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PROCEEDING-RELATED INTERCEPTION OF CORRESPONDENCE, POST AND RETENTION DATA IN ACCORDANCE WITH ARTICLE 218 §1 CPC

PIOTR KRZYSZTOF SOWIŃSKI*

Already at the beginning of this article, it is necessary to highlight that most comments made therein, in spite of some common elements, will mainly refer to interception of correspondence and post in their classical form, about which the Skaldowie band used to sing in "Medytacje wiejskiego listonosza" in 1969. Despite the technological revolution that did not omit the means of communication, "people [still] write letters", which may be the subject of interest for proceeding bodies and an important source of information about facts that are critical from the point of view of the aim of a trial.

It is worth noticing that the "interception of correspondence, post and data (…)" mentioned in the title is a phrase that is not used in Article 218 §1 of the Criminal Procedure Code (CPC) of 1997, which is a normative basis for this activity. The provision regulates an activity consisting in "a surrender of correspondence and post as well as data referred to in Articles 180c and 180d of the Act of 16 July 2004 on telecommunications law [to a court or a prosecutor]".[1] However, it is not a phrase without a statutory origin because the word "interception" is used in the title of Chapter 25 CPC[2], including Article 218 although the "interception" applies to a broader legal category of "things".

There is no definition of "things" in the Criminal Procedure Code or the Criminal Code (CC) although one can find reference to a broader category including, inter alia, Polish or foreign currency or other means of payment (Article 115 §9 CC). The lack of the definition of a thing in criminal law makes it necessary to refer to civil law, where the concept of a "thing" refers to "only material items". Although

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1 Journal of Laws [Dz.U.] of 2014, item 243, as amended.

2 It was not used in Chapter 22 CPC of 1969 devoted to "Examination and evidence". The term "interception" was used in Article 22 §3 of this Code, however, it referred to objects "surrendered or found" in the course of search.

Article 45 Civil Code[3] clearly stipulates that a thing understood in this way is a concept created exclusively for the need of "this [i.e. Civil] Code", where a "thing" is mainly understood as an object of ownership rights and other property rights, as it is noticed in the doctrine of the same civil law, such treatment of a thing in the colloquial language and in the entirety of Polish regulations is not questioned.[4] Undoubtedly, correspondence and post referred to in Article 218 §1 CPC take a material form that is being processed, and because of their (artificial) distinction, in social-economic relations, they may be treated as independent interests.[5] As a result, also correspondence and post may be analysed from the point of view of technical-legal[6] definition of a thing developed in Article 45 Civil Code. As A. Kidyba notices based on civil law, since even a sheet of paper is a thing,[7] the same sheet of paper with a text written on it may also be a thing, which can make it a special kind of thing, i.e. a document referred to in Article 115 §14 CC, especially in the scope in which "in connection with its content, [it] constitutes the evidence of a right, a legal relationship or circumstances that are legally significant".

In the context of Article 218 §1 CPC, it may seem strange that the legislator does not specify what "correspondence and post" are. In the interwar period, they were treated in the doctrine as concepts covering all types of "letters, telegrams and post, regardless of the method used to send them (by post, rail, ship or plane) and their content (documents, money and goods)".[8] Looking at this issue from the perspective of Article 23 Civil Code, which classifies secrecy of correspondence,[9] apart from inter alia health, liberty, honour, freedom of religion and reputation, within the so-called personal interests (Article 23 Civil Code), and Article 267 §1 Criminal Code, which penalises its infringement, one may draw a conclusion that the secrecy of its content and the right of the sender and the addressee, with the exclusion of other persons, to dispose of it as well as the fact of its transmission between the two parties are characteristic features of "correspondence". Although Article 267 CC prohibits infringement of secrecy of correspondence in the form of

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[3] Act of 23 April 1963: Civil Code (Journal of Laws [Dz.U.] of 2016, item 380, as amended).

[4] See, W. Katner, [in:] P. Księżak, M. Pyziak-Szafnicka (ed.) et al., *Kodeks cywilny. Komentarz* [Civil Code: Commentary], LEX 2014, Vol. 1, up to Article 45 Civil Code.

[5] J. Wasilkowski, *Zarys prawa rzeczowego* [Overview of property law], Warsaw 1963, p. 8.

[6] E. Gniewek, [in:] B. Burian, A. Cisek, M. Drela, W. Dubis, E. Gniewek (ed.), J. Gołaczyński, K. Gołębiowski, K. Górska, J. Jezioro, J. Kremis, P. Machnikowski (ed.), J. Nadler, R. Strugała, J. Strzebinczyk, W. Szydło, K. Zagrobelny, *Kodeks cywilny. Komentarz* [Civil Code: Commentary], Warsaw 2011, p. 111.

[7] A. Kidyba, [in:] Z. Gawlik, A. Janiak, A. Jedliński, A. Kidyba (ed.), K. Kopaczyńska-Pieczniak, E. Niezbecka, T. Sokołowski, *Kodeks cywilny. Komentarz* [Civil Code: Commentary], LEX 2012, Vol. 1, up to Article 45 Civil Code.

[8] L. Peiper, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Kraków 1929, p. 100.

[9] It concerns the substantive state (a letter) as well as a non-substantive state (oral communication) or "pure information" (electronic communication), at the same time being additional interests to privacy. See, A. Kidyba (ed.) et al., *Kodeks…* [Civil Code…], LEX 2012, Vol. 14, up to Article 23 Civil Code.

"opening sealed letters"[10], there is a common principle of social life that no one should read somebody else's correspondence, even in the form of postcards.[11]

The Act of 23 November 2012 on postal law (hereinafter PL)[12] also does not contain a legal definition of "correspondence", however, this Act refers to this concept several times. A closer analysis of the solutions in this Act seems to indicate that, from the material point of view, "correspondence" is not a separate being and is treated in PL as an element of post, something that is inside a package (see, inter alia, Article 1(1.2) and (1.3) and Article 29(3) PL), and is protected against third parties and subject to exchange between the parties purchasing a postal service provided by a postal service operator as a business activity in the domestic and foreign turnover and consisting in admitting and exchanging correspondence in special exchange offices organised by this operator (Article 2(1.4) PL). Postal law distinguishes "delivery of correspondence" containing information recorded on any carrier, including one recorded with the use of embossed writing (Article 3(25)), from other deliveries defined as "prints", containing written or graphic information but duplicated with the use of printing or similar methods, recorded on paper or other material used in printing (Article 3(5)). In order to avoid possible misunderstanding, postal law clearly stipulates that a delivery of prints is not treated as a delivery of correspondence. Both types of deliveries may be objects of delivery to blind people (Article 3(18)) and "deliveries of letters" (Article 3(20)), which may take the form of, inter alia, "registered post" (Article 3(22)).

The doctrine points out that Article 218 CPC regulates interception of correspondence *sensu stricto*, while one can find interception used in a general sense, conducted in accordance with Article 217 and Articles 219–236 CPC.[13] Both cases differ not only because of the entity at whose venue interception takes place (a situation laid down in Article 219 and the following, preceded by a search), but mainly due to the fact that in the situation referred to in Article 218 §1 CPC we deal with correspondence and post sent by a relevant postal operator but still not delivered to the addressee. The discussed procedural institution was also known in the former criminal procedure codifications and was laid down in Article 158 §1 CPC of 1928 and in Article 198 CPC of 1969.

The present Criminal Procedure Code describes the discussed activity from the perspective of entities that have correspondence in their possession because Article 218 §1 CPC regulates a "surrender", not a "seizure" or "interception". The entities listed in the Act are authorities, institutions and companies involved in postal or telecommunications services as well as customs offices and transport

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[10] Unlawful obtaining of information may only take place by "opening a sealed letter". In accordance with Article 267 §1 CC, only correspondence sealed against access to it by third parties is protected, not e.g. correspondence in an unsealed envelope. Compare, W. Wróbel, [in:] A. Barczak-Oplustil, M. Bielski, G. Bogdan, Z. Ćwiąkalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, A. Zoll (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special Part], LEX 2013, Vol. 9, up to Article 267 CC.

[11] Supreme Court judgement of 3 February 2004, II KK 388/02, LEX No. 121287.

[12] Journal of Laws [Dz.U.] of 2016, item 113.

[13] K. Dudka, *Kontrola korespondencji i podsłuch w polskim procesie karnym* [Correspondence control and tapping in the Polish criminal proceedings], Lublin 1998, p. 21.

institutions and companies. The list of entities is so broad that it covers postal and telecommunications operators, i.e. those who are professionals involved in the transfer of correspondence from senders to addressees, as well as entities who provide transport services for them and those who may come into possession of correspondence and other post in accordance with other regulations, e.g. the Act of 19 March 2004 on customs law.[14] The ownership structure of these entities is insignificant; they may be state-owned or private entities.

A court's or a prosecutor's decisions are grounds for a surrender, which is laid down in Article 218 §1 CPC. However, in cases conducted by a fiscal body in preparatory proceedings, that is entitled to conduct it and then to develop an indictment and bring it before a court, also the decisions issued by this body are binding (Article 122 §1(1) FPC in connection with Article 218 §1 first sentence CPC). Only a court or a prosecutor has the right to open correspondence, post or other data or order that they be opened (Article 218 §1 second sentence CPC). Thus, where other proceeding bodies recognise the need for getting to know the content of correspondence, post or data listed in Article 218 §1 CPC, they have to apply to a prosecutor because the Act does not envisage any clause in case of an extraordinary situation.

It is not accidental that the legislator differentiates "opening of correspondence, post or data" from "ordering that [they] be opened" in Article 218 §1 second sentence CPC. While opening is an activity performed by a court or a prosecutor, "ordering" results in the activity of opening correspondence, post or data performed by another body indicated by a court or a prosecutor.[15] "Opening" mainly means breaking the seal protecting the entry to the content. Therefore, it seems that in case of opening correspondence, post and data performed by a court or a prosecutor, there is no need to issue a separate decision because Article 218 §1 second sentence CPC reserves it as a disjunctive alternative only in a situation where the performing body is not a court or a prosecutor. Still, a doubt arises whether a court or a prosecutor really decide about the opening of correspondence, post or data via decisions that do not influence the situation of parties and do not clearly interfere into the sphere of adjudication.[16] The problem is not solved in Article 93 §2 CPC, which allows ordering "in cases not requiring a decision" but grants the competence to issue them to a court's president, a chair of a chamber or an authorised judge and not a court, which may issue such an order but only in accordance with §3 of the provision, in the course of the preparatory proceedings and only "in a case envisaged in statute". The limitation of a court's competence to issue orders to the preparatory proceedings and only to cases laid down in a clear statutory provision,

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[14] Journal of Laws [Dz.U.] of 2004, No. 68, item 623, as amended.

[15] K. Dudka, *Kontrola…* [Correspondence…], p. 31, also drew the same conclusion based on Article 198 CPC of 1969, which is not in force at present.

[16] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Mazur (ed.), M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1976, pp. 165–166. However, differently: T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2008, p. 292.

which T. Grzegorczyk[17] approves of, would mean that the situation regulated in Article 218 §2 second sentence CPC is the situation signalled in Article 93 §3 *in fine* CPC. This would raise another question, i.e. what kind of decision, if not an order, should the same court issue in the course of judicial proceedings, or that Article 218 §2 second sentence CPC does not really refer to a separate decision in the form of an order but emphasises that a decision to intercept correspondence is supplied with an additional *passus*, in which the same court, envisaging the necessity of making use of the assistance of another body in opening correspondence or post, assigns the task to it. In such a case, "ordering to open" would be a synonym of giving an instruction or an order, but not a separate decision under Article 93 §4 CPC because, due to Article 93a §2, it would result in further delegation to a judicial officer, who "may also issue orders that a court issues in accordance with statute". The obligation under Article 218 §1 second sentence cannot be treated as an order in the same way as an order under Article 15 §1 to §3 CPC cannot substitute a judgement issued based on the former of these provisions.

However, it is certainly not possible to open correspondence, post or data without their earlier interception because the pronoun "them" used in the second sentence of Article 218 §1 CPC clearly indicates that opening refers to correspondence and post mentioned in the first sentence of the same provision. The legislator's use of the word "open" in Article 218 §1 second sentence may suggest that the adequate court's or prosecutor's decision is necessary only with regard to sealed deliveries because, from the linguistic point of view, we can "open" (*otworzyć*) something that is "closed" (*zamknięte*) or thanks to which the thing becomes "available" (*dostępna*).[18] This interpretation does not seem to be right because in such a case all correspondence that is not sealed in envelopes, i.e. is in the form of postcards, would not be subject to the regulation. The fact that it is sent in this form does not mean that the sender does not mind losing its privacy or reading it by a person other than the addressee. That is why, I would rather interpret the word "opening" used in Article 218 §1 second sentence CPC as a synonym for "reading". As it has already been mentioned at the beginning, Article 218 §1 CPC is applicable only to correspondence and post "on the way" between the sender and the addressee, thus the same items, not sent yet or already delivered, obtained in the course of a search may be subject to examination and, as a result, reading performed in accordance with Article 228 §1 CPC. The provision of Article 228 §1 CPC is applicable to correspondence and post already delivered, even when the delivery was not made to the addressee in person and even if the latter was not able to get to know the content. According to K. Dudka, it does not matter whether the correspondence or post is in places used by the party to the trial or in a letterbox or a *poste restante* office.[19] The application of Article 228 §1 CPC to such correspondence and deliveries is even easier since they belong to, as it has been mentioned at the beginning, a broad category of "objects" that the regulation refers to. The contemporary Criminal Procedure Code, unlike its pre-war counterpart,

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[17] T. Grzegorczyk, *Kodeks…* [Criminal…], p. 292.

[18] Compare, *Słownik języka polskiego PWN* [PWN Dictionary of the Polish language] available at: http://sjp.pwn.pl/sjp/otworzyc;2497122.html [accessed on 14 January 2017].

[19] K. Dudka, *Kontrola…* [Correspondence…], p. 49.

does not envisage a special treatment of correspondence and post obtained during a search, although even the correspondence that has been read does not stop being correspondence. The interwar solution assuming a possibility of checking "correspondence and other papers" only by a court or a prosecutor, and only those found during a search of a person suspected of a crime, due to respect for privacy, seems to have been much better than the present one. The same Article 156 CPC of 1928 also stipulated that checking correspondence, in case of a search of a person not suspected of a crime conducted by a person other than a judge or a prosecutor, and that person's objection, were to result in a ban on checking it and, after sealing, sending it to a court or a prosecutor (§2). The sealing, even by the party interested, was aimed at "protecting it against a searching body's indiscretion".[20]

The ultimate nature of an order under Article 218 §1 CPC is demonstrated not only by the fact that entities listed in Article 218 §1 are "obliged" to surrender correspondence, post and data but also that the legislator gives the order a name of "demand". The body entitled to formulate a demand is a court or a prosecutor, and other law enforcement bodies, e.g. police, are not entitled. As it has already been mentioned, satisfying a court or a prosecutor's demand consists in a physical surrender of correspondence or post to an entitled body and not informing it about the content of correspondence or post demanded. As Article 218 §1 last sentence CPC stipulates, only a court or a prosecutor is entitled to open them or order that they be opened. The Act does not lay down a need for a sender or an addressee to be present in the course of opening correspondence or post, although it was a solution when Article 161 CPC of 1928 was in force. It stipulated "a person who was deprived [here: a person referred to in Article 158 §1 *in fine*] of correspondence [and post] should be present at the moment they are unsealed and checked", which took place in the course of application of Article 157 of the same CPC (Article 161 second sentence CPC of 1928). It is worth mentioning that this presence was not always required but only "if possible", although a judge or a prosecutor should record every exception to the rule and indicate the reason.[21]

The act of opening correspondence and post [and playing the recordings on a carrier] must be recorded in a report which must contain, apart from such obvious data as those concerning persons participating, the time and place of the activity, also data concerning the preliminary examination of the objects intercepted in accordance with Article 218 §1 CPC. The latter should contain information about the state of correspondence and post, i.e. information whether there are signs of earlier interference into its content. This way, the report *de nomine eius* constituting a report on opening correspondence is the report referred to in Article 143 §1(3) CPC. However, there is still an open question whether the report under Article 143 §1(7) CPC should also contain data from the opened correspondence or post. It seems that this should be done because only this way it is possible to protect the data in the opened correspondence that are not connected with the given case, and checking

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[20] L. Peiper, *Komentarz…* [Commentary…], Kraków 1933, p. 257.

[21] A. Mogilnicki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Kraków 1933, p. 336.

them by other persons (e.g. based on Article 156 §1 or §5 CPC) would constitute a too far-reaching interference in the privacy of persons involved in correspondence (Article 143 §1(7) CPC). It seems that interception alone, preceding the opening of correspondence or post, does not require recording in a report, although Article 143 §1(6) *in fine* CPC mentions such an obligation where it refers to "things" *in genere*, but not correspondence and post that are treated following different rules laid down in Chapter 25 CPC, because of a sensitive nature of the latter.

The statement that correspondence or post is subject to "opening" is significant because the sense of the interception of correspondence, post or data referred to in Articles 180c and 180d of the telecommunications law should not be associated only with their surrender to an entitled proceeding body but with the fact that obtaining them, the entitled proceeding body can learn what their content is and make a proper analysis, which is the aim of activities under Article 218 §1 CPC. Thus, interception is just a means leading to the opening of correspondence or post and getting to know their content. However, at least theoretically, it is possible that correspondence or post surrendered to a proceeding body is not opened. It may take place if it proves to lose its significance for criminal proceedings or in case it was not subject to a decision and was surrendered by mistake. In both cases, such correspondence or post should be returned to the authorities, institutions or companies referred to in Article 218 §1 CPC, although this obligation laid down in §3 of the same provision refers only to correspondence and post that has lost their significance for the given case.

"Significance for criminal proceedings" is at the same time a rather imperfect criterion for recognising grounds for activities undertaken in accordance with Article 218 CPC. In this provision, §1 as well as §3 stipulate this "significance", but §1 additionally emphasises the significance for the criminal proceedings that is "pending". This indication suggests that, based on Article 218 §1 CPC, it is not possible to intercept correspondence beyond the scope of the criminal proceedings, which also applies to activities undertaken before it, e.g. in accordance with Article 307 §1 first sentence CPC. There are no obstacles to intercept correspondence and the like in accordance with Article 218 §1 CPC in the course of urgent activities, although e.g. K. Dudka[22] expresses a different opinion, which R.A. Stefański[23] does not approve of. J. Skorupka believes that suspended proceedings do not meet the requirement and identifies "pending" proceedings with "conducting" the proceedings, which is laid down in Article 22 §1 CPC.[24] However, it seems that an activity under Article 218 §1 CPC may be an activity undertaken in the period of suspension of the criminal proceedings based on Article 22 §3 CPC, i.e. in order to

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[22] K. Dudka, *Zatrzymanie korespondencji w projekcie k.p.k. z 1995 r. na tle dotychczasowych uregulowań* [Interception of correspondence in the Bill of CPC of 1995 in the light of present regulations], Prokuratura i Prawo No. 4, 1996, p. 65.

[23] R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński (ed.), S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1998, Vol. I, p. 577.

[24] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], LEGALIS 2016, Vol. 1, up to Article 218.

"protect evidence against its loss or distortion" if only this activity is "appropriate". Article 218 CPC is not applicable, however, in the course of proceedings concerning misdemeanours, it does not apply either directly or by analogy.[25]

The requirement of "significance for the pending criminal proceedings" was formed in such a way that it is possible to intercept correspondence and post in a case concerning every type of crime, regardless of the significance of this act.[26] The Act does not lay down a condition similar to those known from Article 180 §1 ("interest of the institution of justice") or §2 CPC ("interest of the institution of justice" or "inability to establish circumstances based on other evidence"), although it seems that its formulation in case of acts of lesser social harmfulness would be at least desirable. Only because of that, cannot one agree with the opinion expressed by J. Skorupka concerning the necessity of analysing every decision under Article 218 §1 CPC with respect to "the principle of subsidiarity and proportionality of significance of objects and information mentioned for the pending criminal proceedings and the requirement of their protection",[27] because the Criminal Procedure Code does not formulate such a condition. This opinion may be treated only as a proposal rationalising proceeding bodies' activities, which does not go beyond the limits *de lege ferenda*.

In the same way, J. Skorupka rightly notices that in order to establish the existence of the prerequisite of "significance for (…) criminal proceedings", it is necessary to conduct *a priori* and then *a posteriori* assessment of demanded thing or data.[28] The latter assessment may not match the former, which results in a conclusion that the intercepted correspondence or post is useless for the proceedings. One should agree with R.A. Stefański that the return of useless correspondence should not be delayed until the end of the criminal proceedings but it should be done promptly after establishing that it has no significance for the proceedings.[29] It seems that a body could not keep this correspondence or post in the expectation of a change of the assessment in the future, even near future. A different conduct would mean illegal retention of correspondence that, in fact, does not meet the condition of usefulness for the proceedings, which is a basic requirement in the light of norms laid down in Article 218 §1 CPC.

Still in the interwar period, it was possible to intercept only the correspondence and post that were sent by or addressed to the accused (Article 158 CPC of 1928). L. Peiper believed that such a solution was to protect other persons against "strong" interference "into private and personal life", which in case of the accused was admissible only because of "significant necessity".[30] The presently binding Code does not contain any restrictions concerning persons who are subject to a decision

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[25] J. Byrski, D. Karwala, *Tajemnica telekomunikacyjna w postępowaniu w sprawach o wykroczenia* [Telecommunications secrecy in misdemeanour proceedings], Pr.NTech No. 4, 2008, pp. 48–55.

[26] R.A. Stefański, [in:] Z. Gostyński (ed.) et al., *Kodeks…* [Criminal…], p. 577.

[27] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks…* [Criminal…], LEGALIS 2016, Vol. 2, up to Article 218.

[28] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks…* [Criminal…], LEGALIS 2016, Vol. 1, up to Article 218.

[29] R.A. Stefański, [in:] Z. Gostyński (ed.) et al., *Kodeks…* [Criminal…], p. 577.

[30] L. Peiper, *Komentarz…* [Commentary…], Kraków 1929, p. 102.

issued in accordance with Article 218 §1. Thus, a person whose correspondence and post will be checked is a suspect (the accused), although the doctrine does not exclude those connected with the aggrieved.[31] Article 218 §1 CPC does not lay down that interception is applicable only to correspondence or post sent by the suspect or the accused. Thus, post addressed to them may also be subject to interception. As Article 218 §2 CPC defines these persons with the use of a common name "addressees of correspondence and telephone subscribers or senders whose list of connections and other deliveries of information [shall] be surrendered", the activity may also apply to persons who are not directly connected with a case but only keep some kind of contact with the suspect or the aggrieved and to the extent that has no relation to crime.[32] It seems that Article 218 §2 CPC wrongly omits the sender of correspondence or post as a person who is delivered a decision on interception of correspondence, especially as this exclusion does not apply to "a sender whose list of connections or other deliveries of information was surrendered". Thus, if the sender is indicated on a package, which is obligatory in accordance with Article 3(21) of postal law, she/he should be delivered such a decision, especially as secrecy of correspondence seems to concern mainly the person who the content of it comes from.

The lack of such limitations in Article 218 §1 is undoubtedly a solution favourable for proceeding bodies, but is it in conformity with Articles 47 and 49 of the Constitution of the Republic of Poland giving guarantees of the right to protect private life and privacy of communication, which, thanks to broad interpretation in the doctrine and the fact that it covers "all technical forms of transmitting information, in every form of communicating, regardless of the physical carrier used",[33] should concern written correspondence, fax correspondence, text and multimedia massages and electronic mail? Seemingly, everything is perfect. The same Article 49 of the Constitution signals a possibility of "limitation of freedom and privacy of communication in cases and in a manner specified by statute", which Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms also does.[34] Being a kind of model for national regulations, it bans "interference by a public authority with the exercise of the right to respect for private life (…) and one's correspondence" with the exception of cases "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Undoubtedly, Article 218 §1 CPC meets all the requirements for a statutory provision. Where is the problem then? It must be noticed that both the Constitution of the Republic of Poland ("only") and the ECHR ("with the exception") treat interference in private life as an extraordinary situation, which additionally emphasises the conventional

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[31] M. Rogalski, *Udostępnianie danych telekomunikacyjnych sądom i prokuraturom* [Surrender of telecommunications data to courts and prosecutors], Prokuratura i Prawo No. 12, 2015, p. 68.

[32] *Ibid*., pp. 68–69.

[33] *Ibid*., p. 60.

[34] Drafted and signed in Rome on 4 November 1950 and amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended).

requirement for its "necessity" ("as is necessary") because of the necessity to protect higher values. Although the Constitution does not repeat the requirement, it seems certain that the objective criterion for such interference must be formulated by the legislator as, otherwise, its efficient control would not be possible, e.g. in accordance with Article 236 §1 CPC, i.e. appeal against the decision concerning, inter alia, interception of things treated as evidence and against other activities. It does not seem probable that "significance for a case" envisaged in Article 218 §2 CPC could become such a criterion for appropriateness and lawfulness of interception and opening of correspondence and post due to its excessive generality.[35]

Relativity of secrecy of communications is not without influence on the solutions laid down in Article 33(1) (opening "undeliverable post") and Article 36(1) (requesting a sender to open "post that may cause damage to other post or an operator's property") of postal law as well as on the way in which the postal secrecy developed. In accordance with Article 41(1) PL, postal secrecy applies to "information transmitted by post, information concerning settlement of postal orders, data concerning entities using postal services and data concerning the fact and circumstances of providing postal services or using those services" and obliges a postal operator and persons who, because of their business activity, have access to postal secrecy to keep it (Article 41(2) PL). The same Act lays down instances of secrecy infringement: revealing or processing information or data that are subject to postal secrecy (Article 41(3.1)), opening sealed post or getting to know its content (3.2) and enabling unauthorised persons to undertake activities referred to in Article 41(1) and (2) (Article 41(3.3)), admitting a possibility of activities referred to in Article 41(3.1) and (3.2) PL, provided they are undertaken in cases envisaged by law or a contract to provide postal services. The situation announced by Article 41(4.1) in connection with (3.1) PL is nothing else but only a case under Article 218 §1 CPC. A postal operator is obliged, from the very first day of their business operations, to ensure, free of charge, within the postal business activity, that the Police, the Boarder Guard, the Internal Security Agency, the Military Intelligence Service, the Military Police, the Central Anticorruption Bureau and fiscal intelligence, hereinafter referred to as "entitled entities", and the prosecution service and courts can have technical and organisational possibilities of fulfilling their tasks. In accordance with Article 82(1) PL, in the scope regulated by other provisions and in the mode laid down therein, it applies to obtaining data concerning a postal operator, postal services provided and information allowing identification of service users (Article 82(1.1)), surrendering post in order to control the content of correspondence or post (1.2), and also giving access to post intercepted by an operator because of suspicion that it constitutes an object of crime in order that entitled bodies examine it (1.3), and admitting further transport of postal deliveries containing objects of crime in an untouched condition or after their removal and partial or complete substitution (1.4).

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[35] See also, K. Eichstaedt, [in:] D. Świecki (ed.), B. Augustyniak, K. Eichstaedt, M. Kurowski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2013, p. 684.

We can also speak about relativity in case of secrecy of communicating in telecommunications networks, referred to in Article 159 of the Act of 16 July 2004 – Telecommunications law[36] (TL) as telecommunications secrecy, which is limited in accordance with Article 180d in connection with Article 159(1.1) and (1.3–5), in Article 161 and in Article 179 (9) TL, however "in accordance with and following the procedures laid down in other regulations".

Placing Article 218 in Part V ("Evidence") and not Part VII of the Criminal Procedure Code makes us think that interception of correspondence or post may take place in the course of preparatory proceedings as well as in their phase *in rem* and in the course of a judicial proceedings. It seems, however, that due to openness of the last one, the significance of evidence obtained in this phase will be especially high. However, there are no doubts that possibilities of interception are updated in the course of the "pending" proceedings and only for the use of those proceedings.

Although Article 218 §1 CPC uses the nouns "correspondence" and "post" in a plural form in Polish, there are no obstacles to issue a decision to intercept one item or selected items of post sent by or to a given person. The factors allowing differentiation may be, first of all, a sender or an addressee but also a type of post or the time of sending. The content of correspondence or post includes mainly information but also objects enclosed if their size is appropriate for sending from one person to another.

Although, from the linguistic point of view, the word "correspondence" covers "keeping in touch with another person by the exchange of letters" and "a collection of received or sent letters",[37] for the purpose of Article 218 §1 CPC the term should be understood as a material corpus of that contact in the form of all types of letters, postcards, etc. The statutory meaning of the word "post" covers "what is or was sent".[38] In both cases, interception may be applied to private or business correspondence. The legislator does not differentiate between them. It may also be correspondence connected with the job done or a post held, but the doctrine emphasises that formal immunity cannot be disregarded.[39]

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[36] Journal of Laws [Dz.U.] of 2016, item 1489.

[37] Compare, *Słownik języka polskiego PWN* [PWN Dictionary of the Polish Language], http://sjp.pwn.pl/sjp/korespondencja;2564701.html [accessed on 28 December 2016].

[38] *Ibid*., http://sjp.pwn.pl/szukaj/przesy%C5%82ka.html [accessed on 28 December 2016].

[39] K. Dudka, *Kontrola…* [Correspondence…], pp. 24–27.

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PROCEEDING-RELATED INTERCEPTION OF CORRESPONDENCE, POST AND RETENTION DATA IN ACCORDANCE WITH ARTICLE 218 §1 CPC

Summary

This article is devoted to the issue of correspondence and post interception in accordance with Article 218 §1 of the Criminal Procedure Code. The author draws attention to doubts as to whether the regulation is in conformity with the constitutional principle of secrecy and privacy of correspondence, especially in the part referring to the admissibility of this legal tool in each criminal case. The author also highlights the lack of a legal definition of "correspondence" and

the complexity of a court's or a public prosecutor's decision to open it. Apart from that, the issue of recording the interception of correspondence and its opening is discussed.

Keywords: correspondence, post, correspondence interception and control, secrecy of correspondence, communication, correspondence opening, thing

ZATRZYMANIE PROCESOWE KORESPONDENCJI, PRZESYŁEK ORAZ DANYCH RETENCYJNYCH W TRYBIE ART. 218 §1 K.P.K.

Streszczenie

Tekst poświęcony jest zagadnieniom związanym z zatrzymaniem w trybie art. 218 § 1 k.p.k. korespondencji i przesyłek. Zwraca się tu uwagę na wątpliwości co do zgodności tej regulacji z konstytucyjnym prawem do poszanowania prywatności i tajemnicy komunikowania się, zwłaszcza w tej części, w jakiej dopuszcza się stosowanie tej instytucji w każdej sprawie karnej. Wskazuje się na brak definicji ustawowej pojęcia „korespondencja" oraz na złożoność decyzji sądu lub prokuratora odnośnie do otwarcia korespondencji. Osobno omówiono zagadnienia związane z protokołowaniem zatrzymania i otwarcia korespondencji.

Słowa kluczowe: korespondencja, przesyłka, zatrzymanie i kontrola korespondencji, tajemnica korespondencji, komunikowanie się, otwarcie korespondencji, rzecz

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PETRIFICATION OF A COURT BENCH COMPOSITION IN THE TRANSITIONAL PROVISIONS: COMMENTS IN THE LIGHT OF THE SUPREME COURT RULING OF 29 NOVEMBER 2016, I KZP 9/16

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The transitional issues of the law of criminal procedure have become the subject of two essential rulings of the Supreme Court recently,[1] one of which was given the power of a legal principle and generated vivid interest of jurisprudence.[2] The serious consideration given to these issues undoubtedly resulted from turbulences caused by the successive reforms of the Polish criminal procedure in the period 2013–2016. The foregoing article makes comments only on some transitional issues of the law of criminal procedure, namely the principle of petrification of the court bench composition in criminal proceedings. It is worth taking a closer look at it,

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1 Compare the Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016; the Supreme Court resolution of 29 November 2016, I KZP 10/16, OSNKW No. 12, item 79, 2016.

2 Compare especially, H. Paluszkiewicz, *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym* [Studies in transitional issues in the law on criminal procedure], Warsaw 2016; H. Paluszkiewicz, *Zagadnienia intertemporalne w polskim prawie karnym procesowym* [Transitional issues in the Polish law on criminal procedure], [in:] J. Mikołajewicz (ed.), *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia* [Transitional issues in law. Key issues. Transitional solutions. Source, functions, axiology], Warsaw 2015, pp. 321–400; H. Paluszkiewicz, *Kilka uwag o gwarancyjnym charakterze przepisów przejściowych w ustawie z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw* [Several comments on guarantee nature of transitional provisions in the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts], [in:] M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska (eds), *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego* [On the guarantees of the contemporary criminal proceedings. Professor Piotr Kruszyński jubilee book], Warsaw 2015, pp. 339–355.

especially in the context of the opinions expressed by the Supreme Court in its ruling of 29 November 2016[3] since they inspire critical comments.

The above-mentioned ruling was issued as a result of a legal query submitted by the Appellate Court in K., in accordance with Article 441 §1 of the Criminal Procedure Code (CPC), concerning the legal issue requiring fundamental interpretation of statute as follows: "Does the phrase 'a court in its former composition' used in the provision of Article 30 of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.], item 1247, as amended) mean the composition determined by the provisions in force at the moment of the initiation of the proceedings before the court of a given instance or the court with a given bench composition determined in accordance with the provisions that were in force before the above-mentioned Act entered into force, which adjudicated in the main trial before 1 July 2015?"

The Supreme Court was asked to resolve the problem in connection with the appeal against the judgement of the District Court in B. being heard by the Appellate Court in K. concerning compensation for groundless detention applied against J.S., in which the Court ruled the compensation but dismissed other claims. The claim for compensation for groundless detention was filed to the District Court in B. on 27 May 2015. On 15 June 2015, a trial was scheduled for 16 September 2015 and a three-judge professional bench was appointed to hear the case. However, due to the successive adjournments of the hearing, the case was not examined until 8 and 21 April 2016. The judgement was issued on the latter day. However, earlier, on 15 March 2015, the President of the Criminal Chamber appointed the bench composed of one judge and two lay judges to hear the case. The judgement was appealed against by the representative of the petitioner and by the representative of the President of the District Court in B. as a body authorised to represent the State Treasury. The Appellate Court hearing the appeal, in the ruling issued on 12 August 2016, decided to ask the Supreme Court the legal query quoted above.

The legal query undoubtedly concerns an issue that is significant in practice. It is obvious that each amendment to regulations having impact on the composition of a court, as well as on its competence, must be accompanied by normative safeguards against negative consequences of the amendment for cases that were initiated before the change entered into force and pending after this date. It must be highlighted that the introduction of amendments to provisions regulating the bench composition without such safeguards would lead to situations in which, after the amending act entered into force, the composition of the bench formerly hearing the case would not be in compliance with the provisions in force and, in case the bench were to adjudicate, would result in absolute grounds for appeal based on inappropriate bench composition under Article 439 §1(2) CPC. In order to prevent this, it would be necessary to appoint a new adjudicating bench and hear the case from the beginning, regardless of the progress made in it. Similarly, negative consequences would be connected with a lack of relevant transitional provisions in case the amendment concerned the competence of criminal courts. In such a case, it is worth noting that not only the amendment

[3] I KZP 9/16, OSNKW No. 12, item 85, 2016.

to the regulations of the criminal procedure but also to the criminal substantive law would have such a consequence. It results from the content of Article 25 §1 CPC, which uses a term "felony" when determining the cognition of a district court. Therefore, any changes within criminal statute shifting a given category of prohibited acts from the group of crimes into the group of felonies have an indirect influence on the competence of a court hearing the case concerning such an act.[4] Thus, in the light of the above, there is no doubt that it would be irrational to adopt a solution assuming that the change of norms concerning the competence or composition of a court should immediately apply to all pending criminal cases. In many of them, it would lead to the squandering of frequently considerable input into their examination so far. In jurisprudence, it is rightly indicated that petrification of the competence and composition of a court is a significant departure from a general rule that it is possible to establish, which is the application of new provisions. The arguments for it are important axiological reasons for the necessity to ensure effectiveness and economics of trials, which is not insignificant for ensuring legal standards of a fair criminal trial.[5] What must be determined, however, is the issue how long the petrification should be in terms of time. The solutions adopted should be relevant to the needs in relation to the above-mentioned necessity to ensure the effectiveness and economics of trials.

The principle of petrification of the competence and composition of a court is a solution adopted in the successive amendments to the Criminal Procedure Code of 1997. The Act of 1997: Regulations introducing the Criminal Procedure Code[6] already contained Article 7, which stipulated that if the competence of a court has been changed on the basis of the Criminal Procedure Code, the court adjudicating in a case so far is competent to continue in the event the indictment was lodged before the day when the Code entered into force. A similar regulation was laid down in Article 6 of the Act of 29 March 2007 amending the Act on the Public Prosecution, Act: Criminal Procedure

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[4] If we agree with the Supreme Court's stand presented in the ruling of 27 February 2013, I KZP 25/1, OSNKW No. 5, item 37, 2013, such a change in practice will not generate the necessity of referring a case to a court different from the one competent so far. As it was assumed in this ruling, "the provision of Article 25 §1(1) CPC determines the principle of competence *ratione materiae* in accordance with which a district court is competent to adjudicate on felonies as particular acts committed by particular perpetrators. Since the decision whether a particular act committed by a particular perpetrator is felony is based on Article 7 §2 CC in conjunction with the minimum penalty that this particular type of act carries in accordance with the legal state established with the use of rules laid down in Article 4 §1 CC, the provision of Article 25 §1(1) CPC within the scope of the district court competence *ratione materiae* covers only those prohibited acts that belonged to the felony category at the moment of their commission and did not lose their status at the moment of competence examination. Therefore, in the event, due to normative changes, the character of a prohibited act changes its classification from crime into felony, and the act at the moment of its commission was a crime subject to adjudication by a regional court, the determination of the regional court competence cannot be based on the content of Article 25 §1(1) but must result from a clear transitional provision". However, this opinion is at least debatable (for more, compare the justification for the Supreme Court ruling and literature and case law cited therein). Adoption of an opinion different from the Supreme Court's one would result in the necessity of referring cases in accordance with competence to higher level courts.

[5] Compare, H. Paluszkiewicz, *Studia…* [Studies…], pp. 29–33 and 73; H. Paluszkiewicz, *Kilka uwag…* [Several comments…], p. 353.

[6] Journal of Laws [Dz.U.] of 1997, No. 89, item 556.

Code and some other acts,[7] which stipulates that if the competence of a court has been changed based on the present statute, a court competent on the day when an indictment was lodged must adjudicate. In the context of changes concerning adjudicating benches' composition, first of all it is necessary to highlight Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts,[8] which stipulates that in cases in which the main trial started and was not concluded with a valid judgement before the Act entered into force and which, in accordance with the former regulations were heard in the presence of lay judges, the formerly binding regulations apply. However, in the event of a trial stay or adjournment, if the proceedings are not continued after the stay or adjournment, and also in the event of the case re-hearing, the proceedings are to be conducted in accordance with the existing Act. The provisions concerning petrification of the competence and composition of a court include also Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts[9] (hereinafter the September amendment), which stipulates that if on the basis of the present Act the competence or composition of a court changed, until the end of the proceedings in a court of a given instance, the court competent to adjudicate or in the composition to date adjudicates, and Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts[10] with identical content.

The Supreme Court ruling of 29 November 2016 focuses on the analysis of the content of the provision of Article 30 of the September amendment. The comments made by the Supreme Court are much more universal. They can also be referred to other transitional regulations, the content of which will be formulated in an identical or similar way. Thus, the issue is still up to date because Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts is an example of such a norm. This is why, the analysis of the Supreme Court deserves careful consideration.

The provision of Article 30 of the September amendment stipulates that, if based on the present Act the competence or composition of a court has changed, before the conclusion of the proceedings before a court of a given instance, the court competent so far or in its composition to date adjudicates. Thus, while the provision directly determines the final moment of petrification of a court competence or composition, it does not mention the issue of the starting point when it occurs. Before the Supreme Court issued the ruling, the question of the initial moment of petrification of a court composition raised doubts in both jurisprudence and the judicature. The background of the controversies lies within the normative changes concerning the composition of benches adjudicating in cases concerning compensation for groundless conviction, detention or arrest. To be precise, it is necessary to remind that until 1 July 2015, a three-judge professional bench adjudicated on such issues. The September amendment, which entered into force on 1 July 2015, introduced the norm in accordance with which the appropriate bench is composed of one judge and two lay judges. However,

7 Journal of Laws [Dz.U.] of 2007, No. 64, item 423, as amended.
8 Journal of Laws [Dz.U.] of 2007, No. 112, item 766.
9 Journal of Laws [Dz.U.] of 2013, item 1247.
10 Journal of Laws [Dz.U.] of 2016, item 437.

after the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts entered into force, a one-judge bench adjudicates on such issues.

Due to the change of an adjudicating bench composition introduced by the September amendment, there are two different attitudes in case law towards the meaning of the provision on petrification of a court composition. On the one hand, it was assumed that "in cases concerning compensation for groundless conviction and unjustified use of coercive measures that were initiated before court before 1 July 2015 and were not concluded in a court of a given instance, the application of Article 554 §2 CPC in the wording of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.] of 2013, item 1247) is excluded pursuant to Article 30 of that Act, i.e. those cases are subject to hearing by three-judge benches."[11] The Appellate Court in Wrocław discussed the above stand and held that "due to the fact that the provisions of Articles 27 and 30 of the amendment discussed use clear and readable time criteria for a case initiation and conclusion in a court of a given instance, they do not refer, however, to the stage of the trial, they do not make reference to the trial initiation or its adjournment, in the Appellate Court's opinion, for the assessment whether a court had an appropriate bench, it is not important that the present case was heard at the sessions on 9 December 2015 and 22 January 2016, thus, that the adjudication took place after 1 July 2015."[12] The content of Article 30 of the September amendment was also analysed in the Supreme Court rulings, where it was emphasised that "the concept of 'former composition' should (…) not be referred to the bench that heard the case at a given instance but the bench appropriate pursuant to the provision binding to date, i.e. the provisions that were in force until 30 June 2015. Therefore, it concerns a court composition in abstract and not definite meaning. The necessity of such an interpretation of Article 30 of the September amendment is indicated in the wording *in principio*, which reads: "if, on the basis of statute, the change of a court competence or composition took place". It is obvious, however, that no other act may change the composition of a court in a definite sense.[13]

The appellate Court in Katowice expressed a different opinion and held that "in cases concerning compensation for groundless conviction, detention or arrest initiated before 1 July 2015, in which in accordance with the former wording of Article 554 §2 CPC, a district court in a bench of three judges adjudicated, the requirement for maintenance of the same court composition appointed in accordance with former rules is the initiation of a trial before that date. There is no doubt that all adjudication-related activities of a court taking place after calling a case before court should be undertaken by a court in the appropriate composition."[14]

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[11] Judgement of the Appellate Court in Lublin of 26 January 2016, II AKa 295/15, Lex No. 1994424.

[12] Judgement of the Appellate Court in Wrocław of 5 May 2016, II AKa 95/16, Lex No. 2052587; similarly: judgement of the Appellate Court in Wrocław of 7 April 2016, II AKa 93/16, OSAW 2016, No. 2, item 340.

[13] Supreme Court judgement of 23 September 2016, III KK 41/16, Lex No. 2122061; similarly: Supreme Court ruling of 15 June 2016, V KK 114/16, LEX No. 2080107; Supreme Court ruling of 29 June 2016, II KK 180/16, Lex No. 2062819.

[14] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111.

The Appellate Court in Katowice, presenting arguments for its stand, indicated the following issues. Firstly, the linguistic interpretation supports it. Article 30 of the September amendment refers to a former composition, which indicates the composition appointed to hear a case and not the provisions regulating the appointment of a bench. If it were to concern the application of former provisions, the legislator would have stipulated the application of the provisions of the Act repealed in the transitional provisions, as in Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts, and would not have stipulated adjudicating in *verba legis* the same composition.

