hague Convention.

The 1970 UNESCO Convention is the principal instrument for restoring cultural property under international law, described within the Convention by the general label 'Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property'.[66] The cornerstone of the 1970 UNESCO Convention is the return and restitution of cultural property, expressed in Article 7, which imposes an obligation to return a stolen or illegally exported cultural property with regard to objects 'imported after the entry into force of this Convention in both States concerned' (Article 7(b)(ii)).[67] One limitation of this provision is that it applies only to unlawfully removed objects from a state from 1972 onwards. Thus, for instance, it does not cover objects looted during the Holocaust era. By analogy, it is not applicable to cultural property looted in the pursuit of colonial occupation. However, it is worth mentioning that the 1970 Convention is relevant in its application to non-state actors, who are required to take measures to prevent illicit exports.

Another limitation of the 1970 UNESCO Convention is that it is up to each State party to specify in its domestic laws which cultural objects are of national importance and are therefore prohibited from export. Another constraint is that the scope of objects covered by the 1970 UNESCO Convention is narrow and does not include unregistered, illicitly excavated, or illegally exported objects.[68]

The adoption of the 1970 UNESCO Convention has led to significant changes, both through domestic reforms and reforms within cultural institutions, including efforts by UNESCO's Intergovernmental Committee for the Promotion of the Restitution of Cultural Property[69] and the renewed policies of the International Council of Museums.[70] These policies explicitly emphasise the need for mediation or bilateral arrangements to resolve return claims.

Another international instrument, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[71] adopted after the 1970 UNESCO Convention, also did not address the return of cultural property looted during the colonial era. This omission was due to the fact that former colonial powers were reluctant to accept the demands of decolonised countries seeking restitution of cultural property as a link between independence and cultural development. The International Law Commission (ILC), while engaging in discussion, decided that there was no point in engaging with restitution of looted cultural property during colonial occupation, as such objects could not be identified as state property on the

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66 The 1970 UNESCO Convention.

67 Ibidem.

68 Ibidem.

69 Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) – UNESCO Digital Library; https://unesdoc.unesco.org/ark:/48223/pf0000389120 [accessed 2 June 2025].

70 International Council of Museums – The global museum network – International Council of Museums; https://icom.museum/en/ [accessed 2 June 2025].

71 The 1983 Vienna Convention.

date of state succession.[72] In fact, many cultural objects and collections had, over the years, moved to non-state actors or private museums. Thus, the rules of state succession could not evolve to deal with such looted material cultural heritage. In brief, the aim of the 1983 Vienna Convention was not to address the issue of cultural objects that did not form part of state property. Understandably, such a proposition was against the interests of newly independent states. The ILC suggested that the specialist UNESCO Committee, as envisaged under the 1970 UNESCO Convention, could be the relevant body to deal with such contesting postcolonial claims regarding cultural objects.

However, a few scholars advance the view that understanding articulated in Article 15 provides a viable and potential option for deciding claims for restitution or repatriation.[73] Article 15(1)(e) and (f) resolve that 'movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State,' and that 'movable property of the predecessor State (…) to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.'[74] The basis of this understanding seems to invoke the right of self-determination with respect to culture. It is argued that this principle of the right to self-determination in relation to culture may eventually contribute to enhancing the obligation to restore cultural heritage as a means of preserving national identity and tradition. Furthermore, under Article 28(4), 'the predecessor State shall cooperate with the successor state in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.'[75] It should be noted, however, that the Convention has not yet entered into force, as only seven states have ratified it to date.[76]

It would be remiss not to highlight the dispute over the succession of the Koh-i-Noor. India claims that the diamond was extracted from the mines of central or south-eastern India long before the arrival of Alexander the Great. For centuries, it remained royal regalia of various Indian, Mughal, Persian, and Afghan monarchies. The war with the British East India Company led to the defeat of the Sikh Empire and of its incorporation into the British India. In 1849, the last Maharaja, the eleven-year-old Duleep Singh Bahadur, surrendered the Koh-i-Noor to the Queen of England, with the UK claiming it was given as a gift to Queen Victoria. The British administration thus asserted that it was merely a reward of war. However, India maintains that the young Maharaja, still a minor, was sent to London to personally present the diamond to Queen Victoria. According to India, this personal

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72 Ibidem.