Secondly, the Appellate Court in Katowice drew attention to the fact that the September amendment emphasised very strongly the principle of using the new law (Articles 27 and 29 of the September amendment), which differentiates it from other amendments to the Criminal Procedure Code throughout the period 2003–2009. Thus, as a rule, the principle concerns the composition of a court. In this light, the provision of Article 30 of the September amendment constitutes an exception and should be precisely interpreted. Making such an assumption, the adjudicating bench stated that: "in the context of this principle [of applying the new law – note by W.J.], the only rational reason for the introduction of special norms concerning the competence and composition of a court in proceedings conducted earlier was to avoid the necessity of referring cases form court to court and re-hearing adjourned or interrupted trials from the beginning."[15] The above means that the application of Article 30 of the September amendment seems to be admissible only in situations in which there are the above-mentioned reasons for that. However, in the opinion of the Appellate Court in Katowice, in the case it heard, the reasons were not updated. It is worth mentioning that, in the case in which the Court adjudicated, a motion under Article 552 CPC was referred to an incompetent court before 1 July 2015 and submitted to a competent court after the date. According to the Appellate Court in Katowice, the reasons of purposefulness justifying the existence and sense of Article 30 of the September amendment in such circumstances cannot support its application. The adjudicating bench also highlighted that the procedural configuration indicated above resembles, in its essence, other situations that should be recognised as not included in the scope of application of Article 30 of the September amendment, i.e. the situations when e.g. because of the necessity of changing the composition of a court after 1 July 2015, there will be a need to rehear the case from the beginning. Such a stand was expressed in the literature and it was indicated that rehearing a case from the beginning should result in the appointment of a new adjudicating bench in accordance with the new regulations.[16]

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[15] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111; moreover, the Appellate Court in Katowice drew attention to the fact that reference to the reason of a trial effectiveness and economics was also made in the justification for the September amendment bill in the part concerning transitional provisions.

[16] [Sic:] M. Kurowski, *Znowelizowany Kodeks postępowania karnego w pracy prokuratora i sędziego. Zagadnienia ogólne i postępowanie przygotowawcze* [Amended Criminal Procedure Code in the practice of a prosecutor and a judge. General issues and preparatory proceedings], KSSiP, Kraków 2015, p. 110.

Thirdly, the Appellate Court in Katowice emphasised that there is a lack of grounds for the assumption that, regardless of the legislator's silence on the issue, the initiation of the proceedings is an obvious moment of petrification of a court composition. It must be noted that the legislator indicates various moments, which mark time limits for the application of provisions repealed or the new ones (compare Articles 33 to 36, 38 and 42 of the September amendment).

Fourthly, failure to indicate a moment important for petrification of a court composition results in the assumption that "it should be related to the moment when the issue of the competence and composition of a court is updated in a trial".[17] While in case of a court competence there is no doubt that the moment is the initiation of the juridical proceedings, as the Appellate Court in Katowice states, "the issue of a court composition is different because the legislator associates it only with adjudication and sessions (Articles 28 to 30 CPC, and in the event of cases from Chapter 58 CPC – the provision of Article 554 §2 CPC)."[18]

The Appellate Court in Wrocław expressed a similar opinion. In one of the rulings, it held that "the term: proceedings 'in a given instance' used in Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.] 203.1247, as amended) should be related to the main trial in the proceedings before a court of first instance or appeal proceedings before a court of second instance and not to the date of a case registration."[19] In the justification of the stand, the adjudicating bench indicated that petrification of a court composition "aims to avoid the change of the composition or competence of a court that hears a given case at the right forum, which would have to lengthen the proceedings. The aim that is the basis of rules laid down in the provision must be taken into consideration in the interpretation of the term 'in a given instance' used (…). That is why, the term proceedings 'in a given instance' must be related to a trial, the proceedings before a court of first instance or appeal proceedings before a court of second instance, and to the date of a case registration."[20]

The issue of petrification of a court bench composition has also become the subject of different opinions in jurisprudence. On the one hand, it is assumed in the literature that the moment important for the petrification of a court composition is the initiation of proceedings in a given instance court.[21] On the other hand, it is

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[17] Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, LEX No. 2023111.

[18] *Ibid*.

[19] Ruling of the Appellate Court in Wrocław of 25 January 2016, II AKo 200/15, LEX No. 2204496.

[20] *Ibid*.

[21] [Sic:] in the context of appellate proceedings: D. Świecki, [in:] B. Augustyniak, D. Świecki, M. Wąsek-Wiaderek, *Znowelizowany Kodeks postępowania karnego w pracy prokuratora i sędziego. Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych* [Amended Criminal Procedure Code in the practice of a prosecutor and a judge. Appeal proceedings, extraordinary complaint measures, proceedings after the judgement enters into force and proceedings in international criminal cases], KSSiP 2015, p. 16; by the same author, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz do zmian 2016* [Criminal Procedure Code. Commentary on the 2016 amendments], Warsaw 2016, pp. 656–657.

indicated that: "adjudication by the court competent so far, in its composition to date, is an 'exception' to the principle of the directly binding new act laid down in Article 27 in the event of changes introduced with respect to this issue after the amendment. This provision [Article 30 of the September amendment – note by W.J.] applies only to judicial proceedings in cases in which a trial before a court of first instance or appeal proceedings before a court of second instance were initiated before 1 July 2015. Judicial proceedings mean the main trial and the issue of a final ruling in compliance with all statutory requirements, i.e. the course of procedural activities from the moment laid down in Article 381 CPC until the moment laid down in Article 418 CPC."[22] None of the above-mentioned stands was substantiated.

The Supreme Court, in its ruling of 29 November 2016, in the starting point of its analysis, agrees that the interpretational dilemma connected with Article 30 of the September amendment results from the lack of clear indication of the initial moment of petrification of a bench composition. Therefore, two ways of interpreting the content of this provision presented above are possible. Firstly, it can be assumed that it concerns a bench determined by the statutory provisions in force at the moment of proceeding initiation in a given court instance. Secondly, it is possible to assume that it concerns a particular bench adjudicating in the case. The Supreme Court supported the former of the two ways of interpreting the principle of petrification of a court composition and indicates the following arguments for it.

Firstly, referring to Article 30 of the September amendment, the Supreme Court agrees that in the course of establishing the initial moment of petrification of a court composition that is not directly defined in statute, it is necessary to carefully do this by analogy to transitional provisions laid down in other acts amending the Criminal Procedure Code. To tell the truth, there are a few general rules of transitional regulations (including petrification), however, "detailed analysis of the way of laying them down in transitional provisions leads to a conclusion that there is a lack of uniformity in the field of defining the initial and final moment when the rules are in force".[23]

Secondly, the initial moment of petrification of a court bench composition may be established by *argumentum a contrario* to the phrase "conclusion of the proceedings in a given instance" used by the legislator in Article 30 of the September amendment. This prompts a conclusion that it concerns the initiation of the proceedings in a given instance.

Thirdly, assuming the above, it is necessary to draw a conclusion that the change of a court composition referred to in Article 30 of the September amendment does not concern a specific bench appointed to adjudicate in a given case but the statutory provisions creating the bench composition. It is obvious that if the initiation of the proceedings before a court of a given instance is a point of time important for determining petrification, it takes place before the appointment of an adjudicating bench. As the Supreme Court stated, statute cannot modify a court composition in the

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[22] M. Świetlicka, *Komentarz do przepisów przejściowych ustawy z dnia 27 września 2013 roku o zmianie ustawy Kodeks postępowania karnego i niektórych innych ustaw (Dz.U. 2013.1247)* **[**Commentary on the transitional provisions of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws, Dz.U. 2013.1247)**]**, Lex/el 2015.

[23] Supreme Curt ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016.

definite meaning. Moreover, in the context of the discussed argument, once again it was emphasised that there is a lack of sufficient grounds for basing the interpretation of Article 30 of the September amendment on the comparison of the wording of the transitional provisions of various amendments to the Criminal Procedure Code. In the provision of Article 18(2) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts, the legislator included a phrase about the use of the provisions regulating the composition of a court to date and not about adjudication by the bench to date. Therefore, it cannot be a convincing argument against the stand adopted by the Supreme Court.

Therefore, the Supreme Court unambiguously states that: "the wording of the provision of Article 30 of the above-mentioned Act [the September amendment – note by W.J.] confirms that the regulation refers to petrification of the composition of a court resulting from the provisions in force to date."[24]

The above arguments presented by supporters and opponents of the stand that petrification of the composition of a court takes place at the moment of proceeding initiation in a given instance provoke the following comments.

Firstly, the opinion shared by the two parties to the debate that the legislator did not determine the initial moment of petrification of the composition of a court is an obvious starting point to solve the problem in question. Therefore, it is necessary to establish the interpretation of Article 30 of the September amendment. Since it is not possible to determine it based on a linguistic analysis because the legislator does not mention the issue, it is necessary to use other methods of interpretation. In this context, first of all, it is required to consider the Supreme Court argument indicating that as Article 30 of the September amendment uses the phrase "until the conclusion of the proceedings in a given instance", *a contrario* it should be understood that the initiation of the proceedings in a given instance should be an initial moment. Making comments on this argument, it must be stated that, although this seems to be very intuitive, it is hard to recognise it as decisive as the Supreme Court did. To keep the discussion in order, it is worth mentioning that *argumentum a contrario* was not used in this reasoning. In fact, an appeal from the contrary follows an assumption that if a legal norm binds some consequences and a specified fact together, another different fact shall not result in such consequences.[25] Thus, it is obvious that it is not this course of reasoning in the context discussed. What we deal with is an assumption that since the legislator indicates the moment of concluding the proceedings in a given instance, it must be silently assumed that it concerns the whole proceedings before a given court instance. However, the problem with this reasoning consists in the fact that it is difficult to indicate arguments for it. First, it is not a rule generally applied in transitional provisions. For example, Article 18(1) of the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts adopted other initial and final moments than those indicated above. Those were the beginning of the main trial

[24] *Ibid*.

[25] Compare, e.g. L. Morawski, *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Toruń 2005, p. 194.

and the issuing of a valid judgement in a case, respectively, unless it is determined otherwise in statute. Then, a question arises what conclusion concerning the initial moment of petrification of a court composition should be drawn in a situation in which the final moment of the principle of petrification were determined unlike in Article 30 of the September amendment, i.e. "before the conclusion of the proceedings in a given instance". Again, we can use as an example Article 18(1) Act of 15 March 2007 amending the Act: CCP, Act: CPC and some other acts. The Act *in fine* made a reservation that in case of a stay of proceedings or a trial adjournment, provided that after the stay or adjournment the proceedings are not continued, and in the event of rehearing, the proceedings shall be conducted in accordance with the new regulations. What is typical, the Supreme Court in the ruling of 29 November 2016, in the context of the rules of petrification of the composition and competence of a court and proceeding stages, emphasises that "there is a lack of uniformity in the field of determining the initial and final moments for the rules to bind".[26] At the same time, the Court assumes that since the provision refers to the conclusion of the proceedings in a given instance, this must *implicite* mean reference to the initiation of the proceedings in a given instance. In the light of the above, there are no grounds for acknowledging that the intuitive interpretation of Article 30 of the September amendment does not raise any doubts and silently expresses something that was to be obvious on the basis of transitional provisions.

Secondly, one should agree with the Supreme Court that systemic reference to transitional provisions introduced by earlier acts amending the Criminal Procedure Code should be made carefully. Taking into consideration legislative inflation and the insufficient quality of law enactment in Poland, the conclusion seems to be fully justified. Obviously, it would be desirable to adopt a uniform method of creating transitional provisions[27] and use a standard template to develop them, but if we look realistically at the practical conditions, the assumption has no chance to be always implemented. However, the above cannot lead to a conclusion that a comparative analysis of transitional provisions does not make sense. One cannot exclude that some kind of general regularities will be established and they will serve as arguments in the process of transitional provisions interpretation. In the circumstances discussed, however, a comparative analysis does not lead to unambiguous conclusions. The analysis of the transitional provisions quoted at the beginning of the article, enacted in the period when the Criminal Procedure Code of 1997 was in force, does not allow us to draw unambiguous conclusions concerning the issue in what way the rule of petrification of a court composition should function in principle.

Thirdly, it is necessary to make comments on the Supreme Court's argument indicating that the phrase "if the change of a court composition resulted from statute" obviously cannot concern the bench appointed because there in no legal act that can change the composition of an actually appointed bench. One must agree with the Supreme Court that the phrase used by the legislator is actually

[26] Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW No. 12, item 85, 2016.

[27] Obviously, in accordance with the general recommendations in the Regulation of the President of the Council of Ministers of 20 June 2002 concerning the legislative technique rules (Journal of Laws [Dz.U.] of 2016, item 283).

an ellipsis. In fact, it does not refer to the actual composition of a bench but to the provisions regulating the matter. This statement, however, in no way exacts interpretation that the initiation of the proceedings is a moment significant for the assessment of the consequences of the change of regulations. Even after an adequate reformulation of the provision in question, the problem of establishing the initial moment of petrification of a court composition remains and the provision in such wording can continue to be diversely interpreted.

In the light of the above findings, it must be assumed that the arguments presented by the Supreme Court cannot be recognised as convincing to such an extent that they would make it possible to acknowledge that Article 30 of the September amendment should be understood as petrification the composition of a court from the moment of the initiation of the proceedings in a given instance. Thus, in this state of facts, it is necessary to use the purposefulness-based arguments, which the Supreme Court completely ignored in its ruling. However, it is hard to overlook the fact that the consideration of purpose-related reasons is, as it seems, critical for the reasoning presented by the opponents of the opinion supported by the highest court instance. There is no doubt that petrification of an adjudicating bench composition in cases that the amendment "deals with on the fly" is to prevent rehearing them from the beginning and wasting the input of labour and resources invested before the regulations amending the provisions concerning a bench composition came into force. This assumption has two important implications. First, it provokes a conclusion that such input occurs when a bench has already been appointed. Only in such a situation, its change may result in wasting the attempts to examine a given case. Then, the interpretation of a relevant transitional norm assuming petrification of the composition of a court cannot lead to adopting interpretation that will not fulfil its aim. However, determining the initiation of the proceedings as the moment of petrification of a bench composition, the Supreme Court does it in a way that results in petrification of a bench also in situations in which there was no input into a case examination justifying such steps. The circumstances of the case adjudicated by the Appellate Court in Katowice can be the most flagrant example of this. The Court issued a ruling on 17 February 2016 concerning a claim for compensation under Article 552 CPC filed to an incompetent court before the Act amending CPC came into force and referred the case to a competent court after the Act entered into force. In such a situation, there are no grounds whatsoever for appointing a bench under non-binding provisions. The aim of such a possibility, dictated by the economics of trials, cannot be achieved in the presented situation. There are other examples confirming that the initiation of the proceedings is not the optimum moment of petrification of a bench composition. In the context of criminal cases initiated by an indictment, a situation in which an indictment filed before the amending act comes into force is returned to the prosecutor because of formal shortages that must be eliminated and filed again in the period when the amending act is already in force can be an example.

Therefore, in this light, it is hard to agree with the Supreme Court that the lack of explicit determination of the initial moment of petrification of a bench composition in the relevant provision, in the course of its interpretation, leads to the assumption

that it is the moment of the initiation of the proceedings in a given instance. What should be decisive in establishing it are purpose-related reasons, which make it possible to resolve doubts resulting from the linguistic interpretation of Article 30 of the September amendment. Moreover, the Appellate Court in Katowice, in its ruling of 17 February 2016, indicates that the Supreme Court provided too extensive interpretation of the provision in question, which is in fact an exception to the general rules of new law application.

Approval of the above-presented stand makes it necessary to indicate another moment than the initiation of the court proceedings in a given instance when petrification of a bench composition occurs. In the ruling of 17 February 2016, the Appellate Court in Katowice assumes that the moment when an adjudicating bench starts the main trial is one. It argues this results from the fact that the legislator relates the bench composition "only to adjudicating in a trial or a session (Articles 28 to 30 CPC, and in the event of cases from Chapter 58 CPC – the provision of Article 554 §2 CPC)". However, this opinion is not convincing. First, there are no grounds for adopting it on the basis of systemic interpretation. Not all the CPC provisions directly bind adjudication in the trial and a session and the bench composition together. The legal norm concerning the composition of a bench is given a different wording in Article 29 §2 CPC or Article 534 §1 CPC. Such examples can also be found in other acts applicable to criminal cases.[28] Then, an adjudicating bench and its members are assigned entitlements to perform specific procedural activities before a trial or a session in particular CPC provisions (e.g. Articles 349 §7, 350 §§2 to 4 and 352 CPC) or outside those forums of adjudicating (Article 396 CPC). Therefore, there are no grounds for binding only a court composition and adjudicating in a trial or a session together. The opinion does not find grounds in the Supreme Court ruling of 27 February 2007,[29] which is indicated in jurisprudence as one justifying the stand discussed. The ruling assumes that "court proceedings (Article 439 §1(10) CPC) means the conducting of a main trial and issuing a final ruling, in compliance with all statutory conditions from the moment laid down in Article 381 CPC until the moment laid down in Article 418 CPC". It is necessary to note that it was issued in a special context of the interpretation of absolute grounds for appeal consisting in the absence of obligatory defence counsel in court proceedings or such counsel's failure to take part in the activities in which participation is obligatory. In the circumstances that are connected with the obligation to ensure the right to defence, it does not raise objections. However, there are no grounds for its generalisation for other contexts. By the way, the Supreme Court rightly criticises the opinion and states "not taking part in academic discussions concerning the stages of the court proceedings, only in order to provide an example, it is necessary to indicate that the first stage of the jurisdictional proceedings before a court of first instance is the initial review of the indictment, and the first stage of the proceedings before a court of second instance is a review of admissibility of an appellate measure and case files to check their

[28] Compare, Article 8(1) of the Act of 17 June 2004 on complaints against the infringement of a party's right to be heard in the preparatory proceedings conducted by a prosecutor or supervised by a prosecutor and court proceedings without unjustified delay.

[29] I KZP 38/06, OSNKW No. 3, item 23, 2007.

appropriate organisation and the activities performed after the issue of a ruling".[30] Summing up, it cannot be assumed that that the beginning of adjudicating in a trial or a session constitutes the moment of a bench composition petrification.

The exclusion of the possibility of recognising the beginning of adjudicating in a trial or a session as the moment of petrification of a bench composition causes a necessity of indicating another point in time. Since the provision of Article 30 of the September amendment refers to a court bench, it seems that its appointment is the appropriate moment. There are no linguistic or systemic obstacles to such a solution. As it was highlighted above, both the analysis of the wording of Article 30 of the September amendment and consideration of transitional provisions adopted in the acts amending the Criminal Procedure Code in the past do not lead to unambiguous conclusions. In this light, the purposefulness-related reasons should be decisive. Those, however, are unequivocal arguments for the solution proposed. It should be noted that the appointment of an adjudicating bench is a moment when the bench (or its members) may undertake activities aimed to prepare the case for hearing. Therefore, from this moment the change of the adjudicating bench would have a negative impact on the economics of trials.

Finally, it should be emphasised that the above-mentioned solution is not in opposition to the fact that Article 30 of the September amendment jointly regulates the issues concerning the change of a court competence and composition, and in case of the former it is unquestionable that petrification starts with the initiation of the court proceedings. The indicated construction of the provision of Article 30 does not result in the necessity of assuming that the moments of petrification should be identical for both issues. The lack of their unambiguous indication makes such interpretation possible and purposefulness-related reasons, as it has been highlighted earlier, are unambiguous arguments for that.

Summing up, it can be stated that although in the sphere of transitional provisions of the law of criminal procedure it is possible to identify specific rules governing their creation and functioning, it cannot be forgotten that those provisions should be developed and interpreted so that they fulfil their aim, namely safeguard fluent and undisturbed transition from the old to the new legal state. Thus, the identification of values behind their particular form and interpretation is extremely important.[31] Looking through the prism of the above assumption, it is hard to agree with the Supreme Court's stand that the lack of clear indication of the initial moment of a court bench petrification in Article 30 of the September amendment provokes a conclusion that the initiation of court proceedings is such a moment. The analysis conducted leads to a conclusion that it should be the moment of the appointment of an adjudicating bench. There are no linguistic and systemic reasons against such a solution and purposefulness-related reasons unambiguously support it. With respect to the role of transitional provisions, it seems justified to give the latest factor primacy within the issue discussed. However, generalising the issue and going

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[30] Supreme Court judgement of 23 September 2016, III KK 41/16, Lex No. 2122061.

[31] H. Paluszkiewicz exposes this issue not without reasons in: *ibid.*, *Studia…* [Studies…], *passim*.

beyond the interpretation of Article 30 of the September amendment, it is necessary to propose that the moment of petrification of an adjudicating bench be related to the appointment of the bench and not to the initiation of the proceedings in a given instance. The aim can be achieved either by the above-proposed interpretation of transitional provisions, which the legislator would give the form respective to Article 30 of the September amendment,[32] or by eliminating doubts occurring in this matter, thanks to clear determination of the initial moment of a court composition petrification in the transitional provisions enacted in the future.

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[32] For instance, Article 22 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts.

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PETRIFICATION OF A COURT BENCH COMPOSITION IN THE TRANSITIONAL PROVISIONS: COMMENTS IN THE LIGHT OF THE SUPREME COURT RULING OF 29 NOVEMBER 2016, I KZP 9/16

Summary

The article discusses the temporal aspect of a court bench petrification regulated in the transitional provisions of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts. The direct reason for discussing the issue is the Supreme Court's stand presented in its judgement of 29 November 2016 (I KZP 9/16, OSNKW 2016, No. 12, item 85). It assumes that petrification of a court bench takes place at the moment of initiating the proceedings of a given instance. It is necessary to note, however, that the issue solved by the Supreme Court raises doubts in judicial decisions as well as jurisprudence. The author draws attention to them and reconstructs arguments for and against the Supreme Court's opinion. In conclusion, he states that the linguistic and systemic interpretation of the provision of Article 30 of the Act of 27 September 2013 amending the Criminal Procedure Code and some other acts does not unanimously support the opinion on petrification of a court bench at the

moment of initiating the proceedings of a given instance, and the results of the purpose-related interpretation are quite the contrary. Thus, it should be assumed that the moment appropriate for petrification of a court bench is its establishment in accordance with the provisions of the Criminal Procedure Code. The analysis and conclusions presented are not applicable only to the context indicated by the above-mentioned amending act but also, due to the way in which a court bench petrification is constructed in the amending acts, including the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, have universal significance for the discussed issue.

Keywords: petrification of a court bench, transitional provisions, amendments to the Criminal Procedure Code

PETRYFIKACJA SKŁADU SĄDU W PRZEPISACH INTERTEMPORALNYCH – UWAGI NA TLE POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 29 LISTOPADA 2016 R., I KZP 9/16

Streszczenie

W artykule omówiono aspekt temporalny petryfikacji składu sądu uregulowanej w przepisach intertemporalnych ustawy z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw. Bezpośrednim powodem poruszenia tej kwestii jest stanowisko zajęte przez Sąd Najwyższy w postanowieniu z dnia 29 listopada 2016 r. (I KZP 9/16, OSNKW 2016, nr 12, poz. 85). Przyjęto w nim, że petryfikacja składu sądu następuje w chwili wszczęcia postępowania w danej instancji. Należy jednak zauważyć, że rozstrzygana przez Sąd Najwyższy problematyka budzi w orzecznictwie i doktrynie wątpliwości. Autor wskazuje na nie oraz rekonstruuje argumenty przemawiające za i przeciwko stanowisku Sądu Najwyższego. W konkluzji stwierdza, że za poglądem o petryfikacji składu sądu od chwili wszczęcia postępowania w danej instancji nie przemawiają jednoznacznie wyniki wykładni językowej oraz systemowej przepisu art. 30 ustawy z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, natomiast sprzeciwiają się jej wyniki wykładni celowościowej. Tym samym należy przyjąć, że momentem początkowym utrwalenia składu sądu jest jego wyznaczenie zgodnie z przepisami Kodeksu postępowania karnego. Przeprowadzona analiza oraz sformułowane wnioski nie dotyczą wyłącznie kontekstu wskazanej powyżej ustawy nowelizującej, ale, ze względu na sposób konstruowania petryfikacji składu sądu w ustawach nowelizujących, w tym ustawie z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, mają uniwersalne znaczenie dla poruszanej problematyki.

Słowa kluczowe: petryfikacja składu sądu, przepisy intertemporalne, nowelizacja kodeksu postępowania karnego

Ius Novum
3/2017

MIXED (JOINED) PENALTY – CONTROVERSIES OVER THE SCOPE OF ITS APPLICATION

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Mixed (joined) penalty consists of a short penalty of deprivation of liberty for a period from one month to three or six months and a penalty of limitation of liberty for a period from one month to two years (executed successively, as a rule,[1] starting from the deprivation of liberty and ending with the limitation of liberty) was introduced to the Polish criminal law system by the amendment of 20 February 2015 (see Article 37b of the Criminal Code, henceforth CC, that was added) that entered into force on 1 July 2015.[2] The introduction of this originally constructed (combined in an innovative way) legal reaction to prohibited acts that are lesser degree crimes met with common approval because it extended the range of courts' adjudication possibilities and, as a result, individualisation of penal sanctions. From the very beginning, however, the provision of Article 37b CC caused serious interpretational problems. They were connected with an insufficiently precise definition of crimes for which courts could rule the joined penalty of deprivation of liberty and limitation of liberty for the same prohibited act. Moreover, at the beginning, the statutory regulation did not indicate whether the penalty of deprivation of liberty ruled together with the penalty of limitation of liberty was to be absolute, designed for effective execution, or probably also passed as a conditionally suspended sentence. The Justification for the Bill 20 February 2015 introducing the mixed penalty indicated that a penalty of deprivation of liberty as its part might be imposed in an absolute form as well as with conditional suspension of its execution.[3] That is

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1 Article 17a CPC envisages an exception to the rule of execution of the penalty of deprivation of liberty first.

2 Journal of Laws [Dz.U.] of 2015, item 396.

3 See, Justification for the Bill of 20 February 2015 amending the Act: Criminal Code and some other acts, p. 12.

why, it was commonly assumed that the mixed penalty could be imposed in those two different variants. The doubts were dispelled in the amendment to Article 37b CC,[4] stipulating *exspressis verbis* that the provisions of Articles 69–75 CC, i.e. those concerning conditional suspension of the penalty of deprivation of liberty, are not applicable to the mixed penalty of deprivation of liberty and limitation of liberty.[5]

The representatives of criminal law doctrine also disagree over the name of a joined penal response to crimes laid down in Article 37b CC. According to some authors, in conformity with the Justification for the Bill amending the Act of February 2015, Article 37b CC defines a mixed penalty[6] as a combined form of penal sanction. According to other authors, the name is inappropriate because, firstly, it is not one penalty but two penalties joined in a specific way (that is why, the name "joined penalty" is often used) and, secondly, they are not mixed in any way because there is no mixture of the content of the two penalties. They are, to tell the truth, passed at the same time but they maintain their separate form and are executed separately one after the other.[7] Some authors recognise this sequential execution of the two types of punishment passed jointly for the same prohibited act as such an important feature that it justifies the proposal to use the name of "a sequential penalty".[8] In other authors' opinion, it is more adequate to define the penal sanction laid down in Article 37b CC as a certain combination of penalties or a cumulative penalty[9] composed of a relatively short absolute deprivation of liberty and a penalty of limitation of liberty. Summing up this discourse about the name of the new penal response laid down in Article 37b CC, it is necessary to take into consideration a joined sentence to two different types of penalty for the same offence as well as their sequential execution, which is a secondary feature and should not determine the name. It must also be highlighted that defining two penalties ruled in a certain configuration as a penalty (which suggests a unity) is conventional, purely technical, in nature and, that is why, it should not be argued about. Obviously, it would be good if one or possibly two (exchangeable) names adequately expressing the essence of the penal response were adopted and raised no doubts. Taking into

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[4] The Act of 11 March 2016 that entered into force on 15 April 2016 (Journal of Laws [Dz.U.], item 437).

[5] More on the issue in: M. Małecki, *Co zmienia nowelizacja art. 37b k.k.?* [What does the amendment of Article 37b CC change?], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, Year XX: 2016, pp. 19–44

[6] For instance, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, pp. 326–330; J. Lachowski, [in:] J. Lachowski, A. Marek, *Prawo karne. Zarys problematyki* [Criminal law: Overview], Warsaw 2016, p. 188.

[7] J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna, Tom I, Komentarz do art. 1–52* [Criminal Code: General Part, Volume I, Commentary on Articles 1–52], Warsaw 2016, p. 745; however, compare A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...* [Criminal Code...], pp. 326–328.

[8] See, e.g. M. Małecki, *Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37b k.k.) – Zagadnienia podstawowe* [Sequence of a short-term penalty of deprivation of liberty and a penalty of limitation of liberty (Article 37b CC) – Basic issues], Palestra No. 7–8, 2015, pp. 37–46.

[9] For instance, B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, pp. 210–216.

consideration that names are conventional, it seems purposeful to continue using the name that is already common: a mixed penalty or a joined penalty.[10]

Having signalled interpretational problems that occur in connection with Article 37b CC, it is necessary to focus on the issue concerning the application of the mixed (joined) penalty indicated in the title of the article. The Justification for the Bill of 20 February 2015 suggests that the envisaged solutions concerning penalties and other measures of penal response to criminal acts should be a specific remedy to the deficient structure of penalties passed by courts, inadequate to the level and characteristics of contemporary criminality, and in particular should stop the practice of application of the penalty of deprivation of liberty with conditional suspension of its execution on a large scale. To that end, the limitation of a probation measure was introduced (see, the amended Article 69 §1 CC), and the provisions of Article 58 §1 CC concerning the choice of a penalty for crimes carrying an alternative sanction were modified, which made the penalty of deprivation of liberty *ultima ratio*, both in its absolute form and in case of conditional suspension of its execution. The legislator also extended possibility of applying non-custodial penalties for perpetrators of crimes carrying the penalty of deprivation of liberty not exceeding eight years (Article 37a CC) and the mixed penalty (Article 37b CC).[11] The mixed penalty, according to the Justification, "should be especially attractive in case of more serious crimes". The introduction of this new form of penal repression composed of two types of punishment is supposed to influence the change of courts' sentencing practice, which, making the penalty of deprivation of liberty with conditional suspension of its execution a major instrument of the punishment institution, "devalued the assessment of an abstractive level of risk also in case of prohibited acts of such a level of unlawfulness (e.g. a robbery)". On the other hand, the introduction of a possibility of passing the mixed penalty is a way of "incorporating non-custodial punishment to prohibited acts carrying the penalty of deprivation of liberty for a period from one to ten years or from two to 12 years". Moreover, the Justification indicated that "In many situations, inflicting a short-term imprisonment penalty is sufficient to achieve adequate result in the field of special prevention, connected with a sanction", and the penalty of limitation of liberty served next is supposed to establish socially desired behaviour of the convicted perpetrator.[12]

The regulation introducing a possibility of passing the mixed (joined) penalty laid down in Article 37b CC from the very beginning raises doubts what groups of crimes it can be applied to. It results from insufficiently precise indication that the possibility of simultaneous ruling of the penalty of deprivation of liberty for a period not exceeding three months or six months (when the maximum limit of statutory punishment is at least 10 years) and the penalty of limitation of liberty

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[10] For instance, V. Konarska-Wrzosek, *Szczególne dyrektywy sądowego wymiaru kary* [Special directives on sentencing], [in:] T. Kaczmarek (ed.), *System prawa karnego, Tom 5, Nauka o karze. Sądowy wymiar kary* [Criminal law system, Volume 5, On punishment: Sentencing], Warsaw 2017, p. 308.

[11] Compare, Justification for the Bill of 20 February 2015..., p. 1 and pp. 11–17.

[12] Compare, *ibid*., pp. 11–12.

for up to two years is applicable to a crime carrying the penalty of deprivation of liberty, regardless of the minimum statutory limit of punishment laid down in the Act for a given act. The lack of indication in Article 37b CC that it concerns crimes carrying "exclusively" the penalty of deprivation of liberty makes some representatives of the doctrine draw a conclusion that the mixed (joined) penalty may be applied to perpetrators of all crimes carrying the penalty of deprivation of liberty, including those carrying an alternative sanction, in which, apart from the penalty of deprivation of liberty, a non-custodial penalty or penalties in the form of a fine or limitation of liberty are envisaged.[13] According to some representatives of the criminal law doctrine, the possibility of ruling the mixed (joined) penalty may be applied only to crimes carrying the penalty of deprivation of liberty without any non-custodial alternatives, i.e. those that are of medium or high seriousness.[14]

Ambiguousness of the regulation laid down in Article 37b CC led to differences in the imposition of the mixed penalty. Courts apply the mixed penalty to perpetrators of crimes carrying only the penalty of deprivation of liberty as well as those who have committed crimes carrying alternative sanctions, where a court may choose a fine or a penalty of limitation of liberty, or a penalty of deprivation of liberty. The court statistics providing data and information concerning valid convictions of adults in the period of 2011–2015 prove that when the mixed (joined) penalty entered into force, some courts started to apply it for such crimes as non-payment of alimony/maintenance, which carried a penalty of a fine, limitation of liberty or deprivation of liberty for up to two years,[15] and at present, since 31 May 2017, such a sanction for an aggravated type under §1a, and for a basic type under §1 an alternative penalty of a fine, limitation of liberty or deprivation of liberty for up to one year (see Article 209 CC before and after the amendment to CC of 23 March 2017[16]).

Due to divergent interpretation of the provision of Article 37b CC and different practice of applying the mixed (joined) penalty, a question arises about the scope of its application, especially whether it should and may be applied only to perpetrators of serious crimes, which, because of their social harmfulness, carry only a penalty

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[13] See, e.g. M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz* [Criminal law amendment of 2015: Commentary], Kraków 2015, pp. 294–295; J. Majewski, [in:] W. Wróbel, A. Zoll (red.), *Kodeks karny...* [Criminal Code...], pp. 746–748; J. Lachowski, [in:] J. Lachowski, A. Marek, *Prawo karne...* [Criminal law...], p. 188; B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny...* [Criminal Code...], pp. 212–213.

[14] See, e.g. A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...* [Criminal Code...], p. 329; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], LEX 2015; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, pp. 165–166; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, p. 230 and also *Szczególne dyrektywy...* [Special directives...], [in:] T. Kaczmarek (ed.), *System prawa...* [Criminal law...], p. 308.

[15] See, Statystyka sądowa. Prawomocne skazania osób dorosłych 2011–2015 [Court statistics: Valid convictions of adults in the years 2011–2015], Departament Strategii i Funduszy Europejskich. Wydział Statystyczny Informacji Zarządczej, Warsaw 2016, p. 46, which indicates that in the second half of 2015, sentencing perpetrators for alimony/maintenance evasion, in 19 cases courts ruled a mixed penalty under Article 209 CC.

[16] Journal of Laws [Dz.U.], item 952.

of deprivation of liberty, or also minor crimes that carry a penalty of a fine or, alternatively, a penalty of limitation of liberty or deprivation of liberty.

The answer to this question cannot be limited to the grammatical interpretation of the provision of Article 37b CC, including especially reference to the main argument that there is no indication that it applies to a crime carrying "only" or "exclusively" the penalty of deprivation of liberty.[17] The legislator's use of such defining phrases would eliminate the possibility of imposing the mixed (joined) penalty on perpetrators of crimes carrying a penalty of deprivation of liberty and a fine (mainly the obligatory one but also the facultative one), thus it is good that the legislator did not do that. As it has already been proved, based on the wording of Article 37b CC, it is not possible to draw unequivocal conclusions on the scope of application of the mixed (joined) penalty. Different opinions of the representatives of the doctrine and adjudicating courts on this issue confirm that. In order to establish the groups of crimes for which the mixed (joined) penalty may be imposed on their perpetrators, it is additionally necessary to make use of a teleological and systemic interpretation. According to the Justification for the Bill of 20 February 2015, which made a radical reform of Polish criminal law, its main objective was to change the structure of imposed penalties for crimes, and in particular to substantially limit the number of penalties of deprivation of liberty with conditional suspension of its execution and to substitute non-custodial penalties for them, and where it is not possible, to apply a mixed penalty composed of two types of punishment, i.e. a penalty of short deprivation of liberty and a penalty of limitation of liberty.[18] In order to meet this objective, inter alia, the wording of Article 58 §1 CC was changed, Article 58 §3 CC was repealed and Article 37a CC was introduced instead, and Article 37b CC was added to create a possibility of imposing the mixed penalty, which consists in simultaneous sentencing to two different types of punishment for the same crime: an absolute penalty of deprivation of liberty and a penalty of limitation of liberty served sequentially: the penalty of deprivation of liberty served in prison isolation first, and the penalty of limitation of liberty next. Sentencing to the mixed penalty is the second instance of statutory entitlement of courts to impose two types of punishment as a response to the commission of the same prohibited act. Earlier, in accordance with the common criminal law, it was only possible to rule a cumulative penalty of deprivation of liberty and a fine. Therefore, the scope of response to prohibited acts has been extended.

In the light of the above-mentioned different possibilities of penal response to prohibited acts that are classified as less serious crimes, we can see a clearly specified gradation and differentiation of penalties and indications as to how they should be applied based on their harmfulness. The types of a penal response that

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[17] This is done in: J. Majewski, *Kodeks karny. Komentarz do zmian 2015* [Criminal Code: Commentary on the amendments of 2015], LEX 2015, and M. Małecki, *Sekwencja krótkoterminowej kary...* [Sequence of a short-term penalty...], p. 38.

[18] See, Justification for the Bill of 20 February 2015..., pp. 1–3 and 11–18, and A. Jezusek, *Sekwencja kary pozbawienia wolności i ograniczenia wolności jako reakcja na popełnienie przestępstwa (art. 37b k.k.)* [Sequence of a penalty of deprivation of liberty and a penalty of limitation of liberty as a response to crime commission (Article 37b CC)], PiP No. 5, 2017, LEX, pp. 80–94.

are now within the competence of courts have been adjusted to the seriousness of crimes. The criminal law reform shows it strives to maintain internal systemic logics and coherence of the introduced solutions. They match fundamental principles of penalising blameworthy behaviour, in accordance with which a penal response to various acts cannot be the same but must be appropriately differentiated for the reason of justice and prevention. Therefore, for minor crimes carrying an alternative sanction of a fine, a penalty of limitation of liberty or a penalty of deprivation of liberty (usually a short one, i.e. up to one year, up to two years or three years, and in extraordinary situations up to five years), the provision of Article 58 §1 CC lays down a special directive in accordance with which a court must rule a penalty of deprivation of liberty only if another penalty or a penal measure cannot meet the objectives of punishment. This signifies a statutory preference for non-custodial penalties and measures for perpetrators committing minor crimes and a possibility of passing a penalty of deprivation of liberty in any form, i.e. as an absolute penalty of deprivation of liberty as well as a penalty with conditional suspension of its execution in a given case, where the application of a non-custodial penalty or penal measure cannot ensure the achievement of objectives which the penalty should meet towards the punished individual and the society.

In case of crimes classified as criminality of "average" seriousness, which due to general assessment of the level of their social harmfulness do not carry non-custodial penalties but a penalty of deprivation of liberty for up to eight years, the provision of Article 37a CC allows courts to rule, instead of the envisaged penalty of deprivation of liberty, one of non-custodial penalties, i.e. a fine or a penalty of limitation of liberty. The possibility of applying the substitute penalty and ruling a non-custodial penalty instead of the penalty of deprivation of liberty is facultative and within the discretion of a court. Although the provision of Article 37a CC does not lay down any limits on sentencing perpetrators to substitute non-custodial penalties for crimes carrying the penalty of deprivation of liberty for up to eight years, courts must always take into consideration general directives for a penalty referred to in Article 53 §1 CC in such a way that ensures meeting the objectives of punishment by a type and amount of an imposed non-custodial penalty,[19] if necessary, aggravated by a relevant selected and added penal measure.

Directly after the added provision of Article 37a CC, the provision of Article 37b CC was placed, which introduces a possibility of ruling the mixed (joined) penalty composed of two types of punishment: a penalty of deprivation of liberty for up to three months or six months in its absolute form and a penalty of limitation of liberty for up to two years. The mixed penalty consists in combining prison isolation (executed first) with all its hardships and limitations to functioning after the release from prison resulting from the second part of the mixed penalty, i.e. the simultaneous sentence to limitation of liberty. The hardships constituting the content of the mixed penalty that a convict faces are absolutely more severe than those connected with a penalty of deprivation of liberty or a fine imposed as separate ones. This means that the mixed penalty should not be and is not envisaged as one to be imposed on

[19] A. Marek, V. Konarska-Wrzosek, *Prawo karne* [Criminal law], Warsaw 2016, pp. 366–367.

perpetrators of minor crimes where non-custodial penalties are preferred and the penalty of deprivation of liberty is supposed to be an absolute exception limited to the inevitable minimum (see the content of a directive on judicial penalties under Article 58 §1 CC). The mixed penalty is undoubtedly designed for crimes of average and high seriousness, which carry a penalty of deprivation of liberty (without non-custodial alternatives), however, the legislator emphasises that it can be applied to crimes "regardless of the minimum statutory penalty envisaged for a given act in statute". This way, courts are shown that a mixed (joined) penalty may be applied to every crime carrying any type of a penalty of deprivation of liberty and not only a severe or even the most severe one. However, the phrase cannot be interpreted as entitlement to imposing the mixed penalty for all crimes carrying a penalty of deprivation of liberty if they are minor and already carry alternative sanctions instead of simple ones with a penalty of deprivation of liberty. Such interpretation of the provisions of Article 37b CC does not match the necessity of adjusting a certain penal repression to the weight of a crime committed and being ruled by a court. The mixed (joined) penalty is supposed to limit the excessive application of a penalty of deprivation of liberty, inter alia, especially to limit its institution in the absolute form to reasonable and sufficient amounts relevant to a committed crime, and not to provide a possibility of imposing it for minor crimes. The interpretation of the provision of Article 37b CC concerning the scope of application of the mixed (joined) penalty, allowing its application also to minor crimes carrying an alternative penalty of deprivation of liberty, is in conflict with the assumptions of the criminal law reform introduced by the Act of 20 February 2015. In conclusion, it must be stated that the application of the mixed (joined) penalty was envisaged for crimes carrying a simple sanction for a prohibited act only in the form of deprivation of liberty and for crimes, the sanctions for which require a cumulative penalty of deprivation of liberty and a fine (or other general or special regulations lay down such a facultative possibility). Taking into consideration the types of penalties adopted in the Polish criminal law and the provision of Article 37b CC stipulating that the mixed (joined) penalty may be applied to crimes carrying "a penalty of deprivation of liberty regardless of the minimum statutory penalty envisaged in the Act for a given act", it must be assumed that it may be applied to crimes carrying a penalty of deprivation of liberty: from one month to three years, from three months to five years, from six months to eight years, from one year to ten years and from two years to 12 years. It must be emphasised at the same time that, as it was indicated in the Justification for the Bill of 20 February 2015 introducing the mixed penalty, its application should be especially attractive in case of serious crimes. Due to the possibility of imposing the mixed (joined) penalty for all crimes carrying a penalty of deprivation of liberty without a non-custodial alternative, and not only for the most serious ones, the legislator differentiated the maximum admissible penalty of deprivation of liberty that can be a part of this penalty, depending on the seriousness of a crime that is to be imposed in accordance with Article 37b CC. In Article 37b CC, the legislator divided the crimes carrying a penalty of deprivation of liberty without a non-custodial alternative into two groups. One of them includes crimes that carry a penalty of deprivation of liberty for up to ten years, i.e. a penalty of

deprivation of liberty for up to three years, up to five years or up to eight years (which are classified as crimes of average seriousness). The other group includes crimes carrying a penalty for ten or 12 years of imprisonment (i.e. prohibited acts classified as aggravated, most serious crimes). For medium-weight crimes carrying a penalty of deprivation of liberty for less than ten years, a penalty of deprivation of liberty within the mixed (joined) penalty cannot exceed six months of deprivation of liberty. The second element of the mixed (joined) penalty in the form of limitation of liberty is not differentiated in statute as far as the maximum amount is concerned and can be imposed for crimes of average seriousness as well as for most serious crimes in its full scope, i.e. from one month to two years. The differentiation of the maximum amount of a penalty of deprivation of liberty within the mixed (joined) penalty for crimes of different weight confirms the intention to maintain the relevant gradation and proportion of using the new possibility aimed at reasonable reduction of the period of perpetrators' stay in the conditions of prison isolation when they are liable not for minor crimes but for those more serious, where the imposition of a substitute non-custodial penalty is inadequate or inadmissible because of the too serious statutory punishment exceeding eight years.

Having the above in mind, it is difficult to approve of the thesis formulated in *Państwo i Prawo* that "An opinion that the sequence of penalties may be applied only in the case concerning a crime carrying only a penalty of deprivation of liberty would make Article 37b CC empty in the scope in which it envisages the possibility of imposing a penalty of deprivation of liberty for up to three months and a penalty of limitation of liberty for up to two years. Only the second variant envisaged in the provision would be applicable, i.e. the possibility of imposing a penalty of deprivation of liberty for up to six months and a penalty of limitation of liberty for up to two years. Such an interpretational result would be inadmissible".[20]

The first analysis of the courts' adjudication practice in relation to the application of the mixed (joined) penalty indicates that, in general, it is appropriate. Most often courts apply the mixed (joined) penalty instead of a penalty of deprivation of liberty envisaged as a sanction without a non-custodial alternative.[21] According to the 2015 statistics covering the first half of the year after the mixed penalty as a substitute penalty was introduced, courts imposed it for such crimes as: a theft with a burglary under Article 279 §1 CC – 139 cases; a robbery – 94 cases; a theft under Article 278 §1 CC – 45 cases; a theft with the use of violence – 15 cases; extortion – 7 cases; ill-treatment under Article 207 §1 CC – 45 cases and under §2 – 2 cases; causing damage to health under Article 157 §1 CC – 11 cases; taking part in a fight or battery under Article 158 CC – 11 cases; crimes under the Act on preventing drug addiction – 33 cases; driving under the influence of alcohol or a narcotic drug as

[20] A. Jezusek, *Sekwencja kary pozbawienia...* [Sequence of a penalty of deprivation...].

[21] See, e.g. the sentence of the District Court for Warszawa-Praga in Warsaw of 6 April 2017, VI Ka 1629/16, LEX No. 2278417; the sentence of the Regional Court in Szczytno of 13 April 2017, II K 587/16, LEX No. 2280181; the sentence of the District Court in Poznań of 21 April 2017, IV Ka 200/17, LEX No. 2293104; the sentence of the District Court in Siedlce 27 April 2017, II Ka 140/17, LEX No. 2292782.

a relapse to this crime under Article 178a §4 CC – 35 cases; a rape – 5 cases.[22] In case of such crimes, the possibility of applying the mixed penalty gives an opportunity to rationalise a penal repression by a considerable reduction of a penalty of deprivation of liberty in its absolute form, which, if imposed on its own (as it was before the introduction of the provision of Article 37b CC), would be adequately more severe than when it is joined with a penalty of limitation of liberty.

The statistical data on courts' sentencing practice in relation to the mixed (joined) penalty provided in the introduction also indicate that courts sometimes apply this penalty to minor crimes carrying an alternative penalty of deprivation of liberty and non-custodial penalties. This undoubtedly results from differences in the interpretation of the provisions of Article 37b CC that occurred in the doctrine but probably also because of the need for greater individualisation of court decisions on a penalty for some types of crimes than the scope of possibilities laid down in the Act. Some courts still treat the penalty of deprivation of liberty as a main instrument of penal response to a crime, thus they willingly use the mixed (joined) penalty also in case of minor crimes for which the Act envisages and prefers non-custodial penalties. This is a signal that it is necessary to continue looking for new ways of penal response to crimes, inter alia, e.g. to analyse purposefulness of introducing a possibility of imposing other types of penalties jointly, e.g. a penalty of limitation of liberty and a fine (as in fiscal penal law – see Article 110 of the Fiscal Penal Code). In order to avoid misinterpretation of the assumptions and objectives of the criminal law reform of 20 February 2015, which designed substantial reduction of the application of a penalty of deprivation of liberty, especially in its absolute form (which is the most severe punishment for crimes in our legal system) and a very disadvantageous phenomenon of aggravating penal repressions for minor crimes as well as alleviating hardships constituting the consequences of punishment for serious crimes, and thus, what is even more important, to avoid eliminating differences between statutory and judicial sentencing for crimes of different weight, it seems, the content of Article 37b CC should be made more precise as far as its application is concerned.

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[22] M. Melezini, *Polityka karna sądów w kontekście reformy prawa karnego. Wstępne wyniki badań* [Courts' penal policy in the light of criminal law reform: Preliminary research findings], [in:] J. Giezek, D. Gruszecka, T. Kalisz (ed.), *Nowa kodyfikacja prawa karnego* [New criminal law codification], Vol. XLIII, Wrocław 2017, p. 424 and pp. 430–432. Compare also collected data (a bit limited, in general) in Statystyka sądowa, Prawomocne skazania osób dorosłych 2011–2015 [Court statistics: Valid convictions of adults in the years 2011–2015], Departament Strategii i Funduszy Europejskich. Wydział Statystyczny Informacji Zarządczej, Warsaw 2016, pp. 32–46.

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MIXED (JOINED) PENALTY – CONTROVERSIES OVER THE SCOPE OF ITS APPLICATION

Summary

The article is devoted to the interpretation of Article 37b CC with respect to the scope of its application. The provision introduced a mixed penalty to the system of Polish criminal law. It consists in imposing on a perpetrator of a crime the joined penalty of short absolute depriva-

tion of liberty and limitation of liberty instead of an envisaged sanction. It polarised opinions on whether the mixed penalty can be applied to all crimes that carry a penalty of deprivation of liberty, regardless of their seriousness, i.e. also to those which, apart from imprisonment, also envisage alternative non-custodial penalties, or only to crimes of medium and high level of seriousness that carry a penalty of deprivation of liberty without a non-custodial alternative. The article presents arguments indicating that the legislator's will was to make the mixed penalty a substitute for a penalty of deprivation of liberty that was imposed earlier for more serious crimes. It also justifies the interpretation and rightfulness of the opinion that the mixed penalty was not designed and should not be ruled as a response to minor offences. The difference in opinions to what extent the mixed penalty should be applicable is reflected in courts' judgements. That is why, the authors try to resolve the dispute over this issue.

Keywords: mixed (joined) penalty, aim of introduction, scope of application, interpretational differences, application practice, need for detailed statutory specification

KARA MIESZANA (ŁĄCZONA) – KONTROWERSJE WOKÓŁ ZAKRESU JEJ STOSOWANIA

Streszczenie

Artykuł został poświęcony wykładni przepisu art. 37b k.k. w przedmiocie zakresu jego stosowania. Przepis ten wprowadził do systemu polskiego prawa karnego tzw. karę mieszaną, polegającą na wymierzeniu sprawcy występku łącznie krótkiej kary bezwzględnego pozbawienia wolności i kary ograniczenia wolności zamiast kary przewidzianej w sankcji. Wywołał on polaryzację stanowisk co do tego, czy kara mieszana (łączona) może być stosowana do wszystkich występków, które zostały zagrożone karą pozbawienia wolności bez względu na ich ciężar gatunkowy, a więc także do tych, które obok tej kary przewidują kary wolnościowe do alternatywnego wyboru, czy tylko do występków o średnim i poważnym ciężarze gatunkowym, których sankcja przewiduje karę pozbawienia wolności bez wolnościowej alternatywy. Artykuł przedstawia argumenty mające świadczyć o woli ustawodawcy, aby instytucja kary mieszanej zastępowała karę pozbawienia wolności orzekaną dotąd za poważniejsze występki i za zasadnością wykładni oraz trafnością poglądu, że kara mieszana nie została zaprojektowana i nie powinna być orzekana jako reakcja na występki drobne. Rozbieżność stanowisk co do zakresu stosowania kary mieszanej znajduje odzwierciedlenie w działalności orzeczniczej sądów, stąd podjęta przez autorów próba rozstrzygnięcia tego sporu.

Słowa kluczowe: kara mieszana (łączona), cel wprowadzenia, zakres zastosowania, rozbieżności wykładnicze, praktyka stosowania, potrzeba ustawowego doprecyzowania

ON MUTUAL RELATIONS BETWEEN THE TAX FRAUD UNDER ARTICLES 56 AND 76 FPC AND A CRIME OF FRAUD UNDER ARTICLE 286 CC

ŁUKASZ PILARCZYK*

The article aims to explain the nature of relations between Articles 56 and 76 of the Fiscal Penal Code (FPC) and Article 286 of the Criminal Code (CC). The prohibited acts referred to there are often called "tax fraud" in literature, which suggests they are similar to the crime of fraud under Article 286 CC. It also suggests a possibility of concurrence of provisions between Articles 56 and 76 FPC and Article 286 CC, which raises a question whether in case of the commission of prohibited acts against broadly understood tax obligations a perpetrator may be liable under Article 286 CC instead of relevant provisions of the Fiscal Penal Code. It should be added that the answer to this question raises doubts in the doctrine as well as in the Supreme Court judgements, which justifies a need for discussing this issue.

First of all, the analysis will cover Article 56 FPC which refers to a prohibited act that many authors[1] call "tax fraud". However, P. Kardas and G. Łabuda disapprove of a possibility of recognising this act as fraud because there is a lack of result in the form of deception,[2] which is typical of a crime under Article 286 §1 CC. In fact,

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1 T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2009, p. 294; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2014, pp. 279–280; R. Kubacki, A. Bartosiewicz, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2010, p. 304; W. Kotowski, B. Kurzępa, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2007, p. 270; V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Prawo i postępowanie karne skarbowe* [Fiscal penal law and procedure], Warsaw 2013, p. 216; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2012, p. 215.

2 Or taking advantage of an error or inability to adequately understand undertaken steps (compare, J. Bednarzak, *Przestępstwo oszustwa w polskim prawie karnym* [Crime of fraud in the Polish criminal law], Warsaw 1971, p. 25 ff).

the crime under Article 56 FPC consists in the fact that a taxpayer submitting a tax return or a declaration to a revenue office or another entitled body states untruth or conceals the truth, or does not fulfil the duty to inform about the change of data, which exposes a due tax amount to depletion. Thus, it is not necessary to deceive an entitled body to match the features of this prohibited act. However, the feature of this kind is referred to in Articles 76, 87 and 92 FPC and only in connection with those prohibited acts it is possible, in the authors' opinion, to potentially use the term "tax fraud". Therefore, the act prohibited under Article 56 FPC constitutes just fraud *sensu largo*,[3] and that is why, it seems unjustified to call it "tax fraud". There is a fundamental difference between the features of this crime and fraud discussed above.

It is necessary to ask a question: what should be the legal classification of a perpetrator's behaviour if the commission of the act under Article 56 FPC results in a form of deception of an entitled body? Indeed, it is undoubtedly necessary to agree with the above-mentioned opinion that this result occurrence is irrelevant to liability under Article 56 because it is not included in the features of this prohibited act. But can we, in such a situation, consider attributing the commission of ordinary fraud to a perpetrator if such a result, typical of this prohibited act, occurs in this situation?

The answer to this question might be the second argument concerning the lack of all elements typical of "ordinary" fraud in the features laid down in Article 56 FPC, which is based on P. Kardas's opinion that an activity leading to depletion of a due tax amount because of the provision of data that are not in conformity with facts does not constitute disadvantageous disposal of property, because then only the due tax to be paid to the State Treasury is reduced and it is not a part of its property yet. In such a situation, we cannot speak about fraud because there is no result in the form of the disadvantageous disposal of property caused by deception of the aggrieved, which must be attributed to fraud. In a situation characterised in Article 56 FPC, there are no disposing activities on the part of the employees of revenue offices. What we deal with is only the depletion of a due tax amount as a result of providing untruth in a tax return.[4] According to this author,[5] the only possible classification of the behaviour consisting in depletion of a due tax amount by providing a tax return or a declaration containing untrue data is under

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[3] P. Kardas, G. Łabuda, *Kryminalizacja oszustwa podatkowego w prawie karnym skarbowym* [Criminalisation of tax fraud in fiscal penal law], Prokuratura i Prawo No. 3, 2003, pp. 61–62; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks…* [Fiscal…], pp. 215–216. By the way, it must be indicated that there is an opinion that, based on fiscal penal law, it is possible to develop an autonomous definition of fraud (L. Wilk, *Szczególne cechy odpowiedzialności za przestępstwa i wykroczenia podatkowe* [Specific features of liability for tax-related crimes and misdemeanours], Katowice 2006, pp. 74–75).

[4] P. Kardas, *Prawnokarne aspekty uchylania się od wykonania zobowiązania podatkowego w podatku VAT – oszustwo skarbowe czy oszustwo klasyczne?* [Penal aspects of VAT liability evasion – fiscal fraud or classical fraud?], Prokuratura i Prawo No. 5, 2006, p. 45. For more on the disadvantageous disposal of property under Article 286 CC, see e.g. A.N. Preibisz, *Niekorzystne rozporządzenie mieniem jako znamię oszustwa (art. 286 §1 k.k.)* [Disadvantageous disposal of property as a feature of fraud (Article 286 §1 CC)], Prokuratura i Prawo No. 10, 2005, p. 63.

[5] P. Kardas, *Prawnokarne aspekty…* [Penal aspects…], p. 47.

Article 56 FPC, which does not require an occurrence of a result in the form of disposal of property. Thus, there is no occurrence of the features of an ordinary type of fraud under Article 286 CC.

As far as this argument is concerned, it can be assumed that we deal with a situation where a revenue office is deceived by a perpetrator about the correct tax amount that should be paid, and because of that it does not undertake steps to obtain the amount that is actually due. Thus, a question arises whether a disadvantageous disposal of property may be treated as omission. If so, in the situation specified in Article 56 FPC (if a revenue office was deceived about the amount of tax liability), we would theoretically also deal with the features of a crime of fraud under Article 286, provided a revenue office abandoned vindication of the due tax liability not knowing about its existence,[6] which would suggest concurrence of the provisions of Article 56 FPC and Article 286 CC. Answering the question, it is necessary to indicate that in judgements, a very broad interpretation of the concept of "disadvantageous disposal of property" is adopted: "every activity that is disposal of property concerning all property rights as well as liabilities influencing a financial situation that results in general deterioration of the aggrieved person's financial situation is disadvantageous disposal of property as a feature of a crime of fraud. "[7] Still, can we say that a failure to perform some activities resulting from a lack of knowledge may be considered "disposal of property"? It is pointed out in literature that it is possible to be approved of. An example of that can be a contractor desisting from business as a result of misleading him by a business partner or the postponement of debt settlement by a creditor who is not aware that it is time for its settlement because a debtor unlawfully deceived him.[8] This broad interpretation of the features of the prohibited act under Article 286 CC is justified by the need for the broadest protection of the legal interest in the form of property and reliability of economic turnover.[9]

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[6] Although, one can have doubts whether it is possible to speak about omission in a situation where someone is not aware that she/he is committing it because she/he does not know about some circumstances of the actual state. The Appellate Court in Katowice draws attention to that in its judgement of 21 February 2014 file No. II AKa 409/13 (Krakowskie Zeszyty Sądowe No. 6, 2014, item 136): "Analysing the actual state in this case on the part of the aggrieved, it is necessary to state that the behaviour of competent authorities' representatives was passive and limited to receipt of tax (VAT) returns from the accused and then entering the tax amounts settled in accordance with tax returns into books. In order to recognise disposal of property, there must be a conscious act that may take the form of omission that, in accordance with legal regulations, results in disposal of one's own or somebody else's property. In the case under examination, the competent authorities remaining in passive unawareness did not make such disposal of property". A gloss of disapproval of that judgement by J. Duży, P. Kołodziejski, Przegląd Sądowy No. 4, 2015, pp. 131–137.

[7] Supreme Court ruling of 3 April 2012, file No. V KK 451/11, LEX No. 1163989.

[8] For more, see: T. Oczkowski, *Oszustwo jako przestępstwo majątkowe i gospodarcze* [Fraud as property-related and economic crime], Kraków 2004, p. 66.

[9] A.N. Preibisz, *Niekorzystne rozporządzenie…* [Disadvantageous disposal…], pp. 70–71; similarly, W. Cieślak, *„Rozporządzenie mieniem" jako znamię wymuszenia rozbójniczego (art. 211 k.k.)* ["Disposal of property" as a feature of extortion (Article 211CC)], Palestra No. 11–12, 1995, p. 54; differently: the Supreme Court ruling of 24 June 2015, file No. I KZP 2/15, OSNKW No. 7, 2015, item 56, where it was directly indicated that: "Statutory authorisation of a revenue office

Although one can have objections to the above-mentioned conception, it is necessary to state that the next argument presented by P. Kardas and G. Łabuda, differentiating the features of the prohibited act under Article 56 FPC and Article 286 CC, does not seem to be convincing at all because, in the light of the above, a revenue office in the analysed situation would disadvantageously dispose of property and match the features of Article 286 CC.

On the other hand, J. Duży and P. Kołodziejski are representatives of an opinion that in a situation of submission of an unreliable tax return in order to avoid tax obligation, there is disadvantageous disposal of property. They draw attention to the fact that perpetrators' behaviour also covers other actions, inter alia, a series of activities aimed at deceiving revenue authorities,[10] which is to result in disadvantageous disposal of the property of the State Treasury, and thus results in the occurrence of the feature typical of fraud under Article 286 CC. They rightly note[11] that in a situation of depletion of a due tax amount, we do not deal with a taxpayer's free disposal but with a situation where she/he should submit a tax return being in conformity with the actual state and, documenting real business transactions that are subject to tax at a certain level; it is not him or her who disposes of the due tax amount because she/he cannot do this – these are revenue authorities who can. As a consequence, we deal with disadvantageous disposal of property if revenue authorities are deceived about the amount of due tax. It also seems to be absolutely justified that the authors draw attention to the fact that disposal of property covers a broad catalogue of activities that simply lead to deterioration of the financial situation of the property rights holder, that is why it is justified to assume that we also deal with it in the situations described here.[12]

In order to present arguments for their conception, its authors use the analogy to the court fraud[13] committed in a situation where false heirs submit untrue declarations based on which a court issues a judgement on the acquisition of rights to inheritance, which harms some heirs. However, this analogy seems to be unjustified because in this type of situations we deal with a court's active behaviour in the form of issuing a judgement confirming the acquisition of rights to inheritance. This situation is different from checking the correctness of a tax return where revenue authorities conduct silent positive verification of a tax return and do not initiate proceedings to establish the correct amount of tax liability. There is no obvious active conduct that we observe in case of court fraud, which can be recognised

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(a body of fiscal control) to abandon checking the calculation of tax in a tax return (…), in which a taxpayer reduced a due tax amount, excludes that body from matching the features of Article 286 §1 CC in the form of making that body disadvantageously dispose of property by abandoning the collection of due tax."

[10] J. Duży, *Wina sprawców oszukańczych uszczupleń podatkowych a kwalifikacja prawna* [Guilt of perpetrators of fraudulent tax depletion versus legal classification], Prokuratura i Prawo No. 7–8, 2012, p. 50.

[11] J. Duży, P. Kołodziejski, *Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 21 lutego 2014 roku, (sygn. II AKa 409/13)* [Gloss on the Appellate Court in Katowice judgement of 21 February 2014 (file No. II Aka 409/13)], Przegląd Sądowy No. 4, 2015, p. 134.

[12] J. Duży, P. Kołodziejski, *Glosa…* [Gloss…], p. 135.

[13] *Ibid*., p. 134.

as disposal of property. An authority's failure to initiate proceedings is something different from initiating proceedings by a court and issuing a decision, which the authors wrongly refer to one another, although only one type of this behaviour is active in nature. They alternatively indicate that it may lead to appropriation if a taxpayer and not a revenue office disposes of property on their own.[14] We would deal with appropriation of liability, which seems to be doubtful because such legal classification would occur in case of all prohibited acts specified in the Fiscal Penal Code consisting in settlement of tax in a depleted amount. Such multiplication of provisions, which might be used to penal assessment of those acts, must raise theoretical and axiological doubts and, that is why, this conception should be definitely rejected.

Despite the above-mentioned doubts about P. Kardas's arguments concerning the lack of the features of disadvantageous disposal of property on the part of revenue authorities in the act under Article 56, it is necessary to state that he is right that the concurrence of prohibited acts under Article 56 FPC and Article 286 CC is not possible, which results from the diversity of the interest legally protected by those provisions. As this author rightly indicates, in case of fiscal crimes, tax obligations constitute this type of legally protected interest that differentiates those prohibited acts from fraud under Article 286 CC, which does not protect the property of the State Treasury against attempts implemented with the use of the provisions of public law, including especially financial law regulating the issues connected with the financial interests of the State in the area of budgetary income from public contributions.[15] Thus, Article 286 CC will protect the property of the State Treasury but it will take place only in case when, e.g. the State Treasury takes part in the turnover in the same way as other market entities. As a result, in case of infringement of tax obligations, it is necessary to state that they are penalised by the provisions of the Fiscal Penal Code and because of that excluded from the application of regulations of Article 268 CC, as it refers to another type of a legally protected interest. The application of Article 268 CC would also be purposeless in case of acts consisting in different violations of tax obligations in the situation where there is a special regulation directly referring to such acts that was introduced to the Polish legal order, i.e. the Fiscal Penal Code. Thus, violating tax obligations towards the State Treasury cannot match the features of the crime of fraud because of a lack

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[14] *Ibid*., p. 137.

[15] P. Kardas, *Prawnokarne aspekty…* [Penal aspects…], pp. 47–48. For more on this issue, also see: P. Kardas, G. Łabuda, *Zbieg przepisów kryminalizujących klasyczne oszustwo oraz oszustwo skarbowe* [Concurrence of provisions criminalising classical fraud and fiscal fraud], [in:] J. Majewski (ed.), *Zbieg przepisów i zbieg przestępstw w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego* [Concurrence of provisions and concurrence of crimes in the Polish criminal law: Material of the 2nd Bielańskie Criminal Colloquium], Toruń 2006, p. 131, where it is rightly emphasised that in case of fiscal crimes, there is a lack of a specific element of freedom to decide on the part of the aggrieved that matches the features of Article 286 CC because a revenue office is obliged by law to act in a special way; therefore, the difference between the object of protection under Article 286 CC and crimes specified in FPC lies here: if there is a lack of this element of freedom to decide on the part of the aggrieved, we deal with a situation in which the provisions of FPC, not CC, protect the property of the State Treasury because public law norms are protected.

of an adequate legally protected interest, property of the State Treasury, connected with settling tax obligations, which is an interest that the legal norms of Article 286 CC do not protect.[16]

This statement seems to be extremely important if we take into consideration that, based on Article 56 FPC, a question arises whether its features match providing of untruth in a tax return as far as the amount of VAT is concerned, which results in groundless reduction of the amount of that tax that should be paid to the revenue authority.[17] It is indicated that tax returns are usually completed based on invoices that are either totally false or provide unreliable information documenting business operations that have actually taken place. Of course, such a prohibited act can also be committed, e.g. without the issue of any invoices but by referring to business operations not documented by any invoices when completing tax returns.[18]

According to P. Kardas,[19] filling in tax returns in the way that is not in conformity with the actual state based on invoices unreliably documenting real economic operations matches the features of the fiscal crime under Article 56 FPC and this does not constitute a doubtful issue in the doctrine and judicial decisions. However, the situation is different in case of false invoices and the procedure of groundless increase in the amount of calculated tax, which results in the depletion of the amount of due tax. There are opinions[20] that such situations should be treated not as ones matching the features of the prohibited act under Article 56 FPC but the features of fraud under Article 286 CC. The argument for this thesis is that in such a situation we deal with a fictitious economic operation that does not result in tax liability, thus this situation cannot be subject to interest and intervention of tax authorities. Those authorities cannot act to establish tax liability resulting from this operation. Thus, the interest in the form of tax obligation has not been violated so we cannot say that the features of the prohibited act under Article 56 FPC are matched.

Discussing this opinion, it is necessary to state that its authors not accidentally refer to the concept of a legal interest in order to prove that they are right. Just having a look at the features of the crime under Article 56 FPC does not give grounds for such an opinion. The provision penalises, inter alia, the act of providing untruth or concealing the truth when submitting a tax return, which results in tax depletion, and this also refers to a VAT return that is based on previously issued false invoices documenting calculated tax. Thus, such a tax return contains untrue data and, as a result, the tax settled is smaller than it should be. Therefore, we deal with its obvious depletion. Seemingly, in such a situation the features of the prohibited act under Article 56 FPC are matched, however, the authors of the above opinion object stating that there is no violation of the interest in the form of tax obligation as the

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16 A similar situation concerns other crimes against property in Chapter XXXV CC, e.g. the crime of appropriation.

17 For more, see: P. Kardas, *Prawnokarne aspekty…* [Penal aspects…], p. 36 ff.

18 *Ibid*., p. 37, footnote no. 32.

19 *Ibid*., p. 38.

20 For instance, J. Duży, *Wina sprawców...* [Guilt of perpetrators…], pp. 56–58; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks…* [Fiscal…], p. 218.

operation documented in invoices is a fictitious event and is not connected with this obligation.[21]

Attention must be drawn to the fact that Article 56 FPC is placed in the FPC chapter classifying crimes against tax obligations and settlements connected with grants and subsidies. Therefore, we see a clear indication that tax obligations (indicated in a plural form) constitute an interest legally protected by those provisions,[22] which does not seem to be a controversial issue. However, the title of the chapter does not read: "crimes against a tax obligation", which indicates that not only a tax obligation laid down in Article 4 of the Tax Law (TL), which is an unspecified obligation to make a pecuniary contribution in connection with an event laid down in those Acts,[23] is an interest legally protected by the provisions of this chapter. Thus, the provision protects various types of tax obligations, not only those connected with pecuniary contributions. For example, Article 61 FPC penalising unreliable bookkeeping does not require that there are features of any results in the form of a failure to pay due tax. A perpetrator's behaviour is penalised regardless of the fact that she/he has settled due tax. Thus, it is not necessary to violate a tax obligation under Article 4 TL to match the features of this act, so fiscal crimes and misdemeanours classified in this chapter must be also against other tax liabilities.

Therefore, particular obligations laid down in the Acts on taxation and imposed on taxpayers or tax collectors are legally protected interests. It is not only a tax obligation under Article 4 TL. In the light of Article 56 FPC, the main tax obligation infringed is providing untrue data in a tax return or a declaration, which seems to result clearly from the content of this provision.[24] It is necessary to indicate that providing untrue data based on fictitious invoices as far as calculated tax is concerned leading to reduction in due tax undoubtedly infringes that obligation, thus violates the interest legally protected by this provision. Therefore, in this situation, there are no grounds for adopting a legal classification under Article 286 CC because there are features of the act under Article 56 §1 FPC. Moreover, it is necessary to highlight that even if the issue of false invoices does not in itself create a tax obligation under Article 4 TL, the reduction in due tax as a result of taking the

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[21] J. Duży, *Wina sprawców...* [Guilt of perpetrators…], pp. 56–58.

[22] Similarly: S. Baniak, *Prawo karne skarbowe* [Fiscal Penal Code], Warsaw 2006, p. 196 ("the object of protection under Article 56 consists in compliance with tax obligations"); R. Kubacki, A. Bartosiewicz, *Kodeks…* [Fiscal…], p. 305: ("the object of protection (…) consists in compliance with obligations imposed by substantive fiscal law"); F. Prusak, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2011, p. 236. Fore more on this issue, also see: L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks…* [Fiscal…], pp. 261–266, describing the object of protection of the provisions placed in this chapter of FPC as: "a group of different legal interests connected, obviously in a certain way, with the fiscal interest of the revenue creditor").

[23] Similarly, A. Bartosiewicz, *Wyłudzenie zwrotu podatku VAT* [Obtaining VAT refund under false pretences], Glosa No. 4, 2005, pp. 104–106. In the author's opinion, "the term 'tax obligation' laid down in Article 53 §30 FPC is included in the term 'tax obligations' used in the title of Chapter 6 of Part I FPC", and he indicates absurd consequences of the adoption of a different interpretation.

[24] Similarly, F. Prusak, stating that the basic tax obligation protected by this provision consists in an obligation to provide tax information on time (F. Prusak, *Kodeks…* [Fiscal…], p. 237).

data from those invoices into consideration when completing tax returns results in depletion of the amount of pecuniary contributions that should be paid to the State Treasury, which seems to be also a violation of the tax obligation under Article 4 TL if the contribution laid down in this provision is not settled in the full amount. It does not mean, therefore, that a tax obligation under Article 4 TL is not infringed or that those fictitious economic operations documented by invoices do not result in any tax liabilities. If they are taken into consideration in tax returns, they obviously influence the amount of tax liability to be settled. There are no grounds, though, for adopting a legal classification of Article 268 CC, as it has been indicated above, especially because the property of the State Treasury is not the object of its protection in the area of tax obligations.

P. Kardas[25] is of the same opinion and states that there are no grounds for differentiating penal consequences of depletion of VAT based on false and unreliable invoices. If there is a VAT obligation on the part of a perpetrator and she/he declares a higher calculated tax in a given period than the real amount (which causes depletion of due tax), it does not matter whether the groundless calculation of tax was based on unreliable or false invoices. The consequence is the same: depletion of the amount of tax that should be paid to the State Treasury. This stand deserves full approval.

The author is also right to point out that Article 108(1) of the Act on value added tax undermines the sense of the division into unreliable and false invoices.[26] In accordance with this provision, in case a legal person, an organisational unit that does not hold its own legal identity or a natural person issues an invoice indicating an amount of tax, she/he is obliged to pay that tax. Therefore, even in case of an issued invoice documenting an economic operation that is not real, there is an obligation to pay a tax amount indicated in the invoice. From this point of view, it is not important whether obtaining a tax refund under false pretences takes place as a result of the use of "empty" invoices or only unreliable ones but documenting real economic operations. The issue of a false invoice results in the obligation to pay tax on the one hand, and on the other hand, a legal relation that is a possibility of deducting calculated tax (and, hence, an obligation to calculate tax in adequate amount in the given period).

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[25] P. Kardas, *Prawnokarne aspekty…* [Penal aspects…], pp. 39–41.

[26] P. Kardas, *O wzajemnych relacjach między przepisem art. 76 §1 k.k.s. a przepisem art. 286 §1 k.k.* [On mutual relations between the provision of Article 76 §1 FPC and the provision of Article 286 §1 CC], Prokuratura i Prawo No. 12, 2008, pp. 13–16; similarly, P. Kardas, *Prawnokarne aspekty…* [Penal aspects…], pp. 40–41, footnote no. 39; justification for the resolution of seven judges of the Supreme Court of 30 September 2003, I KZP 22/03, OSNKW 2003, No. 9–10, item 75, pp. 19–20. For more on the issue of doubts about the interpretation of Article 108(1) of the Act on value added tax, see A. Błachnio-Parzych, *Glosa do postanowienia Sądu Najwyższego z dnia 10 lipca 2013 r., sygn. II KK 20/13* [Gloss on the Supreme Court ruling of 10 July 2013, file No. II KK 20/13], Palestra No. 1–2, 2015, pp. 129–130; J. Duży, *Fałszerstwo intelektualne faktury a uszczuplenie podatku od towarów i usług* [Invoice-related intellectual fraud versus depletion of value added tax], Przegląd Sądowy No. 11–12, 2009, pp. 161–163; J. Duży, *Znaczenie regulacji art. 108 ust. 1 ustawy o podatku od towarów i usług dla karnoprawnej oceny oszukańczych uszczupleń podatkowych* [Significance of the regulation of Article 108(1) of the Act on value added tax for penal assessment of fraudulent tax depletion], Przegląd Sądowy No. 1, 2012, p. 68.

Therefore, it cannot be reasonably stated that the issue of a false invoice is not connected with the inception of rights and obligations on the part of the taxpayer and, that is why, it should not be the subject to fiscal penal law. As a consequence, it is necessary to point out that every time a false invoice is issued we deal with the infringement of the provisions of tax law and, as a result, with the occurrence of the features of crimes under Article 62 §2 or §5 FPC. On the other hand, depletion of due tax (Article 56 FPC) or a refund of tax (Article 76 FPC) based on a false invoice should be taken into consideration whenever it results from an issued invoice, regardless of whether it is a false or unreliable invoice, provided the submitted tax return contains untrue data. In such a case, a perpetrator may become richer at the State Treasury's expense. This, all the more, indicates groundlessness of differentiation of false and unreliable invoices based on fiscal penal law. It is hard to understand why in case of issuing a false invoice, depletion of the amount of tax should be classified as a prohibited act under the Criminal Code (Article 286) and the issue of an unreliable invoice should be classified as a prohibited act under the Fiscal Penal Code (Article 56 FPC), in spite of the fact that there are practically no differences between the two legal events.

The issue of the object of protection is more complicated when we take into consideration opinions of authors who believe that a prohibited act consisting in depletion of due tax by completing a tax return based on false invoices is a crime against property[27] because it is an activity aimed at obtaining financial benefits at the State Treasury's expense. In accordance with this opinion, depletion of due tax as an act detrimental to property should be classified based on the provisions of the Criminal Code, namely Article 286, as a crime against property because this behaviour infringes property, i.e. the interest that is legally protected. The basic aim of perpetrators' activities is to obtain financial benefits. Other legally protected interests, as e.g. tax obligations, are also infringed but only as a result of a potential intention; perpetrators decide to violate tax obligations but, first of all, they want to obtain financial benefits and this is their direct intention.[28] Potential infringement of some tax obligations taking place when a prohibited act is committed only constitutes a side effect of perpetrators' action (the main result is damage to the State Treasury property) and is not the reason for undertaking criminal activities.[29]

Regardless of whether Article 268 CC protects the State Treasury property in the above-discussed situations of non-settlement of tax liability (as it has already been mentioned, in the author's opinion it does not), it must be noted that the representatives of the above opinion are completely wrong to differentiate between the two situations: first, where a perpetrator acts in order to obtain financial benefits, and second, where a perpetrator aims to avoid a tax liability by non-settlement of due tax amount. It is obvious that if someone provides untrue data in a tax return

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[27] J. Duży, P. Kołodziejski, *Glosa…* [Gloss…], p. 133. A similar opinion by J. Duży, *Wina sprawców…* [Guilt of perpetrators…], p. 59.

[28] J. Duży, *Wina sprawców…* [Guilt of perpetrators…], p. 55.

[29] *Ibid*., p. 59; similarly, J. Bryk, A. Choromańska, A. Kalisz, S. Miszkiewicz, D. Mocarska, D. Porwisz, A. Sadlo-Nowak, A. Świerczewska-Gąsiorowska, *Wybrane zagadnienia prawa karnego skarbowego* [Selected issues of fiscal penal law], Szczytno 2014, p. 91.

in order to avoid a tax obligation, she/he acts to obtain financial benefits. What objective, other than obtaining financial benefits at the State Treasury's expense, can their behaviour have if they want to avoid a tax amount settlement? It cannot raise any doubts that intentionally committing any crime or misdemeanour, a perpetrator does it to obtain financial benefits. Thus, there are no grounds for differentiating between those two situations. Following this train of thought, there are no grounds for placing Article 56 in the Fiscal Penal Code, because the submission of tax returns documenting an untrue state, indicating a smaller due tax amount, is always an activity performed to obtain financial benefits in the form of tax evasion or depletion by entirely or partially avoiding a tax obligation. If we approved of this opinion, the behaviour would always match the features of a crime against property and it would be necessary to adopt the legal classification of Article 268 CC. We would not be able, in fact, to prosecute a perpetrator in accordance with Article 56 FPC because the committed crime would match the features of a crime against property and not a fiscal one. Thus, the differentiation of the features of two types of prohibited acts under Article 56 FPC and Article 268 CC based on a perpetrator's intention is groundless.

Generally, it must be stated that acts specified in FPC are against a legal interest that is property, and it is a special type of property: the property of the State Treasury or local self-government units. Those prohibited acts cannot be identified with and referred to crimes against property in accordance with the Criminal Code because this would lead to negation of the significance of the fiscal penal law regulations.

J. Duży additionally states that in case of depletion of the amount of due tax based on false invoices, a tax liability does not take place at all, and so we cannot speak about the violation of tax obligations. This means that a tax obligation is not infringed by perpetrators of this kind of acts which only cause damage to property. This stand is not precise, however, because, in accordance with Article 108(1) of the Act on value added tax, in case of the issue of a false invoice, it is necessary to settle the tax indicated in it. To tell the truth, J. Duży treats this liability as a fiscal sanction,[30] however, the author of this article believes that in such a situation tax obligation occurs anyway because of the definition of this concept in the Tax Law. Moreover, one of the obligations imposed on taxpayers is correct completion of a tax return, which is especially important in case of prohibited acts committed as a result of intentionally incorrect completion of tax returns and, as it has been indicated above, Article 56 refers to the group of prohibited acts infringing broadly understood "tax obligations". In case of those acts, the correct completion of tax returns would be object of protection.[31] Thus, it is difficult to rationally state that e.g.

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[30] J. Duży, *Wina sprawców…* [Guilt of perpetrators…], p. 59; J. Duży, *Fałszerstwo intelektualne…* [Invoice-related…], p. 157. Other supporters of the opinion that this provision does not decide on the inception of a tax obligation indicate its erroneous construction, which is, in their opinion, an argument for purposelessness of this reference: L. Wilk, *Glosa do postanowienia Sądu Najwyższego z dnia 10 lipca 2013 r., sygn. II KK 20/13* [Gloss on the Supreme Court ruling of 10 July 2013, file No. II KK 20/13], Orzecznictwo Sądów Polskich No. 4, 2014, item 36, p. 474.

[31] Similarly, J. Bryk, A. Choromańska, A. Kalisz, S. Miszkiewicz, D. Mocarska, D. Porwisz, A. Sadlo-Nowak, A. Świerczewska-Gąsiorowska, *Wybrane zagadnienia…* [Selected issues…], p. 62, where "compliance with obligations imposed by substantial tax law" is indicated as the object of

a crime consisting in depletion of a due tax amount is a prohibited act targeted only against property and not a taxpayer's obligations connected with correct completion of a tax return.

Thus, in fact, it is necessary to state that in spite of some similarities between the features of the prohibited act under Article 56 §1 FPC and Article 268 CC, mainly due to a different object of protection of the two provisions, it is not possible to acknowledge that the exposure of tax to depletion by submitting a tax return containing untrue data matches the features of the prohibited act under Article 268 CC, even if those tax returns are completed based on invoices documenting fictitious economic operations. In addition, it also means that the use of a term "tax fraud" in relation to the fiscal crime under Article 56 FPC is not really justified because of the differences between their features.

On the other hand, the situation connected with the prohibited act under Article 76 FPC consisting in obtaining tax refund by a perpetrator not entitled to it, especially VAT or excise duty, by misleading a tax authority is different.[32] There are significant similarities between the features of acts specified in Article 76 FPC and Article 268 CC. They are bigger than between fraud and the act under Article 56 FPC. Obtaining a tax refund under false pretences as well as "ordinary" fraud specified in Article 286 CC have features that contain an element of deception[33] and disadvantageous disposal of property (in case of Article 76 FPC, a tax refund or its use for the settlement of future liabilities or tax debts is that disposal of property). Moreover, both prohibited acts refer to two actions performed.[34] On the one hand, a perpetrator's action is targeted at a person entitled to dispose of property (in case of the crime under Article 76 – the entitled authority), on the other hand, at property owned by that entity. Obviously, the authorities cannot in the same way as natural persons (who may be harmed by a perpetrator's action matching the features of the act under Article 286 CC) freely dispose of financial resources they manage and in this situation they must act in accordance with the provisions of financial

protection of Article 56 FPC, which means that, according to the authors, the object of protection is not only the property of the State Treasury, but also a series of legal norms that taxpayers are obliged to comply with when completing tax returns.

[32] It must be noted, however, that as M. Mozgawa indicates (*Prawnokarne aspekty naruszenia podatku VAT* [Penal law aspects of VAT infringement], Prokuratura i Prawo No. 6, 1999, p. 17), an undue refund of tax referred to in Article 76 FPC may be treated as tax depletion referred to in Article 56 FPC, which would make differentiation between those two prohibited acts not really unambiguous. Moreover, in accordance with Article 52 §2 of the Tax Law, an undue tax refund is treated as tax arrears. Therefore, it is justifiable to ask a question about purposefulness of differentiating Article 76 FPC while, as it seems, the behaviour it penalises might be also classified under Article 56 FPC. For more on this issue, also see: T. Oczkowski, *Problematyka karnoprawnej oceny wyłudzenia podatku VAT* [Issues of penal law assessment of obtaining VAT under false pretences], Prokuratura i Prawo No. 7–8, 2009, pp. 100–101.

[33] On the other hand, there is no possibility of committing a prohibited act under Article 76 FPC by taking advantage of another person's error, which is specified in Article 286 CC (T. Grzegorczyk, *Kodeks…* [Fiscal…], p. 360).

[34] P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], p. 83.

law.[35] As a result, the prohibited act under Article 76 §1 FPC is sometimes called "an autonomous fiscal variation of crime under Article 286 CC".[36]

In spite of those similarities, however, there are also obvious differences between fraud and obtaining a tax refund under false pretences. The property that is an object of a perpetrator's act under Article 76 FPC may only be money subject to refund within a given tax liability and not property in any other form. Taxes in Poland, as it is laid down in Articles 4–6 TL, can be only and exclusively in the form of pecuniary contributions. Any events posing threat to other types of property do not have features specified in Article 76 FPC. However, we can still analyse if they match the features of the act under Article 286 CC.[37]

The difference between Article 76 FPC and Article 286 CC, according to P. Kardas and G. Łabuda,[38] also consists in the fact that the objective aspect of the features of the two prohibited acts is different. A prohibited act specified in Article 76 FPC can be committed with a direct as well as potential intention while fraud, in accordance with Article 286 CC, only with a direct intention.[39]

Another element differentiating the prohibited act under Article 76 FPC from that under Article 286 CC is the subject (agent) who may commit them. It must be decided who can commit a prohibited act in the form of obtaining a tax refund under false pretences. Conversly to what is usually stated in the doctrine,[40] only a person who is a registered VAT payer may obtain such a refund. A person who is not a payer of a certain type of tax is not practically able to register a tax return documenting overpaid tax in the computer system and thus, their claim cannot be dealt with. Although it is not expressed in the provision directly, the subject may only be a payer of the given tax, which differentiates that act from the crime under Article 286 CC, which is a common crime. Moreover, a doubt is sometimes raised whether the term "a person" used in Article 286 CC, meaning a subject (agent) disposing of property, may refer to a state body, which makes a disadvantageous disposal of property deciding on a tax refund.[41]

A question arises, however, like in relation to the act under Article 56 FPC, what shall be done in a situation where a tax refund has been obtained based on false invoices documenting operations that did not actually take place. Again, there is a problem whether we can speak of the commission of a prohibited act under

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[35] *Ibid*.

[36] A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks…* [Fiscal…], p. 277.

[37] P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], p. 83.

[38] *Ibid*., p. 84; similarly, T. Grzegorczyk, *Kodeks…* [Fiscal…], p. 360.

[39] Some doubts concern, however, the types of lesser degree crimes under Article 76 FPC, where, according to some authors, there is only direct intention (P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], pp. 83–84). Differently in: R. Kubacki, A. Bartosiewicz, *Kodeks…* [Fiscal…], p. 466 and L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks…* [Fiscal…], pp. 362–363.

[40] For instance, W. Kotowski, B. Kurzępa, *Kodeks…* [Fiscal…], p. 347; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks…* [Fiscal…], p. 277; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks…* [Fiscal…], p. 358.

[41] P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], p. 70, although it is relatively easy to challenge this argument stating that in case of obtaining a tax refund under false pretences, a natural person, an employee of the revenue office, is misled.

Article 286 CC, which is even more justified in the context of greater similarity of the two provisions than it occurrs in relation to Article 56 FPC.

The Supreme Court gave a positive answer to this question in its judgement of 1 March 2004.[42] It states: "in case where acts committed by a perpetrator to obtain a VAT refund under false pretences, in accordance with the Act of 8 January 1993 on value added tax and excise (…), are not limited to omission of a reliable report of the object of taxation leading to avoiding expenditure from one's own property at the expense of depletion of the State Treasury revenue, but consist in acts simulating the existence of a tax obligation only in order to obtain profits from the property of the State Treasury by pretending before a tax authority (with the use of false documents or by undertaking others steps) to have conducted real transactions, including ones concerning actually existing goods, not their substitutes, such activities constitute crimes specified in the provisions of the Criminal Code and not fiscal crimes".[43]

The arguments of the Supreme Court are that if we deal with obtaining a VAT refund under false pretences based on false invoices, a perpetrator acts in order to obtain financial benefits by making a tax authority refund an amount of money indicated by him/her from the property of the State Treasury with the use of fraudulent means, misleading a tax authority about the existence of tax obligation entitling to a refund. Unlike this, in connection with an act of unreliable provision of data concerning actual operations resulting in tax obligation the aim is not important, and the fact of exposing the State Treasury to depletion of tax may result from a perpetrator's direct as well as potential intention. That is why, not every instance of obtaining a VAT refund under false pretences will always cause a fiscal penal liability. This results from the fact that the scope of protection provided by the provisions of fiscal penal law is connected with tax obligations. If they do not exist, it is not possible to deal with such a situation as a fiscal penal liability (and in case of false invoices, according to the Supreme Court, we do not deal with tax liability inception).