73 A. Caligiuri, 'The Irreparability of Colonialism Legal Aspects Concerning the Restitution of Cultural Property Removed during Colonial Occupation', *Question of International Law* blog, 31 January 2024; https://www.qil-qdi.org/legal-aspects-concerning-the-restitution-of-cultural-property-removed-during-colonial-occupation/ [accessed on 13 May 2025].

74 The 1983 Vienna Convention.

75 Ibidem.

76 Cf. A. Caligiuri, 'The Irreparability…', op. cit.

visit of Dalip Singh was staged more as a ceremonial gesture to honour the Queen than a voluntary gift. In 1947, India and Pakistan underwent partition. Following the division of Punjab, Pakistan also laid claim to the Koh-i-Noor. Moreover, the British government deliberately failed to address the allocation of cultural property in the context of state succession within the legal instrument transferring powers to these newly independent states. As discussed above, the ILC also did not resolve the issue of distributing disputed cultural property in the Vienna Convention on State Succession. As a result, Koh-i-Noor is claimed by India, Pakistan, and the United Kingdom. Pakistan claim rests on the diamond's symbolic significance as a representation of the country's power, authority, culture, and heritage. The British government has firmly rejected demands for Koh-i-Noor's return on two procedural grounds: first, that Pakistan is not the sole claimant; and second, that the diamond was formally presented to Queen Victoria rather than seized as a war trophy. United Kingdom revealed that between 1997 and 2002, several other parties submitted claims for the repatriation of the diamond. As enumerated by A. Jakubowski, 'these included the representatives of India, Pakistan, and Afghanistan (…), an individual, Mr. Beant Singh Sandhanwalia, the last recognised heir of late Maharaja Duleep Singh, and officials of the Jagannath Temple in Puri, India, to which the gem had allegedly been bequeathed prior to its surrender to the British.'[77] In response, the British government reiterated its position that the existence of numerous and competing claims makes it impossible to determine a single rightful owner of the gem. Furthermore, it asserted that the Crown Jewels, including the Koh-i-Noor, form part of the United Kingdom's national heritage and are held by the Queen in her capacity as sovereign. This stance was recently reaffirmed by British Prime Minister David Cameron.[78]

Similarly, the 1995 UNIDROIT Convention[79] contains provisions for the restitution of cultural property and the regulation of theft and illegal export, but it does not explicitly mention return requests related to colonial expropriation. It is also not retroactive. However, a few provisions of the 1995 UNIDROIT Convention may be interpreted as addressing repatriation requests for cultural goods illegally taken from former colonies. For instance, Article 10(3) provides that the absence of a non-retroactivity provision does not 'legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention (…) nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention.'[80] In addition, under Article 5(3):

> 'the court or other competent authority of the State shall order the return of an illegally exported cultural object if the requesting State shows that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the tradi-

[77] A. Jakubowski, *State Succession in Cultural Property*, Oxford, 2015, pp. 92–93.

[78] Cf. ibidem; see also 'Koh-i-Noor diamond "staying put" in UK says Cameron', *BBC News*; http://www.bbc.co.uk/news/uk-politics-10802469 [accessed on 4 December 2024].

[79] The 1995 UNIDROIT Convention.

[80] Ibidem.

tional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.'[81]

The 2003 UNESCO Convention[82] included provisions to take account of the special needs of communities in playing an active role in maintaining and conserving intangible cultural heritage, and therefore obligated state parties to ensure these communities' participation in such efforts. The 2003 Convention introduced an expanded view of cultural heritage and included the non-material aspects of cultural property that are central to community identity. Article 11 of this Convention calls upon each state party 'to ensure the safeguarding of the intangible cultural heritage present in its territory' by involving communities and groups in the process of identifying, defining, and maintaining this heritage.[83] Recently, in 2024, while considering becoming party to 2003 UNESCO Convention, UK noted that its ratification 'has potential to be a gamechanger for museums and galleries, as well as the communities they serve'.[84]