Analysing this opinion, it is first of all necessary to note that the Supreme Court did not pay attention to one more basic difference between the prohibited act under Article 76 FPC and fraud under Article 286 CC, which should be referred to here.

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[42] File No.: V KK 248/03, OSNKW No. 5, 2004, item 51. Similarly, Supreme Court ruling of 10 July 2013, file No. II KK 20/13, OSNKW 2013, No. 10, item 91 and glosses of approval in: A. Błachnio-Parzych, Palestra No. 1–2, 2015, p. 127 and L. Wilk, Orzecznictwo Sądów Polskich No. 4, item 36, 2014; O. Górniok, *Jeszcze* o *nadużyciach procedury podatku VAT* [More about misuse of VAT procedures], Prokuratura i Prawo No. 6, 2010, p. 20 ff; R. Kubacki, A. Bartosiewicz, *Kodeks…* [Fiscal…], p. 460. Differently in: Supreme Court judgement of 22 October 2009, file No. IV KK 433/08, OSNwSK 2009, No. 1, item 2115 with a critical gloss by J. Duży (Państwo i Prawo No. 10, 2011, p. 135). T. Grzegorczyk's opinion on the Supreme Court ruling of 1 March 2004 was also critical. He stated that its theses raised doubts about their validity because of Article 108(1) of the Act on value added tax (T. Grzegorczyk, *Kodeks…* [Fiscal…], pp. 319–320); even the supporters of the Supreme Court stand notice this circumstance (e.g. R. Kubacki, A. Bartosiewicz, *Kodeks…* [Fiscal…], p. 461).

[43] Inter alia, M. Mozgawa expresses a similar opinion, *Prawnokarne aspekty…* [Penal aspects…], pp. 14–15, although the author refers to Article 276 CC concerning the features of the crime of theft, not Article 286 CC, as the provision of the Criminal Code applicable to the legal classification of a perpetrator's behaviour.

Article 76 does not refer to a result, not only exposure to depletion of a tax liability amount, while the features of the act under Article 286 require a result in the form of disadvantageous disposal of property.[44]

If we assume, in accordance with the logics of the Supreme Court, that we do not deal with a fiscal crime in case a taxpayer claims a refund of tax based on a false invoice, then when she/he fails to obtain a refund of tax, she/he might be prosecuted only for an attempt to commit fraud under Article 286 CC. On the other hand, in a similar situation where invoices used to complete tax returns documented real operations, we would deal with the commission of the act under Article 76 FPC. It is hard to explain rationally why in the two almost identical situations one of them should be treated as the commission of a prohibited act and the other would just be an attempt to commit a prohibited act. The Supreme Court did not explain this issue in its judgement at all.

Moreover, as P. Kardas rightly notes, the conception (represented in the above-mentioned judgement) consisting in acknowledgement that in case of false invoices we deal with a lack of infringement of a tax obligation is consequently connected with a further statement that we do not deal with a violation of any sanctioning norms that can be drawn from Article 76 FPC but we deal with the violation of sanctioning norms specified in Article 286 CC.[45] Still, the problem is that three out of four norms laid down in Article 76 FPC do not refer, in any way, to the scope of regulation in Article 286. Those are norms specifying penalisation of misleading and exposure to an undue tax liability refund committed with direct intention; misleading and exposure to an undue tax liability refund committed with potential intention; and misleading and obtaining an undue tax liability refund committed with potential intention. The behaviour listed is not subject to regulation of any norms laid down in Article 286 CC.

What is more, the features of an act under Article 76 FPC may also take place where a perpetrator depletes the value of due tax, which results in a surplus of tax calculated compared to due tax. Thus, obtaining a VAT refund under false pretences does not always take place via an artificial increase in the amount of calculated tax. Its amount may equal the amount that a taxpayer may deduct. Despite that, thanks to his/her manipulations, an undue refund of tax may take place.[46] Those acts will not be connected with the issue of false invoices. Thus, as far as they are concerned, we will also not deal with a potential classification under Article 286 CC.

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[44] More on the issue, e.g. P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], pp. 73–77.

[45] P. Kardas, *O wzajemnych relacjach…* [On mutual relations…], pp. 18–19, but it must be noted that the author uses a concept of a sanctioning norm, which one can disagree with, because the norms he indicates may be recognised, based on a different point of view, as sanctioned norms. The terminology used by the author most probably is the result of A. Zoll's conception concerning the normative content of criminal provisions. More on the issue: A. Zoll, *O normie prawnej z punktu widzenia prawa karnego* [On a legal norm from the point of view of criminal law], Krakowskie Studia Prawnicze 1990, Year XXIII, pp. 65–95; Ł. Pohl, *Struktura normy sankcjonowanej w prawie karnym* [Structure of a sanctioning norm in criminal law], Poznań 2007, pp. 34–38.

[46] See, A. Bartosiewicz, *Wyłudzenie…* [Obtaining…], pp. 100–101.

One norm we can decode from the content of Article 76 FPC, which can raise doubts whether it matches, to some extent, legal norms decoded from the content of Article 286 CC, is the norm penalising misleading and causing an undue refund of tax committed with direct intention. As the norm is infringed by unentitled reduction of the amount of due tax, it is not possible to adopt legal classification under Article 286 CC, because then undoubtedly the tax obligation starts but the resulting amount of tax to be settled is groundlessly reduced by a perpetrator, which should be obviously classified under Article 76 FPC if it causes a risk of an undue tax refund.

As a result, it is necessary to state that the scope of protection by the two provisions does not match one another. Not every type of behaviour penalised by Article 76 is within the scope of the norm of Article 286 CC,[47] which raises justified doubts concerning the possibility of applying Article 286 CC to punish obtaining a tax refund under false pretences with the use of a false invoice. This is because only when a perpetrator causes a refund of undue tax by acting with direct intention, will we potentially deal with the infringement of sanctioning norms derived from Article 286 CC.

Then, however, there is a problem with a loophole noticed by P. Kardas.[48] If, in every situation where a perpetrator infringes the above-mentioned norm using a false invoice, the features of the prohibited act under Article 76 do not occur (a tax obligation does not take place because the invoice does not refer to an actual legal event), there are no legal grounds for prosecuting a perpetrator of prohibited acts consisting in the infringement of three sanctioning norms mentioned above, provided a perpetrator uses a false invoice to commit those acts. On the one hand, those types of behaviour do not match the features of fraud because of an inadequate type of intention or a lack of disadvantageous disposal of property, and simultaneously, they do not match the features of the act under Article 76 FPC due to an inadequate object of protection (as according to the Supreme Court, there is a lack of tax obligation inception). This type of situation, which results from the way of thinking presented by the Supreme Court in its judgement of 1 March 2004, is hard to be considered logical or criminally and politically substantiated. Here, it is necessary to define precisely that in connection with the exposure to an undue refund of tax as a result of a perpetrator's act with direct intention committed based on false invoices, the above-mentioned P. Kardas's opinion on non-punishability of this behaviour is not precise, as this type of behaviour is not included in the normative scope of Article 286 CC, due to a lack of a required result (exposure to a refund instead of causing a refund, necessary for assigning liability under Article 286 CC). Therefore, this type of behaviour does not match the features specified in Article 286 in the form of commission but a perpetrator of this act will be probably liable for an attempt of fraud. Thus, his/her behaviour, contrary to P. Kardas's opinion, will be punishable (as she/he has exposed a legal interest to harm but has not managed to fulfil the objective).[49]

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[47] P. Kardas, *O wzajemnych relacjach…* [On mutual relations…], p. 19.

[48] *Ibid.*, pp. 21–22.

[49] Obviously, based on an assumption that we can consider legal classification of this behaviour in accordance with Article 286 CC.

Thus, regardless of the above, the statements in the Supreme Court judgement of 12 December 2008[50] are undoubtedly erroneous as they indicate: "The comparison of the content of Article 76 §1 FPC and Article 286 §1 CC leads to an obvious conclusion that the former is a provision *lex specialis* in relation to the latter. The features of a crime under Article 76 §1 FPC are completely contained in the general description of an action of a perpetrator of the crime under Article 286 §1 CC, specifying a special type of fraud leading to obtaining an undue refund of tax under false pretences". This opinion is wrong because the features of the prohibited act specified in Article 76 FPC are not completely contained in the features of "ordinary" fraud due to the above-mentioned partly different scope of application of the norms laid down in the two provisions as well as a different object of protection.

It is rightly noticed that the object of protection in Article 76 FPC is, apart from tax obligations, also the property of the State Treasury and local self-government units.[51] Protection of tax obligations (apart from property), however, is a factor differentiating this provision from classical fraud in the scope of a legally protected interest, which results in a conclusion that recognition of any act infringing broadly understood tax obligations as classical fraud is not possible because of a different object of protection.[52] From this point of view, the division into false and unreliable invoices is not important in penal law because in both cases there is an occurrence of infringement of tax obligations connected with correct completion of tax returns that are based on those invoices and leading to an undue refund of tax. Thus, both situations should be classified under Article 76 FPC. Here, it is again necessary to quote P. Kardas's opinion, with which the author of the article agrees, according to which the norm sanctioning actions consisting in infringement of private law norms can be decoded from Article 286 §1 CC. On the other hand, the norm sanctioning behaviour consisting in infringement of public law norms can be decoded from Article 76 §1 FPC.[53]

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[50] File No. V KK 76/08, LEX No. 449041.

[51] P. Kardas, G. Łabuda, *Zbieg przepisów…* [Concurrence of provisions…], p. 124 ff; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks…* [Fiscal…], p. 278; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks…* [Fiscal…], p. 357. F. Prusak also specifies the object of protection of the provisions of FPC broadly as: "financial interest of the State and the European Communities as well as an established legal order in public finances" (*Kodeks…* [Fiscal…], p. 22), which seems to correspond to the opinion presented by P. Kardas and G. Łabuda. Of course, first of all, the interests legally protected by Article 76 FPC shall be, like in case of Article 56 FPC, tax obligations imposed by substantive tax law (see, e.g. R. Kubacki, A. Bartosiewicz, *Kodeks…* [Fiscal…], p. 42), which is an unquestionable fact, however, in case of infringement of those obligations, the results influence the property of the State Treasury and local self-government units. That is why, e.g. in: J. Bryk, A. Choromańska, A. Kalisz, S. Miszkiewicz, D. Mocarska, D. Porwisz, A. Sadlo-Nowak, A. Świerczewska-Gąsiorowska, *Wybrane zagadnienia…* [Selected issues…], p. 88, the authors specify the object of protection of this provision as: "compliance with the provisions of substantive tax law concerning the procedure of tax liability refund".

[52] P. Kardas, G. Łabuda, *Kryminalizacja…* [Criminalisation…], p. 64 ff; P. Kardas, *O wzajemnych relacjach…* [On mutual relations…], p. 24–25; similarly, justification for the Supreme Court judgement of 19 March 2008, II KK 347/07, Orzecznictwo Sądów Polskich No. 4, item 43, 2009.

[53] P. Kardas, *O wzajemnych relacjach…* [On mutual relations…], pp. 27–28.

The thesis formulated by J. Duży that the State Treasury property is also a legally protected interest of Article 286 CC does not deserve approval. This author states[54] that: "One cannot agree with an opinion that the provision of Article 286 §1 CC does not protect the property of the State Treasury or other entitled entities against attempts implemented with the use of regulations of public law. This would *de facto* mean that the property of the State Treasury is protected to a lesser extent (only and exclusively by regulations of a specialised branch of law) and is subject to other (in fact, weaker) standards of protection". This opinion cannot be recognised as substantiated because, firstly, it is hard to acknowledge that the selection of a specific group of provisions sanctioning unlawful non-settlement of tax contributions, characterised by specific differences, should indicate weaker protection for the State property.[55] These are the specific features and institutions, such as vicarious liability or contributory liability that decide about a better adjustment of penal fiscal law norms to protection of tax liabilities in comparison to norms contained in the Criminal Code being more general in nature.

Apart from that, we cannot forget that the State Treasury property is also protected by the norms of financial law, which regulate such issues as, e.g. obligation to pay interest for non-settlement of tax liabilities, which are also aimed to deter taxpayers from committing acts that are detrimental to the financial interests of the State. The provisions of fiscal penal law play an ancillary role, they perform a supplementary function in relation to those provisions and this is what cannot be forgotten. It is really difficult to understand why this quoted author believes that the provisions of the Fiscal Penal Code ensure poorer standards of protection of the State Treasury property. Probably, the author based the opinion on the fact that penalties of deprivation of liberty envisaged in the Fiscal Penal Code for particular crimes are usually more lenient than those of common criminal law. On the other hand, a higher fine may be imposed in accordance with the regulations of the Fiscal Penal Code than based on the Criminal Code. Moreover, the scope of various types

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[54] J. Duży, *Przedmiot ochrony oszukańczych uszczupleń podatkowych* [Object of protection in fraudulent tax depletion], Prokuratura i Prawo No. 12, 2011, p. 139; J. Duży, *Kryminalizacja nadużycia mechanizmów podatkowych* [Criminalisation of tax mechanisms misuse], [in:] B. Sygit, T. Kuczur (ed.), *Aktualne problemy kryminalizacyjne* [Current criminalisation issues], Toruń 2013, pp. 166–167. Differently in: M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna, t. III* [Criminal Code, Special Part, Vol. III], Kraków 2006, p. 319.

[55] By the way, it must be noted that it is not possible to approve of the thesis proposed by J. Duży that because of, inter alia, a longer period of limitation and simplification of the procedure of giving evidence for a perpetrator's guilt, we should prefer liability under the provisions of the Criminal Code in a situation of their potential concurrence with the provisions of FPC (J. Duży, *Kwalifikacja prawna uszczuplenia podatku od towarów i usług* [Legal classification of VAT depletion], Państwo i Prawo No. 10, 2008, p. 80). Circumstances indicated by the author cannot have any significance for assigning liability. What may be important are only the issues of appropriate interpretation of given provisions and their correct classification within the actual state, and not which legal classification facilitates a perpetrator's prosecution. The author directly indicates that the adoption of a legal classification of the act under Article 76 FPC, and not Article 286 CC, in his opinion, is an unjustified privilege for perpetrators (*ibid*., p. 83), however, he disregards the fact that a subjective opinion that some type of behaviour is not penalised severely enough cannot lead to adopting an incorrect legal classification in order to prosecute a perpetrator and punish them more severely.

of liability is extended on a broader group of entities, which the Criminal Code lacks (e.g. because of the application of the above-mentioned vicarious liability under Article 9 §3 FPC).

Therefore, the statement that the provisions of the Criminal Code must additionally protect the State Treasury property is groundless. Moreover, such reasoning would simply undermine the sense of applying the provisions of the Fiscal Penal Code in many cases if relevant provisions of the Criminal Code, which are more universal in nature than the provisions of the Fiscal Penal Code, might substitute for them. Therefore, it is necessary to select various types of legally protected interests: the property of the State Treasury and local self-government units (protected by Article 76 FPC) and other types of property protected by Article 286 CC. Thus, it is necessary to state that the act under Article 76 FPC and the act under Article 286 CC are applicable in a different scope. Moreover, they differ considerably as to the legally protected interest. Thus, it is necessary to draw a conclusion that there is no concurrence of provisions.[56] Just to make it clear, it is must be reminded that the provisions specifying crimes against property in the Criminal Code also protect the State Treasury property but only when they are dealt with within the sphere of private law regulations.[57]

J. Duży's opinions about the interest legally protected by Article 286 CC result from the fact that he supports the earlier presented thesis of the Supreme Court judgement of 1 March 2004,[58] according to which obtaining a tax refund under false pretences may be in some circumstances classified as fraud under Article 286 CC, inter alia, because actions of perpetrators of prohibited acts of this kind are, first of all, detrimental to property and only then to tax obligation.[59] In the author's opinion, the State Treasury property is a primary object of protection and tax obligation is a secondary one. The author daws attention to the fact that perpetrators' aim is to become richer and not to infringe tax obligations. Thus, property is the main (type of) object of protection provided by this provision.[60] T. Oczkowski[61] also believes that in some cases of obtaining a VAT refund under false pretences, perpetrators'

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[56] See, P. Kardas, *O wzajemnych relacjach…* [On mutual relations…], pp. 25–28, where it is rightly noticed that the adoption of a different stand admitting such concurrence would result in a statement that "behaviour consisting in the use of unreliable or false invoices and resulting in undue refund of a tax liability in such a way that behaviour with direct intention, with identical components, would be classified as two crimes with the use of the concept of the ideal concurrence of punishable acts, and behaviour with direct intention but not in order to obtain financial benefits or with potential intention would 'only' constitute a crime of fiscal fraud". Similarly, P. Kardas, G. Łabuda, *Zbieg przepisów…* [Concurrence of provisions…], p. 162; R. Kubacki, *Wyłudzenie zwrotu VAT – odpowiedzialność karna skarbowa* [Obtaining VAT refund under false pretences – fiscal penal liability], Przegląd Podatkowy No. 9, 2002, p. 54, and also p. 55, where the author indicates that there is a possibility of ideal concurrence of Article 76 FPC and particular common crimes, but he does not mention fraud.

[57] P. Kardas, *O wzajemnych relacjach…* [On mutual realtions…], p. 30, footnote no. 46.

[58] File No. V KK 248/03.

[59] J. Duży, *Przedmiot ochrony…* [Object of protection…], p. 134 ff.

[60] J. Duży, *Kryminalizacja nadużycia…* [Criminalisation…], pp. 167–169.

[61] T. Oczkowski, *Problematyka…* [Issues…], p. 92.

activities aim to reduce tax burdens,[62] which means they want to obtain financial benefits, so those acts should be classified in accordance with Article 286 CC. The problem should be, however, resolved in the same way as in case of Article 56 FPC: it is unquestionable that committing a fiscal crime or misdemeanour, a perpetrator acts in order to obtain financial benefits. Even a wish to reduce tax burdens leads to obtaining financial benefits by reducing a due tax amount to be settled. Therefore, there are no grounds for differentiating whether a perpetrator acted in order to obtain financial benefits or to infringe tax obligations. Thus, regardless of whether the act of issuing false invoices was the cause of a perpetrator's act or not, the aim of his/her activity was to, eventually, obtain financial benefits. That is why, the circumstances the above-mentioned authors referred to are not important for the penal assessment of an act.

Moreover, it is worth mentioning that if a perpetrator acting with direct intention obtains an undue VAT refund (only this kind of situation can be recognised as the commission of a crime under Article 286 CC) based on false invoices, even if we acknowledge that the above action of a perpetrator does not infringe a tax obligation (which is, however, doubtful if we take into consideration the previously discussed Article 108(1) of the Act on value added tax), his/her behaviour undoubtedly infringes other tax obligations which are subject to protection by Article 76 FPC (i.e. broadly understood tax obligations). J. Duży himself confirms this way of treating the object of protection under this provision indicating that the act under Article 76 FPC is targeted not only against tax obligations such as proper bookkeeping or the issue of invoices documenting economic operations in conformity with the actual state.

Thus, as a perpetrator's action based on false invoices infringes the object of protection under Article 76 FPC (broadly understood tax obligations and also the property of the State Treasury protected by this provision), it is difficult to reasonably adopt its legal classification in accordance with Article 286 CC. It seems that one can support the opinion that, as the objects of protection (what J. Duży himself agrees with) under Article 76 FPC contain numerous tax obligations, a perpetrator's act consists in the fact that she/he first of all infringes them (namely, obligations connected with proper and reliable issue of invoices and submission of tax returns). This results in a state of exposure to the detriment to the legal interest, which is the property of the State Treasury. That is why, one can state that the broadly understood tax obligations are a basic interest protected by this provision. Also because of that, the author's statements that in case of the issue of false or unreliable invoices and claiming a tax refund based on them we deal with a legal classification

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62 The author disregards the fact that in accordance with Article 76 FPC when penalising of a tax refund obtained under false pretences, it is difficult to consider that a perpetrator's action in any situation may result from "a wish to decrease tax burdens". If a perpetrator wanted to decrease that burden, she/he should try to decrease the amount of due VAT, even to a null level, and not declare otherwise and claim a refund. Therefore, if we speak about an act under Article 76 FPC, it is not possible to find a perpetrator's motivation in the way that T. Oczkowski does. The circumstance, which the author refers to, that a perpetrator may really do business does not matter, either, if she/he uses it to obtain an undue VAT refund. There is no difference between this and a situation when a perpetrator does not do business and, nevertheless, obtains an undue tax refund.

under Article 286 CC are groundless as even if there is no tax liability inception[63] (which, as it must be emphasised again, is doubtful), many other tax obligations are infringed. Therefore, legal classification under Article 76 FPC needs to be adopted.

Consequently, it is not possible to approve of J Duży's statement that in the cases he describes we can distinguish direct intention targeted at the State Treasury property and potential intention targeted at tax obligations.[64] A perpetrator of the prohibited act under Article 76 FPC infringes, first of all, the tax obligation consisting in proper completion of a tax return and does it in order to obtain financial benefits. The infringement of the former interest is, therefore, a means leading to the infringement of the latter interest and the two things cannot be rationally separated. Obtaining a refund of VAT under false pretences, based on a false invoice or an invoice documenting an actual economic operation, is an act committed with the same intention that differs only in a perpetrator's method of acting.

The author's another thesis is also groundless. In case of potential concurrence of Article 286 and Article 76 FPC, it undermines purposefulness of the application of the principle of *lex specialis derogat legi generali* by adopting a primacy of solutions envisaged in the Criminal Code, due to the fact that the regulation of fiscal law (tax liability) is infringed.[65] The author states that there are no normative grounds for the application of the principle and he overlooks the fact that the essence of this principle application is that it is not usually laid down in legal regulations. He also draws a failed parallel with the concurrence of provisions of administrative law and criminal law without indicating that it is impossible to apply the principle of speciality because these are two completely different branches of law, unlike in the case of criminal law and fiscal penal law, which are closely connected with one another.

If we adopted the author's arguments, in the discussed situation, we would deal with the "ideal" concurrence[66] of the provisions of Article 76 FPC and Article 286 CC (which, as the author himself indicates, is an appropriate legal classification). This would take place in a considerable number of cases of applying Article 76 FPC (excluding those where there is a potential intention on the part of a perpetrator and there is only an exposure of tax liability to depletion).[67] Thus, the legislator would assume in advance that in some cases of Article 76 FPC application, there would be ideal concurrence with another criminal law provision, and what is more, that a sanction ruled in accordance with Article 76 would not usually be executed because Article 268 CC envisages more severe penalties, at least as far as

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[63] In the context of a prohibited act under Article 76 FPC, a tax liability concerns the issuer of an invoice and not their contractor who, based on that invoice, claims a VAT refund (see, P. Kardas, G. Łabuda, *Zbieg przepisów…* [Concurrence of provisions…], pp. 135–136).

[64] J. Duży, *Przedmiot ochrony…* [Object of protection…], p. 140.

[65] *Ibid*., pp. 142–143.

[66] Of course, only when we assume that the object of protection against the act under Article 286 CC is the property of the State Treasury in the area of tax liabilities; otherwise, there will be no concurrence because one of the features of the prohibited act (the feature of the object of protection) will not be matched.

[67] A similar conception is presented in I. Stolarczyk, *Odpowiedzialność za nierzetelne wystawienie faktury VAT* [Liability for unreliable issue of VAT invoices], Prokuratura i Prawo No. 9, 2010, p. 97 ff.

deprivation of liberty is concerned. It is difficult to assume that the legislator wanted to introduce a provision concerning some cases, which match statutory features of punishable acts for which penalties would not be executed. Such a statement would totally negate the principle of the legislator's rationality and, that is why, it should be decidedly dismissed. This stand would make Article 76 FPC a useless provision, which is an additional argument for the adoption of a different legal classification of the analysed instances of obtaining a tax refund under false pretences.

Another argument for the application of Article 268 CC to some types of criminal behaviour connected with obtaining a tax refund under false pretences consists in the interpretation of the concept of "undue refund" under Article 76 FPC. According to this opinion, a refund is only a process of giving back, i.e. the amount must earlier be under control of the body that gives it back. Therefore, as a result, an undue refund is only "a refund of an amount resulting from a deduction of due tax from calculated tax claimed by a taxpayer. In this context, it is obvious that if an amount of calculated tax declared is not due tax, there is no refund of a tax amount",[68] which will take place not only in case of false invoices but also unreliable ones, because the amount of calculated tax is increased based on them. Hence, in such situations, all features of the act under Article 76 FPC are not matched.

The opinion does not seem to be convincing, however, because it would grossly limit the scope of application of Article 76 FPC, which might be applied only to cases where a tax refund results from a groundless decrease of due tax with the correctly specified amount of calculated tax or in case where a perpetrator groundlessly deducts calculated tax, regardless of an existing prohibition in the Act on taxation.[69] Apart from that, the conception neglects an important circumstance. The features specified in Article 76 FPC do not contain the term "refund" but "undue refund". Therefore, the provision covers all situations when revenue authorities refund amounts that, as they are convinced, should be refunded, but actually there are no grounds for doing it, which seems to be unquestionable. Thus, a refund may be an undue one because the amount refunded by a revenue office has never been paid to it. Here, again, there are no grounds for a refund of the amount. A revenue office erroneously pays a taxpayer an amount as a due refund. Actually and literally, something can be given back only if it has been in somebody's possession before. But when we speak about an undue refund, the term should also cover situations when there are no grounds for a refund because the amount in question has never been in the possession of the refunding party.[70]

This conception is also based on one more fundamental error consisting in the interpretation of the term "refund" with complete disregard of the meaning of the term assigned to it in statutes on taxation. It must be noticed that in tax refund proceedings, a revenue office always applies, regardless of whether we deal with

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[68] A. Bartosiewicz, *Wyłudzenie…* [Obtaining…], pp. 100–102.

[69] The catalogue of such prohibitions is included in Article 88(1) of the Act on value added tax.

[70] See, W. Kotowski, B. Kurzępa, *Kodeks…* [Fiscal…], p. 347, where it is indicated that: "groundless refund is a refund of a tax liability without any legal or factual grounds, not based on anything, unjustified and inequitable".

real or artificially increased calculated tax, the provisions of Part IX of the Act on value added tax. Thus, since a revenue office, e.g. in case of a false invoice, makes a refund of an amount a taxpayer is trying to obtain in accordance with the provisions on tax refunds, it is hard to understand why we should believe that this situation cannot be considered a tax refund. The statutes on taxation themselves recognise such situations as tax refunds. It is also difficult to provide rational and axiological explanation why a person who groundlessly increases the amount of calculated tax in a tax return by PLN 2,000 and obtains a PLN 1,000 surplus in calculated tax should be liable under Article 286 CC, and a person who groundlessly reduces an amount of due tax by PLN 2,000 and obtains a surplus of the same amount in calculated tax should be liable under Article 76 FPC.

Summing up, it must be stated that Article 76 FPC and Article 286 CC have a different scope of protection and their ideal concurrence is not possible. In case of obtaining a tax refund under false pretences, with the use of false invoices, a tax liability occurs nevertheless. Even in case of a different interpretation of tax law, in every situation, this kind of a prohibited act infringes broadly understood tax obligations, i.e. a legal interest protected by Article 76 FPC. Thus, the features of this prohibited act are matched. However, if we assume a possibility of concurrence of both acts, there are still no grounds for stating that the principle of speciality, excluding the possibility of applying Article 286 CC, would not be applicable. The example provided by P. Kardas and G. Łabuda is still up to date: "if we recognised such a criterion of (non)-existence of an event as reliable, we would have to draw a conclusion that matching the features of the prohibited act under Article 76 FPC would take place in case of a purchase of a product for PLN 1 in the EU, while a perpetrator indicated PLN 1,000,000 in a tax return VAT-7, while it would not take place in case of no purchase in the EU at all [and the issue of an invoice – note by Ł.P.]. In such an extreme situation, the amount of PLN 1 would decide about a legal classification of the behaviour under Article 76 FPC".[71] This example shows perfectly absurd consequences of an opinion that prohibited acts connected with the issue of a false invoice should lead to adopting legal classification of such behaviour under Article 286 CC and not relevant provisions of the Fiscal Penal Code.

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[71] P. Kardas, G. Łabuda, *Zbieg przepisów…* [Concurrence of provisions…], p. 135.

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ON MUTUAL RELATIONS BETWEEN THE TAX FRAUD UNDER ARTICLES 56 AND 76 FPC AND A CRIME OF FRAUD UNDER ARTICLE 286 CC

Summary

The article aims to analyse mutual relations between Article 286 of the Criminal Code penalising a crime of fraud and prohibited acts under Articles 56 and 76 of the Fiscal Penal Code in order to answer a question whether the concurrence of provisions is possible and whether crimes connected with reduction of due tax liabilities by taxpayers may be classified as fraud. It is especially important in case of tax evasion connected with the use of false invoices that do not document real economic operations and where serious doubts arise as to whether there is a tax liability and, if so, whether the interests protected by fiscal penal law have been infringed. In the author's opinion, however, the analysis of the provisions and tax regulations

indicated allows stating that a crime of fraud and acts prohibited under Fiscal Penal Code differ as far as the object of protection is concerned. Thus, this is the main reason why all acts prohibited in connection with the reduction of due tax liabilities should be classified as those matching the features of fiscal crimes and misdemeanours and not the features of the crime of fraud under Article 286 CC.

Keywords: crime of fraud, tax fraud, reduction of due tax liabilities, false invoices

O WZAJEMNYCH RELACJACH POMIĘDZY TZW. OSZUSTWEM PODATKOWYM Z ART. 56 I 76 K.K.S. A PRZESTĘPSTWEM OSZUSTWA Z ART. 286 K.K.

Streszczenie

Celem artykułu jest prześledzenie wzajemnych relacji pomiędzy art. 286 Kodeksu karnego penalizującym przestępstwo oszustwa a czynami zabronionymi z art. 56 oraz 76 Kodeksu karnego skarbowego w celu odpowiedzi na to, czy jest możliwe wystąpienie pomiędzy nimi zbiegu przepisów i czy jako przestępstwo oszustwa mogą być kwalifikowane sytuacje związane z uszczupleniem przez podatników należności publicznoprawnych. Szczególnie duże znaczenie ma to przy przestępstwach podatkowych związanych z posługiwaniem się fakturami fikcyjnymi, niedokumentującymi prawdziwych zdarzeń gospodarczych, gdzie pojawiają się istotne wątpliwości co do tego, czy powstaje wtedy obowiązek podatkowy i czy wobec tego zostały naruszone dobra prawnie chronione przez przepisy karnoskarbowe. Zdaniem autora jednak analiza wskazanych przepisów oraz regulacji prawnopodatkowych pozwala na stwierdzenie, że przestępstwo oszustwa oraz czyny zabronione z Kodeksu karnego skarbowego mają odmienny przedmiot ochrony i przede wszystkim z tego powodu wszelkie czyny zabronione związane z uszczupleniem należności publicznoprawnych powinny być kwalifikowane jako realizacja znamion odpowiednich przestępstw i wykroczeń skarbowych, a nie znamion przestępstwa oszustwa z art. 286 k.k.

Słowa kluczowe: oszustwo, oszustwo podatkowe, uszczuplenie należności publicznoprawnej, faktury fikcyjne

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FORFEITURE VERSUS DISCONTINUANCE OF PROCEEDINGS IN ACCORDANCE WITH ARTICLE 62 OF THE ACT ON PREVENTING DRUG ADDICTION

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The limitation of the statutory approach to the issue of the "small" possession of intoxicants or psychotropic substances in a way forced the national legislator to develop a new formula that would make it possible to soften the extremely strict position on that matter. Only as a necessary digression, let me remind that the presently binding Act of 29 July 2005 on preventing drug addiction[1] (APDA) does not lay any exclusions of penalisation of the possession of intoxicants or psychotropic substances and classifies it, similarly to the former legal state, as a basic type, an aggravated type due to a bigger amount in possession, and a type treated less severely because of lesser significance. As a result, absolutely every case of possession of the above-mentioned substances, against statutory provisions, is subject to penalty today. Any attempts to assign a different meaning to the provision of Article 62 APDA may constitute an example of at the most creative interpretation.[2] The conclusion is drawn not only from the construction of the provision of Article 62 APDA but mainly from the intention of the legislator, who until recently was still strongly convinced that this route is the most efficient tool in the fight against the phenomenon of so socially harmful drug addiction. It will, inter alia, allow coping with the problem of dealers who, without a great risk of legal liability, used to traffic in psychoactive substances, while being

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1 Journal of Laws [Dz.U.] of 2016, items 224, 437.

2 For more on the issue of possible controversies over the interpretation of conduct consisting in the possession of narcotic drugs in order to consume, see J. Raglewski, *Kilka uwag de lege lata i de lege ferenda w kwestii karania za posiadanie narkotyku w związku z przeznaczeniem go na własne potrzeby* [Some comments *de lege lata* and *de lege ferenda* on the issue of drugs possession in connection with their use for one's own needs], [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [Problems with the institution of criminal justice. Professor Jan Skupiński jubilee book], Warsaw 2013, pp. 1092–1105 and literature cited therein.

in possession of small amounts of them. Nevertheless, criminalisation of all forms of possessing psychoactive substances, also the small amount for personal use, means *de facto* the creation of broad possibilities of using penal repression, especially against addicts. Still, because of their addiction, they require a completely diverse approach that goes far beyond the traditional instruments typical of criminal law. Thus, it soon turned out that the stricter legal response, instead of efficient prevention of the phenomenon of drug addiction, produced a totally different effect. However, contrary to the legislative assumptions, it did not lead to the reduction of psychoactive substances consumption in Poland. What is worse, it created a new category of criminals: addicts and illegal users of psychoactive substances.[3] Since 2000, the number of people sentenced for the possession of intoxicants or psychoactive substances has risen substantially. Thus, the penalisation of this activity has become a means of criminalising the use of psychoactive substances and not of preventing drug addiction. This is why, it might have been expected that the legislator, wanting to change this unfavourable trend, would recommend the change of the approach to consumers of intoxicants and psychotropic substances.

In fact, the new Act of 1 April 2011 amending the Act on preventing drug addiction and some other acts[4] introduced the provision of Article 62a to the legal order, which creates a possibility of absolute discontinuance of the proceedings against perpetrators possessing small amounts of intoxicants for their own use. In accordance with the provision, a prosecutor, and at the juridical stage a court, provided some premises are met, assesses purposelessness of ruling a penalty because of the circumstances of the act commission and the level of its social harmfulness.

Even a cursory review of the above-mentioned regulation allows stating that the solution adopted does not resemble in any way the one that was in force pursuant to Article 48(4) of the Act of 1997 on preventing drug addiction.[5] It does not lead to de-penalisation of psychoactive substances possession. In accordance with the Act on preventing drug addiction, the possession of even a small amount of them is still a prohibited act carrying a penalty. The real sense of the discussed measure is exhausted, however, in the far-reaching simplification of the criminal proceedings in this kind of cases. It envisages a mechanism of abandoning prosecution and penalising perpetrators of petty crimes connected with the consumption of intoxicants and psychotropic substances, against whom the use of penal repression has not produced positive results so far.[6] And, in the legislator's opinion, it would be totally negated if,

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[3] *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r. o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw (druk nr 3420)* [Justification for the Bill of 1 April amending the Act on preventing drug addiction and some other acts (the Sejm paper no. 3420)], www.orka.sejm.gov.pl, p. 1, www.orka.sejm.gov.pl. Also compare, E. Kuźmicz, Z. Mielecka-Kubień, D. Wiszejko-Wierzbicka (ed.), *Karanie za posiadanie. Art. 62 ustawy o przeciwdziałaniu narkomanii – koszt, czas, opinie* [Punishment for possession: Article 62 of the Act on preventing drug addiction: cost, time, opinions], Instytut Spraw Publicznych, Warsaw 2009.

[4] Journal of Laws [Dz.U.] of 2011, No. 117, item 678.

[5] Journal of Laws [Dz.U.] of 2003, No. 24, item 198, as amended.

[6] For more, see *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r.…* [Justification for the Bill of 1 April 2011…, p. 14.

as a rule, it were necessary to conduct the preparatory proceedings, in a situation of purposelessness of penalising a perpetrator, and to finally discontinue it. That is why, the legislator made it possible to discontinue the proceedings before the decision to initiate criminal proceedings is made. As a consequence of the adopted assumption, a prosecutor may refuse to initiate the proceedings and undertake a series of activities, which usually follow a decision on proceedings initiation.

It is not necessary to add that the above formula of "discontinuance of proceedings not yet initiated" from the very beginning raised many more doubts and much less certainty as to whether it would be really possible to achieve the expected effects of the amendment in the field of trial economics. More pragmatic authors, questioning not just the value of the solution worked out but basing their assessment on the possibility of discontinuing actually non-existent proceedings, indicate that it needlessly complicates the scheme sufficiently established in the criminal procedure, in accordance with which, depending on the moment when the given procedural obstacle takes place, the criminal proceedings are not initiated, discontinued or, possibly, the accused is acquitted of a charge.[7] As a matter of fact, it resembles enchanting reality, which takes a form of calling the same institution (refusal to initiate proceedings) with the use of a name reserved for another one (discontinuance). It is really difficult to imagine discontinuance of something that has not been formerly initiated.[8]

If the value of the results of the analysis conducted in this area is left aside, it seems that still one more issue deserves attention. Despite the valuable work by P. Gensikowski,[9] it is in a way almost unnoticed in literature although it has, as it should be recognised, fundamental significance for determination whether and to what extent the acceptance of the construction "discontinuance before the initiation of proceedings" is admissible. It concerns the relations of content that take place between the latter and the institution of forfeiture, which is actually implemented in every, without exception, case of committing a crime of possessing a small amount of psychoactive substances for one's own use (Article 62(1) or (3) APDA). The issue is becoming even more complicated, mainly because the proceeding body confronts, in a way just "at the very beginning", its two different types. Usually, it faces a necessity of ruling the forfeiture of intoxicants or psychotropic substances seized in the course of the criminal proceedings, as well as objects used to commit a crime of possessing them violating the provisions of the Act. By the way, in practice, it quite frequently turns out that the possibility of forfeiture is implemented in relation to the latter. It happens especially when the vestigial amount of white powder is found in the seized plastic bags, metal boxes or glass tubes used for smoking. It is unquestionable then that, e.g. a plastic bag and not amphetamine is subject to forfeiture because it is hard to imagine a ruling of forfeiture of a vestigial amount of

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[7] A. Bojańczyk, T. Razowski, *W sprawie nieprzekraczalnych granic semantyki* [On the issue of impassable borders of semantics], Prokuratura i Prawo No. 11, 2011, p. 142 ff.

[8] *Ibid*.

[9] P. Gensikowski, *Instytucja przewidziana w art. 62a ustawy o przeciwdziałaniu narkomanii a orzeczenie przepadku* [Institution envisaged in Article 62a of the Act of preventing drug addiction versus a ruling of forfeiture], Prokuratura i Prawo No. 2, 2013, pp. 37–48.

white powder. However, regardless of the interpretation of the concept of "an object used to commit crime", in a broad or narrow sense, such a plastic bag undoubtedly is such an object as it made the commission of the crime possible.[10]

As a result of such a strict limitation of the two types of forfeiture, the normative basis for decisions in this area also looks different. However, it must be stated here that only in case of the forfeiture of intoxicants or psychotropic substances (objects of the act performed) it is relatively simple. It is sufficient to refer to the content of the regulation in Article 70(2) APDA, which unambiguously indicates that in the event, inter alia, of discontinuance of the proceedings in the case of crime under Article 62 APDA, the forfeiture of intoxicants or psychotropic substances is to be ruled, even if they were not the perpetrator's possessions.[11] Not discussing the issue of its legal nature more thoroughly as we are going to come back to it later, to be precise, we should add that, based on Article 70(2) APDA, it is used as a protective means. Anyway, it is right to say that the provision only makes a general reference to discontinuance of the criminal proceedings, thus, there is no obstacle to rule the forfeiture of psychoactive substances as a protective means in the event of every decision to discontinue the proceedings, including the one laid down in Article 62a APDA.[12] By the way, if the legislator wanted to limit the ruling of forfeiture under Article 62a APDA to some circumstances determining the discontinuance of criminal proceedings and exclude some others, it would have to be explicitly indicated in the content of the provision. However, it is not. Yet, such a conclusion is not obvious for everyone. It is raised in literature that such a broad affirmation of the discontinuance of criminal proceedings as a basis for ruling the forfeiture of an intoxicant or a psychotropic substance is simply an oversight on the legislator's part, which should be rectified in the course of interpretation narrowing the premises of the procedural decision to only those that are commonly identified with the general clause of "circumstances excluding punishment" of the perpetrator of a prohibited act laid down in Article 44a Criminal Code (ex Article 100 CC).[13] Fully approving

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[10] Judgement of the Appellate Court in Katowice of 29 December 2011, II AKa 498/11, KZS 2012, No. 4, item 70.

[11] In accordance with Article 70(3) APDA, forfeiture shall not be ruled if an intoxicant or psychotropic substance belong to a third party, and a perpetrator obtained them in the course of a crime or misdemeanour or was in possession of them in a way flagrantly violating employees' duties or the conditions of an agreement he/she has with the owner of those intoxicants or psychotropic substances.

[12] P. Góralski, *Środki zabezpieczające w polskim prawie karnym* [Protective measures in Polish criminal law], Warsaw 2015, p. 511.

[13] In M. Siwek's opinion, it is not possible to accept an option of ruling forfeiture as a protective measure if the discontinuance of proceedings took place, e.g. because the act had not been committed, the act did not have the statutory features of a prohibited act or there was another circumstance excluding prosecution, different from the circumstances excluding the punishment of the perpetrator of a prohibited act. The first two circumstances, in this author's opinion, exclude whatever penal reaction, also in the form of protective measures, as there is no possibility of establishing the subject of an act, and the statutory features of a prohibited act are not matched.

As a result, ruling a protective measure in this situation would be in conflict with its essence. It is true that the author admits there is a danger for the society, which results from the fact that some intoxicants or psychotropic substances remain available, however, he states that it does

of the opinion that any reason for the discontinuance of criminal proceedings may generate a ruling of the forfeiture of an intoxicant or a psychotropic substance, it is necessary to notice that the approval of such a stand may unavoidably lead to misinterpretation of the actual essence of Article 70(2) APDA. It completely omits the legislator's will expressed in it to formulate legal grounds for forfeiture in the broadest way possible. The chronology of the solutions discussed here indicates that. The legislator confined that to regulating the grounds for forfeiture under Article 70(2) APDA, despite the awareness of the existence of different solutions to those issues laid down in Article 45a CC or Article 42 §3 Fiscal Penal Code.[14] It seems that just this fact may constitute an argument sufficient for a broad approach to the discontinuance of criminal proceedings as a premise of the application of the forfeiture of an intoxicant or a psychotropic substance as a protective means in accordance with Article 70(2) APDA, all in all, in a broader way than in case of Article 45a CC or Article 42 §3 FPC.

The rightfulness of this conclusion may be verified in another way, namely, by referring to the function of forfeiture ruled in accordance with Article 70(2) APDA. In such a case, the need to apply it results, in general, from a fear that a perpetrator will reuse the objects somehow "contaminated", due to the source of it, for the purpose that is illegal. In order to deprive him or her of that opportunity, it is necessary to prevent a perpetrator from possessing them and to rule forfeiture. This way, the society as well as the perpetrator are protected against the commission of successive prohibited acts resulting from the disposal of the objects in spite of the ban.[15] Undoubtedly, this functional aspect of forfeiture is demonstrated equally well when the discontinuance of criminal proceedings takes place because of the reasons partially indicated in Article 17 §1 Criminal Procedure Code (CPC) and those laid down in Article 62a APDA.[16]

What has been already said suggests that Article 70(2) APDA directly lays down only the forfeiture of intoxicants and psychotropic substances. However, it does not mention the forfeiture of tools used to commit a crime under Article 62(1) or (3) APDA. In the light of reticence about the issue in the Act on preventing drug addiction, it seems justified to apply regulations of the Criminal Code. Especially, as the general clause expressed in Article 116 CC encourages this. In accordance with the clause, issues not covered in APDA and connected with the prevention of drug addiction may and should be supplemented with the provisions laid down

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not constitute *se ipse* a sufficient argument for the application of a protective measure, which is in fact one of the tools of criminal law in a situation when an act was not committed or when it does not have the statutory features of a prohibited act.