In terms of the criminalisation of the unlawful taking and sale of cultural property, the Nicosia Convention draws heavily from the 2000 UN Convention against Transnational Organized Crime, which seeks to prevent and combat such crimes within a broader international framework addressing terrorism and organised crime. Over the past decade, it has been increasingly and urgently recognised that organised criminal groups are often closely connected to the trafficking and destruction of cultural property, whether to secure financing or to advance political objectives. Ongoing geopolitical conflicts in the Middle East have brought this issue to the forefront, as large-scale illicit excavations have occurred in countries such as Iraq, Afghanistan, Mali, and Syria. These activities have led to a dramatic increase in the illicit flow of cultural objects from conflict-affected regions. The Nicosia Convention seeks to close the existing gaps in the international protection regime by criminalising the illegal appropriation and trade of cultural heritage (Articles 3–11).[85]

It is important to mention that although Chapter IV of the 1999 Second Protocol to the 1954 Hague Convention[86] contains provisions criminalising specific acts against cultural property when committed intentionally, the advantage of the Nicosia Convention lies in its provision of detailed measures to curb crimes against cultural property.

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81 Ibidem.

82 The 2003 UNESCO Convention.

83 Ibidem.

84 See Jacob O'Sullivan, 'Intangible Cultural Heritage Could be a Gamechanger for Museums', *Museums Journal*, 1 February 2024; https://www.museumsassociation.org/museums-journal/opinion/2024/02/intangible-cultural-heritage-could-be-a-gamechanger-for-museums/ [accessed on 13 May 2025].

85 Cf. E. Gartstein, 'Revisiting the 2017 Nicosia Convention', *Center for Art Law*, 6 November 2024; https://itsartlaw.org/art-law/revisiting-the-2017-nicosia-convention/ [accessed on 6 June 2025].

86 The 1954 Hague Convention and its two Protocols.

ADVANCES AND PROGRESS IN THE OBLIGATION TO RETURN REQUESTS

To overcome the issue of retroactivity, several solutions are underway. Running parallel with the development of norms prohibiting the illegal trafficking of cultural property through multilateral treaties under the UNESCO regime, the post-colonial period has witnessed a significant rise in their institutional presence. The increase in bilateral agreements for the return of cultural property has become a recent trend. Other solutions include mediation, adoption of codes of ethics in museums, internal rules for the return of looted cultural property, bilateral agreements between States as well as between cultural institutions, new guidelines adopted for colonial collections (in countries such as Germany, the Netherlands, and Belgium), modified laws for return (as in France and Belgium), and cooperation initiatives from museums.[87] These solutions are administered and supervised through the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP).

ICPRCP

To address the non-retroactivity limitation, the ICPRCP or the Committee was established as a permanent intergovernmental body by the UNESCO General Conference in 1978, with India currently holding membership on the Committee for the 2022–2026 period).[88] The Committee is mandated to administer and provide an international platform to help settle disputes over the restitution of cultural property between UNESCO member states, particularly in cases that fall outside the scope of the 1970 Convention and therefore rely on negotiations between the concerned states.[89]

The Committee also established an International Fund, supported through voluntary contributions from States and private institutions.[90] This Fund is intended to finance training and educational initiatives.[91] Recently, the UNESCO General Conference authorised the Fund to be used, in part, to cover legal expenses and compensate individuals involved in lawsuits.[92] This mechanism mirrors the UN Trust Fund, created in 1989, which was designed to assist States in settling disputes before the ICJ by easing the financial burden of court proceedings.[93]

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[87] German Museums Association, *Guidelines for German Museums. Care of Collections from Colonial Contexts*, 3rd edn, Berlin, 2021; https://www.museumsbund.de/publikationen/guidelines-on-dealing-with-collections-from-colonial-contexts-2/ [accessed on 20 December 2024].

[88] Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) – UNESCO Digital Library; https://unesdoc.unesco.org/ark:/48223/pf0000389120 [accessed on 4 June 2025].

[89] Ibidem.

[90] Ibidem.

[91] Ibidem.

[92] Ibidem.