(M. Siwek, *Materialnoprawne podstawy orzekania środków zabezpieczających o charakterze administracyjnym* [Substantive legal grounds for ruling administrative protective measures], [in:] L.K. Paprzycki (ed.), *System Prawa Karnego, t. 7, Środki zabezpieczające* [Criminal law system, vol. 7, Protective measures], 2nd edition, Warsaw 2015, pp. 578–579).

[14] P. Góralski, *Środki zabezpieczające…* [Protective measures…], p. 511.

[15] It is worth highlighting that forfeiture ruled as a protective measure differs from forfeiture ruled as a penal measure and it can only apply to a perpetrator who is not sentenced by a court (for more on the issue, see K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym* [Forfeiture in Polish criminal law], Zakamycze 2004, p. 206).

[16] P. Gensikowski, *Instytucja przewidziana w art. 62a…* [Institution envisaged in Article 62a…], p. 40.

in the General Part of the Criminal Code.[17] Assuming that, the judicature started to apply the provision of Article 44 §2 CC regardless of the fact that this type of practice is, to tell the truth, admissible but only when we deal with a perpetrator's conviction.[18] In the event of the discontinuance of criminal proceedings, inter alia because of the reasons laid down in Article 62a APDA, the proposed ruling turns out to be simply inappropriate because it has no basis in the content of the above-cited provision. Certainly, this does not mean that the problem cannot be solved in a different way. Looking for an appropriate point of reference in the formerly binding legal state, P. Gensikowski rightly notices that if the forfeiture of tools used to commit a prohibited act is laid down in the Criminal Code in order to somehow play a double role, on the one hand as a penal measure and on the other hand as a protective one, it is possible and would be even highly desired to link it with Article 100 CC (at present Article 45a CC),[19] putting this more literally, in one of the premises laid down in its content, namely the one that the legislator specified as the circumstance excluding the punishment of the perpetrator of a prohibited act. Distancing ourselves from disputes over the characteristics of this phrase, we can assume, with a certain simplification, that it applies not only to such circumstances the consequences of which consist in the exclusion of the perpetrator's punishment. At the same time, it is unimportant for their assessment whether they originate from procedural obstacles, thus, whether they are formal-legal in nature, or whether they have been determined in the provisions of substantive law.[20] All those circumstances

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[17] The Act on preventing drug addiction contains a clear exclusion only in relation to the provisions of Article 93a §1(1) to (3) CC (see Article 74 APDA, in accordance with which "Within the scope regulated in the present Chapter, protective measures laid down in Article 93a §1(1) to (3) CC do not apply to perpetrators referred to in Article 93c(5) Criminal Code").

[18] In the judgement of 20 January 2004, the Appellate Court in Lublin erroneously ruled in connection with evidence in the form of: a metal box, a glass tray and a spatula. Article 55(2) APDA of 24 April 1997 (Journal of Laws [Dz.U.] No. 75, item 468) cannot constitute grounds for the forfeiture of those objects because it applies only to intoxicants and psychotropic substances. On the other hand, it should have been Article 44 §2 CC as the objects served the commission of crime (II AKa 390/03, KZS 2005, No. 1, item 30). Similarly, the Appellate Court in Wrocław in its judgement of 12 March 2014, II AKa 41/14, Lex, No. 1451870.

[19] Forfeiture as a protective measure was provided for in Article 100 and Article 99 §1 CC. With the amendment to Article 99 §1 CC and repealing of Article 100 CC, a completely new Article 45a CC was introduced, which at first glance turns out to be a synthesis of the two former provisions. Despite that, the legislator decisively emphasises in the justification for the amendment project developed by the Committee of Criminal Law, that Article 45a contains forfeiture as an administrative measure (see, *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, w redakcji z dnia 5 listopada 2013 r*. [Justification for the Bill amending the Act: Criminal Code and some other acts, in edition of 5 November 2013], p. 14; https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego-2009-2013/, [accessed on 16 June 2016].

[20] The non-uniform approach of jurisprudence to the essence of circumstances excluding the punishment of the perpetrator of a prohibited act is confirmed in the opinions contained in the works of, inter alia, P. Góralski, *O wątpliwościach dotyczących „okoliczności wyłączającej ukaranie sprawcy czynu zabronionego" jako przesłance zastosowania przepadku tytułem środka zabezpieczającego* [On doubts concerning "circumstances excluding the punishment of the perpetrator of a prohibited act" as premises of forfeiture as a protective measure], Przegląd Sądowy No. 1–2, 2009, p. 166 ff; by the same author, *Reforma unormowań poświęconych środkom zabezpieczającym z dn. 20 lutego 2015 r.* [Reform of regulations concerning protective measures of 20 February

the consequences of which are a little more far-reaching and consist either in acquitting or in annulling the unlawfulness of an act are outside this conceptual category.[21] At the same time, it is necessary to emphasise that the circumstances excluding the perpetrator's punishment apply to cases in which we deal with a prohibited act, i.e. the conduct having the features laid down in the Criminal Code (Article 115 §1 CC), matching the features of a prohibited act carrying a penalty when, however, that penalty cannot be imposed. Therefore, we can include in this group situations in which a criminal provision uses a phrase "is not subject to a penalty" as well as those in which punishment of a perpetrator is excluded due to the statute of limitations or the legislator's evident abandonment of punishment.[22]

We can state without hesitation that the issue is exactly the same as the institution laid down in Article 62a APDA. First of all, the provision, using terms referring directly to a prohibited act ("subject of an act", "circumstances of an act commission") or to a perpetrator ("for a perpetrator's own use", "sentencing a perpetrator"), unquestionably proves that the discontinuance of proceedings may take place only when a suspect's conduct implements the whole catalogue of statutory features of a prohibited act under Article 62(1) or (3) APDA in the conditions in which his/her criminal liability is not annulled, due to the circumstances excluding unlawfulness of a prohibited act or the perpetrator's guilt. A situation when the perpetrator's act does not constitute a crime because of a low level of social harmfulness should be assessed similarly. Upon the legislator's initiative, Article 62a APDA is to apply to prohibited acts specified in Article 62(1) or (3) APDA, which are characterised by the level of social harmfulness higher than scarce but not so high that it excludes the recognition that imposing a penalty on the perpetrator would be purposeless.[23]

The conclusion that can be drawn next is that the discontinuance of proceedings under Article 62a APDA is implemented only when the imposition of a penalty

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2015] (in press); *Środki zabezpieczające…* [Protective measures…], pp. 497–515; J. Raglewski, *Podstawy orzekania środków zabezpieczających o charakterze administracyjnym w kodeksie karnym z roku 1997* [Grounds for ruling administrative protective measures in the Criminal Code of 1997], Prokuratura i Prawo No. 4, 2002, pp. 44–51; M. Siwek, K. Postulski, *Przepadek w polskim prawie…* [Forfeiture in Polish criminal…], pp. 218; M. Siwek, *Materialnoprawne podstawy orzekania środków zabezpieczających…* [Substantive legal grounds for ruling administrative…], pp. 596–618; by the same author, *Okoliczność wyłączająca ukaranie sprawcy czynu zabronionego jako przesłanka orzeczenia przepadku tytułem środka zabezpieczającego* [Circumstance excluding punishment of the perpetrator of a prohibited act as a premise of ruling forfeiture as a protective measure], Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury No. 2, 2011, p. 6 ff.

[21] K. Postulski, *Glosa do uchwały SN z dnia 13 marca 1984 r., VI KZP 47/83* [Goss on the Supreme Court resolution of 13 March 1984, VI KZP 47/83], Nowe Prawo No. 3, 1985, p. 102 and J. Warylewski, *Orzekanie przepadku tytułem środka zabezpieczającego wobec sprawcy czynu zabronionego* [Ruling of forfeiture as a protective measure in case of the perpetrator of a prohibited act], Prokuratura i Prawo No. 6, 2000, pp. 125–127.

[22] M. Siwek, *Okoliczność wyłączająca ukaranie sprawcy…* [Circumstance excluding punishment…], p. 232. Not without a reason, it is stated that the application of treatment-related or administrative protective measures at the procedural stage should always match the ruling discontinuing the proceedings (M. Siwek, *Glosa do postanowienia Sądu Najwyższego z dnia 8 kwietnia 2010 r., IV KK 52/10* [Gloss on the Supreme Court ruling of 8 April 2010, IV KK 52/10], Lex/el. 2011, thesis 13).

[23] *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r. …* [Justification for the Bill of 1 April 2011…], p. 13.

is fully admissible. Regardless of that, a proceeding body, having recognised that the subject of an act referred to above is an intoxicant or a psychotropic substance in a small amount to be used by the perpetrator alone and that it is aimless to impose a penalty on him/her because of the circumstances of the act commission as well as the level of its social harmfulness, takes a procedural decision to discontinue criminal proceedings, which directly results in the abandonment of punishment of the perpetrator. This way and because of that, P. Gensikowski's belief that the institution laid down in Article 62a APDA matches the essence of "circumstances excluding the punishment of a perpetrator" allowing, in accordance with Article 45a APDA, ruling the forfeiture of tools used to commit a prohibited act as a protective measure deserves full approval. At the same time, the assessment cannot be challenged by the fact that the discontinuance of proceedings under Article 62a APDA is facultative in nature and the premises *se ipse* listed in the provision do not constitute an obstacle to initiate and continue the proceedings, i.e. they do not constitute negative procedural premises meaning that non-initiation or the discontinuance of proceedings is obligatory as it happens in case of other circumstances recognised as excluding the punishment of the perpetrator of a prohibited act in the meaning of Article 45a CC. However, it is necessary to notice that, in spite of the facultative form of the discussed institution, because of purpose-related reasons, its obligatory nature should be presumed. What substantive-legal or procedural purpose, in case of the implementation of all the circumstances laid down in the provision, would accompany further criminal proceedings[24]? Even if this explanation were insufficient, paying too much attention to obligatory or facultative nature of the given institution as a circumstance excluding the punishment of the perpetrator pursuant to Article 45a CC does not seem to be right either because of the consequences of imposed penalty. In case of the discontinuance of proceedings pursuant to Article 62a APDA as well as the application of other circumstances excluding the punishment of the perpetrator of a prohibited act, the punishment, i.e. the imposition of a penalty on the perpetrator, does not in fact take place.[25] And this, it seems, constitutes a characteristic feature of all, without exception, circumstances excluding the punishment of the perpetrator in accordance with Article 45a CC. Let me add that the prevalence of individual approach in the legal construction of Article 62a APDA is to prevent its automatic application. Indeed, obligatoriness usually excludes whatever decision based on actual facts and places the whole burden of taking it on statute and not the body concerned. As the latter has to adjudicate, the purposefulness of the ruling escapes its control. This way, the adjudication loses its significance. The only reasonable solution to this situation, making it possible to fulfil other aims of criminal law (general prevention, therapeutic purposes) in case

[24] B. Wilamowska, *Komentarz do art. 62a* [Commentary on Art. 62a], [in:] P. Kładoczny (ed.), B. Wilamowska, P. Kubaszewski, *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych* [Act on preventing drug addiction: Commentary on selected penal provisions], Warsaw 2013, pp. 92–93.

[25] P. Gensikowski, *Instytucja przewidziana w art. 62a…* [Institution envisaged in Article 62a…], p. 44.

of the petty possession, is to lift the feature of obligatoriness from the formula in Article 62a APDA and use a facultative mode of its application instead.

P. Gensikowski's reasoning, in which Article 62a APDA constitutes an example of circumstances excluding the punishment of the perpetrator in the meaning of Article 45a CC, finally finds support in the functional aspect of forfeiture as a protective measure. As forfeiture is ruled as such, it plays almost all functions traditionally attributed to penalties or penal measures with the exception of the repressive function, which it does not actually contain, and one can look in it for a factor considerably strengthening the opinion about the purposelessness of punishing the perpetrator pursuant to Article 62(1) or (3) APDA.[26] Complete abandonment of the application of forfeiture to a perpetrator, who in the circumstance of a lack of penalty actually implemented the features of the prohibited act, might meet with justified criticism. Apart from a rather obvious protective function, especially within individual prevention or positive general prevention, the aim is also to meet the social sense of justice. Especially, as we deal with objects, leaving of which for reuse, just due to the public interest, would be highly inadvisable.[27] In any event, in this kind of situations, the prospect of ruling forfeiture as a protective means should only be conducive to a decision to discontinue proceedings pursuant Article 62a APDA. To tell the truth, due to the content of Article 45a CC, forfeiture is facultative in nature, however, whenever a decision is made to rule it, a court should consider ruling it in this form provided there are premises that are laid down in Article 44 §2 CC.

Here, the above-presented findings should be supplemented and it should be added that an opinion admitting the application of forfeiture as a protective measure in a situation when the punishment of the perpetrator is abandoned, despite the latest amendment to its legal classification, did not lose much of its up-to-date nature. The forfeiture can still be a measure of penal reaction included in the sentence or a protective measure when the perpetrator of a punishable act cannot be sentenced due to various reasons. *Tertium non datur*. It is absolutely certain, however, that the lack of classification of forfeiture in one of the known categories of penal reaction, i.e. penalties, penal measures, protective measures, compensation or probation, instead of leading to a common opinion on its legal characteristics, intensifies doubts concerning this matter.[28]. First of all, it is not possible to state that

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[26] Due to the fact that ruling of forfeiture as a protective measure is not an institution of a penalty to the perpetrator of a prohibited act, its major aim cannot be a burden for him. Such burden that is possible as a result of its application is not a form of revenge but an unavoidable "side effect" connected with the implementation of that protective measure (S. Śliwiński, *Polskie prawo karne materialne. Część ogólna* [Polish substantive criminal law. General Part], Warsaw 1946, p. 439). Due to that, M. Cieślak is right to comment that we deal with the burden that is not intended but unavoidable. (M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* [Polish criminal law: Outline of systemic approach], Warsaw 1990, p. 479).

[27] Supreme Court judgement of 12 February 1946, K 375/45, Państwo i Prawo issue 4, 1946, p. 99.

[28] According to J. Raglewski, the only reasonable solution to the situation is to place forfeiture in a separate chapter entitled "Forfeiture" and containing the present Articles 44 to 45a CC and to treat it as an institution similar to an administrative measure as far as its juridical characteristic is concerned (J. Raglewski, *Rozdział III: Przepadek i środki kompensacyjne* [Chapter III: Forfeiture and compensation means], [in:] M. Melezini (ed.), *Kary i inne środki reakcji prawnokarnej*

it lacks a penal nature. While in case of the forfeiture of objects (property-related gains) originating from crime (*producta sceleris*) the above stand may be supported, it completely loses its significance in a situation when the forfeiture concerns objects used or intended for the commission of crime (*instrumenta sceleris*). It is necessary to hinder or directly make it impossible to continue criminal activities by depriving the perpetrator of tools necessary to do this. If so, this form of the forfeiture of an object cannot be denied a feature of a penal measure. The more so, as Article 56 CC directly indicates that directives on judicial sentencing defined in Article 53, Article 54 §1 and Article 55 CC apply to forfeiture as "another means provided for in this code". The only exclusion refers to compensation under Article 46 CC. Similarly, the elimination of forfeiture from the chapter containing protective means and its replacement in a new Chapter Va entitled "Forfeiture and compensation measures", contrary to the legislator's declarations, does not introduce anything new to the issue. It is due to the fact that the legal characteristics of the measure determine its normative features, especially including the aims, the implementation of which it serves, and not the fact of placing it in this or the other chapter of the Criminal Code.[29] And taking them into consideration in the right way allows assuming that the forfeiture laid down in Article 45a CC still remains a protective measure and, as a result of such a reshuffle, we cannot only refer to its general rules concerning protective measures specified in Chapter X CC. If we added to this that in case of fiscal crimes and misdemeanours forfeiture still functions as a protective measure that is administrative in nature (Article 22 §3(6) and Article 47 §4 FPC), the scope of use of which corresponds to the features specified in Article 45a CC, the approval of the above-expressed stand should no longer be the subject matter of any dispute. On the contrary, it may lead to a sad reflection that there is a lack of the legislator's proper care for internal coherence of the Polish criminal law. The legislator might

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[Penalties and other penal reaction measures], 2nd edition, Warsaw 2016, pp. 788–791; by the same author, *Przepadek i środki kompensacyjne w projektowanej nowelizacji Kodeksu karnego* [Forfeiture and compensation means in the planned amendment to the Criminal Code], Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury issue 3, 2014, pp. 126–127; also compare, B.J. Stefańska, *Przepadek przedmiotów* [Forfeiture of objects], [in:] R.A. Stefański, *Środki karne po nowelizacji w 2015 roku* [Penal measures after the amendment of 2015], Warsaw 2016, pp. 333–334). There is only a question whether the introduction of completely new divisions instead of the well-known penal instruments is a move that will really make it possible to solve all the problems that occur in the light of the application of forfeiture.

[29] Rightly so, P. Góralski, who in addition indicates that the history of domestic regulations of criminal law covers cases of placing protective measures outside the chapter dedicated to them. Not quoting all of them after the author, one can refer to the solutions concerning, inter alia, police supervision laid down in the Regulation of the President of the Republic of Poland of 1934 and 1938, supervision of protection and placing habitual criminals in OPS in CC of 1969, actual protective measures applied to tramps and beggars in accordance with non-statutory legal acts of 1927 and 1950, measures really protective described as "a penalty" – forfeiture ruled in case of no conviction, and treatment-related preventive measures of the Bill of the Criminal Code of 1963 (P. Góralski, *Środki zabezpieczające…* [Protective measures…], respectively: pp. 74–78 and 209, 135–137, 139–142, 168, 173, 179–180). All acts related to drug addiction also envisaged, and still do it, some measures that do resemble protective measures, although they are not called as such (compare Article 34 Act on preventing drug addiction of 1985, Article 56 APDA of 1997 and Article 71 APDA of 2005).

have as well included penal measures and administrative protective measures in the same chapter of the Criminal Code because their content is the same.[30]

Now it is time to return to the question of the possibility of reconciling forfeiture with the formula of the discontinuance of proceedings before the decision to initiate an investigation or inquiry, which the legislator adopted. First of all, it is necessary to notice that a prosecutor's decision to discontinue proceedings in accordance with Article 62a APDA cannot contain adjudication on the issue of forfeiture. As it constitutes an element of the institution of justice, its adjudication is entirely reserved for a court.[31] On the other hand, this means that after the above-mentioned adjudication becomes valid, applying the solution laid down in Article 323 §3 first sentence CPC, a prosecutor must submit to a court a separate motion to rule the forfeiture in its both forms, although the content of this provision may suggest that the mode of proceedings applies only to the motion to rule forfeiture as a protective measure. Indeed, it concerns lodging a motion to a court to rule forfeiture "(…) provided there are grounds provided for in Article 45a CC (…)". Therefore, there is evidently no mention of the forfeiture of intoxicants or psychotropic substances under Article 70(2) APDA. It does not seem, however, taking into consideration the aim of ruling such a forfeiture, that it is impossible to eliminate the legislator's oversight by analogy to the provision of Article 323 §3, first sentence, CPC and apply it also to forfeiture as the most appropriate one. The lack of a formal-legal basis for ruling a protective measure in the form of forfeiture in the situation when substantive regulations envisage its adjudication should not constitute *se ipse* obstacle to ruling it if we do not want to lead to a contradiction in the same branch of law.[32] Anyway, filing a motion to rule the forfeiture of the objects of crime (Article 70(2) APDA) and the forfeiture of tools used to commit a crime (Article 45a CC) by a prosecutor binds a court of first instance to hear a case in the meaning that it should refer the motion to be examined at a sitting designated based on Article 339 §1 CPC.

In order to accept the motion to rule forfeiture, the adjudicating body must obviously be in possession of reliable information about the type and real amount of psychoactive substances seized in the course of criminal proceedings. However, only an expert toxicologist can provide it. By the way, the verification of the data must be preceded by a prosecutor's decision to discontinue the proceedings pursuant to Article 62a APDA. The necessity to appoint an expert eliminates the possibility of conducting the proceedings within the necessary limits laid down in Article 308 CPC, of which the legislator thought when developing Article 62a APDA. There are no doubts that the legislator referred the discontinuance before the initiation of proceedings, which is laid down in it, to a situation when there is a need to undertake particular procedural activities within an investigation or inquiry but only in the necessary scope. To tell the

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[30] P. Góralski, *Środki zabezpieczające…* [Protective measures…], p. 557.

[31] Provision of Article 46 of the Constitution of the Republic of Poland admits forfeiture of objects only if so laid down in statute and only based on a valid court's judgement. The provision does not envisage any exceptions to the cognition of a court in the case or a possibility of stipulating such an exception by the legislator in the course of a standard act.

[32] K. Postulski, M. Siwek, *Przepadek w polskim prawie …* [Forfeiture in Polish criminal…], p. 263.

truth, the catalogue of possible activities in this mode is open, however, this does not mean that based on that all procedural activities, without exception, are permitted. It is inadmissible to issue a decision on conducting physical-chemical examination by an appropriate expert. Moreover, the legislator also ignored the fact that activities in the necessary scope are, in fact, an element of the preparatory proceedings, which anyhow start with the first chronologically undertaken activity.[33] Only this means that the idea of "discontinuance of proceedings not yet initiated", being in a loose relation with the basic principles of a trial, in fact, does not achieve the aim for which it was developed. One can even risk the statement that exposing itself to criticism containing this charge, it actually constitutes the weakest link in the chain of the regulation laid down in Article 62a APDA, which, according to the assumptions, was to introduce a solution to the problem of perpetrators of petty crimes connected with the consumption of drugs that would be free of criticism. That is why, it is quite probable that the provision of Article 62a APDA, in the part admitting the possibility of discontinuing criminal proceedings before their initiation, may fail to meet the expectations that were the basis for its enactment.

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[33] W. Grzeszczyk, *Przebieg postępowania przygotowawczego* [Course of preparatory proceedings], [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego* [New criminal codification: Criminal Procedure Code], Warsaw 1997, p. 7.

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FORFEITURE VERSUS DISCONTINUANCE OF PROCEEDINGS IN ACCORDANCE WITH ARTICLE 62 OF THE ACT ON PREVENTING DRUG ADDICTION

Summary

The topic of this study is the question of legal admissibility of the ruling of forfeiture of objects of crime and forfeiture of instruments of crime in case of applying a new institution laid down in Article 62a of the Act on preventing drug addiction (APDA), which envisages discontinuance of criminal proceedings in case of offences specified in Article 62(1) and (3) APDA. Apart from this issue, the author considers whether and to what extent it is possible to reconcile the ruling of forfeiture in the two forms with the part of the provision of Article 62a APDA, which assumes "discontinuance of proceedings not yet initiated".

Keywords: discontinuance of criminal proceedings, intoxicant, psychoactive substance, forfeiture

PRZEPADEK A INSTYTUCJA UMORZENIA POSTĘPOWANIA Z ART. 62A USTAWY O PRZECIWDZIAŁANIU NARKOMANII

Streszczenie

Przedmiotem niniejszego opracowania jest zagadnienie prawnej dopuszczalności orzeczenia przepadku przedmiotów przestępstwa oraz przepadku narzędzi przestępstwa w razie zastosowania nowej instytucji przewidzianej w art. 62 a u.p.n., która zakłada umorzenie postępowania karnego w sprawach o czyny zabronione określone w art. 62 ust. 1 i 3 u.p.n. Poza tą kwestią autorka rozważa, czy i na ile możliwe jest pogodzenie orzeczenia przepadku w obu jego postaciach z tą częścią przepisu art. 62 a u.p.n., która zakłada „umorzenie postępowania karnego przed wszczęciem".

Słowa kluczowe: umorzenie postepowania karnego, środek odurzający, substancja psychotropowa, przepadek

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OBSERVATIONS ON FEMALE CRIMINALITY IN FRANCE*

JOANNA BRZEZIŃSKA**

1. INTRODUCTION

The term "female criminality" is very popular in French criminology at present, although it already appeared in the literature on the subject of the 19th century.[1] Particular categories of perpetrators were distinguished in the research into criminality then and women formed one of them.[2] It was emphasised that they had committed common crimes in the "private sphere" such as infanticide or a murder of a close relation: a child or a partner. That is why, the dominance of female perpetrators in the family-related crime against close relations was observed in France, especially in the last century. In fact, if women had appeared in the criminal population less frequently than men, it had resulted from the fact that crimes committed by them had been criminalised to a lesser extent or treated with greater leniency by courts. Moreover, female perpetrators also less often had a criminal record because of low detection rate of forbidden acts (infanticide, abortion) committed by them.[3] It is highlighted in France at present that the difference between male and female perpetrators[4] is visible mainly in the frequency of some categories of committed crime,[5]

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1 See, http://crimefeminin.free.fr/qui-sont-criminelles.html.

2 M. Agrapart-Delmas, *Les femmes criminelles*, [in:] S. Tzitzis, *Déviances et délinquances. Aproches psycho-sociales et pénales*, Vol. 8, Dalloz, Paris 2009, p. 187.

3 A. Laingui, A. Lebigre, *Histoire du droit pénal*, Vol. I: *Le droit pnal*, Cujas, Paris 1979, p. 172 ff.

4 D. Deligny, *Délinquance et criminalité féminine: une exception difficile à appréhender*, Observatoire de la Justice Pénale, 29 March 2016, http://www.justicepenale.net/single-post/2016/03/29/D%C3%A9linquance-et-criminalit%C3%A9-f%C3%A9minine-une-exception-difficile-%C3%A0-appr%C3%A9hender.

5 C. Parent, *La contribution féministe à l'étude de la déviance en criminologie*, Criminologie, Vol. XXV, No. 2, 1992, pp. 73–91; C. Parent, *Au-delà du silence: les productions féministes sur la "criminalité" et la criminalisation des femmes*, Déviance et Société, Vol. 16, No. 3, 1992, pp. 297–328.

and a lack of symmetry between men's and women's statistical criminal activity is more visible today than it was in the past.[6]

With the development of criminality in France at present, female perpetrators' increased violence and aggression accompanying their criminal activity have been observed. At the same time, French criminal law experts draw attention to the fact that the concept of an "act of violence" is to a great extent inconsistent and it is used in French criminal law to refer to a catalogue of crimes from detriment to health to premeditated homicide.[7] Thus, it is difficult to unambiguously state why the range of violent acts committed by women is so changeable. Analyses indicate that in 2008 French female perpetrators committed 21.7% of crimes with the use of violence more than in 2003. Moreover, the number of under-age women committing acts of violence doubled in five years' time (from 3,521 in 2003 to 7,079 in 2008 – an increase by over 100%).[8] Looking at the phenomenon of criminality from perpetrators' perspective, N. Bourgoin[9] distinguishes three main categories: crimes in which women dominate (e.g. infanticide, abortion),[10] crimes in which women's participation is lower but higher than average (crimes against children, domestic theft, handling stolen goods) and crimes with a very high or even untypically high rate of commission by women in recent years (homicide, affrays and acts of violence), and finally typically male crimes which are rather seldom committed by women (e.g. rape, aggravated theft or political crimes). As he emphasises, French analyses show that particular increase in the number of female perpetrators has been recorded especially among the category of women who commit forbidden acts resulting in high level of social harm, which is an alarming phenomenon.

2. SELECTED CATEGORIES OF FEMALE CRIMES

It is commonly highlighted that women, unlike men, have a certain category or categories of motives for committing crimes, which determine their criminal activity. One can distinguish forbidden acts performed under the influence of emotions (e.g. because of love, envy or revenge), due to financial factors (a wish to become rich or obtain an advantageous disposal of property) or because of moral ones (aversion to motherhood).[11]

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[6] P. Genuit, *La criminalité feminine: Une criminalité épicène et insolite. Réflexions d'épistemiologie et d'anthropobiologie clinique*, 2007, doctoral dissertation, Department of Psychology, Université Rennes 2, 2007, https://halshs.archives-ouvertes.fr/tel-00198603/document, p. 17.

[7] X. Rousseau, *Civilisation des moeurs et/ou déplacement de l'insécurité? La violence à l'épreuve du temps*, Déviance et Société Vol. 17, No. 3, 1993, p. 291.

[8] *Les femmes de plus en plus sujettes à la délinquance*, L'OBS, 16 June 2009, http://tempsreel.nouvelobs.com/societe/20090616.OBS0697/les-femmes-de-plus-en-plus-sujettes-a-la-delinquance.html.

[9] N. Bourgoin, *Les chiffres du crime. Statistiques criminelles et contrôle social (France, 1825–2006)*, Logiques sociales, L'Harmattan, Paris 2008, pp. 75–80.

[10] J.-M. Delassus, *Le sens de la meternité*, Dunod, Paris 2007, p. 285.

[11] S. Harratis, D. Vavassori, L. Villerbu, *Étude des caractéristiques psychopathologiques et psychocriminologiques d'un échantillon de 40 femmes criminelles*, L'Information Psychiatrique, Vol. 83, 6/2007, pp. 485–493.

Homicide is a dominant crime most often committed by women. If it is a murder of a female perpetrator's partner, it usually results from the use of various types of violence against her (physical or psychological one).[12] A former victim decides to eliminate her tyrant and murder is an opportunity of liberation.[13] It has been stated that women demonstrate extremely strong emotional reactions after murder. It has been observed that female murderers' behaviour is driven by untypical aggression, even an instinct to inflict pain. They satisfy this need with the suffering of a person being killed. It is hard to find sorrow or compunction in their behaviour.[14] What must also be mentioned is that "acts of violence in liminal states are connected with a violent and primitive instinct rather than pleasure which the intended attack will lack".[15] E. Durkheim explains that women's lower inclination to kill is due to their input into social life. He claims: "A woman does not kill less often or does not kill at all because she is different from a man in a psychological sense; it is because she does not take part in everyday life in the same way. Every time homicide is within her reach, a woman commits it as often as a man and sometimes even more often than a man."[16] Having noticed that homicide is a forbidden act the frequency of which is always higher for men, one should emphasise that women's share in the population of convicts for this crime in France remains at the level of 15% (one out of seven homicide perpetrators is a woman) [17].

Infanticide is another, although undoubtedly the most symptomatic, female homicide. Until the amendment to the French criminal code of 1992 (*Code pénal*, hereinafter: C.P.), two types of this crime against children committed by a mother could be distinguished: newborn baby homicide (infanticide) and older child homicide. At present, based on the criminal code in force, child homicide constitutes one of the aggravating circumstances (in accordance with Article 221–4 C.P., manslaughter of a juvenile under 15 years of age),[18] which results in more severe punishment due to crime committed against an always weak, immature victim who remains unable to defend oneself.[19] The current wording of the provision

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[12] P. Mercader, *Les déterminants sociaux et psychiques du crime dit "passionnel"*, Recherches et Prévisions, Vol. 89, No. 1, September 2007, pp. 43–53.

[13] S. Frigon, *L'homicide conjugal au féminin. D'hier à aujourd'hui*, Remue-Ménage, Montreal 2003, p. 16.

[14] M. Agrapart-Delmas, *Les femmes…*, [in:] S. Tzitzis, *Déviances et délinquances…*, p. 189.

[15] *Ibid*.

[16] E. Durkheim, *Le suicide. Étude de sociologie*, PUF, Paris 1967, p. 389.

[17] L. Mucchielli, *Les homicides dans la France contemporaine (1970–2007): évolution, géographie et protagonistes*, [in:] L. Mucchielli, P. Spierenburg (ed.), *Histoire de l'homicide en Europe*, La Découverte, Paris 2009, p. 147.

[18] Article 221–4 C.P.: "Le meurtre est puni de la réclusion criminelle à perpétuité lorsqu'il est commis: 1° Sur un mineur de quinze ans, (…)".; https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417572&cidTexte=LEGITEXT000006070719&dateTexte=20100102.

[19] Ch. Bellard, *Les crimes au féminin*, L'Harmattan, Paris 2010, p. 89 ff; O. Verschoot, *Ils ont tué leurs enfants. Approche psychologique de l'infanticide*, Imago, Paris 2007, p. 111; S. Marinopoulos, *La vie ordinaire d'une mère meurtière*, Fayard, Paris 2008, p. 88; M. Agrapart-Delmas, *Les femmes…*, [in:] S. Tzitzis, *Déviances et délinquances…*, p. 187; M.-L. Rassat, G. Roujou de Boubée (ed.), *Droit pénal spécial*, Ellipses, Paris 2008, p. 31; J. Francillon, B. Bouloc, I. Mayaud, G. Roujou de Boubée, *Code pénal commenté*, Dalloz-Sirey, Paris 1997, p. 150.

of Article 224–1 C.P. expresses the French legislator's care of an infant victim.[20] It should be emphasised that even if a female perpetrator is not aware of the child's age (under 15), the circumstance is still aggravating in nature,[21] and the above-mentioned provision stipulates life imprisonment punishment.

At the same time, apart from symptomatic newborn baby homicide, women also commit manslaughter of older children, which is most often called extended suicide.[22] Older mothers (26–35 or 36–45 years of age) commit this crime usually against a few years old children, regardless of their gender. It is emphasised in psychology that there is a specific emotional context of an extended suicide. It usually takes place after the partners' separation when a mother is alone and realises that her existence is not possible, does not want to make a child unhappy when left without her as a caregiver, and eventually decides to finish not only her own but also her child's life. Sometimes, extended suicide takes place because of poor mental health of a single mother who takes care of a handicapped or disabled child. She decides that it is necessary to shorten her offspring's suffering and share the same destiny. Another interesting regularity is also worth emphasising: in case of infanticide, a mother does not usually want to have a child much earlier, at the stage of pregnancy. She tries to hide the condition, she does not use healthcare services or see the need to devote herself to the good of her future offspring, because for some reasons she does not accept her child's existence. On the other hand, in case of extended suicide, mothers commit crime against their long-awaited and beloved children, they decide to eliminate them because they love them and do not want to expose them to the risk of any suffering.[23] As far as punishment for infanticide in France is concerned, there is no uniform court decision-making policy. The younger the child, the more lenient the punishment is (usually at the same level as it used to be for a newborn baby homicide). However, the older the child, the more severe the punishment because it is believed that a mother killing her offspring meets the features of aggravated crime under Article 224–1 C.P. Thus, she acts against a maternal instinct and her behaviour not only challenges the legal order but also breaches the moral one to a big extent.

Acts of violence against persons under 15 years of age are the most serious crimes committed by French female perpetrators. Various forms of bullying juveniles and physical violence lead to victims' death or serious disabilities. Female perpetrators of this category of crimes are usually between 26 and 31 years old. The victims of violence are most often their biological children (79%) who are very young (from six to up to 20 months old). Unfortunately, the statistics are alarming because in 73% of cases, violence leads to a child's death.[24] It is worth emphasising that the

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[20] M.-L. Rassat, G. Roujou de Boubée, *Droit pénal...*, p. 31; J. Francillon et al., *Code pénal...*, p. 150.

[21] M. Daury-Fauveau, *Droit pénal spécial. Livres 2 et 3 du code pénal: infractions contre les personnes et les biens*, PUF, Paris 2010, p. 198.

[22] Ch. Bellard, *Les crimes...*, pp. 99–99.

[23] P. Mercader, A. Houel, H. Sobota, *L'asymétrie des comportements amoureux: violences et passions dans le crime dit passionnel*, Sociétés Contemporaines, No. 55, 3/2004, p. 107; O. Verschoot, *Ils ont tué...*, pp. 35–36.

[24] P. Mercader, A. Houel, H. Sobota, *L'asymétrie...*, pp. 110–111.

national survey conducted in France in 2008 by Dr Tursz revealed that the number of deaths resulting from maltreatment might be underreported.[25] In addition, H. Romano emphasises that the increased under-quoted number of murders results from very low interest in the phenomenon of children maltreatment in France. Law enforcement services are rarely interested in children's deaths, except for cases of decease undoubtedly caused by third parties' involvement.[26]

It is important that, apart from the different types of murders, an explicit increase in female criminality with elements of violence, especially in acts of violence (11% are committed by women) as well as burglaries and armed robberies are reported in France. The criminogenic activity of women is varied and it is sometimes targeted not only at people but also at specific property.[27] At the same time, it is interesting that female perpetrators of the above-mentioned crimes are severely punished as they commit aggravated types of those crimes. Average punishment for female perpetrators varies from seven years and six months' imprisonment (lack of care of a child)[28] to even 16 years and six months' imprisonment (special cruelty to a victim).

Thus, looking at the types of crimes committed by French female perpetrators at present, one should emphasise that violence of different level dominates. Undoubtedly, the strongest aggression is that used by female perpetrators who commit various types of manslaughter (usually with atrocity), but it is also present when performing acts of violence of different aetiology. It seems that the increase in brutality in female criminal activity results from a general French society's brutalization trend, which sociologists currently emphasise.[29]

3. STATISTICAL ASPECTS OF FEMALE CRIMINALITY

An evident increase in women's share in the entire convict population has been reported in France over the last decades[30] and it was common for them to commit crimes with extraordinarily high level of aggression and use of violence.[31] According to the findings of the French National Institute for Advanced Studies in Security and Justice (INHESJ) and the National Observatory on Crime and Criminal Justice

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[25] H. Romano, *Infanticide: réflexions au sujet des homicides sur mineurs de un an*, Enfance Majuscule No. 98, , January-February 2008, pp. 16–28.

[26] Ch. Bellard, *Les crimes...*, p. 111; C. Dauphin, A. Farge (ed.), *De la violence et des femmes*, Albin Michel, Paris 1999, p. 37.

[27] S. Marinopoulos, *Solitude des futures mères*, l'Humanité, 1 September 2007.

[28] Ch. Bellard, *Les crimes...*, pp. 137–142.

[29] Report "La violence à la télévision" developed under the supervision of Blandine Kriegel commissioned by the Ministry of Culture, PUF, Paris 2003.

[30] L. Dancoing, *Le boom de la délinquence féminine*, Paris Match, 5 October 2010, http://www.parismatch.com/Actu/Societe/Le-boom-de-la-delinquance-feminine-155045#.

[31] H. Van Gijseghem, *Le crime féminin et masculin: deux expressions d'une même délinquence*, Revue Québécoise de Psychologie, Vol. 1, No. 1, February 1980, p. 109–122; M.A. Bertrand, *La femme et le crime*, Les Éditions de l'Aurore, Montreal 1979.

(ONDRP), criminal activity of women is intensifying[32] (depending on the type of crime) from three to ten times faster than in case of men. Unfortunately, more and more often it is also observed among young women and even girls.[33] M.A. Bertrand's observations indicate that the explanation of the phenomenon of female criminality evolution requires that different conditions (biological, sociological and psychological ones) determining such an increase be defined.[34]

Undoubtedly, it must be emphasised that the growth in frequency of crime committed by women can be explained by the change in their social status.[35] At the same time, it must be noted that this modification of women's status does not mean a permanent change of their customary position. The fact that they are becoming financially independent does not change their position in family relations because they remain dependent upon men (husbands, fathers or sons). Thus, a woman "bound by her weaker position loses importance within her social status".[36]

As far as the French statistics are concerned, it must be emphasised that the number of women convicted by correctional tribunals in 1990 was 58,406 (in comparison to 413,675 men). On the other hand, in 2008 there were 60,216 female perpetrators (577,449 men), i.e. 9.4% of the convict population. According to police statistics, in 1992 women violating legal order accounted for 14.97% of the convict population; in 2006 the rate was 17% and in 2009 – 15%. On the other hand, in 2010 the number of female perpetrators reached 182,884 in comparison to 1,174,837 male perpetrators.[37]

Table 1 below presents statistical data indicating French women's criminogenic activity in 14 selected crime categories in three research periods: 1919–1932, 1953–1978 and 1984–2006.

The above-presented statistics show that over a period of nearly 100 years one could observe specific changes in tendencies of frequency of prohibited acts committed by French perpetrators. Firstly, the basic evolution is connected with infanticide, the level of which was extremely high in the first research period (1919–1932), then it decreased radically (by almost 90%) and in the period 1984–2006 only 114 cases were reported (five cases per year on average), which used to be the most negative "symbol" of mother perpetrators' activity. On the other hand, women's share in the commission of other crimes is alarming in France. It must be emphasised that the number of homicide, affray and acts of violence as well as

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[32] C. Chauvel, *Délinquance féminine: Plus de doutes que de confirmations pour les sociologues*, 5 October 2010, http://www.20minutes.fr/societe/605145-20101005-societe-delinquance-feminine-plus-doutes-confirmations-sociologues.

[33] M. Agrapart-Delmas, *Les femmes…*, [in:] S. Tzitzis, *Déviances et délinquances…*, p. 187.

[34] M.A. Bertrand, *La femme...*, p. 36; E. Dieu, *Analyses psychocriminologiques et motivaionnelles des crimes féminins*, Revue Européenne de Psychologie et de Droit, 14 December 2011, p. 2; http://www.psyetdroit.eu/wp-content/uploads/2011/12/ED-Analyses-psychocriminologiques.pdf.

[35] L. Dancoing, *Le boom de la délinquence...*

[36] S. Karstedt, *Liberté, égalité, sororité. Quelques réflexions sur la politique criminelle féministe*, Déviance et Société, Vol. 16, No. 3, 1992, pp. 287–296; R. Lucchini, *Femme et déviance ou le débat sur la spécificité de la délinquence féminine*, 1996, pp. 22–24, https://www.unifr.ch/socsem/Fichiers%20PDF/Femme%20&%20deviance.pdf.

[37] R. Gassin, S. Cimamonti, P. Bonfils, *Criminologie*, Dalloz, Paris 2011, p. 438.

aggravated types of theft clearly increased in all the research periods.[38] The level of female criminality is growing fast. Homicide increased 2.5 times, on the other hand the frequency of affray and acts of violence rose almost eightfold. As far as aggravated theft is concerned, the growth was by 30%. Moreover, the level of fraud committed by women grew sevenfold. The presented data prove that the diversity of female crime categories in France over the last century clearly indicates that the stereotype of women committing prohibited acts in the privacy of their home has been challenged and that female perpetrators transgress standards of due behaviour in the sphere of compliance with relevant legal-criminal norms.

Table 1. Number of women convicted in France in the period 1919–2006 for selected crimes[39]

	1919–1932	**1953–1978**	**1984–2006**
Patricide	16	18	–
Infanticide	951	360	114
Other homicide	556	450	1,220
Affray and acts of violence	123	472	839
Crime against children	61	19	–
Domestic theft	43	–	–
Aggravated types of theft	448	389	587
Aggravated handling stolen goods	25	331	246
Fraud	124	32	886
Political crime	11	4	–
Forgery	178	98	19
Organised crime	14	14	–
Abortion	970	–	–
Bigamy	17	–	–

Source: N. Bourgoin, *Les chiffres du crime. Statistiques criminelles et controle social (France, 1825–2006)*, Logiques sociales, L'Harmattan, Paris 2008, pp. 152–156.

[38] http://www.etudier.com/dissertations/La-D%C3%A9linquance-F%C3%A9minine/556412.html; http://www.etudier.com/dissertations/D%C3%A9linquance-F%C3%A9minine/298769.html.

[39] In comparison, according to statistics, female criminality by selected types of crime in Canada in 1999 was as follows: homicide: 35, crime with elements of aggression: 15,045, theft: 17,712, handling stolen goods: 2,233, fraud: 7,132, prostitution: 2,607, drug-related crime: 6,076; M. Beare, *Les femmes et le crime organisé*, Sécurité publique Canada 2010, p. 31, http://publications.gc.ca/collections/collection_2012/sp-ps/PS4-106-2010-fra.pdf.

In order to obtain the most current picture of female criminality in France, another table of selected categories of prohibited acts committed by French female perpetrators in the period 2006–2014 is presented below (Table 2). It must be emphasised that the initial analysis of the presented crime categories allows observing a certain general evolution of trends in the criminality under analysis. What is interesting, there are some categories of crime that did not occur in the former analysis (Table 1). These are drug-related crimes as well as traffic in and transport of firearms. Their appearance in the research demonstrates that women not only take an active part in law violation but also modify their illegal activity in the same way as men do. A clear increase in the frequency of these types of crime as well as the maintenance of high (3,500 drug-related crimes were committed in 2014) and even very high level (women committed as many as 19,199 traffic crimes in 2014!) was reported.