[93] Ibidem.

As clarified in its Statute, this Committee does not function as a formal Tribunal that settles disputes through binding judgment.[94] Rather, it serves as a framework for, and facilitator of, intergovernmental negotiations on restitution requests concerning cultural property. In this capacity, the Committee operates as an advisory body.[95] Its mandate is limited to considering cases regarding cultural property of fundamental importance to the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO, and which has been lost due to colonial or foreign occupation, or through illicit appropriation.[96]

However, the Committee's work over the past forty years has revealed certain limitations and may point to its relative ineffectiveness, likely due to the voluntary nature of its procedures, which allow disputing parties to opt in on a case-by-case basis. Nevertheless, in its intent to regulate the return of cultural property, the Committee adopted in 1999 the International Code of Ethics ('the Code') and Appropriate Rules of Procedure.[97] These instruments complement 1970 ICOM Declaration on the Ethics of Collecting[98] and the 1986 ICOM International Code of Professional Ethics (revised in 2004)[99] which together have helped promote the

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[94] Under Article 4 of the Statutes, 'The Committee shall be responsible for:
1. seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned, it being understood that mediation implies the intervention of an outside party to bring the concerned parties to a dispute together and assist them in reaching a solution, while under conciliation, the concerned parties agree to submit their dispute to a constituted organ for investigation and efforts to effect a settlement, provided that any additional, necessary funding shall come from extrabudgetary resources. For the exercise of the mediation and conciliation functions, the Committee may establish appropriate rules of procedure. The outcome of the mediation and conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it;
2. promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin;
3. encouraging the necessary research and studies for the establishment of coherent programmes for the constitution of representative collections in countries whose cultural heritage has been dispersed;
4. fostering a public information campaign on the real nature, scale and scope of the problem of the restitution or return of cultural property to its countries of origin;
5. guiding the planning and implementation of UNESCO's programme of activities with regard to the restitution or return of cultural property to its countries of origin;
6. encouraging the establishment or reinforcement of museums or other institutions for the conservation of cultural property and the training of the necessary scientific and technical personnel;
7. promoting exchanges of cultural property in accordance with the Recommendation on the International Exchange of Cultural Property;
8. reporting on its activities to the General Conference of UNESCO at each of its ordinary sessions.'

[95] Ibidem.

[96] Ibidem.

[97] Ibidem.

[98] Cf. https://icom.museum/en/resources/standards-guidelines/code-of-ethics/ [accessed on 3 June 2025].

[99] *ICOM Code of Ethics for Museums*; https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf [accessed on 2 June 2025].

principle of respecting the cultural property interests of others within museums and among art dealers.[100] The Code has been widely acknowledged and implemented by art and antiquities trade organisations in various countries.

ICOM had advocated for the creation of a fund to serve as an operational tool for the Committee.[101] This fund, subject to approval by relevant UNESCO bodies, could support the Committee's activities by enabling it to finance (a) research aimed at compiling complete collections; (b) technical co-operation initiatives, including expert assistance, grants, or equipment; (c) public information campaigns; and (d) in specific cases, return or restitution operations, such as covering transportation and insurance costs.[102]

In 2010, UNESCO adopted the Rules of Procedure for Mediation and Conciliation to be applied before the Committee in accordance with Article 4(1) of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation.[103]

Earlier, in 2008, the Association of Art Museum Directors (AAMD) developed a comprehensive policy addressing unprovenanced antiquities, grounded in the 1970 UNESCO Convention. It issued new guidelines stipulating that the acquisition of unprovenanced antiquities would be considered participation in illicit trade. The AAMD also established the 1970 cutoff date, meaning that its member institutions are required to acquire only those antiquities that can be shown to have been legally exported after 1970 or removed from their country of origin prior to that date. Accordingly, museum members must verify the ownership history of potential acquisitions dating back to 1970 and ensure that their acquisition policies, as well as information regarding new acquisitions, are publicly accessible.[104] Institutions such as the British Museum, the Metropolitan Museum of Art, and the J. Paul Getty Museum in Los Angeles have similarly implemented the 1970 cutoff date in their acquisition practices.[105]

Since 2008, the Association of American Museums (AAM) has emphasised the prohibition of acquiring disputed antiquities and has required its members to rigorously research provenance before making acquisitions.[106] In 2007, the

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[100] Ibidem.

[101] Ibidem.

[102] Ibidem; see also F. Shyllon, 'The Recovery of Cultural Objects by African States through the UNESCO and Unidroit Conventions and the Role of Arbitration', *Uniform Law Review*, Vol. 5, Issue 2, April 2000, pp. 219–240.

[103] *Mediation and conciliation procedures provided for within the framework of the Committee*; https://unesdoc.unesco.org/ark:/48223/pf0000378896#:~:text=In%20order%20to%20exercise%20these%20mediation%20and%20conciliation,agree%20to%20amend%20them%20before%20the%20procedure.2%204 [accessed on 1 June 2025].

[104] *New Report on Acquisition of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors*; https://cms.aamd.org/sites/default/files/document/2008ReportAndRelease.pdf [accessed on 1 June 2025].

[105] Cf. https://museumsandheritage.com/advisor/posts/museums-association-launches-guidance-address-legacy-british-colonialism/ [accessed on 2 June 2025].

[106] *Acquisition Guidelines*; https://www.smithsonianmag.com/history/acquisition-guidelines-107940667/ [accessed on 2 June 2025].

International Council of Museums (ICOM) launched an urgent initiative and formulated a mediation process aimed at encouraging museums to avoid litigation over cultural objects which often delay the resolution of disputes. ICOM also adopted and implemented Codes of Ethics grounded in the principles of the 1970 UNESCO Convention.[107]

A case study of the British Museum offers useful insight into the challenges and gaps in responding to repatriation requests. Established in 1753, the British Museum holds an extraordinary collection of more than eight million artefacts and is regarded as one of the world's oldest and most extensive museum collections. The institution has been heavily criticised for its categorical refusal to return the Parthenon/Elgin Marbles to Greece,[108] amid Greece's claim which has received support from both China and the EU. The British Museum operates as a statutory corporation governed by a Board of Trustees.[109] While legal ownership of the Museum collection is vested in the Board of Trustees, it is required to serve the public interest as defined by statute.[110] A Board Trustee has 'no extraordinary rights to benefit from them, only obligations towards their beneficiaries, the public'.[111] The Museum Board of Trustees comprises twenty-five members: one appointed by the Crown, fifteen by the Prime Minister, four by the Secretary of State, and five by the Trustees themselves.[112] The British Museum Act of 1963 stipulates that Trustees have a fiduciary duty to preserve the collection and may only dispose of objects under very limited and exceptional circumstances.[113] As such, the Board is legally and ethically responsible for managing the collection and is generally prohibited from returning any item. However, the Holocaust (Return of Cultural Objects) Act of 2009 created a legal exception, enabling British museums to repatriate artefacts looted during the Nazi era without contravening the 1963 Act.[114] This legislation has opened a pathway for repatriations for artwork related to the Holocaust.

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[107] The International Council of Museums (ICOM), established in 1946, is the only global organisation of museums and museum professionals committed to the protection of cultural and natural heritage. ICOM has approximately 30,000 members across 137 countries and has facilitated the preservation and conservation of cultural property on numerous occasions over the years. Furthermore, ICOM cooperates closely with UNESCO and maintains partner relations with the UN Economic and Social Council, the World Intellectual Property Organization, INTERPOL, and World Customs Organisation (WCO); cf. https://icommuseum.com/en/about-us/missions-and-objectives/index.html [accessed on 6 June 2025].

[108] The British Museum refers to the sculptures as the Parthenon Marbles, although they are still frequently referred to as the Elgin Marbles around the world. See R. Wilde, 'The Elgin marbles/Parthenon Sculptures', *ThoughtCo.*, 4 April 2019; https://www.thoughtco.com/the-elgin-marbles-parthenon-sculptures-1221618 [accessed on 20 May 2025].

[109] British Museum Act of 1963; https://www.britishmuseum.org/sites/default/files/2019-10/British-Museum-Act-1963.pdf [accessed on 20 May 2025].