Table. 2 Number of women convicted in France in the period 2006–2014 for selected crimes[40]

	2006	2010	2014
Homicide	49	34	37
Unintentional manslaughter	221	167	136
Infanticide	11	15	8
Theft	5,350	4,338	4,948
Aggravated theft	5,064	5,389	5,620
Handling stolen goods	1,901	1,439	1,231
Fraud	1,921	4,084	3,330
Damage to property	1,149	1,032	886
Crimes in traffic	18,203	17,958	19,199
Forgery	178	108	92
Affray and acts of violence	4,215	5,104	5,063
Domestic assaults	1,046	922	843
Assaults on a person	1,239	1,102	1,106
Drug-related crime	2,136	2,968	3,521
Traffic in and transport of firearms	95	115	141
Signature forgery	1,004	994	1,269
Crime against public administration	2,994	3,011	3,201

Source: http://www.justice.gouv.fr/budget-et-statistiques-10054/donnees-statistiques-10302/les-condamnations-27130.html.

[40] In comparison, according to statistics, female criminality by selected types of crime in Canada in 2009 was as follows: homicide: 55, threats: 3,650, aggravated theft: 1,742, fraud: 10,699, prostitution: 1,351, drug-related crime: 15,419. T. Hotton Mahony, *Les femmes et le système de justice pénale*, Statistics Canada, April 2011, p. 21, http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11416-fra.pdf; for more, see M.A. Bertrand, *La femme*....

It must be emphasised that specific criminogenic modification of women's activity keeps taking place in the only "female" crime, i.e. infanticide, because its share in other prohibited acts committed by women is decreasing (only eight such cases were reported in 2014). However, unfortunately, in comparison with the former statistical data (Table 1), there is still a rising trend in the commission of crime with elements of violence by women. It must be emphasised that "female" affrays, acts of violence and aggravated thefts are getting more and more intense. In the period 2006–2014, there was a 20% increase in the first of the above-indicated crime and a 12% growth in the second category. Moreover, an intense rise in the commission of theft was reported, as in the last eight-year period (2006–2014) its level initially increased by over 100% to slightly fall then, however, still maintaining extraordinarily high frequency (over 3,300 cases). There is also another alarming phenomenon observed: a high level of aggression used by women towards family members (over 800 cases in 2014) and towards third parties (over 1,100 crimes in 2014).

4. CONCLUSIONS

Observing the phenomenon of female criminality in France, it is necessary to emphasise a few basic findings. Firstly, the range of forbidden acts committed by female perpetrators grows in a specific way. The statistics presented above show a clear increase in the volume of crimes in which women use all kinds of violence.

Likewise in other European countries (e.g. Poland or Italy), it seems that the growth in aggression among French perpetrators results from political, economic and also cultural changes that took place in France in the last decades. Women's participation in social life, which is commonplace because of their scientific and professional development, made them start competing with men in all the fields of social life. Unfortunately, criminality is one of these areas. It was observed that the level of every type of crime indicated had increased in all the three periods: 1919–1932, 1953–1978 and 1984–2006. The only female crime that did not show that tendency was infanticide, which decreased considerably (almost ninefold) throughout the last century. The reason for that should be looked for in the evolution of women's position in social life. A stereotypical woman's role of a mother and a wife is not justified any more. Women uncompromisingly went beyond the limits of traditional social behaviour and entered the areas that used to be reserved for men. Unfortunately, this observation refers to the area of criminality, where they are "more visible" now.

It is worth mentioning that not only the frequency of female perpetrators' participation in the total convict population changes but this evolution also applies to their criminality characteristics. One can take the risk of stating that infanticide is losing its dominant status in female criminal activity. However, despite this finding, it is necessary to indicate the criminogenic behaviour that still remains typical of women such as acts of violence towards children, emotionally motivated manslaughter and petty theft, which dominate. This general pattern is changing because of the commission of other, formerly non-existent female crimes, including especially drug smuggling or trafficking in and transporting firearms. Thus, the

above-mentioned categories of crime give evidence of even stronger belief that women started competing with men in all fields of social life and are not inferior to men, also in the area of legal and criminal activity that was formerly typical of men exclusively. What is also important, their share in the commission of the "new" illegal acts is noticeable but not dominant.

Characterising French female perpetrators' criminogenic activity, one may get an impression that the evolution in this respect is typical and critical. However, it seems that criminologists who soften this radical attitude are right. It is true that female perpetrators' participation in atypical or deviant illegal activities occurs but, at the same time, the total population and the male perpetrator population in France are growing, too. On the other hand, women are more and more often influenced by "negative" education. They observe all signs of male criminality and easily adopt them. It seems, however, that the general level of French female criminality is not so advanced as some researchers suggest. In conclusion, it must be stated that in order to conduct a complex analysis of this issue, apart from a detailed examination of statistical data, it is also necessary to take into consideration other factors (customary, social, economic and cultural ones), which will make the final picture of the examined phenomenon more plausible rather than minimise it.

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OBSERVATIONS ON FEMALE CRIMINALITY IN FRANCE

Summary

The aim of this paper is to indicate characteristics of women's crime in France. The study shows categories of criminal acts in which women demonstrate the highest criminal activity, i.e. murder of a partner, infanticide and many acts of violence (e.g. affray or damage to health). It is noticed that the number of female crimes with the use of violence is currently increasing drastically and aggression dominates in behaviours of the youngest female perpetrators. It has been determined that general tendencies for female crime are changing. The female perpetrators more and more frequently commit the most severe crimes, which in previous years were reserved solely for men, such as arms trafficking, drug smuggling or participation in organized criminal groups. It can be deduced that such prompt modification in female perpetrators' behaviour results from social and economic changes that intensified in France in the several past decades.

Keywords: women's crime, female-perpetrators, trends in female criminality

UWAGI O PRZESTĘPCZOŚCI KOBIET WE FRANCJI

Streszczenie

Celem niniejszego artykułu jest charakterystyka przestępczości kobiet we Francji. W opracowaniu wskazano te kategorie przestępstw, w których kobiety wykazują najwyższą aktywność kryminalną, a wśród nich zabójstwo partnera, zabójstwo dziecka oraz liczne akty przemocy (np. bójka lub uszczerbek na zdrowiu). Zauważono, że obecnie radykalnie wzrasta poziom przestępstw popełnianych przez kobiety z użyciem przemocy, a agresja dominuje już w zachowaniu najmłodszych sprawczyń. Ustalono także, że zmianie ulegają ogólne tendencje w przestępczości kobiecej. Sprawczynie coraz częściej realizują najpoważniejsze, zarezerwowane niegdyś wyłącznie dla mężczyzn, czyny zabronione, takie jak: handel bronią, przemyt narkotyków czy udział w zorganizowanych grupach przestępczych. Wydaje się, że tak zdecydowana modyfikacja postaw kobiet-sprawczyń stanowi rezultat przemian społeczno-gospodarczych, które od kilku dekad nasilają się we Francji.

Słowa kluczowe: przestępczość kobiet, kobiety-sprawczynie, tendencje kobiecej przestępczości

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OBJECTIVE ASSESSMENT OF HARM IN ORDER TO ESTABLISH COMPENSATION TO THE AGGRIEVED PATIENT

EDYTA WASILEWSKA*

1. INTRODUCTION

Obtaining healthcare services is a circumstance posing an increased risk of various, often serious and irreversible, non-pecuniary damage to a patient. Requesting healthcare services from a medical institution, patients put themselves at other people's (doctors and other medical staff) disposal and those people's medical activities have direct influence not only on their health but also other personal interests, especially such as dignity, autonomy of the will, or the feeling of safety. Although, at present, the provision of healthcare services is developing in the way that is far from the medical profession's "paternalism", it is necessary to state that patients still are, to some extent, a weaker party in the relations with medical personnel. It is due to the fact that they seek healthcare services or already obtain them when they are ill, disabled or suffering from various pains. This specific circumstance causes that patients subordinate themselves to physicians who provide them with the only possibility of obtaining the desired state of health because, as healthcare services providers, they have knowledge, competence and tools to perform medical activities. Although patients are expected to cooperate with physicians in the course of healthcare services provision, in practice, this cooperation, because of the lack of knowledge necessary to verify the medical procedures applied, is most often limited to passive adaptation to physicians' decisions and recommendations. Even the slightest departure from the established rules of appropriate medical treatment exposes patients to the infringement of their most precious personal values. Various health conditions that require hospitalisation are so extraordinary that any omissions in the process of healthcare services provision may not only worsen the state but also be a factor endangering a patient's life. Therefore, medical personnel are required to do

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their job with special, in fact higher than average, diligence because of the object of their activities, i.e. a person, and consequences that are often irreversible.[1] However, in recent years, the number of legal actions initiated by patients harmed as a result of non-compliance with the rules based on the present medical knowledge as well as medical personnel's failure to be careful enough in the course of healthcare services provision has been rising.

The development of contemporary medical knowledge, more and more modern medical techniques and technologies, any potential irregularities in the provision of healthcare services such as negligence or a lack of good work management, no improvement in competence and update of knowledge by medical personnel, failure to maintain a strict sanitary and hygienic regime in medical institutions or insufficient qualifications of the management and many other circumstances may prove to pose a threat to non-pecuniary values of a patient.

The word "patient" is derived from the Latin word *patiens*, which means "ill", "bearing pains".[2] According to the definition in the dictionary of the Polish language, a patient is "a sick person asking a physician for advice and being under his/her care".[3] On the other hand, the dictionary of foreign words defines a patient as a sick person paying a visit to a physician and being under a physician's care.[4] One can draw a conclusion that a patient is only a person suffering from a particular disease. However, the legislator introduced a definition that treats a patient in a broader sense than just a "sick person". Article 3(1).4 of the Act of 6 November 2008 on patients' rights and the Commissioner for Patients' Rights[5] (hereinafter APR) directly indicates that a patient is a person asking an institution providing healthcare services or a person working in the medical profession for the provision of healthcare services or a person already being provided with such services. A criterion of health or disease is completely omitted. It is especially important nowadays because the only thing which patients often expect asking for healthcare services is the improvement of the quality of their life. They have regular check-ups, need medical consultations, undergo aesthetic surgery, etc. A patient is every person using healthcare services, regardless of the fact whether they are sick or healthy. A woman giving birth to a child in hospital can be an example as she is a patient but, as a rule, is not a sick person.[6]

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[1] Judgement of the Appellate Court in Kraków of 9.03.200, I ACa 124/01, PS 2002, No. 10, with a gloss of approval by M. Nesterowicz, PS 2002, No. 10, p. 130; Supreme Court ruling of 17.10.2002, IV KKN 634/99, OSNKW 2003, No. 3–4, item 33; J. Bujny, *Prawa pacjenta. Między autonomią a paternalizmem* [Patents' rights. Between autonomy and paternalism], Warsaw 2007, p. 112 and literature quoted therein; E. Zielińska (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz* [Act on the professions of a physician and a dentist. Commentary], Warsaw 2014, p. 94.

[2] M. Dercz, T. Rek, *Prawa dziecka jako pacjenta* [Child patient's rights], Warsaw 2003, p. 7.

[3] *Mały słownik języka polskiego* [Small dictionary of the Polish language], E. Sobol (ed.), Warsaw 1995, p. 591.

[4] W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych* [Dictionary of foreign words and expressions], Warsaw 1989.

[5] Journal of Laws [Dz.U.] of 2016, item 186, as amended.

[6] M. Boratyńska, P. Konieczniak, *Prawa pacjenta* [Patients' rights], Warsaw 2001, pp. 12–13.

A few factors are decisive in establishing that given persons are the aggrieved patients: firstly, the fact that the damage was done in a situation when a person asked for the provision of healthcare services or was actually provided them; and secondly, the service was or was to be provided by an institution providing healthcare services or a person who works in the medical profession. The basic definition of healthcare services is laid down in Article 2 (1).10 of the Act on medical activities (hereinafter AMA).[7] In accordance with the regulation, healthcare services are activities serving to maintain, save, restore or improve health, and other medical activities resulting from the process of treatment or from other provisions regulating the rules of performing them. The institution providing healthcare services, on the other hand, is an entity performing medical activities. In accordance with Article 2 (1).5 AMA, it may be divided into a medical entity and medical practice. Article 4 AMA lays down that medical entities are, in particular, independent healthcare institutions, research institutes, foundations and associations the statute of which envisages the performance of medical activities. Medical practice, on the other hand, is individual or group medical practice of doctors and nurses referred to in Article 5 AMA. A person working in the medical profession, in accordance with Article 2 (1).2 AMA, is a person authorised to provide medical services based on other regulations and a person having formal vocational qualifications to provide medical services in a particular scope and medical field. Basic medical professions are of course a physician and a dentist, a nurse and a midwife, a feldsher, a paramedic, a pharmacist or a laboratory diagnostician.

Thus, a person who was harmed in circumstances similar to healthcare services provision but by entities or persons that are not authorised to provide the services and a person who visited patients in a medical entity cannot be granted the status of the aggrieved patient.[8]

A patient, as any other person, has the right to protection of non-pecuniary fundamental values strictly connected with the inherent and inalienable dignity of a human being indicated in Chapter II of the Constitution of the Republic of Poland and Article 23 of the Civil Code. However, due to the circumstances and the nature of healthcare services provision, some of those valuable human interests are especially vulnerable to infringement. These are, in particular, such interests as life, health, dignity, intimacy and privacy. That is why, patients have been given rights, which do not only aim to strengthen the protection of the above-mentioned personal interests but also to raise their position in the field of the protection of other non-pecuniary interests, which are essential in the process of providing them with healthcare services, such as the autonomy of the will or the trust in the system of health protection.

The idea of patients' rights appeared in Poland relatively not long ago. Before 1989, evident medical paternalism could be observed. The relations connected with healthcare services provision were hierarchical, and medical personnel were superior to patients. The introduction of patients' rights was aimed at equipping the group

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[7] Act of 15 April 2011, Journal of Laws [Dz.U.] of 2015, item 618, as amended.

[8] M. Dercz, H. Izdebski, T. Rek, *Dziecko – pacjent i świadczeniobiorca. Poradnik prawny* [A child – a patient and service recipient. Legal guide], Warsaw 2015, pp. 73 and 74.

with the entitlement to exercise those rights and strengthening patients' position, not weakening the physicians' position.[9] The whole catalogue of patients' rights was collected in one legal regulation: Act on patients' rights and the Commissioner for Patients' Rights. The initiative was especially important for the improvement of healthcare services standards as well as the patients' awareness. They could learn what the full scope of their rights and mechanisms of their effective protection were.[10]

Patients' rights include, first of all, the right to healthcare services relevant to the requirements of the contemporary medical knowledge, provided with due diligence, in conditions that conform to professional and sanitary requirements and the rules of professional ethics, and in case of limited possibilities of providing adequate healthcare services, to clear, objective and based on medical criteria procedure of determining access to those services (Articles 6, 7 and 8 APR). In case of endangered health or life, a patient has the right to emergency healthcare services (Article 7 APR). It is also the patients' right to be informed about their health, disease diagnosis, proposed and possible diagnostic and treatment methods, the consequences of their application or non-application that can be envisaged, treatment results and prognosis (Article 9 APR). We can speak about an autonomous entities-patients' wilful entry into a relationship with an entity providing healthcare services or a person working in the medical profession only when they are informed about the scope of the proposed methods of treatment. A broad catalogue of patients' rights also includes the right to expect that information obtained by medical personnel as a result of their work and concerning patients must remain confidential (Article 13 APR). Patients also have the right to get access to medical documents (Article 23 APR) and to expect respect for their private and family life (Articles 33 and 34 APR), and many other rights.

In the course of a complex and complicated process of treatment, a negative interference into the sphere of personality rights and patients' rights may take place, which consists in such conduct of a physician or a medical entity that results in harming a patient. The harm caused as a result of the infringement of medical activities rules means, first of all, physical pain and psychical suffering caused by an injury or health disorder,[11] loss of or decrease in prospects for recovery because of the omission of adequate activities or failure to undertake them in the right time, loss of prospects for health improvement,[12] inconvenience and discomfort resulting from the necessity to agree to numerous procedures, operations or antibiotic therapies aimed at eliminating health-related consequences of the infringement,[13] the unnecessary lengthening of the treatment process, during which the aggrieved felt significant pains, took part in useless rehabilitation that was also connected with physical pain and, in addition,

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[9] D. Karkowska, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz. II wydanie* [Act on patients' rights and the Commissioner for Patients' Rights. 2nd edition], Warsaw 2012, p. 17.

[10] *Ibid*., p. 21.

[11] M. Nesterowicz, *Prawo medyczne* [Medical law], Toruń 2007, p. 44; and by the same author, *Zadośćuczynienie pieniężne za doznaną krzywdę w „procesach lekarskich"* [Pecuniary compensation for the harm sustained in "medical proceedings"], PiP No. 3, 2005, p. 6.

[12] Supreme Court judgement of 17.6.2009, IV CSK 37/09.

[13] M. Nesterowicz, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 7.

the lengthened period of their disability,[14] the fear for life and health, the feeling of loneliness in case of being in isolation from relatives resulting from treatment and social uselessness,[15] the feeling of lower self-esteem because of deformation,[16] the necessity to change the former lifestyle, and the loss of trust in people working in the medical profession.[17] The health-related results of a defective operation overlapping the already existing defect may be perceived as a factor increasing patients' feeling of helplessness resulting from inability to perform elementary daily self-care activities, which makes them dependent on care provided by other people.[18]

The legislator, in accordance with the principles determined in the Civil Code, envisaged the possibility of claiming compensation for the harm inflicted by persons whose personal interests have been infringed to be paid to them or alternatively to an indicated charity. The normative grounds for claiming compensation by the aggrieved party are laid down in Articles 445 and 448 of the Civil Code. Based on those regulations, a court may rule an adequate compensation for the harm caused by injury or health disorder (Article 445 Civil Code) or for the infringement of any of the other personality rights (Article 448 Civil Code). A certain difficulty occurred in connection with the patients' non-pecuniary interests safeguards. Courts rightly did not associate personality rights under Article 23 Civil Code with patients' rights laid down in special acts concerning the provision of healthcare services.[19] Non-pecuniary damage that took place as a result of the infringement of patients' rights, which was not the infringement of personality rights at the same time, was not always subject to compensation in accordance with Article 445 and 448 Civil Code. That is why, it was necessary to extend legal grounds for claiming compensation and to create a mechanism that would efficiently safeguard the institution of patients' rights resulting from the fact of being the object of healthcare services. M. Nesterowicz presented such a proposal during the Sejm sub-committee discussion of Article 19a of the Act on healthcare institutions in 1996. The representatives of the Chamber of Physicians and Dentists (Naczelna Rada Lekarska) believed that the introduction of this provision was useless and "unfriendly" towards physicians and that it could worsen the relations between patients and physicians, and lead to litigation in cases that might be resolved out of court. Eventually, it was agreed that it was purposeful and necessary to introduce such a regulation to the Act on healthcare institutions.[20] The amendment of 20 April 1997 to the Act of 30 April 1991 on healthcare institutions[21] added Article 19a(1), in accordance with which patients

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[14] Judgement of the Appellate Court in Łódź of 22.1.2013, I ACa 1018/12.

[15] Supreme Court judgement of 14.12.2010, I PK 95/10, unpublished.

[16] Judgement of the District Court in Bydgoszcz of 19.7.1999, I C 1150/98, with a gloss by M. Nesterowicz, OSP 2002/4/59.

[17] Compare, e.g. the judgement of the Appellate Court in Białystok of 3.06.2016, I ACa 106/16, unpublished; judgement of the Appellate Court in Rzeszów of 5.09.2013, I ACa 251/13, unpublished; judgement of the Appellate Court in Warsaw of 29.08.2006, I ACa 310/06, unpublished.

[18] Supreme Court judgement of 22.06.2005, III CK 392/04, unpublished.

[19] M. Nesterowicz, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 15.

[20] Gloss by M. Nesterowicz on the Supreme Court judgement of 27.04.2012, V CSK 142/11, OSP 2013, issue 6, p. 436.

[21] Journal of Laws [Dz. U.] No. 91, item 408, as amended.

whose rights have been infringed are entitled to claim compensation for harm under Article 448 Civil Code.

Article 4 APR substituted for the former Article 19a(1) of the now non-binding Act on healthcare institutions. In the presently binding legal state, patients can claim compensation for damage resulting from the infringement of their rights based on this regulation. Its introduction should be assessed as a positive step because in practice it means softening the legislator's rigourism in the field of ruling compensation for non-pecuniary damage only in cases when harm has resulted from the infringement of personality rights.

The opinion that Article 4 APR plays a supplementary role in relation to the basic statutory regulations, which is dominating in jurisprudence and case law, seems to be correct.[22] The scope of application of Article 4 APR to a great extent matches the scope of the regulation under Article 448 Civil Code and partly goes beyond it. Indeed, some of the patients' rights protect human personality rights directly indicated in Article 23 Civil Code. These are in particular such rights as the right to healthcare services, the right to secrecy of information about patients or the right to get respect for their privacy and dignity. Other rights protect the interests resulting directly from the fact of participating in medical relations, e.g. the right to give consent to medical treatment in writing or the right to expect appropriate standard of the services, which cannot be identified with human personality rights. In such a case, the choice of grounds for claiming compensation for harm is the aggrieved patient's decision. A patient has discretion to decide whether the grounds for claiming compensation should be Article 4 APR in conjunction with Article 448 Civil Code or Article 448 Civil Code.[23]

Causing harm that constitutes the grounds for claiming compensation may take place at the stage of diagnosing, therapy and rehabilitation. Although Article 448 Civil Code itself does not prejudice the premises of liability, in accordance with the prevailing approach, not only unlawfulness of an act is required but that act must also be a culpable one.[24] In case of Article 4 APR, however, the legislator's

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[22] M. Safjan, *Kilka refleksji wokół problematyki zadośćuczynienia pieniężnego z tytułu szkody wyrządzonej pacjentom* [Several comments on the issue of pecuniary compensation for harm caused to patients], PiM 1/2005 (18, Vol. 7), p. 8; M. Wałachowska, *Zadośćuczynienie pieniężne za doznaną krzywdę* [Pecuniary compensation for sustained harm], Toruń 2007, p. 315.

[23] M. Safjan, *Kilka refleksji…* [Several comments...], p. 11.

[24] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna* [Liabilities – General part], Warsaw 2016, p. 221; M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2008. p. 1315 ff; M. Safjan, *Nowy kształt instytucji zadośćuczynienia pieniężnego* [A new shape of the conception of pecuniary compensation], [in:] M. Bączyk (ed.), J.A. Piszczek, E. Radomska, M. Wilke, *Księga pamiątkowa ku czci Profesora Leopolda Steckiego* [Jubilee book for Professor Leopold Stecki], Toruń 1997, p. 263 ff; B. Lewaszkiewicz-Petrykowska, *W sprawie wykładni art. 448 k.c.* [On the interpretation of Article 448 Civil Code], PS No. 1, 1997, p. 6 ff; J. Pietrzykowski, *Nowelizacja kodeksu cywilnego z dnia 23 sierpnia 1996 r.* [Amendment of the Civil Code of 23 August 1996], PS No. 3, 1997, p. 3 ff; B. Kordasiewicz, *Cywilnoprawna ochrona prawa do prywatności* [Civil law protection of privacy right], KPP 2000, No. 1, p. 48; A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową* [Compensation for non-pecuniary harm], Bydgoszcz 1999, p. 212; also compare the Supreme Court judgement of 12.12.2002, V CKN 1581/00, OSN 2004, No. 4, item 53; Supreme Court judgement of 15.6.2005, IV CK 805/04, Legalis; Supreme Court judgement 11.12.2013, IV CSK 188/13, Legalis. Different opinion in: G. Bieniek,

will concerning the principle on which liability for a patient's harm should be based does not raise any doubts. The provision lays down *expressis verbis* fault as a condition for ruling compensation.

In case of persons working in the medical professions, the event is most often manifested in the form of culpable conduct, activity or omission departing from guidelines that are binding for the persons on the basis of the current standards of healthcare services, especially when this conduct is in conflict with the principles of the current medical knowledge, available methods and measures of preventing, diagnosing and treating diseases, rules of professional ethics and due diligence. Those unquestionable basic criteria for the way of providing healthcare services are laid down in special statutory regulations concerning particular medical professions, e.g. Article 4 of the Act on the professions of a physician and a dentist,[25] Article 11 of the Act on the professions of a nurse and a midwife,[26] or Article 11 of the Act on the State Medical Rescue Service.[27] On the other hand, the fault of a medical entity consists in failure to fulfil obligations connected with the nature and aim of its activity.[28] Thus, it may be inappropriate organisation of a medical institution, a lack of competent personnel, insufficient qualifications of its personnel, inappropriate conditions for a surgery or treatment as well as other instances of defective management of the process of treatment.[29]

2. SIGNIFICANCE OF OBJECTIVE ASSESSMENT OF A PATIENT'S HARM

One of the elements of a claim for compensation that is most difficult to establish is the determination of the amount of money the aggrieved should be paid. There are no clear criteria laid down in statute. The legislator only indicated that the sum granted for compensation should be "appropriate" to the harm caused. Eventually, courts and law theoreticians made attempts to establish the criteria for determining the amount of money respective to the harm caused. It is commonly approved that in order to determine the amount of compensation on the basis of Article 445 or 448 Civil Code, a court should take into account the size of the non-pecuniary harm, i.e. the level and time of physical and psychical pains,[30] and consider a number of other circumstances that may have an influence on the scope of pains suffered, such as

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[in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia: Zobowiązania* [Commentary on the Civil Code. Book Three: Liabilities], Vol. I, Warsaw 2003, p. 455.

[25] Act of 5 December 1996, Journal of Laws [Dz.U.] of 2015, item 464.

[26] Act of 15 July 2011, Journal of Laws [Dz.U.] of 2014, item 1435.

[27] Act of 8 September 2006, Journal of Laws [Dz.U.] of 2016, item 1868.

[28] B. Lewaszkiewicz-Petrykowska, *Wina jako podstawa odpowiedzialności z tytułu czynów niedozwolonych* [Guilt as the basis of liability for prohibited acts], Studia Prawniczo-Ekonomiczne 1969, p. 132.

[29] M. Nesterowicz, *Prawo medyczne...* [Medical law...], p. 338.

[30] Compare, the Supreme Court ruling of 19.10.1961, II CR 804/60, OSPiKA 1962, No. 6, item 155. Compare also the Supreme Court ruling of 15.12.1965, II PR 280/65, OSNCP 1966, No. 10, item 168.

e.g. irreversibility of the consequences of the infringement, the type of profession, prospects, the feeling of social uselessness, age, gender, life helplessness and other similar factors.[31]

Therefore, it is not sufficient to prove that a given harmful event has really caused consequences in the sphere of non-pecuniary rights and interests of the aggrieved patient. It is also necessary to determine how those consequences have been reflected in the entirety of interests, i.e. to determine the size and intensity of individual physical and psychical pains. The aggrieved is not awarded compensation for the injury or health disorder but for the non-pecuniary damage resulting from it.[32] The physical and psychical pains resulting from the infringement of personality rights decide about ruling compensation as well as its amount. However, the intensity of harm is a phenomenon difficult to measure because it takes place in a person's psyche and depends on his/her sensitivity.[33] Everyone has their own internal attitude towards various phenomena and gives them an individual level of importance. A person's internal hierarchy of highly valued rights translates directly into a different reaction to the negative influence of those values. "For one person truth, beauty and freedom may be at the top of the list and thriftiness, order and tidiness at the bottom; for another person it can be quite the opposite".[34] Individual sensitivity may cause that the consequences of the infringement of the same non-pecuniary right may result in really severe consequences for one person and be quite soft for another.

That is why, when determining the amount of compensation, it is necessary to use an objective method of assessment of the consequences of the infringement of personality rights and other non-pecuniary interests. There were opinions in the past that, while explaining the essence of personality rights, it is necessary to use a subjective concept proposed mainly by S. Grzybowski, who held that personality rights are "individual values from the world of feelings, the state of

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[31] See, the resolution of the full bench of the Supreme Court Civil Chamber of 8.12.1973, III CZP 37/73, OSNC 1974, No. 9, item 145, and the Supreme Court judgements of 15.12.1965, II PR 280/65, OSNCP 1966, No. 10, item 168; of 4.06.1968, I PR 175/68, OSNCP 1969, No. 2, item 37; of 10.10.1967, I CR 224/67, OSNCP 1968, No. 6, item 107; of 13.3.1973, II CR 50/73, unpublished; of 18.12.1975, I CR 862/75, unpublished; of 19.08.1980, IV CR 283/80, OSNCP 1981, No. 5, item 81; of 10.12.1997, III CKN 219/97, unpublished; of 11.7.2000, II CKN 1119/98, unpublished; of 12.10.2000, IV CKN 128/00, unpublished; of 12.09.2002, IV CKN 1266/00,unpublished; of 30.01.2004, I CK 131/03, OSNC 2005, No. 2, item 40; of 28.06.2005, I CK 7/05, unpublished; of 5.12.2006, II PK 102/06, OSNP 2008, No. 1–2, item 11; of 9.11.2007, V CSK 245/06, OSNC-ZD 2008, No. D, item 11; of 17.09.2010, II CSK 94/10, OSNC 2011, No. 4, item 44; of 12.07.2012, I CSK 74/12, unpublished, and of 30.01.2014, III CSK 69/13, unpublished.

[32] Z. Radwański, *Zadośćuczynienie pieniężne za szkodę niemajątkową* [Pecuniary compensation for non-pecuniary harm], Poznańskie Towarzystwo Przyjaciół Nauk. Faculty of History and Social Sciences. Reseach of the committee of social sciences, Volume VII, Book 1, Poznań 1956, p. 173.

[33] J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym* [A model of pecuniary compensation due to non-pecuniary harm under the Civil Code], Warsaw 2010, p. 234.

[34] M. Rokeach, *Beliefs, attitudes and values. A theory of organization and change*, San Francisco, Washington, London 1972, p. 124, citation after: M. Misztal, *Problematyka wartości w socjologii* [The problem of values in sociology], PWN, Warsaw 1980, p. 68.

human psychical life (…). The human feeling, the undisturbed state of psychical life is subject to protection".[35] However, it is necessary to approve of the presently common opinion that when analysing the essence of personality rights and assessing the consequences of their infringement, i.e. when determining the scope of harm suffered, it is necessary to use the objective criterion referring to opinions adopted in the society.[36] The objective criterion for the assessment of the harm caused consists, as a rule, in taking into consideration only rational reactions of the aggrieved to the given damage to his or her non-pecuniary rights and interests. Thus, in this scope, individual systems of values of members of the community play a significant role in the process of developing legal protection of a person's personality rights. Determining the structure of importance of different personality rights, they also make it possible to explain and predict most frequent human reactions to their infringement. Thanks to that, it is possible to determine what a person's "normal" sensitivity and "typical" reaction to the infringement of the right are, and then to adopt those criteria as a starting point for the assessment of the scope of harm the aggrieved party has sustained.

Indeed, it turns out that there is no infringement of personality rights when the hardship caused to another person, in accordance with the opinions that are common in the community, is the hardship of little significance, i.e. does not exceed the threshold from which the infringement of personality rights starts.

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[35] S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego* [Protection of personality rights under general provisions of civil law], Warsaw 1957, p. 78; by the same author, [in:] W. Czachórski (ed.), *System prawa cywilnego, t. I, Część ogólna* [Civil law system, Vol. I, General Part], Ossolineum 1974, p. 297. Also A. Wolter, *Prawo cywilne* [Civil law], Warsaw 1986, p. 178; similar opinions were expressed in the judicature in the Supreme Court judgements of 19.09.1968, II CR 291/68, OSN 1969, No. 11, item 200, with a gloss by A. Kędzierska-Cieślak, PiP No. 5, 1970, p. 818 ff; of 12.07.1968, I CR 252/68, OSN 1970, No.1, item 18, with a gloss by A. Kędzierska-Cieślak, PiP No. 8–9, 1970, p. 417 ff.

[36] Compare, inter alia, A. Szpunar, *Ochrona dóbr osobistych* [Protection of personality rights], Warsaw 1979, p. 107; J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych* [Pecuniary protection of personality rights], Warsaw 1975, p. 29; J.S. Piątkowski, *Ewolucja ochrony dóbr osobistych* [Development of protection of personality rights], ZN IBPS 1983, p. 20 ff; A. Cisek, *Dobra osobiste i ich niemajątkowa ochrona w kodeksie cywilnym* [Personality rights and their non-pecuniary protection in the Civil Code], Wrocław 1989, p. 39; by the same author, [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2011, p. 56; P. Machnikowski, [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary] Warsaw 2014, p. 59; S. Dmowski, [in:] S. Dmowski, S. Rudnicki, (eds), *Komentarz do kodeksu cywilnego* [Commentary on the Civil Code], Warsaw 2009, p. 108; S. Rudnicki, *Ochrona dóbr osobistych na podstawie art. 23 i 24 k.c. w orzecznictwie Sądu Najwyższego w latach 1985–1991* [Protection of personality rights under Articles 23 and 24 Civil Code in the Supreme Court judgements in the years 1985–1991], Przegląd Sądowy 1992, p. 34; In the judicature, compare, inter alia, the Supreme Court judgement of 16.01.1976, II CR 692/75, OSN 1976, No. 11, item 251 with a gloss of approval of the rule by J.S. Piątowski, NP. 1977, No. 7–8, p. 1144 ff; Supreme Court judgement of 25.04.1989, I CR 143/89, OSP 1990, No. 9, item 330 with a gloss of approval of the rule by A. Szpunar; judgement of the Appellate Court in Kraków of 13.12.1991, I ACr 363/91, OSA in Kraków, year I, Bielsko-Biała 1993, item 62, p. 218; judgement of the Appellate Court in Łódź of 28.08.1996, I ACr 341/96, OSA 1997, No. 7–8, item 43 with a gloss by T. Grzeszak, MoP No. 8, 1997, p. 318; Supreme Court judgement of 11.03.1997, II CKN 33/97, OSN 1997, No. 6–7, item 93; of 23.05.2002, IV CKN 1076/00, OSN 2003, No. 9, item 121; Supreme Court judgement of 28.02.2003, V CK 308/02, OSN 2004, No. 5, item 82.

The level of distress suffered by the aggrieved party is important when it exceeds that threshold.[37] Thus, the scope of the harm sustained cannot be insignificant. Insignificance of harm is one of the reasons why courts refuse to rule compensation, which the representatives of jurisprudence and the judicature do not question.[38] Compensation for non-pecuniary damage is not an obligatory ruling but an optional decision.[39] The principle of optionality results from the phrase used by the legislator in Articles 445 and 448 Civil Code: "a court may rule".[40] The discretion to adjudicate on compensation in a given case is called "a court's right". That is why, meeting the criteria for liability for harm caused does not result in a patient's disposal of a claim because this depends on a discrete, to some extent, decision of a court. Optionality of ruling compensation means that a court has the right to assess whether, in a particular case, there are sufficient circumstances meeting the criteria for the refusal of compensation. Consistently, the legislator maintained the rule in the content of Article 4 APR.

At the same time, what is rightly noticed in the literature, being a member of the community and functioning in it is necessarily connected with some kind of mutual interference into the sphere of broadly understood personality rights.[41] It is assumed that until the interference is insignificant and does not exceed a certain threshold acceptable in our culture, no one should speak about harm.[42] It seems that the circumstance of taking part in the relations resulting from the provision of healthcare services is rich in situations when we deal with such interference. For instance, calling patients out loud in the waiting room with the use of their names, which is a common practice, is such unlawful interference. Also patients' short visits to physicians with the surgery door left open infringe their right to get respect for their intimacy and dignity. It seems, however, that the recognition of some activities within the limits of conventional interference as not causing harm results not only from rational assessment but also from the fact that such interference is necessary for more efficient functioning in the community.

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[37] M. Pazdan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2013, p. 94; by the same author, [in:] M. Safjan (ed.), *System prawa prywatnego. Prawo cywilne – część ogólna* [Private law system. Civil law – General Part], Warsaw 2012, p. 1234; P. Nazaruk, [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2014, p. 59.

[38] P. Granecki, *Odpowiedzialność sprawcy szkody niemajątkowej na podstawie art. 448 k.c.* [Responsibility of a perpetrator of a non-pecuniary harm under Article 448 Civil Code], p. 109; J. Jastrzębski, *Kilka uwag o naprawieniu szkody niemajątkowej* [Comments on repairing the non-pecuniary damage], Palestra issue 3–4, 2005, p. 42.

[39] Supreme Court judgement of 15.12.1999, III CKN 339/98, OSP 4/2000, item 66, however compare the Supreme Court judgement of 19.10.2011, II CSK 721/10, Legalis; Constitutional Tribunal judgement of 7.02.2005, SK 49/03, OTK-A 2005, No. 2, item 13.

[40] Supreme Court judgement of 12.05.1951, C 646/50, Zb. Urz. item 22/52; *ibid.*, resolution of seven judges of 15.12.1951, C 15/51, Zb. Urz. item 3/53; Supreme Court judgement of 15.05.1951, C 109/51, Zb. Urz. item 23/52; Supreme Court judgement of 21.04.1951, C 25/51, Zb. Urz. item 43/52; Supreme Court judgement of 30.06.1951, C 649/50, Zb. Urz. item 44/52.

[41] P. Machnikowski, [in:] E. Gniewek (ed.), P. Machnikowski, *Kodeks cywilny. Komentarz. VI wydanie* [Civil Code. Commentary. 6th edition], Warsaw 2014, p. 63.

[42] *Ibid*.

The objective conception of the assessment of infringement consequences assumes evident significance in relation to such personality rights, especially important to a patient, as dignity, honour, bodily integrity, good reputation, the right to privacy or the freedom of conscience where the assessment of infringement is most often made through the prism of subjective psychical feelings of the aggrieved party. To give an example of reference made by a court to objective rules of assessing the level of consequences of the infringement of non-pecuniary interests, one can present a case heard by the Appellate Court in Kraków,[43] in which a patient sued a hospital and requested that it should make a specified declaration and pay a compensation for harm sustained as a result of giving an unauthorised third person access to medical documents. However, the court held that, objectively, giving another physician, a professor of medical sciences, access to medical documents for the purpose of consultation, even in the event of the infringement of APR in the form of insufficient protection of personal data, is not related to the common feeling of the breach of medical secrecy in the way that violates personality rights. Although the court stated that the defendant undoubtedly was not authorised to give access to the entire documents (with the patient's personal data), such an activity does not automatically constitute the infringement of the patient's personality rights. In this case, indeed, the data protected were given to a specialist physician, and the fact that another physician learns about the course of complicated childbirth, in objective social assessment, does not harm feelings and is not deemed to be interference into privacy. Moreover, there is no risk of making the obtained information public because the other physician is also obliged to comply with the rules of professional confidentiality and medical ethics.

The assessment whether personality rights have been infringed and to what extent cannot be made on the basis of individual sensitivity of the party concerned but on objective social reaction[44] and, moreover, with the opinions in the community and not the social reaction to the defendant's given conduct taken into consideration.[45] The application of the objective conception is of special importance as, on the one hand, it makes it possible to eliminate pathological oversensitivity of the aggrieved that usually exists still before sustaining harm[46] and, on the other hand, to dismiss an action of the barraters, excessively litigious, oversensitive men.[47] Although patients' awareness of the scope of their rights in connection with healthcare services provision is still very low in Poland, its evident growth can be observed nowadays. Inter alia, the institution of the Commissioner for Patients' Rights and propagation of the rights by the media contribute to that. This creates a threat that in the future, patients will become more and more demanding not only in relation to physicians but also the whole healthcare system. It can directly translate into multiplicity of litigations because

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[43] Judgement of the Appellate Court in Kraków of 3.09.2015, I ACa 679/15.

[44] Supreme Court judgement of 16.01.1976, II CR 692/75, OSNCP 1976, No. 11, item 251, with a gloss by J.S. Piątowski, NP 1977, No. 7–8, p. 1144.

[45] Supreme Court judgement of 29.09.2010, V CSK 19/10, OSN 2011, No. B, item 37.

[46] A. Śmieja, [in:] A. Olejniczak (ed.), *System prawa prywatnego. Prawo zobowiązań – część ogólna. Tom 6, wydanie II* [Private law system. Liability law – General Part, 6th Volume, 2nd edition], Warsaw 2014, p. 736.

[47] P. Nazaruk, [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz. Wydanie II* [Civil Code. Commentary, 2nd edition], Warsaw 2014, p. 60.

of seeming harms sustained as a result of even minor hardships resulting from the treatment process. The assessment of the size of harm with the use of objective criteria is to counteract such threats. On the other hand, an objective assessment of harm makes it possible to notice the suffering of people who, because of their incomplete intellectual development connected with age or mental condition, cannot properly assess or express the scope of harm they sustain as well as the situation in which they are.[48] In case of the aggrieved patients, it is especially evident in relation to the prenatal damage and situations when, due to inappropriate treatment, the harmed person is in the state of cerebral coma, i.e. in the "vegetative" state. It can be even said that the objective way of assessing the consequences of infringements is in particular frequently applied to assess patients' harm.

2.1. COMPENSATION AWARDED TO THE AGGRIEVED PATIENTS IN CEREBRAL COMA

The present development of medicine allows people with permanent damage to their brain resulting in coma to be kept alive for many years. At the same time, inappropriate medical conduct, most often in the course of surgeries performed under general anaesthesia, leads to inflicting such consequences. General anaesthesia eliminates consciousness of a patient and perception of pain controlled by physicians and other medical personnel. The physicians and special devices must monitor basic living functions of the patient's organism (blood circulation, respiration). Many surgeries can only be performed under general anaesthesia. However, it is a state that poses many threats to the body. There are many factors behind that, e.g. age or weight. Many serious complications may take place during general anaesthesia; these can be circulatory or respiratory collapse, anaphylaxis due to anaesthetic agents, vomiting and passage of gastric content to the respiratory tract, embolism, etc. That is why, based on the contemporary medical knowledge and due diligence required from medical personnel, all possible surgeries on a patient in the state of general anaesthesia are expected to be performed with the highest conscientiousness and carefulness. Indeed, it quite often happens that during the provision of healthcare services in the form of a surgical operation performed under general anaesthesia, there are situations when the surgical intervention is successfully performed and in compliance with medicinal art, however, the omission of appropriate care after the operation, still before the patient is woken up, may lead to circulatory and respiratory collapse, and as a result to cerebral coma.[49]

Such a person undoubtedly is the aggrieved because he or she sustains persistent damage to health as a result of culpable inappropriate medical procedure. There is a question, however, whether an unconscious person who cannot feel actual harm should be awarded compensation and, if so, in what amount. Case law in

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[48] M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code. Commentary. Volume I], Warsaw 2008, pp. 1436–1437.

[49] A. Kubler (ed.), 3rd Polish edition of *Anestezjologia. Tom I* [Anaesthesiology. Volume I], Wrocław 2010, p. 699.

Poland as well as in many European countries (Germany, England, France) seems to be established. Courts unanimously hold that such people should be awarded damages.[50] It is worth emphasising that in French jurisprudence, there are also different opinions. Opponents of awarding compensation in such circumstances believe that the necessary requirement for damages is the aggrieved person's consciousness. Since such people cannot feel the harm, only their needs, i.e. costs of hospitalisation, should be compensated.[51] According to the supporters of awarding compensation to people in cerebral coma, any harm, regardless of the state in which the aggrieved is, should be awarded damages. On the other hand, refusal to award them would be unfair and it would favour perpetrators and their insurers, while the aggrieved would actually remain deprived of happiness and life pleasures.[52]

The issue was solved in the Supreme Court ruling of 16 April 2015.[53] The plaintiff, being a car passenger, was injured in an accident. Her loss of health was calculated and quoted at 230%. Since the accident, she has been in the vegetative state. All the three court instances had no doubts in this case. The lack of possibility of feeling the harm cannot deprive the plaintiff of compensation. The liability of the perpetrator and the insurer was unquestionable. The problem was what amount of compensation should be awarded. The district court ruled PLN 250,000 in damages. The appellate court, emphasising the application of objective criteria in the analysis of the essence of personality rights, stated that the compensation ruled by the court of first instance was inadequately low in relation to the harm sustained and raised the amount to PLN 500,000. Next, the Supreme Court once again raised damages to PLN 700,000. The Court rightly emphasised that: "The right to compensation does not depend on the possibility of assessing the extent of the harm by the aggrieved party and the possibility of getting to know how the person feels the harm. On the basis of objective criteria for the assessment of the extent of harm, in case the conditions under Article 445 §1 Civil Code are met, it is possible to award adequate compensation to persons who, because of the age or psychical state, are not aware of the harm sustained and cannot assess its extent". This attitude of the Supreme Court should be absolutely approved of.