[110] Ibidem.

[111] A. Pantazatos, 'The Ethics of Trusteeship and the Biography of Objects', *Royal Institute of Philosophy Supplement*, 2016, Vol. 79, pp. 179–197.

[112] British Museum Act of 1963.

[113] Ibidem, see also H.R. Godwin, 'Legal Complications…', op. cit., pp. 147–148.

[114] Cf. https://www.legislation.gov.uk/ukpga/2009/16/contents [accessed on 6 June 2025].

While the ICOM Code of Ethics for Museums sets out shared international standards,[115] national museums and cultural institutions in countries, such as Germany,[116] Belgium,[117] and United Kingdom,[118] often develop their own internal policy frameworks for handling artefacts acquired during the colonial period.

VOLUNTARY RETURNS

Development of legislation relating to return requests has allowed states to devise options for voluntary returns. This may be an independent decision of an individual cultural institution or museum that possesses one or more cultural objects removed during the colonial era. For instance, in December 2022, the Cambridge University Museum of Archaeology and Anthropology proposed returning to Nigeria over 100 Benin bronzes taken from the Kingdom of Benin by the British military during the expedition to Benin City in 1897.[119] However, such voluntary returns have also proved unsuccessful due to the absence of a clear legal framework, as these returns now depend upon the goodwill of the UK. In the above-mentioned case, for example, in May 2023 the Cambridge University Museum postponed the return, citing a decree issued by the Nigerian President on 28 March 2023 that appointed a Nigerian traditional ruler as the owner and custodian of all artefacts to be returned.[120] The UK's refusal raised several new issues, particularly concerning the right of the receiving country to freely dispose of its cultural heritage once it has been recovered.

Another emerging practice involves the temporary return of cultural property under long-term loan agreements. Such arrangements enable the country of origin to

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[115] 'ICOM Code of Ethics for Museums', adopted in 1986 and revised in 2004; https://icom.museum/en/resources/standards-guidelines/code-of-ethics/ [accessed on 23 December 2024].

[116] See German Museums Association, *Guidelines on Dealing with Collections from Colonial Contexts*, Berlin, 2018; https://www.museumsbund.de/wp-content/uploads/2019/10/dmb-guidelines-colonial-context.pdf [accessed on 20 May 2025]. 'This text outlines some core recommendations: (a) not every discussion that looks like a restitution demand must end in restitution; (b) the museums are urged to consider alternatives to the restitution of the physical object; (c) if there is a clear right to restitution, the object must be given back and the museum or the relevant authority should not advance the argument based on prescription or time lapse; (d) all claims dating to the colonial times are time-barred', see A. Caligiuri, 'The Irreparability…', op. cit.

[117] Restitution Belgium, *Ethical Principles for the Management and Restitution of Colonial Collections in Belgium*, June 2021; https://restitutionbelgium.be/en/foreword [accessed on 11 November 2024].

[118] Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England*, 2023; https://www.artscouncil.org.uk/media/21957/download?attachment [accessed on 6 June 2025].

[119] 'Cambridge University to return Benin Bronzes to Nigeria', *BBC News*, 14 December 2022; https://www.bbc.com/news/uk-england-cambridgeshire-63973271 [accessed on 10 December 2024], see also A. Caligiuri, 'The Irreparability…', op. cit.

[120] Cf. M. Dzirutwe, 'Return of Benin Bronzes delayed after Nigerian president's decree', *Reuters*, 10 May 2023; https://www.reuters.com/world/africa/return-benin-bronzes-delayed-after-nigerian-presidents-decree-2023-05-10/ [accessed on 11 December 2024].

regain legal ownership while permitting the holding country to continue exhibiting the cultural goods in its museums for a defined period. For example, in 2002, France and Nigeria concluded an agreement regarding the statuettes of Nok and Sokoto, whereby Nigeria's ownership title over the statuettes was recognised in exchange for a renewable 25-year loan to the Quay Branly Museum in France.[121]