The defendants in such cases usually refer to the circumstance that since compensation aims to first of all soothe the physical and psychical pains, the person in cerebral coma who does not feel such pains is not entitled to damages. However,

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[50] See, M. Nesterowicz, *Prawo medyczne. Komentarze i glosy do orzeczeń sądowych. Wydanie II,* [Medical law. Commentaries and glosses on court judgements, 2nd edition], Warsaw 2014, p. 484; by the same author, *Zadośćuczynienie pieniężne na rzecz poszkodowanych w stanie wegetatywnym na skutek śpiączki mózgowej (na tle wyroku Sądu Najwyższego z 16.04.2015 r., I CSK 434/14)* [Pecuniary compensation for the aggrieved in the vegetative state as a result of cerebral coma (in the light of the Supreme Court judgement of 16 April 2015, ICSK 434/14)], Przegląd Sądowy No. 6, 2016, p. 28 and Polish and foreign case law referred to therein; M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], p. 40, 69 ff, 93 ff and foreign case law referred to therein.

[51] See, R. Barrot, *Le dommage corporel et sa compensation,* Litec 1988, p. 385, citation after: M. Wałachowska, *Zadośćuczynienie pieniężne…* [Pecuniary compensation...], p. 70.

[52] M. Nesterowicz, *Zadośćuczynienie pieniężne na rzecz poszkodowanych…* [Pecuniary compensation for the aggrieved...], p. 29 and French literature listed therein; M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], p. 70.

[53] I CSK 434/14, LEX No. 1712803.

the harm sustained is real; the persons lost an opportunity to live a normal life and the lack of physical and psychical fitness deprived them of the possibility of professional development, having a family or enjoying all life pleasures. That is why, they are entitled to compensation.[54]

2.2. COMPENSATION TO PATIENTS HARMED IN THE PRENATAL PERIOD

Straight at the beginning of the discussion of this issue, it is worth emphasising that a human being in the prenatal phase of life is subject to special protection.[55] First of all, he has the fundamental right to health and life protection referred to in Articles 38 and 68(1) of the Constitution of the Republic of Poland. Such an interest as life is subject to constitutional protection at every stage of development, thus also in the prenatal period. That is why, also the entitlement to the legal protection of health in this period is unlimited.[56] On the other hand, the legal protection of health of the conceived human being is implemented by the right to healthcare services in this period. The legal definition of a patient laid down in the provisions of the Act on patients' rights, in fact, does not directly indicate that the term also covers a foetus, however, the Act lists various groups of patients, including minors, which is aimed at regulating the rights of children. On the other hand, in accordance with the definition laid down in Article 2(1) of the Act on the Children's Ombudsman,[57] a child is any human being from the moment of conception to the age of majority. Therefore, it is rightly emphasised in the literature that there are no obstacles to assume that the definition also covers the period of prenatal development.[58] Consequently, there should be no doubts that a foetus, in the period when the mother is provided pregnancy-related care, should be treated as a patient and as such may also become aggrieved as a result of the process of treatment. The foetus is also provided healthcare services not only indirectly through the care for the pregnant mother but also directly in the course of surgical treatment performed on him/her in the mother's womb thanks to the advanced medical techniques.

Although civil law does not equip a conceived child with legal capacity, in case someone's conduct, activity or omission causes harm to him/her, when he/she is born, he/she may claim redress to the harm sustained before birth based on

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[54] See, M. Nesterowicz, *Prawo medyczne. Komentarze i glosy…* [Medical law. Commentaries and glosses...], p. 484 ff; *ibid*., *Zadośćuczynienie pieniężne na rzecz…* [Pecuniary compensation for the aggrieved...], p. 21 ff. M. Wałachowska, *Zadośćuczynienie pieniężne...* [Pecuniary compensation...], pp. 40, 69 ff, 93 ff.

[55] More on this issue in: D. Karkowska, *Prawa pacjenta, wyd. II* [Patients' rights, 2nd edition], Warsaw 2009, pp. 100–101.

[56] Constitutional Tribunal ruling of 28 May 1997, K 26/96.

[57] Act of 6 January 2000 on the Children's Ombudsman (Journal of Laws [Dz.U.] No. 6, item 69, as amended).

[58] J. Ciszewski, *Prawa pacjenta w aspekcie odpowiedzialności lekarza za niektóre szkody medyczne*, [Patents' rights in the light of doctor's responsibility for some medical harm], Gdańsk 2002, p. 13 ff; D. Karkowska, *Ustawa o prawach pacjenta…* [Act on patients' rights...], p. 77.

Article 446[1] Civil Code. With the use of this regulation, the legislator protects the future interests of the conceived child. Therefore, the necessary requirement for their implementation is his/her live birth. Thus, if defectively undertaken activities of the medical personnel in relation to the provision of healthcare services in the prenatal period caused non-pecuniary damage to a child born alive, he/she may through his/her statutory representatives or in person within the period of two years after reaching the age of majority claim compensation for the harm sustained.

The state of pregnancy is a circumstance of health that is so vulnerable to a risk of many complications that any medical activities in this period should be undertaken with the highest conscientiousness so that they lead to successful results. Some of the numerous reasons for complications during pregnancy and delivery being the physicians' fault and resulting in a conceived child's harm include: failure to diagnose or late diagnosis of congenital or genetic disorders, failure to refer a mother to specialist genetic tests, failure to diagnose or late diagnosis of the mother's disease endangering her life and the life of the foetus, disrespect for motherly or foetal reasons for planned caesarean section, a lack of proper monitoring of the mother's or foetus' state during delivery, especially disrespect for reasons for emergency caesarean section and as a result failure to perform it or delayed performance, unskilful hand grips during natural vaginal birth or too strong pharmacological induction of labour and birth.[59]

Defective medical treatment of a pregnant woman in relation to pregnancy and delivery often leads to disastrous health complications to a child born this way. These include, inter alia, foetal hypoxia, intracerebral haemorrhage and as a result damage to the brain leading to persistent cerebral palsy, clavicle fracture, brachial plexus injury and so on.[60] At present, patients' awareness of the possibility of claiming compensation for damage caused during medical treatment is constantly growing. More and more frequently, the aggrieved newborn baby's parents as his/her statutory representatives take legal action on his/her behalf and claim compensation adequate to the harm sustained straight after the child's birth.

That is why, also in this case, it may occur to be controversial whether the newborn baby is entitled to compensation if due to his/her incomplete intellectual development connected with age or mental condition (provided that the harm caused resulted in persistent damage to the brain), he/she can neither properly assess nor express the scope of harm sustained. In fact, a court awarding compensation also takes into account the consequences of the damage that may most probably occur in the future. Thus, if as a result of defectively performed prenatal healthcare a sick child is born, a court also takes into consideration all the related hardships that he/she will have to suffer from in the whole period of his future life. However, there is no doubt it can be stated that at the moment of claiming compensation for harm and often also at the time of ruling, the aggrieved baby is able neither to assess nor

[59] J. Szczapa, *Neonatologia. Wydanie II* [Neonatology. 2nd edition], PZWL, Warsaw 2015, p. 63 ff; W. Kawalec, R. Grenda, H. Ziółkowska, *Pediatria. tom 2* [Paediatrics. Vol. 2], PZWL, Warsaw 2013, p. 745 ff; J. Gadzinowski, *Neonatologia* [Neonatology], Warsaw 2015, pp. 1, 6–7, 10–11.

[60] J. Szczapa, *Neonatologia...* [Neonatology...], p. 63 ff.

to express it. It also often happens that a baby dies as a result of the damage just a few months after birth and the initiation of litigation. Then, the potential harm could take place only in the period when the aggrieved was really able to feel it. However, also in this case, applying the objective criterion of explaining the essence of the results of personality rights infringement, it is necessary to recognise that the damage to the person concerned is real.

In this place, it is purposeful to discuss the way in which the Supreme Court treats the issue of compensation to the babies aggrieved in the prenatal period. The example is a tragic case of a child who sustained damage during the delivery. The case was referred to the Supreme Court for adjudication in 2011.[61] In 2008, a pregnant woman, the mother of the aggrieved child, was admitted to hospital to give birth to her baby. However, the birth did not start in the planned term so doctors decided to induce labour. The attempts proved ineffective. Although there were medical reasons for caesarean section, the attempts to induce natural vaginal birth were continued and took nine days. The baby was eventually born after a 14-hour delivery but without any signs of life. It resulted in hypoxic ischemic encephalopathy with permanent brain damage. Having heard the case, the District Court in Tarnobrzeg held that in the short period of life (the baby died 14 months after birth), the plaintiff was unimaginatively sick, "helpless and inert in the whole medical procedure that served only and exclusively maintaining the baby's basic living functions". The Court stated that the baby was excessively harmed and it is not possible to calculate or rationally estimate his pains. The court ruled PLN 1,000,000 in damages and substantiated the decision this way: "just in the realities of this case, the compensation ruled is adequate and if the court had not accepted the claim, a claim for a similar amount in compensation would be impossible to be ruled in any other case". Inability to feel the harm by the baby did not constitute an obstacle to award one of the highest compensation amounts at that time. However, the second instance court, hearing the appeal against the judgement of the District Court in Tarnobrzeg, reduced the compensation to PLN 200,000 explaining that although the baby felt physical pain, he did not suffer psychical pain connected with the feeling of harm, did not benefit from the compensation, which his parents as statutory heirs inherited. The plaintiffs made a cassation appeal to the Supreme Court, which reversed the decision of the Appellate Court in Rzeszów and dismissed the appeal. In the justification, the Supreme Court stated that the circumstance that the baby did not have a developed psyche could not mean that he did not suffer psychical pain, either. Thus, the final sum of compensation was PLN 1,000,000 and was awarded to the heirs of the child.

The case is one of the numerous instances of causing damage to a child's health in the prenatal period, the signs of which are evident just after birth. Courts hearing cases concerning claims for compensation for damage sustained before delivery have no doubts that, although there is a lack of sufficient consciousness of the aggrieved, the minors are entitled to be awarded damages. It would be unbelievable to wait

[61] Supreme Court judgement of 24.03.2011, I CSK 389/10, OSNC-ZD 2012/1, item 22, with a gloss by M. Neterowicz, Przegląd Sądowy No. 7–8, 2012, pp. 197–202.

with adjudication until a child reaches a state of adequate intellectual development to be able to understand and express what his or her condition is. The more so, as due to the extent of the damage caused to their health, there is no certainty how long they are going to live.

3. CONSLUSIONS

The circumstance of being provided healthcare services increases the risk of sustaining various types of non-pecuniary harm that result in bodily injuries or health disorders, which are the most painful ones for the aggrieved. In this context, claiming compensation for the harm sustained by people who, because of their mental state or incomplete intellectual development connected with age, have no ability to perceive harm proved to be controversial. That is why, it is necessary to note that inappropriate medical proceedings may lead to such damage to a patient's health that often results in severe and permanent damage to the brain. The aggrieved patient is often in cerebral coma, which results in the "vegetative" state. A patient does not feel anything, does not react to stimuli, is unconscious and has no contact with the surrounding world. Quite commonly, harm to patients' health is also made in the prenatal period, which becomes evident straight after birth when the psyche is not yet developed to the extent letting the patient assess the harm. However, it must be stated that the right to compensation does not depend on the possibility of assessing the extent of the sustained harm by the aggrieved party. The subjective feelings of the aggrieved are not important. What is important is the reference to objective and rational reactions of the community. An objective method of assessing the extent of harm is important in determining compensation to the aggrieved patients, which also makes it possible to provide compensation for the results of tragic medical errors even if the aggrieved cannot feel them.

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OBJECTIVE ASSESSMENT OF HARM IN ORDER TO ESTABLISH COMPENSATION TO THE AGGRIEVED PATIENT

Summary

The article presents the issue of using objective methods to assess the scale of harm in the process of establishing financial compensation for patients injured in the course of treatment. The study can be divided into two parts. The first one discusses the factual and legal situation of a person who is a healthcare beneficiary in the context of the protection of his or her personality rights. This section also presents the legal grounds for compensatory damages for providing defective healthcare services. The second part shows the significance of the objective method of assessing the extent of harm inflicted, as exemplified by patients injured during a prenatal period and patients in the cerebral coma.

Keywords: harm, financial compensation, patient, health services, personality rights, prenatal injuries, cerebral coma

ZOBIEKTYWIZOWANY SPOSÓB OCENY ROZMIARU KRZYWDY PRZY USTALANIU ZADOŚĆUCZYNIENIA PIENIĘŻNEGO NA RZECZ POSZKODOWANEGO PACJENTA

Streszczenie

Artykuł przedstawia problematykę posługiwania się zobiektywizowanym sposobem oceny rozmiaru krzywdy przy ustalaniu zadośćuczynienia pieniężnego na rzecz poszkodowanego pacjenta. Opracowanie można podzielić na dwie części. W pierwszej omówiono sytuację faktyczną i prawną osoby będącej podmiotem świadczeń zdrowotnych w kontekście ochrony jej dóbr osobistych. W tej części przedstawione zostały również podstawy prawne kompensacji krzywdy wynikającej z wadliwości udzielania świadczeń zdrowotnych. W drugiej części ukazano znaczenie zobiektywizowanego sposobu oceny rozmiaru krzywdy na przykładzie pacjentów poszkodowanych w okresie prenatalnym oraz pozostających w śpiączce mózgowej.

Słowa kluczowe: krzywda, zadośćuczynienie pieniężne, pacjent, świadczenia zdrowotne, dobra osobiste, szkody prenatalne, śpiączka mózgowa

EU CITIZENSHIP: AN ELEMENT OF NATIONAL, EUROPEAN IDENTITY OR ONLY AN ADDITIONAL STATUS OF MEMBER STATES' CITIZENS?*

DOMINIKA HARASIMIUK**

1. INTRODUCTION

The legal situation of an individual in the European Union is one of the key issues of the EU law at present. The European Union citizenship plays a special role in the process of the union development. Its establishment based on the Treaty of Maastricht (TEU), supported by the codification in the treaty of the general principle of the fundamental rights protection, started the process of strengthening the European Union as an organisation that is not only economic but also political in nature. The issue of the conflicting identities: the European one, which can be assigned to the EU, and the national one, typical of the particular Member States, has been a great challenge to the European integration up till now. Indeed, it has been developed in a specific way. Remaining on the borderline between the EU law and national laws, it is both an addition to and a derivative of the national citizenship. In accordance with Article 9 TEU, every national of a Member State is a citizen of the Union and the citizenship of the Union is additional to and not to replace national citizenship. The complicated relationship between the national and the Union citizenship, which translates into the issues of coexistence of the European and national identities will be the subject of a detailed analysis in the successive parts of this article.

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2. EU CITIZENSHIP – AN INSTITUTION ON THE BORDERLINE BETWEEN NATIONAL LAW, THE EU LAW AND INTERNATIONAL LAW

The institution of the EU citizenship was created as an autonomous term typical of the EU law, however, being in a strong correlation with national law. In fact, the issue concerning the acquisition and loss of the EU citizenship is determined in the regulations on national citizenship of the particular Member States. This way, the EU law accepts the general principle of international law, according to which it is the sovereign right of all states to determine the mutual relations between the state and an individual in accordance with nationality law.[1] In international law, the principle is confirmed in positive law, including the European Convention on Nationality of 6 November 1997, where Article 3 (1) lays down that "Each State shall determine under its own law who are its nationals".[2] The above-mentioned rule was also specified at the Union level in Declaration no 2 annexed to the Treaty of Maastricht on nationality of a Member State, according to which the question whether an individual possesses the nationality of a Member State must be settled solely by reference to the national law of the Member State concerned.[3] Due to a strong connection between the EU citizenship and national regulations of particular Member States, it is necessary to analyse general conceptions and rules concerning national citizenship.

Citizenship is an extremely complex institution, which is the subject of interest for jurisprudence as well as sociology or political studies. Basically, in the normative dimension, citizenship is treated as an expression of bounds between the state and an individual. It is an institution that determines formal membership of an individual in an organised political community based on the existence of mutual rights and obligations.[4] As the Polish Constitutional Tribunal indicated, "citizenship consists in a strong legal bound between a given individual and a given state, the belonging of an individual to that state, and its essence is expressed in the entirety

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[1] States' competence to regulate citizenship was confirmed by the Permanent Court of International Justice in 1923 in an advisory opinion concerning Decrees on Citizenship of Tunisia and Morocco (P.C.I.J. Publications 1923, Series B, no. 4), and also by the International Court of Justice in the case *Nottebohm* (*Nottebohm Case (second phase*), judgement of 6 April 1955, I.C.J. Reports 1955, p. 20.), compare D. Pudzianowska, *Obywatelstwo w procesie zmian* [Citizenship in the process of change], Warsaw 2013, pp. 53–65.

[2] The Republic of Poland did not ratify the European Convention on Nationality. The ECN text unofficial translation into Polish available on: http://libr.sejm.gov.pl/tek01/txt/re/1997c.html [accessed on 8 July 2016]. For more on the ECN and the limitation of states' regulation freedom, compare W. Czapliński, *Problematyka obywatelstwa w aktualnych pracach Rady Europy* [The problem of citizenship in the current work of the Council of Europe], Studia Europejskie No. 2, 1998, pp. 50–53.

[3] OJ C 191 of 29 July 1992; the Declaration was adopted by the decision of the European Council in Edinburgh in 1992, concerning certain problems raised by Denmark in relation to the ratification of the Treaty on European Union. Compare, M. Condinanzi, A.A. Lang, B. Nascimbene, *Citizenship of the Union and freedom of movement of persons,* Leiden 2008, p. 6; E. Gulid, S. Peers, J. Tomkin, *The EU Citizenship Directive. A commentary,* Oxford 2014, p. 23.

[4] A. Bodnar, *Obywatelstwo wielopoziomowe. Status jednostki w europejskiej przestrzeni konstytucyjnej* [Multi-level citizenship: Status of an individual in the European constitutional space], Warsaw 2008, pp. 23–24.

of an individual and the state mutual rights and obligations, which are determined in the legal norms in force".[5] The concept of citizenship is strictly connected with the concept of a nation as a community of citizens. From the historical perspective, one can distinguish two basic models of the development of bounds between an individual and a state. They originate from the period of the French Revolution and the process of national states development that it started. The above-mentioned models reflect different understanding of the concept of a nation. In France, a nation, and thus a citizenship as a legal institution indicating the belonging to it, was based on the political community (demos). As A. Bodnar indicates, a French citizen is a person sharing common political values, attached to the achievements of the French Revolution, the Declaration of the Rights of Man and of the Citizen, and the republican model of government with no reference to ethnic roots.[6] The ethnic character of a nation (citizenship) is typical of the German model. It means that all citizens are members of a nation, which is not only understood as a political community but also a society based on common ethnic, historical, cultural, linguistic or religious roots. In the German model, the development of a state in a natural way precedes the development of a nation. In the French model, an ethnic element is of secondary importance and is not what forms citizenship.[7] The two models exerted influence on the legal rules determining access to citizenship. The French model was connected with the territorial criterion for acquiring citizenship (*ius soli*), and the German model with the principle based on the ties of blood (*ius sanguinis*). As D. Pudzianowska notices, at present, with the determination of legal norms concerning nationality, such strict divisions connected with the perception of a nation lost their significance. Instead, the changing actual circumstances, connected with the inflow of immigrants and openness of states' immigration policies, are more often taken into consideration.[8]

Thinking about citizenship as a basic institution determining the relationship between an individual and a state, one can notice that from the point of view of the state, it is mainly a legal relation. From the perspective of individuals and determination of their own belonging to the state, actual circumstances that build their identity are often more important. The state, determining the rules of acquisition or loss of citizenship, more and more often decides to take into account also the elements connected with the facts that help to define bounds between an individual and the state. These elements include, e.g.: the domicile, the knowledge of a language, the birthplace or marriage to a citizen of a given state.[9] This way,

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[5] Constitutional Tribunal judgement of 18 January 2012, Kp5/09.

[6] A. Bodnar, *Obywatelstwo…* [Multi-level citizenship...], p. 29.

[7] For more on the issue of constitutional models concerning a nation and the citizenship of France and Germany, see M. Rosenfeld, *The identity of the constitutional subjects. Selfhood, citizenship, culture and community*, London–New York, 2010, pp. 152–158.

[8] D. Pudzianowska, *Obywatelstwo…* [Citizenship...], pp. 87–88.

[9] *Ibid.*, pp. 65–55. In Polish law, in accordance with Article 34 of the Constitution of the Republic of Poland, the *ius sanguinis* principle was adopted; pursuant to it, Polish citizenship is acquired by birth to parents being Polish citizens. Apart from the acquisition of Polish citizenship by virtue of the law, the Act on citizenship of 2009 (Journal of Laws [Dz.U.] of 2012, item 161) lays down a possibility of granting citizenship of the Republic of Poland and recognition of a Polish

factual circumstances may have a significant impact on the existence of legal bounds resulting from regulations on citizenship.

Against that background, considering the relation of citizenship with a nation and bounds with a state, the EU citizenship acquires separate features. It is indeed supranational citizenship and its establishment cannot be treated as a moment that started the development of a nation at the Union level. Also, if we accept the opinion about ethnic roots of citizenship and a nation, in case of the Union citizenship, one cannot state that it was created based on the linguistically, culturally and historically bound community.[10] The Federal Constitutional Court drew attention to that in its judgement concerning the Treaty of Lisbon. The construction of the Union citizenship indicates that it is not a basis for establishing a uniform nation-like community on the European level.[11] The national community remains an element strictly connected with sovereign state government, which is the legitimate source of democratic identity. Due to the fact that there is no uniform "European people", the role of the EU citizenship is entirely different from that of its national equivalent. It is, through the establishment of rights typical of the EU citizens, to strengthen the position of an individual in the EU law and emphasise a political character of cooperation between the Member States. The creation of real bounds between a citizen and the EU as an international organisation is an extremely difficult task. In the initial period of the organisation's existence, it was emphasised that its importance was mainly symbolic because of relatively limited scope of entitlements or the lack of clearly indicated obligations to be imposed on the EU citizens. Moreover, the EU citizenship was long treated as "a new robe" of the already existing model of a market citizen who, thanks to his/her economic activeness, could make use of the internal market freedoms.[12]

Despite the secondary and additional character of the EU citizenship in relation to domestic citizenship, it is necessary to take into consideration that the competence of the Member States to shape the subjective scope of the EU citizenship with the use of domestic regulations is limited to some extent. In case a given issue goes beyond the scope of the EU law, the Member States cannot apply the principle of "effective

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citizen. In the two cases, factual circumstances laid down in statute are taken into consideration, including: sufficiently long residence in Poland, knowledge of the Polish language or information about sources of maintenance of the person concerned.

[10] The European Union motto – United in diversity – indicates that cultural and historical diversity is the foundation of the EU.

[11] FCC judgement of 30 June 2009 in the case 2 BvE 2/08 (Lisbon case), para. 346; for more on this judgement, compare P. Bała, *„Tożsamość konstytucyjna" a traktat z Lizbony. Tezy wyroku Federalnego Trybunału Konstytucyjnego z 30 czerwca 2009 r.* ["Constitutional identity" versus the Treaty of Lisbon: Theses of the Federal Constitutional Court of 30 June 2009], Ius Novum No. 2, 2010, p. 7; K. Wójtowicz, *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r. (K32/09)* [Maintenance of constitutional identity of the Polish State within the EU: comments in the light of the Constitutional Tribunal ruling of 24 November 2010 (K32/09)], Europejski Przegląd Sądowy No. 11, 2011, p. 4; F. Mayer, *Rashomon à Karlsruhe,* Revue Trimestrielle de Droit Européen Vol. 46, No. 1, 2010, p. 77.

[12] For more on the issue, together with literature referred to therein, compare D. Kostakopoulou, *European Union citizenship: Writing the future,* European Law Journal, Vol. 12, No. 5, September 2007, p. 625.

citizenship". It was confirmed in *Nottebohm* case in accordance with international public law. Pursuant to its assumptions, in case of dual citizenship, a third state may determine which of the two citizenships prevails and the international effectiveness of citizenship depends on the effectiveness of citizenship that is determined based on material criteria.[13] In *Micheletti* case, the Court of Justice of the EU rejected this approach.[14] It ruled that Spanish authorities could use the rules of effectiveness and recognise the individual holding dual citizenship (Italian and Argentinian) as an Argentinian citizen and withhold his freedom of establishment. Limiting the application of the principle of effective citizenship in the EU law, the Court followed the principle of non-discrimination based on the state-related origin. *Micheletti* case, apart from the application dismissal based on the EU law principle of effective citizenship, started the application of an important interpretational formula, according to which, determining the rules of domestic citizenship acquisition or loss, the Member States should comply with the EU law.[15] The above-mentioned rule was confirmed in *Rottmann* case,[16] which concerned the scope of the Member States' discretion over decisions on domestic citizenship withdrawal in a situation when such a decision at the same time causes a loss of the EU citizenship. Facing a very difficult task, the Court emphasised that this type of problem, due to its nature and consequences, was subject to the EU law. This means that the national rules on national citizenship, due to its effect on the EU citizenship, fall within the ambit of the European Union law. The Member States should exercise their competences in this respect in accordance with the EU law and the principle of proportionality. As a result, the Member States' freedom with regard to withdrawal of domestic citizenship is, at least theoretically, limited. This means that a decision like that in *Rottmann* case, depriving a citizen naturalised in Germany of his citizenship on the grounds that it was obtained fraudulently should have been reviewed by a national court examining the criterion of proportionality of its consequences for the EU citizenship status of the person concerned.[17] In its judgement, the Court

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[13] D. Pudzianowska, *Obywatelstwo…* [Citizenship...], pp. 60–61.

[14] CJ judgement of 7 July 1992 in the case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria,* ECLI:EU:C:1992:295.

[15] *Ibid*., para. 10.

[16] CJ judgement of 2 March 2010, in the case C-135/08, *Janko Rottmann v. Freistaat Bayern,* ECLI:EU:C:2010:104. For detailed discussion of the judgement, compare D.E. Harasimiuk, *Rola przepisów państw członkowskich przy określaniu zakresu podmiotowego obywatelstwa UE – uwagi na tle wyroku TSUE z 2 marca 2010 r. w sprawie Janko Rottmann przeciwko Freistaat Bayern, sygn. C-135/08*, [Role of the Member States' regulations in determining the subjective scope of the EU citizenship: Comments in the light of the CJEU judgement of 2 March 2010 in the case *Janko Rottmann v. Freistaat Bayern*, C-135/08], [in:] D.E. Harasimiuk, M. Olszówka, A. Zinkiewicz (ed.), *Prawo UE i porządek konstytucyjny państw członkowskich. Problem konkurencji i wzajemych relacji* [EU law and Member States' constitutional order: Competition and mutual relations issues], Warsaw 2014, pp. 42–54.

[17] D. Pudzianowska, *Warunki nabycia i utraty obywatelstwa Unii Europejskiej. Czy dochodzi do autonomizacji pojęcia obywatelstwa Unii?* [Grounds for acquisition and loss of the European Union citizenship: Does the concept of the Union citizenship become autonomous?], [in:] G. Baranowska, A. Bodnar, A. Gliszczyńska-Grabias (ed.), *Ochrona praw obywatelek i obywateli Unii Europejskiej. 20 lat – osiągnięcia i wyzwania na przyszłość* [Protection of the European Union citizens' rights: Twenty years of achievements and future challenges], Warsaw 2015, pp. 153–154.

indicated the elements that should be taken into consideration in the assessment of the proportionality of a legal measure of national citizenship withdrawal resulting in the loss of the EU citizenship. First of all, it is essential to examine whether the loss of citizenship is justified because of the seriousness of law violation by the citizen concerned, the length of time that has passed from the acquisition to the withdrawal of naturalisation, and also whether it is possible to recover the citizenship of the country of origin.[18] It is hard to unambiguously assess how deep the analysis of the proportionality of the national court's decision on citizenship withdrawal was. The ruling of the Court of Justice referring the assessment of proportionality to the national court makes the assumed limitation of the Member States' competence in the sphere of citizenship (exercising this competence in compliance with the EU law) solely theoretical and conditional, depending on the assessment made at the national level. As a result, one cannot speak about more advanced autonomy of the EU citizenship in relation to the domestic one, and the secondary nature of the former still remains its essential constituting feature.[19]

3. THE PRINCIPLE OF RECOGNISING NATIONAL IDENTITIES OF THE MEMBER STATES VERSUS THE EU CITIZENSHIP

The complexity of the relations between the national law and the legal order of the European Union was formulated in the principle of recognising national identities of the Member States. A clear reference to national identities of the Member States was made as early as in Article F TEU, which was then changed into Article 6 (3) TEU of the Amsterdam Treaty. The provision that stipulated that: "The Union shall respect the national identities of its Member States" was not of big judicial significance then and was in fact a political signal intended to be a counterbalance to supranational tendencies dominating the Community at the time.[20] The real increase in the importance of the principle of recognition of national identities of the Member States took place after the Treaty of Lisbon entered into force. It regulates the issue in Article 4 (2) TEU in the wording that differs from the original. At present, the provision stipulates that: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (…)". It is currently one of the most frequently commented provisions in the EU jurisprudence, and the

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[18] CJ judgement in the case C-135/08, *Janko Rottmann v. Freistaat Bayern*, para. 56.

[19] W. Sadurski, *Obywatelstwo europejskie a legitymacja demokratyczna Unii Europejskiej* [European citizenship and democratic legitimation of the European Union], [in:] G. Baranowska, A. Bodnar, A. Gliszczyńska-Grabias (ed.), *Ochrona praw...* [Protection of the European Union...], p. 30.

[20] L.F.M. Besselink, *National and constitutional identity before and after Lisbon*, Utrecht Law Review Vol. 6, issue 3, 2010, pp. 40–41; available at: http://ssrn.com/abstract=1714350 [accessed on 9 August 2016]; similarly V. Constantinesco, *La confrontation entre identié constitutionelle éuropéenne et identité constitutionelles nationales. Convergence ou contradiction? Contrepoint ou hierarchie?* [in:] J.-C. Masclet, H. Ruiz-Fabri, Ch. Boutayeb, S. Rodrigues (ed.), *Mélanges en l'honneur de Philippe Manin. L'Union europ*éenne: Union de droit, Union des droits, Ed. A. Pedone, Paris 2010, p. 83.

concept of national identity acquired fundamental significance for the determination of mutual relations between national and the EU law.[21] As R. Toniatti notes, the increase in the importance of the concept of national identity in our times should be associated with the changing approach to the concept of the States' sovereignty.[22] Sovereignty viewed in a traditional way,[23] in the face of challenges resulting from the processes typical of the European integration undergoes considerable transformations. Sovereignty stops being perceived as an unlimited possibility of influencing other States or an expression of power that is not subject to external influence.[24] For the Member States, the European Union membership is connected with the limitation of a part of their sovereign rights and passing them onto the level of a supranational, international organisation, which the EU forms. However, as it is indicated in the literature, the transfer of a Member State's powers to the EU does not mean a loss of its sovereignty.[25] Participation in integration processes, which is the Member States' conscious choice, is connected with the possibility of coping with a series of economic or legal problems more efficiently. According to J. Kranz, in case of the EU, the present crises are not an expression of the lack of instruments or problems connected with a State's sovereignty, but with the weakness of the political leadership.[26] S. Konopacki believes that, giving up some of its entitlements, a Member State improves its sovereignty. In the author's opinion, a State that actually depends on external factors limiting its sovereignty (such as international interdependence in the sphere of economy, security or environment

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[21] Compare, inter alia: M.R. Donnarumma, *Integration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de Justice et des cours constitutionnelles,* Revue française de droit constitutionnel, 2010/4, No. 84, p. 719; D. Ritleng, *Le droit au respect de l'identité constitutionnelle nationale,* [in:] J.-Ch. Barbato, J.-D. Mouton (ed.), *Vers la reconnaisance de droits fondamentaux aux États Membres de l'UE? Réflexions à partir des notions d'identité et de solidarité,* Bryulant Bruxelles 2010, p. 23; K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej* [Respect for the European Union Member States' constitutional identity], Przegląd Sejmowy No. 4, 2010, p. 9; A. von Bogdandy, S. Schill, *Overcoming absolute primacy: respect for national identity under Lisbon Treaty,* Common Market Law Review Vol. 48, 2011, p. 1417; G. van der Schyff, *The constitutional relationship between the European Union and its Member States: the role of national identity in Article 4 (2) TEU*, European Law Review Vol. 37(5), 2012, p. 563; A. Saiz Arnaiz, C. Alcoberro Llivina (ed.), *National constitutional identity and European integration,* Intersentia, Cambridge-Antwerp-Portland 2013; K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?* [National identity: admissible exception to the rule of primacy?], [in:] S. Dudzik, N. Półtorak (ed.), *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich* [European Union law vs. Member States' constitutional law], Warsaw 2013, p. 40; V. Constantinesco, *Le statut d'État européen: quelle place pour l'autonomie et l'identité constitutionnelle nationales?* Revue des Affaires Européennes No. 3, 2013, p. 447; E. Cloots, *National identity in EU law*, Oxford 2015.

[22] R. Toniatti, *Sovereignty lost, constitutional identity regained,* [in:] A. Saiz Arnaiz, C. Alcoberro Llivina (ed.), *National constitutional…*, p. 56.

[23] For more broadly on the concept of a state sovereignty in international law, compare R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym* [State sovereignty: Reconstruction and significance of the idea in international law], Kraków 2004, p. 91 ff.

[24] For more on the issue, compare the Constitutional Tribunal judgement of 24 November 2010, K 32/09 (judgement concerning the Treaty of Lisbon), p. 16 ff.

[25] R. Kwiecień, *Suwerenność…* [State sovereignty...], p. 103.

[26] J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym* [Concept of sovereignty in contemporary international law], Warsaw 2015, p. 41.

protection leading to the States' dependence on global economy or regional systems), thanks to the EU membership, becomes more powerful in regulating its internal and foreign affairs.[27]

The possibility of withdrawing from the EU, which is laid down in the Treaty (Article 50 TFEU), and the recognition of their national identity constitute a natural guarantee of traditionally formulated sovereign rights, which the States maintain. The provision of Article 4 (2) TEU indicates elements that to some extent define the concept. National identity, according to the Treaty, is inseparably connected with the political and constitutional structures of a Member State as well as with its fundamental functions related to ensuring public order and national security. This means that the European Union should not interfere in the constitutional structure of its Member States.[28] It is a narrow meaning of the concept of national identity, which can be associated with the concept of constitutional identity often applied by national constitutional courts.[29] As Advocate General, M. Poires Maduro, noticed in *Michaniki* case, "The national identity (…) clearly includes the constitutional identity of the Member State. That is confirmed, if such was necessary, by the explanation of the aspects of national identity (…) in Article 4 (2) TEU".[30] It is highlighted in the literature that the concept of national identity understood in a broader way is becoming a counterpoint to the process of the European integration. It contrasts the process of creating a closer and closer relation between the European nations with various national, linguistic or cultural traditions that should not be subject to integration.[31] According to K. Kowalik-Bańczyk, national identity is an open concept that changes depending on the State which identity is analysed.[32]

The concept of constitutional identity, which is closely connected with the national identity principle, was defined and popularised in the European legal space by the German Federal Constitutional Court (FCC).[33] In a judgement concerning the Treaty of Lisbon, the Court included, inter alia, the following areas in the German constitutional identity: citizenship, the civil and military monopoly on the use of force, revenue and expenditure or encroachment on fundamental rights.[34] Taking into consideration the aim of the present article, it is necessary to draw attention

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[27] S. Konopacki, *Problem suwerenności w Unii Europejskiej* [Issue of sovereignty in the European Union], Studia Europejskie No. 3, 2008, pp. 16–17.

[28] K. Kowalik-Bańczyk, *Tożsamość narodowa…* [National identity...], p. 40.

[29] Fore more on the issue of the concept of constitutional identity in the rulings of constitutional courts of the EU Member States, compare A. Kustra, *Sądy konstytucyjne a ochrona tożsamości narodowej i konstytucyjnej państw członkowskich Unii Europejskiej* [Constitutional courts and protection of national and constitutional identity of the European Union Member States], [in:] S. Dudzik, N. Półtorak (ed.), *Prawo Unii Europejskiej…* [European Union law...], pp. 66–77.

[30] Opinion of Advocate General, M. Poiresa Madury, of 8 October 2008 in the case C-213/07, *Michaniki AE v. Ethniko Symvoulio Radiotileorasis, Ypoyrgos Epikrateias, Elliniki Technodomiki (TEVAE), former Pantechniki AE, Syndesmos Epicheiriseon Periodikou Typou, Somateio*, ECLI:EU:C:2008:544, para. 31.

[31] M. Claes, *National identity: trump card or up for negotiation?* [in:] A. Saiz Arnaiz, C. Alcoberro Llivina (ed.), *National constitutional…*, p. 109.

[32] K. Kowalik-Bańczyk, *Tożsamość narodowa…* [National identity...], pp. 40–41.

[33] A. Kustra, *Sądy konstytucyjne…*, p. 67.

[34] FCC judgement of 30 June 2009 in the case 2 BvE 2/08 (Lisbon case), para. 249; also compare K. Wójtowicz, *Zachowanie tożsamości…* [Maintenance of constitutional...], p. 7.

to the location of the citizenship of a Member State among the elements forming the national (constitutional) identity of the State. Undoubtedly, in the light of the former considerations regarding the relations between the national citizenship and the EU citizenship, the approach of the FCC is absolutely justified. The Member States have an opportunity to shape the subjective scope of the EU citizenship. It must be remembered, however, that there is a restriction introduced by the Court of Justice concerning the necessity of respecting the EU law when exercising a Member State's competences to grant or withdraw domestic citizenship. As a result, there is a dependence difficult to define clearly because the element of a Member State's national identity becomes one of the factors conditioning the scope of the EU citizenship.[35] The Court of Justice did not analyse the issue directly. The *Rottmann* case is, up to now, the only one where one can look for the Court's attempt to deal with the issue. It must be taken into account, however, that the judgement in the *Rottmann* case was issued in accordance with the provisions that were binding before the Treaty of Lisbon entered into force. Therefore, there could not be any reference made to Article 4 (2) TEU in its present wording. Only Advocate General, M. Poires Maduro, directly drew attention to the problem connected with national identity and referred to Article 6 (3) TEU (in its wording before the Treaty of Lisbon). Advocate General, analysing the dependencies between national citizenship and the EU citizenship, recognised that a potential introduction of a ban on withdrawing national citizenship of a specified person resulting in the loss of the EU citizenship would lead to the actual deprivation of a Member State of its competence to regulate its citizenship. In Advocate General's opinion, the adoption of such an approach would violate Article 6 (3) TEU, which lays down an obligation to respect national identities of the Member States.[36] Advocate General recognised that determination of the composition of the political community consisting in the possibility of deciding on granting or withdrawing national citizenship by the Member States is undoubtedly a significant element of national identity.[37] This analysis, although it is based on the provision that changed its wording and place in the Treaty, remains up-to-date also in accordance with the presently binding provision of Article 4 (2) TEU. It should be noted, however, that complete exclusion of the issues connected with the determination of national citizenship (the EU citizenship) from the rules the EU law is inadmissible because it can lead to considerable weakening of the EU competences to shape the rights and obligations of its citizens. That is why, the judgement of the Court of Justice in the *Rottmann* case confirms the necessity of respecting the EU law, especially the principle of proportionality, by the Member States when they take decisions having impact on the subjective scope of the Union citizenship. Respecting national identity in case of the Member States' competence

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[35] S. Konopacki draws attention to a similar problem in *Problem suwerenności…* [Issue of sovereignty...], pp. 13–14. The author assumes that the paradox of the legal construction of the Union citizenship consists in the fact that citizenship of a Member State determines the scope of supranational categories such as the European law and citizenship. A national State sovereignty is a basic factor determining national citizenship, and thus the Union one, too.

[36] Opinion of Advocate General, M. Poiresa Madury, in the case *Rottmann*, para. 24–25.

[37] *Ibid.*

to grant or withdraw national citizenship is, therefore, limited by the obligation to respect the Union law by the Member States. Indeed, the issues cannot be completely excluded from the scope of the EU law and the secondary and additional institution (the Union citizenship) cannot determine the existence of the primary institution (national citizenship).[38]

The above-presented considerations refer to the influence of the principle of respecting national identity of a Member State on the subjective scope of the Union citizenship. After the Treaty of Lisbon entered into force with its new Article 4 (2) TEU included in the scope of jurisdiction of the Court of Justice, the principle of respecting national identity started to be applied by the Court, inter alia, in cases connected with the subjective scope of the Union citizenship. As it is indicated in the literature, the Member States may use reference to national identity at present in order to justify making exceptions to the treaty guarantees and to exclude the effectiveness of the EU regulations violating national identity of a Member State.[39] This is the context in which the Court of Justice referred to the principle of national identity in two cases: *Sayn-Wittgenstein*[40] and *Runevič-Vardyn*[41]. Both of them concerned issues connected with the Member States' competence to establish the rules of giving and registering natural persons' names, and spelling them with the use of specific characters of a language.[42] The *Sayn-Wittgenstein* case concerned the Austrian authorities' decision to correct the name of an Austrian citizen in civil status documents. The Austrian citizen, following her adoption by a German citizen, acquired his name, i.e. Fürstin von Sayn-Wittgenstein. The name in this original form was entered into the Austrian register of civil status and the applicant used it based on the identity documents issued by the Austrian authorities (a passport) and German authorities (a driving licence). Moreover, the applicant registered a business in Germany under the name Fürstin von Sayn-Wittgenstein. The situation took 15 years until the Austrian Constitutional Court issued a ruling on similar

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[38] *Ibid.*, para. 24 and 26.

[39] Compare M. Safjan, P. Mikłaszewicz, *Granice uprzywilejowania wyrównawczego,* Przegląd Sejmowy 2011/6, p. 43; K. Kowalik-Bańczyk, *Tożsamość narodowa…* [National identity...], p. 48; A. von Bogdandy and S. Schill draw attention that the principle of national identity is becoming a tool to temper conflict between the CJEU and constitutional courts of the Member States in the scope of the principle of primacy of the EU law over national law. Compare, A. von Bogdandy, S. Schill, *Overcoming…*, p. 1417.

[40] CJ judgement of 22 December 2010, in the case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien,* ECLI:EU:C:2010:806. See, L.F.M. Besselink, *Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.* Common Market Law Review Vol. 49, 2012, p. 671.

[41] CJ judgement of 12 May 2011, in the case C-391/09, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija*, ECLI:EU:C:2011:291. See, A. Dorabialska, *Glosa do wyroku C-391/09* [Gloss on the judgement C-391/09], Państwo i Prawo No. 9, 2011, p. 116; H. van Eijken, *Case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others. Judgment of the Court (Second Chamber) of 12 May 2011, nyr.*, Common Market Law Review Vol. 49, 2012, p. 809.