Cultural institutions collaborate with museums to undertake temporary exchanges of artworks, conduct joint research programmes, host shared exhibitions, and carry out collaborative restoration projects. In 2010, the Government of the Republic of Peru and Yale University entered into a Memorandum of Understanding under which Yale was to return to Peru all artefacts removed from the site of Machu Picchu between 1912 and 1916, upon completion of an inventory.[122] A similar MoU was concluded in in 2011 between Yale University and the Universidad Nacional de San Antonio Abad del Cusco, whereby the parties undertook 'to collaborate and jointly develop an international facility and associated programs designed to serve as a base for the display, conservation and study of the Machu Picchu collections as well as for the interchange of students, scholars and scholarship regarding Machu Picchu and Inca culture'.[123]

In recent years, digitisation and the creation of replicas have emerged as means of overcoming the practical difficulties associated with transferring requested cultural objects. Such agreements enable the country of origin to retain a digital copy of cultural goods and to exhibit replicas in its cultural institutions, particularly where the transfer of the originals from the holding country would be impractical or unfeasible. Efforts towards formal arrangements began in 1984 under the auspices of ICPRCP. With its assistance, an agreement was reached between the Government of Jordan and the Cincinnati Art Museum (USA), whereby the two parties undertook to exchange plastic casts of parts of the sandstone panel of Tyche with the Zodiac

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[121] See 'Press Release 5 March 2002 ICOM Red List: Nigeria's Ownership of Nok and Sokoto Objects recognised', *CIMCIM Bulletin,* No. 48, March 2002; https://cimcim.mini.icom.museum/wp-content/uploads/sites/7/2019/01/Bulletin_48_March2002.pdf [accessed on 21 November 2024]; 'Une convention entre la France et le Nigéria à propos des œuvres Nok et Sokoto du future musée du quai Branly', 13 February 2002; http://www2.culture.gouv.fr/culture/actualites/communiq/tasca2002/nok.htm [accessed on 21 November 2024]. As observed by A. Caligiuri, 'the agreement between France and Nigeria over the Nok and Sokoto statuettes was formally based on Article 7 of the 1970 UNESCO Convention', cf. Caligiuri A., 'The Irreparability…', op. cit., p. 60.

[122] A. Chechi, L. Aufseesser, M.-A. Renold, 'Case Machu Picchu Collection – Peru and Yale University', *Platform ArThemis*, Art-Law Centre, University of Geneva, October 2011; https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university/case-note-2013-machu-picchu-collection-2013-peru-and-yale-university [accessed on 21 November 2024].

[123] See 'Memorandum of Understanding between Universidad Nacional de San Antonio Abad del Cusco and Yale University Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and the Inca Culture', 11 February 2011; https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university/memorandum-of-understanding-between-the-government-of-peru-and-yale-university-11-february-2011/at_download/file [accessed on 21 November 2024].

held by each of them.[124] In the long term, it is hoped that such digitisation proposals and agreements, if implemented in good faith, could establish a new model for successful return requests.

HUMAN RIGHTS STRATEGIES FOR THE PROTECTION OF CULTURAL PROPERTY

The emerging global strategies incorporating human rights dimension into cultural property constitute a timely development. This approach can, in turn, provide additional legal avenues and tools for claims seeking the return of stolen colonial property under the multilateral human rights regime. The invocation of human rights rules in relation to the restitution of such property has featured in recent activities and deliberations of the Human Rights Council. In 2009, through resolution 10/23, the Council 'established the mandate of the independent expert in the field of cultural rights',[125] appointing Ms Farida Shaheed to advance the protection of cultural rights. Through a series of ten thematic reports, the Special Rapporteur elaborated upon the content of Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[126] and was tasked with coordinating efforts with intergovernmental and non-governmental organisations, other special procedures, the Committee on Economic, Social and Cultural Rights, UNSECO, and other relevant actors.[127] Initially focusing on various aspects of cultural rights and conducting a preliminary study on the destruction of cultural heritage as a violation of human rights, the Human Rights Council, in its resolution 37/17 of 22 March 2018, noted with concern 'the organized looting, smuggling, and theft of and illicit trafficking in cultural property that could undermine the full enjoyment of cultural rights'.[128] Again in 2025, Human Rights Council, called upon states to strengthen 'international cooperation on the return or restitution of cultural properties of spiritual, ancestral, historical and cultural value to countries of origin, including but not limited to objets d'art, monuments, museum pieces, manuscripts and documents, and strongly encourages relevant private entities to similarly

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[124] UNESCO, *Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, 1987, 24 C/94;; https://unesdoc.unesco.org/ark:/48223/pf0000075160 [accessed on 24 October 2024].

[125] Report of the Special Rapporteur in the Field of Cultural Rights, Thirty-first session, Human Rights Council, 3 February 2016, UNGA A/HRC/31/59; https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.59_E.docx [accessed on 6 June 2025].

[126] Report of the Independent Expert in the Field of Cultural Rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council, Fourteenth session of Human Rights Council, UNGA, A/HRC/14/36, 22 March 2010; https://digitallibrary.un.org/record/680585?ln=en&v=pdf [accessed on 6 June 2025].

[127] Ibidem.

[128] Cultural rights and the protection of cultural heritage, resolution adopted by the Human Rights Council on 22 March 2018, Human Rights Council, Thirty-seventh session, 26 February–23 March 2018, Agenda item 3, A/HRC/RES/37/17, 9 April 2018; http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/37/17&Lang=E [accessed on 6 June 2025].

engage, including through bilateral dialogue and with the assistance of multilateral mechanisms, as appropriate'.[129] This convergence warrants further exploration and operationalisation to ensure the return of cultural property.

Although the Human Rights Council does not explicitly address stolen colonial property, the Expert Mechanism on the Rights of Indigenous Peoples, in its study *Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*,[130] it has established a link between the restitution of cultural property and human rights, specifically in cases concerning indigenous communities, connecting such stolen property to the rights of indigenous peoples under, *inter alia*, Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, part six of the Study by the Expert Mechanism emphasises that 'the right to redress and restitution where violations of the rights of indigenous peoples have occurred is a foundational element to ensuring reconciliation and the future commitment to protecting the rights of indigenous peoples. Under human rights law, there is a strong principle in favour of restitution when a violation has occurred.'[131] Such initiatives for repatriation through the multilateral human rights regime may reshape the states' public policies, ultimately advancing the cause of cultural nationalism.

CONCLUSIONS

The shift in international law concerning the protection of cultural objects was introduced by the 1954 Hague Convention and its Protocols, yet obligation to return looted property from occupied colonies was not explicitly recognised in any of the treaties. However, since the 1990s, several international initiatives have addressed this issue. States are legally obliged to have recourse to all appropriate measures to secure the return of looted cultural property, including through human rights law. Three major legal developments can be identified: first, the obligation to return cultural property to the State of origin has attained the status of a customary obligation under international law. Its roots can be traced historically and have been further reinforced by recent initiatives within the corpus of human rights law. Second, the rise of bilateral agreements in recent decades, alongside the evolution of multilateral treaties, raises major conceptual and policy considerations. One view is that bilateral agreements and multilateral treaties concluded under UNESCO can mutually promote and enforce the obligation to return cultural objects. Another perspective warns that such bilateral agreements may prove counterproductive, undermining the stability and integrity of multilateral treaties and threatening the vision of

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[129] Cultural rights and the protection of cultural heritage: revised draft resolution, Fifty-eighth session, Human Rights Council, 24 February–4 April 2025, A/HRC/58/L.4/REV.1; https://docs.un.org/en/A/HRC/58/L.4/REV.1 [accessed on 6 June 2025].

[130] *Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*. Study by the Expert Mechanism on the Rights of Indigenous Peoples, Thirtieth session, Human Rights Council, 19 August 2015, A/HRC/30/53); https://documents.un.org/doc/undoc/gen/g15/185/41/pdf/g1518541.pdf [accessed on 15 May 2024].

[131] Ibidem.

cooperative and non-discriminatory measures for the protection of cultural heritage as envisaged by the architects of UNESCO. Third, under emerging international law, looted cultural property may be classified as a transnational criminal offence, in which case the effective operationalisation of international cooperation becomes all the more essential and imperative.

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