[42] For more on the issue, see M. Taborowski, *Swobodny przepływ osób w UE a nazwiska osób fizycznych – uwagi na tle orzecznictwa TS* [Free movement of people in the EU vs. the names of natural persons: comments in the light of CJ rulings], Europejski Przegląd Sądowy No. 1, 2012, p. 22.

circumstances and held that, in accordance with the Law on the abolition of the nobility, Austrian citizens are precluded from acquiring a surname that includes a title of nobility. As a result, Vienna authorities decided that it was necessary to enter a new name into the register of civil status without the title of nobility and adopt a form Sayn-Wittgenstein. The Court of Justice heard the case in the light of Article 21 TFEU guaranteeing the EU citizens the freedom of movement. The Court held that the provision was in conflict with the Austrian norms that could lead to a specific risk of being accused of using false identity and a necessity to refute the allegation. This may result in the use of different names in identity documents issued by the state of origin and the state of residence (in case of the applicant, the German driving licence). The obstacle to free movement, however, was justified by the Court of Justice by reference to the reasons connected with the need to protect public order.[43] The Austrian court's arguments referred to the importance of Law on the abolition of the nobility in order to ensure the principle of equality, which on the other hand is one of the elements of national identity, that should be protected. The Court of Justice, taking into consideration this interpretation, referred to Article 4 (2) TEU as an auxiliary provision, and ruled that respecting national identity of a Member State, one element of which is the principle of equality and a republican political system of the State, is included in the treaty-related derogation of the protection of public order. This means that in the *Sayn-Wittgenstein* case, Article 4 (2) TEU was not applied as autonomous treaty-related derogation but used as an auxiliary provision to define the concept of public order.[44]

In the other case, *Runevič-Vardyn*, the principle of national identity was used in the assessment of the Lithuanian rules concerning the spelling of names. It concerned a citizen of Lithuania, a member of the Polish ethnic minority, and her husband, a Polish citizen. The problem was connected with the way of spelling their forenames and surnames in the Lithuanian documents (birth and marriage certificates). The Lithuanian authorities issuing the documents used the spelling rules typical of the Lithuanian language, i.e. without Polish diacritic modifications and letters (there is no letter "w" in Lithuanian). In the opinion of the applicants, requesting that their names should be spelled in accordance with the rules of the Polish language, it constituted a violation of the principle of non-discrimination based on nationality. In the proceedings before the Court of Justice, the Lithuanian authorities presented the argument that "the Lithuanian language constitutes a constitutional value that protects national identity, contributes to citizens integration, ensures the expression of national sovereignty, indivisibility of the State and appropriate functioning of the state and self-government bodies".[45] The Court of Justice approved of the position of the Lithuanian authorities and emphasised that the protection of the official

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[43] L.F.M. Besselink, draws attention to the fact that in the judgement in the case *Sayn-Wittgenstein*, the exception to the protection of public order was used in the case concerning the Union citizenship heard directly under Article 21 TEU for the first time. Formerly, this type of exception had been used in the justification for the decision on the ban on entry or expulsion of the EU citizen. Compare, L.F.M. Besselink, *Case C-208/09…*, p. 681.

[44] A. von Bogdandy, S. Schill, *Overcoming…*, p. 1424.

[45] CJ judgement in the case C-391/09, *Runevič-Vardyn,* para. 84.

language of the Member State is included within the scope of national identity protected under Article 4 (2) TEU. To support the argument, the Court referred to Article 3 (3(4)) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, pursuant to which the Union respects cultural and linguistic diversity of its Member States. The domestic court is competent to finally assess the obstacle to free movement of people and possibility of justifying it with the need to protect national identity – the protection of the official language of a given State.

The presented rulings indicate that the protection of national identity is becoming a significant value that is taken into consideration when establishing obstacles to free movement of the EU citizens. In the issues discussed, the Court of Justice did not apply the provision of Article 4 (2) as autonomous grounds for justifying exceptions to freedoms guaranteed by the EU law. The Court made use of the principle laid down in Article 4 (2) TEU as an additional interpretational guideline strengthening the application of the formerly accepted in the Treaty and judicial decisions special reasons for derogation from provisions guaranteeing free movement of people.

4. THE EU CITIZENSHIP VERSUS EUROPEAN IDENTITY

Citizenship, according to W. Sadurski, has two dimensions: a formal-legal one and a symbolic-political one.[46] The former, dominant in case of the EU citizenship, encompasses the rights provided in the Treaty, which thanks to the broadening interpretation of the Court of Justice of the EU became a basic part of the status of each Member State's citizen.[47] The rights directly granted to the EU citizens include: the right to move and reside freely (Article 21 TFEU), the right to vote and to stand as a candidate in elections to the European Parliament and at municipal elections in the Member State in which he resides, under the same conditions as nationals of the State (Article 22 TFEU), the right to protection by the diplomatic or consular authorities in the territory of a third country (Article 23 TFEU), the right to petition the European Parliament (Article 24 para. 2 TFEU), the right to apply to the Ombudsman (Article 24 para. 3 TFEU), the right to write to any of the institutions or bodies of the EU (Article 24 para. 4 TFEU), and the right to a citizen's initiative (Article 24 para. 1 TFEU within the meaning of Article 11 TEU). According to the research com-

[46] W. Sadurski, *Obywatelstwo…* [European citizenship...], p. 23.

[47] The process of strengthening the Union citizenship as a basic status of each citizen of a Member State was started by the CJ judgement of 20 September 2001 in the case C-184/99 *Rudy Grzelczyk v. Centre public d'aide d'Ottignies-Louvain-la Neuve*, Rec. 2001, p. I-06193, para. 31. What deserves special attention is the fact that neither TEU nor TFEU directly mention the EU citizens' obligations, which would shape their legal status. D. Kochenov, (*EU citizenship without duties*, European Law Journal Vol. 20, No. 4, July 2014, p. 482) holds that citizenship in general, and the Union citizenship in particular, is freeing itself from the initial correlation of rights and obligations. The author recognises that basing a legal system on the rights, and not obligations, the principles of a democratic State ruled by law are fully guaranteed and the citizens should be really free in it. On the contrary, he recognises that the rights cannot be separated from obligations that citizens have towards the State or the EU; R. Bellamy, *A duty-free Europe? What's wrong with Kochenov's account of EU citizenship rights*, European Law Journal Vol. 21, No. 4, July 2015, p. 558.

missioned by the European Commission in 2015, the citizens of the Member States have a medium-level awareness of the status of the EU citizen and the method of acquiring it or the rights they have. Although 87% of the respondents are acquainted with the term "EU citizenship", only 52% know what it really means. The data on the knowledge of the rights they have are even worse: 42% of the respondents state that they feel they are very well or sufficiently informed on their entitlements. Despite that, 84% of citizens are aware of their right to move and reside freely and 83% of them know they can apply to the European Ombudsman, petition the European Parliament and write to the European Commission. The lowest level of awareness concerns the right to vote and stand as a candidate in elections in the State in which they reside (54% of respondents give the right answers that a citizen of the EU residing in their countries has the same rights at municipal elections as their nationals). The awareness of other entitlements is at the level of 67–77%.[48]

It can be noted that some of the rights granted by the Treaty are strictly connected with the functioning of the domestic market (the freedom to move and reside), and this way they strengthen the implementation of the freedom of the movement of people existing from the very beginning of integration, and some of them are the rights political in nature. While the former is typical of the EU citizenship, the electoral rights or those connected with the relations between an individual and the EU bodies are the rights typical of citizenship in general. They specify the relations between an individual and a political community to which he or she belongs. This way, the formal-legal dimension overlaps the symbolic-political dimension of citizenship. The latter dimension mainly determines the relations between a citizen and a political community and the relations between the citizens.[49] As W. Sadurski indicates, the main content of citizenship is identity meant as "identification with what, in the eyes of the citizens, binds them as the members of the same community".[50] In case of the EU citizenship, a problem arises how to determine the European identity, which would enable the EU citizens identify with the Union as an organisation, activities of their institutions and feel the bounds with citizens from other Member States. Whether such a universal European identity is possible at all is the subject of a doctrinal debate.[51] In case of the EU citizenship, one cannot expect such an obvious sense of identification and belonging as in case of national citizenship and belonging to a nation. National

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[48] Flash Eurobarometer 430, Report, European Union Citizenship, March 2016, http://ec.europa.eu/justice/citizen/document/files/2016-flash-eurobarometer-430-citizenship_en.pdf [accessed on 1 August 2017].

[49] W. Sadurski, *Obywatelstwo…* [European citizenship...], pp. 25–26.

[50] *Ibid*., p. 26.

[51] Compare, inter alia, S. Kadelbach, *Union citizenship,* [in:] A. von Bogdandy, J. Bast, *Principles of European constitutional law,* Hart-CH Beck-Nomos, Oxford–München, pp. 470–475; P. Magnette, *How can one be European? Reflections on the pillars of European civic identity,* European Law Journal Vol. 13, No. 5, September 2007, p. 664; D. Kostakopoulou, *On European identity,* [in:] R. Bellamy, U. Saiger (eds), *EU citizenship and the market,* The Europan Insitute UCL, 2011; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117157 [accessed on 24 August 2016]; *idem*, *European Union citizenship…*, pp. 625–626; F. Benoît-Rohmer, *Identité éuropéenne et identité nationale. Absorption, complémentarité ou conflit,* [in:] Mélanges en l'honneur de Jean Paul Jacqué. Chemins d'Europe, Dalloz, Paris 2010, pp. 63–64.

and European identity will differ, although sometimes they will have something in common. In the context of comments on the EU citizenship, it is necessary to emphasise that the European identity may be treated in a subjective and objective way. The first approach is presented above and it consists in an individual's feeling of belonging to the EU political community. An objective European identity will encompass a certain general collection of values that are important for the process of the European integration, where some of them will be essential (fundamental), and some will be derivatives of integration mechanisms. Thus, it will be the identity of the European Union as an international organisation that is supranational in nature. The necessity of strengthening the European identity treated in this way was clearly laid down in the Declaration on European Identity adopted in Copenhagen already in 1973.[52] The nine then Member States emphasised the necessity of pursuing unity in mutual relations and, to that end, attempted to define the European identity. It was described based on values common to all the States, which include: the rules of representative democracy, the state governed by law, social justice and respect for human rights. Thus, it is the part of values building the European identity which matches the values that may be part of a national identity of each Member State. The document also lists specific components of the European identity that result from the integration processes. Thus, for the European identity, they are very specific in nature and should be developed and strengthened by progressing integration movements. These include: internal market, the EU system of institutions, common policy or cooperation mechanisms worked out. Also the Declaration on European Union of 1983 adopted in Stuttgart refers to the European identity.[53] This is the document that contains the famous statement that it is necessary to continue the process of developing stronger relations between the European nations with the aim to strengthen the European identity. One of the aims of the Stuttgart Declaration was to tighten cooperation in the field of culture in order to strengthen the awareness of common cultural heritage being one of the elements of the European identity.

At present, the framework of the European identity can be defined with the use of the criteria for the EU membership adopted in Copenhagen in 1993,[54] the values on which the EU is founded and which are laid down in Article 2 TEU[55] as well as general rules of the Union law, including the principles of direct effectiveness

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[52] Declaration on European Identity (Copenhagen, 14 December 1973), http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwgC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013 [accessed on 22 August 2016]. Also compare, V. Constantinesco, *La confrontation…*, p. 80.

[53] Solemn Declaration on European Union (Stuttgart, 19 June 1983), http://aei.pitt.edu/1788/1/stuttgart_declaration_1983.pdf [accessed on 31 July 2017].

[54] The Copenhagen criteria, adopted by the European Council in 1993, assume that to become a Member State, a country must respect the rules of democracy, must be a state ruled by law, respect human rights (including those of ethnic minorities), and function within an efficient free market economy that can cope with competition and market pressure within the EU. The text of the European Council summit conclusions containing the criteria is available at: www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf [accessed on 22 August 2016].

[55] Article 2 TEU stipulates that: "The Union is founded of the values of respect for human dignity, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

and supremacy, the Charter of Fundamental Rights or the rules of establishing and functioning of the internal market strengthened by the CJEU judgements (including the principle of non-discrimination based on national origin).[56]

A subjective European identity, important from the point of view of an individual – the EU citizen, is absolutely more difficult to define and achieve. It concerns the establishment of a type of collective identity that would strengthen integration mechanisms and be the source of democratic legitimation of the Union. The European Commission, in its Third Report on Citizenship of 2001, held that the EU citizenship is at the same time a source of integration processes legitimation as well as a basic factor in the process of developing the feeling of belonging to the EU among its citizens and possessing real European identity.[57] The issue of legitimation of integration processes is connected with the issue of democratic deficit in the EU that is broadly discussed in the literature.[58] On the one hand, the Union declares in Article 2 TEU that it is founded on freedom, democracy or the state ruled by law, and on the other hand, the institutional system does not reflect the typical tripartite separation of powers. The status of the European Parliament, which is the only representative assembly, was fully strengthened after the Treaty of Lisbon.[59] Article 10 TEU that was introduced then indicates that the basis for the functioning of the EU is representative democracy and the citizens are directly represented at the Union level in the European Parliament, and that every citizen has the right to participate in the democratic life of the Union. Undoubtedly, the establishment of the European Citizens' Initiative aimed to strengthen the citizens' participation in the political life of the Union. However, the citizens still do not feel that their voice is heard at the Union level.[60] The establishment of the EU citizenship did not

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which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[56] V. Constantinesco, *La confrontation…*, p. 81.

[57] Report from the Commission. The Third Report from the Commission on Citizenship of the Union, Brussels, 07.09.2001, COM (2001) 506 final, p. 7. Compare also, D. Kostakopoulou, *European Union citizenship…*, pp. 625–626.

[58] More on the issue, together with the literature referred to therein, in: W. Sadurski, *Democratic legitimacy of the European Union: A diagnosis and some modest proposals,* Polish Yearbook of International Law Vol. 32, 2012, pp. 19–43; A. Śledzińska-Simon, *Europejska inicjatywa obywatelska, czyli fiasko demokratycznego telos?* [European Citizens' Initiative, or a failure of the democratic *telos*?], [in:] G. Baranowska, A. Bodnar, A. Gliszczyńska-Grabias (ed.), *Ochrona praw...* [Protection of the European...], pp. 39–46.

[59] The European Parliament mainly became an actual co-legislator because the former procedure of co-decision making after the Treaty of Lisbon changed into an ordinary legislative procedure (Article 294 TFEU) and it covers all the most important areas of the EU law (inter alia, Common Agricultural or Fisheries Policy, or implementation of Common Commercial Policy). Soon after the Treaty of Lisbon entered into force (2010–2011), the ordinary legislative procedure covered ca. 90% of adopted legal acts. Compare, Report: *Mid-term Evaluation of the 2009–2014 European Parliament: Legislative activity and decision-making dynamics,* VoteWatch Europe no. 63/ July 2012, p. 5, Centre for European Policy Studies, Brussels, available at: https://www.ceps.eu/publications/mid-term-evaluation-2009-14-european-parliament-legislative-activity-and-decision [accessed on 31 July 2017].

[60] According to the European Commission statistical data, only 39% of the EU citizens agree with the opinion that their vote counts in the EU (54% do not agree with the statement). Citation after Standard Eurobarometer 84, Autumn 2015, Public opinion in the European Union,

change the situation much. Although 50% of the citizens state that they know their rights as the EU citizens,[61] only ca. 42% of them decided to exercise their right to elect representatives to the European Parliament in 2009 and 2014,[62] and as many as 63% declare that they do not intend to exercise their rights of the European Citizens' Initiative.[63] As the above data indicate, one of the main political objectives of the Union citizenship has not been reached. When it was set, the assumption was that it should lead to bridging the gap between the citizens and the European bodies, which were to become more effective thanks to that.[64] However, the EU citizens still do not identify with the Union bodies forgetting, or often not knowing, that the institutions representing national interests of the Member States (the European Council and the Council of the European Union) are composed of prime ministers, heads of state or ministers of national governments. This means that in fact the weak democratic legitimation of the EU is a result of the deficit of democratic legitimation of national state institutions.[65] At the same time, it is necessary to remember that, in the institutional system of the European Union, there is no representative body elected by citizens that makes it possible to hold the government liable. It is true that the European Parliament is competent to control the European Commission but the European Council remains outside the parliamentary system of supervision.[66] Thus, the above-mentioned facts have impact on the very low level of citizens' identification with and trust in the Union institutions. From political perspective, the European *demos* still has no full common identity and is based on the citizens who feel that they are and who actually are the citizens of the Member States and only next – the citizens of the EU.[67] Therefore, one can speak about a multi-level identity connected with the secondary character of the EU citizenship,[68] in which the element of national identity overrides the European one.

December 2015. Available at: http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/ResultDoc/download/DocumentKy/70150, [accessed on 25 August 2016].

[61] Standard Eurobarometer 83, European Citizenship. Report, Spring 2015, p. 31.

[62] Statistical data on the turnout in the European Parliament elections available at: http://www.europarl.europa.eu/aboutparliament/pl/20150201PVL00021/Poprzednie-wybory [accessed on 25 August 2016].

[63] Standard Eurobarometer 83…, p. 75.

[64] W. Sadurski, *Obywatelstwo…* [European citizenship...], p. 30.

[65] *Ibid.*, p. 36.

[66] A. Śledzińska-Simon, *Europejska inicjatywa obywatelska…* [European Citizens' Initiative...], pp. 40–41.

[67] According to the European Commission statistical data, 52% of the EU citizens primarily identify with the citizens of their Member State and only then with the citizens of the EU. 38% of the citizens believe they are only citizens of the given State, and 6% – primarily citizens of the EU and then citizens of their State, and only 1% believe they are only citizens of the EU. Compare Standard Eurobarometer 83, European Citizenship. Report, Spring 2015, p. 21.

[68] For more on the issue of citizenship and multi-level identity, compare A. Bodnar, *Obywatelstwo…* [Multi-level citizenship], pp. 292–301.

5. CONCLUSIONS

Summing up the considerations, it is necessary to state that the influence of the European citizenship on the strengthening of the European identity is absolutely smaller than it was originally assumed to be. As S. Konopacki indicates, the construction of the Union citizenship alone, based on the sovereign States' rights to determine the subjective scope of national citizenship, leads to the limitation of possibilities of bringing the European identity into existence.[69] Although the Union citizens share, apart from the legal status that is laid down in the Treaty, some historical, cultural or religious roots, the EU citizens' identity at the political level is still very weak. Thus, it turns out that national identity is stronger in case of the Member States' citizens' feeling of belonging to a political community. For the EU citizens, mainly their State, not the Union, constitutes such a community. In addition, the latest political events, especially the Brexit referendum, indicate a serious crisis of common European values, which were to be a binder of the EU citizens' identity. It turns out that one of the key entitlements of the EU citizens, the right to move and reside freely, becomes the reason for a split. As the President of the European Council, Donald Tusk, indicates in his letter sent on the eve of the summit in Bratislava, considering the result of the British referendum only from the point of view of the moods in the British community would be a serious mistake.[70] It is an indicator of general tendencies of the citizens' lack of trust in the European Union. At the same time, the Member States' governments, making use of the trend, often blame the European Union for all their failures and political or economic difficulties. Thus, we can speak about a crisis of the European identity understood as a group of certain values binding, despite the diversity, the Member States and the EU citizens. The sources of the crisis should be looked for in the citizens' lack of knowledge about the Union as an international organisation, the mechanisms governing it and interrelations between national governments and the Union institutions in the decision-making process.[71] That is also why, in the public discourse, there is stronger and stronger attachment to the idea of the national identity, which should be protected against the "pernicious" influence of the European idea.

The EU citizenship, which is an institution on the borderline between the national and European identity, in the face of the crisis, clearly loses its importance. It is becoming an institution that is a weaker and weaker carrier of the European

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[69] S. Konopacki, *Problem suwerenności…* [Issue of sovereignty...], p. 14.

[70] Letter from President Donald Tusk before the Bratislava summit, Press release 511/16, 13 September 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/09/13-tusk-invitation-letter-bratislava/ [accessed on 14 September 2016].

[71] J.M. Fiszer draws attention to a similar issue, *Skutki członkostwa w UE dla suwerenności i tożsamości kulturowej* [Consequences of the EU membership for sovereignty and cultural identity], Myśl Ekonomiczna i Polityczna No. 1–2, 2011, p. 174. The author points out that although more and more decisions are taken on the Union institutions' forum, the European issues have a scarce share in the domestic discourse. He discusses the example of the elections to the European Parliament and the electoral campaign in which domestic matters dominate. This results in insufficient information of the citizens who adopt critical attitudes towards the EU decisions.

idea and remains solely an additional status of the Member States' citizens. This multi-level construction results in a situation in which common rights, instead of binding, start to divide the citizens.

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EU CITIZENSHIP: AN ELEMENT OF NATIONAL, EUROPEAN IDENTITY OR ONLY AN ADDITIONAL STATUS OF MEMBER STATES' CITIZENS?

Summary

The European Union citizenship is a concept on the borderline between the EU law and domestic laws. The Member States' regulations decide about its subjective scope. The EU citizenship was originally supposed to be the source of integration processes legitimisation as well as a basic factor in the process of developing the citizens' feeling of belonging to the European Union and possessing a real European identity. Therefore, it is a legal institution with multi-level construction and is based on the co-existence of national states' identities (which are expressed, inter alia, in national citizenships) and the European identity. Respecting a national identity in case of Member States' entitlement to naturalise or deprive a citizen

of their national citizenship has limits indicated by the Member States' obligation to respect the EU law. However, considerable weakening of the European citizenship as a carrier of the European identity has been observed recently. It can be especially well seen now, at the time of the European values crisis, which resulted in the negative outcome of the Brexit referendum.

Keywords: citizenship, EU citizenship, national identity, European identity

OBYWATELSTWO UE – ELEMENT TOŻSAMOŚCI NARODOWEJ, EUROPEJSKIEJ, CZY JEDYNIE DODATKOWY STATUS OBYWATELI PAŃSTW CZŁONKOWSKICH?

Streszczenie

Obywatelstwo UE jest instytucją pozostającą na styku prawa unijnego i prawa krajowego. O jej zakresie podmiotowym decydują przepisy państw członkowskich. Obywatelstwo unijne w pierwotnym założeniu miało być źródłem legitymacji procesów integracyjnych, a także podstawowym czynnikiem w procesie kształtowania wśród obywateli poczucia przynależności do Unii Europejskiej i posiadania prawdziwej tożsamości europejskiej. Jest to zatem instytucja prawna, która skonstruowana jest wielopoziomowo i opiera się na współistnieniu tożsamości narodowych państw (których wyrazem jest m.in. obywatelstwo krajowe) oraz tożsamości europejskiej. Poszanowanie tożsamości narodowej w przypadku uprawnień państw członkowskich dotyczących nadawania lub pozbawiania obywatelstwa krajowego ma granice wyznaczone przez obowiązek poszanowania przez państwa członkowskie prawa unijnego. Z kolei w ostatnim czasie można zaobserwować istotne osłabienie obywatelstwa unijnego jako nośnika tożsamości europejskiej, co szczególnie widoczne jest w dobie kryzysu wartości europejskich a czego wyrazem był negatywny wynik referendum brytyjskiego.

Słowa kluczowe: obywatelstwo, obywatelstwo UE, tożsamość narodowa, tożsamość europejska

Ius Novum
3/2017

OBTAINING OF COMMUNICATIONS DATA BY THE INTERNAL SECURITY AGENCY AFTER THE CONSTITUTIONAL TRIBUNAL JUDGEMENT OF 30 JULY 2014

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1. INTRODUCTION

The Republic of Poland is a democratic state, which results from the declaration laid down in the Constitution of the Republic of Poland of 2 April 1997[1] as well as the political system practice. One of the key issues in every democracy is the scope of the state apparatus interference into different areas of the citizens' activity. One of the areas is the sphere of citizens' rights and freedoms and, within it, a serious issue of obtaining telecommunications data, especially telecommunications billings.[2] The problem is related to ensuring efficient crime prevention and constitutes one of the tools used by law enforcement agencies.[3]

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1 In accordance with Article 2 of the Constitution of the Republic of Poland, the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.

2 See, L. Garlicki, *Uwaga nr 3 do art. 49 Konstytucji RP* [Comment No. 3 on Article 49 of the Constitution of the Republic of Poland], [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], Vol. II, Warsaw 2002, p. 1.

3 It seems that the numerous terrorist attacks, especially the one on the World Trade Center on 11 September 2001 as well as terrorist attacks in Madrid (11 March 2004) and in London (7 July 2005), were significant stimuli to the introduction of legal regulations allowing the retention of telecommunications data and giving the police, state security services and justice institutions access to them. That period initiated the global war with terrorism. Its efficient implementation required preparation of appropriate legal instruments to be able to undertake activities in the area. See, M. Kiziński, *Retencja danych telekomunikacyjnych* [Retention of telecommunications data], Prokuratura i Prawo No. 1, 2016, p. 138; Fundacja Panoptykon, *Telefoniczna Kopalnia Informacji. Przewodnik* [Telecom Information Mine. A Guide], p. 20, http://panoptykon.org/biblio/telefoniczna–kopalnia–informacji–przewodnik.

In accordance with Article 180a of the Act of 16 July 2004: Telecommunications law (hereinafter TL),[4] public telecommunications network operators and providers of publicly available telecommunications services are obliged to retain telecommunications data and give access to them.[5] The provision stipulates directly that the addressees of the obligation to retain telecommunications data are public telecommunications network operators and providers of publicly available telecommunications services.[6] Definitions of each of those entities are laid down in Article 2(27) TL. In accordance with this provision, an operator is

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[4] Journal of Laws [Dz.U.] of 2014, item 243, as amended.

[5] A question arises what those telecommunications data that are subject to retention and provision are. The answer to this question is rather complicated because it requires an analysis of many provisions. In accordance with Article 180c(1) TL, the data that are subject to provision are those concerning the network end facility, the telecommunications end device, the end user initiating a connection or receiving a connection as well as data concerning the day and time of the connection, its length, type and location of the telecommunications end facility. On the other hand, Article 180d TL does not lay down the catalogue of data that are subject to provision to the state services. It refers to Article 159(1(1) and (3) to (5)), Article 161 and Article 179(9) TL. The legislator, based on the provisions indicated, authorised given entities to obtain data concerning a user, transmission data (i.e. data processed in order to transmit messages in telecommunications networks or calculate fees for communications services, including location data that concern any data processed in the network indicating the geographical location of the end device of the user of the public telecommunications services), localisation data that concern localisation data going beyond what is necessary telecommunications services, data concerning location, i.e. localisation data exceeding the data that are necessary to transmit a massage or issue an invoice, data concerning attempts to obtain a connection between the end devices, including unsuccessful attempts to make connections indicating connections between the telecommunications end devices or network ends that have been listed but not answered by the end user or there has been a break of the listed connections. In accordance with Article 161 TL, a provider of public telecommunications services may also retain a subscriber's personal data, including given names, a surname, their parents' names, the place and date of birth, the address of residence and for correspondence, the PESEL number of the Polish citizen, an identification document number and series number, a passport number or residence permit in case of a citizen of a country that is not the European Union Member State or the Swiss Confederation, and data contained in documents confirming the possibility of fulfilling the obligations towards the provider of public telecommunications services resulting from a contract concerning the provision of telecommunications services. Moreover, if the provider of public telecommunications data was given consent from the subscriber who is a natural person to process his/her other data in connection with the service provided, especially the bank account number, banker's card number, the address for correspondence (if it is different from residence address), email address and telephone numbers, the police services and the state security services may also obtain and process those data being at the operator's disposal for the purposes laid down in statute. In addition, the state services may obtain data referred to in Article 179(9) TL, i.e. data every telecommunications business is obliged to include in the register of subscribers, users or end devices, data obtained during the conclusion of a contract. Summing up, it is possible to obtain three types of data: concerning a subscriber, the traffic (the billing data) and localisation.

[6] The introduction of the regulations concerning telecommunications data retention to the Polish legal system resulted from the implementation of Directive 2006/24/EC. It should be noted, however, that legal mechanisms allowing police institutions and state security bodies to obtain data retained by telecommunications businesses, although in a less extensive form than at present, existed in the Polish legal system also before the implementation of Directive 2006/24/EC. They were introduced on 24 January 2003 on the basis of the Regulation of the Minister of Infrastructure on the fulfilment of operators' tasks in connection with defence, state security and security and public order, Journal of Laws [Dz.U.] No. 19, item 166, as amended. However, the transposition of Directive 2006/24/EC ensured legal specification of the businesses' obligations in the field of data retention.

a telecommunications business authorised to provide public telecommunications networks or accompanying services. A provider of services, on the other hand, is a telecommunications business authorised to provide telecommunications services. It is necessary to emphasise that the legislator stressed the different plane of activities of telecommunications businesses. The activity of the operator focuses on the provision of a telecommunications network, which means preparation of this network for the provision of services within it. The activity of the service provider focuses on the provision of telecommunications services with the use of its own network or the network owned by another operator.[7]

What correlates with the obligation to retain telecommunications data is authorised bodies' entitlement to request access to the data (Article 180a (1(2)) TL and Article 180d TL). The group of those entities is quite large because it encompasses a court and a prosecutor's office[8] and eight police and state protection institutions, i.e. the Police,[9] the Border Guard,[10] Military Police (Żandarmeria Wojskowa),[11] the Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego, ABW),[12] the Military Counterintelligence Service,[13] Central Anticorruption Bureau (Centralne Biuro Antykorupcyjne, CBA),[14] the Customs Service,[15] and also fiscal authorities.[16]

One of the special services authorised to obtain telecommunications data is the Internal Security Agency. As it has already been mentioned, the issue was regulated in Article 28 of the Act on the Internal Security Agency (ABW) and the Intelligence Agency (AW). In accordance with the provision, the obligation to obtain a court's consent referred to in Article 27(1) does not apply to information necessary to implement ABW tasks referred to in Article 5(1) of the Act on ABW and AW in the form of data referred to in Articles 180c and 180d TL and data identifying an entity using postal services and concerning the fact, circumstances of postal services provision or their use (para. 1). It is also stipulated that an entity doing business in the field of telecommunications or

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[7] A third option is also noted in the literature. Namely, a provider of telecommunications services may resell services bought from another provider. See, K. Kawałek, M. Rogalski (ed.), *Prawo telekomunikacyjne. Komentarz* [Telecommunications law. Commentary], Warsaw 2010, p. 64.

[8] See, Article 218 of the Act of 6 June 1997: Criminal Procedure Code, Journal of Laws [Dz.U.] No. 89, item 555, as amended, hereinafter: CPC.

[9] See, Article 20c of the Act of 6 April 1990 on the Police, Journal of Laws [Dz.U.] of 2015, item 355, as amended, hereinafter: Act on the Police.

[10] See, Article 10b of the Act of 12 October 1990 on the Border Guard, Journal of Laws [Dz.U.] of 2014, item 1402, as amended, hereinafter: Act on BG.

[11] See, Article 30(1) of the Act of 24 August 2001 on the Military Police and military order keeping bodies, Journal of Laws [Dz.U.] of 2016, item 96, as amended, hereinafter: Act on MP.

[12] See, Article 28 of the Act of 24 May 2002 on the Internal Security Agency (ABW) and the Intelligence Agency (AW), Journal of Laws [Dz.U.] of 2015, item 1929, as amended, hereinafter: Act on ABW and AW.

[13] See, Article 32 of the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service, Journal of Laws [Dz.U.] of 2016, item 1318, as amended, hereinafter: Act on MCS and MIS.

[14] See, Article 18 of the Act of 9 June 2006 on the Central Anti-corruption Bureau (CBA), Journal of Laws [Dz.U.] of 2016, item 1310, as amended, hereinafter: Act on CBA.

[15] See, Article 75d of the Act of 27 August 2009 on Customs Service, Journal of Laws [Dz.U.] of 2015, item 990, as amended, hereinafter: Act on CS.

[16] See, Article 36b of the Act of 28 September 1991 on fiscal control, Journal of Laws [Dz.U.] of 2016, item 720, as amended, hereinafter: Act on FC.

an operator providing postal services must provide the data referred to in para. 1 free of charge to an ABW officer indicated in the ABW Head's written motion or a person authorised by that body, on verbal request of an ABW officer authorised by the ABW Head in writing as well as to an ABW officer authorised by the ABW Head in writing via the telecommunications network (para. 2). In the last of the cases mentioned, the telecommunications data are provided without the participation of the employees of the telecommunications business or with their indispensable co-participation if it is possible on the basis of an agreement between the ABW Head and this entity (para. 3). The provision of data referred to in Articles 180c and 180d TL and data identifying the user of postal services and concerning the fact, circumstances of postal services provision or of using them, may take place via the telecommunications network if this network makes it possible to identify an ABW officer obtaining the data, their type and the time of obtaining them as well as the technical and organisational measures protecting those data against unauthorised access (para. 4).

Since they entered into force, the legal regulations concerning communications data retention and their provision to ABW as well as other authorised state bodies have provoked controversies.[17] As a result, the Supreme Audit Office (Najwyższa Izba Kontroli, NIK) verified the way of obtaining and processing billing data, information about location and other data referred to in Article 180c and Article 180d TL by the authorised entities. In the audit report, NIK indicated that it is necessary to determine the catalogue of matters for the needs of which telecommunications data can be obtained. Attention was also drawn to the need to introduce legal solutions additionally providing protection for people doing jobs of public trust. It was also recognised that it is purposeful to introduce internal control mechanisms of the process of obtaining data, their verification and disposal of useless data.[18]

The Constitutional Tribunal judgement of 30 July 2014 (case No. K 23/11, i.e. the "billings and communication interception" case) was the consequence and in a way recapitulation of the controversies over telecommunications data retention. The judgement was issued as a result of the motions filed by the Ombudsman and the Prosecutor General to examine the constitutionality of the provisions regulating obtaining telecommunications data by entitled entities, including the Internal Security Agency. As a consequence, it was necessary to amend particular pragmatic acts in order to adjust the regulations on telecommunications data retention and provision to the standards indicated by the Constitutional Tribunal. The aim of this Article is related to that. It is an analysis of the above-mentioned Constitutional Tribunal judgement on billings and communication interception concerning the Internal Security Agency and the legislator's response to its content and recommendations in the field of obtaining telecommunications data by this state service.

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[17] They concerned various issues, inter alia, arrest of data concerning all telecommunications services users or grounds for the retention of data for a period of 24 months. See, M. Wach, *Zatrzymywanie danych telekomunikacyjnych przez dwa lata w celach bliżej nieokreślonych a prawo do prywatności* [Retention of telecommunications data for two years for undefined reasons and the privacy right], Radca Prawny scientific supplement No. 115–116, 2011.

[18] Information of the NIK audit results: http://www.nik.gov.pl/plik/id, 5421,vp,7038.pdf [accessed on 16 June 2016].

2. CONTENT OF THE MOTIONS OF THE OMBUDSMAN AND THE PROSECUTOR GENERAL

Formally, it was the Ombudsman and the Prosecutor General who initiated the review concerning obtaining telecommunications data by entitled entities, which the Constitutional Tribunal performed. In a motion of 1 August 2011, based on the analysis of Articles 180c and 180d TL regulating particular services' access to data protected by communication secrecy, the Ombudsman questioned the conformity of two provisions of the Act on ABW[19] with the Constitution of the Republic of Poland. One of them is Article 28 (1(1)) of the Act on ABW and AW. The petitioner challenged the conformity of this provision with Article 49 in conjunction with Article 31(3) of the Constitution and Article 8 ECHR. The other provision is Article 28 of the Act on ABW and AW concerning the scope in which ABW is authorised to obtain data referred to in Articles 180c and Article 180d TL but is not obliged to dispose of data that are insignificant for the conducted proceedings. In the Ombudsman's opinion, the provision is in conflict with Article 51(2) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.[20]

The Ombudsman formulated five objections to the above-mentioned regulation. Firstly, the provisions discussed do not precisely regulate the aim of data retention. They only refer to the scope of ABW tasks or a general statement that the data are obtained in order to prevent or detect crimes. Secondly, the provisions do not indicate the category of persons whose right to professional confidentiality should be respected. Thirdly, the requirement for obtaining access to those data is not the exhaustion of other means of obtaining necessary information that are less intrusive in the sphere of citizens' rights and freedoms. Fourthly, the procedure of obtaining data in this mode is not subject to any external supervision. Finally, a considerable amount of data retained by ABW is not disposed of even when the data are no longer useful from the point of view of performed tasks.[21]

In his motion of 21 June 2012 filed to the Constitutional Tribunal, the Prosecutor General challenged the conformity of Article 28(1(1)) in conjunction with Article 5

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[19] The content of the motion was originally broader. For the purpose of this article, it is important to discuss only those issues that concern the provisions of the Act on ABW and AW. However, apart from the provisions of this Act, the Ombudsman also questioned the provisions of other acts, namely Article 36b(5) of the Act on FC, Article 18 of the Act on CBA and Article 32 of the Act on MCS and MIS, concerning the scope in which they allow that data referred to in Articles 180c and 180d TL be obtained and do not envisage disposal of data that are insignificant for the conducted proceedings. In the Ombudsman's opinion, the provisions are in conflict with Article 51(2) in conjunction with Article 31(3) of the Constitution. The content of the provisions questioned is similar. Based on them, the Police and state protection services are granted competence to obtain and process data referred to in Articles 180c and 180d TL in order to prevent and detect crimes or fulfil the statutory tasks of those services.

[20] It is worth noting that on 27 April 2012, the Ombudsman filed another motion to the Constitutional Tribunal concerning data retention and their provision for the Customs Service. On 1 September 2011 and on 8 May 2012, the President of the Constitutional Tribunal ruled the two Ombudsman's motions should be joined and examined together.

[21] See, the motion of the Ombudsman to the Constitutional Tribunal of 1 August 2011: http://db.trybunal.gov.pl/sprawa/sprawa_pobierz_plik62.asp?plik=F–274604174/ K_23_11_Wns_2011_06_29.pdf&syg=K%2023/11 [accessed on 10 June 2016].

(1(2a)) of the Act on ABW and AW as far as it uses a phrase "and other crimes against the security of the state" as well as Article 28(1(1)) in conjunction with Article 5 (1(2b and 2c)) and Article 5(1(5)) of the Act on ABW and AW with Articles 2, 47 and 49 in conjunction with Article 31(3) of the Constitution and Article 8 ECHR.[22] The provisions challenged entitle the Internal Security Agency

[22] In the same way as in case of the Ombudsman's motion, due to the aim of this article, the analysis of issues other than the provisions of the Act on ABW and AW is insignificant and is not conducted here. However, in order to be reliable, it is necessary to indicate that the Prosecutor General also questioned the conformity of the provisions listed below with Article 2, Article 47 and Article 49 in conjunction with Article 31(3) of the Constitution and Article 8 ECHR: Article 20c(1) of the Act on the Police in conjunction with: Article 212 §§1 and 2, Article 216 §§1 and2, Article 217 §1, Article 221, Article 278 §§1–3 and 5, Article 284 §§1–3, Article 288 §§1 and 2 and Article 290 §1 CC, Article 45, Article 46(1), Article 49 and Article 49a of the Act of 26 January 1984: Press law, Journal of Laws [Dz.U.] No. 5, item 24, as amended; with Article 34(2), (3) and (4) of the Act of 16 April 2004 on construction products, Journal of Laws [Dz.U.] No. 92, item 881, as amended; Article 33 of the Act of 25 February 2011 on chemical substances and their mixtures, Journal of Laws [Dz.U.] No. 63, item 332, as amended; Article 77(2), (2a) and (3) of the Act of 11 March 2004 on protection of animal health and eliminating contagious diseases in animals, Journal of Laws [Dz.U.] of 2008, No. 213, item 1342, as amended, and in conjunction with Article 52(2) and (4) of the Act of 13 October 1995: Hunting law, Journal of Laws [Dz.U.] of 2005, No. 127, item 1066, as amended; Article 10b(1) of the Act on the Border Guard in conjunction with: Article 212 §§1 and 2, Article 216 §§1 and 2, Article 217 §1, Article 221, Article 278 §§1–3 and 5, Article 284 §§1–3, Article 288 §§1 and 2 and Article 290 §1 CC, Article 45, Article 46(1), Article 49 and Article 49a of the Press law, Article 34(2), (3) and (4) of the Act on construction products, Article 33 of the Act on chemical substances and their mixtures, Article 77(2), (2a) and (3) of the Act on protection of animal health eliminating contagious diseases in animals, and in conjunction with Article 52(2) and (4) of the Hunting law; Article 30(1) of the Act on MP, in conjunction with: Article 212 §§ and 2, Article 216 §§1 and 2, Article 217 §1, Article 221, Article 278 §§1–3 and 5, Article 284 §§1–3, Article 288 §§1 and 2 and Article 290 §1 CC, with Article 60 §§2 and 3, Article 61 §1, Article 62 §§1, 3 and 4, Article 80 §§1 and 2, Article 93 §§2 and 3, Article 95 §1, Article 108 §2 and Article 109 FPC, Article 45, Article 46(1), Article 49 and Article 49a of the Press law, with Article 34(2), (3) and (4) of the Act on construction products, Article 33 of the Act on chemical substances and their mixtures, Article 77(2), (2a) and (3) of the Act on protection of animal health and in conjunction with Article 52(2) and (4) of the Hunting law; Article 36b(1(1)) of the Act on FC in conjunction with Article 60 §§2 and 3, Article 61 §1, Article 62 §§1, 3 and 4, Art. 80 §§1 and 2, Article 93 §§2 and 3, Article 95 §1, Article 108 §2 and Article 109 FPC; Article 36b(1(1)) in conjunction with Article 2(1(12)) of the Act on FC, in conjunction with Article 85 §4, Article 86 §4, Article 87 §4, Article 88 §3, Article 89 §3, Article 90 §3, Article 91 §4, Article 92 §3, Article 94 §3, Article 95 §2 and Article 96 §1 FPC and in conjunction with Article 100(1) and Article 101(1) of the Act of 19 March 2004: Customs law, Journal of Laws [Dz.U.] of 2004, No. 68, item 662, as amended; Article 32(1(1)) in conjunction with Article 5(1(1a)) of the Act on MCS and MIS in the scope related to the phrase "and also other acts and international agreements"; Article 32(1(1)) in conjunction with Article 5(1(1g)) of the Act on MCS and MIS in the scope related to the phrase "and other than laid down in (a) to (f), against the security of the state defence potential, the Armed Forces of the Republic of Poland and organisational units of the Ministry of National Defence, and the states ensuring reciprocity"; Article 32(1(1)) in conjunction with Article 5(1(9) of the Act on MCS and MIS; Article 18(1(1)) in conjunction with Article 2(1(2)) of the Act on CBA in conjunction with Article 4, Article 12(3) to (6), Article 13 and Article 15 of the Act of 21 August 1997 on the limitation on business activities conducted by persons holding public posts, Journal of Laws [Dz.U.] of 2006, No. 216, item 1584, as amended; Article 18 (1(1)) in conjunction with Article 2(1(5)) of the Act on CBA in conjunction with Article 8(1) and (3) and Article 10(1), (2), (5) and (6) of the Act on the limitation on business activities conducted by persons holding public posts, with Article 35(1) of the Act of 9 May 1996 on the mandate of an MP and a senator, Journal of Laws [Dz.U.] of 2011, No. 7, item 29, as amended; with Article 87 §1 of the Act of 27 July 2001: Law on the system of common courts, Journal of Laws [Dz.U.] of 2001, No. 98,

to retain and process telecommunications data concerning persons suspected of committing crimes of low social harmfulness. In the Prosecutor General's opinion, they constitute disproportional interference into constitutionally protected status of an individual. The indicated catalogue of illegal acts does not substantiate limiting constitutional rights to privacy and secrecy of communication.

3. CONSTITUTIONAL TRIBUNAL JUDGEMENT CONCERNING ABW AND AW

The system of data retention by telecommunications businesses developed by the provisions of the Polish law is an important tool in the state bodies' fight against criminality. As such, it matches European regulations in this field. The system is not, however, a perfect tool. Quite the contrary, it is necessary to introduce far-reaching changes to the system so that the statutory regulations comply with the provisions of the Constitution of the Republic of Poland. Many conclusions concerning that can be drawn from the Constitutional Tribunal judgement of 30 July 2014 (K 23/11). Having examined the motions of the Ombudsman and the Prosecutor General, the Tribunal held that Article 28(1(1)) of the Act on ABW and AW is in conflict with Articles 47 and 49 in conjunction with Article 31(3) of the Constitution because it does not lay down independent supervision of the provision of telecommunications data referred to in Articles 180c and 180d TL. Moreover, the Tribunal held that Article 28 of the Act on ABW and AW in the scope in which it does not envisage disposal of data insignificant for conducted proceedings is in conflict with Article 51(2) in conjunction with Article 31(3) of the Constitution. At the same time, the loss of binding force of the provisions that are in conflict with the Constitution of the Republic of Poland was postponed for a period of 18 months after its promulgation in Journal of Laws (Dziennik Ustaw [Dz.U.]).

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item 1070, as amended; with Article 38 of the Act of 23 November 2002 on the Supreme Court, Journal of Laws [Dz.U.] of 2002, No. 240, item 2052, as amended; with Article 49a(1) of the Act of 20 June 1985 on the public prosecution office, Journal of Laws [Dz.U.] of 2011, No. 270, item 1599, as amended; with Article 24h(1) of the Act of 8 March 1990 on commune (*gmina*) self-government, Journal of Laws [Dz.U.] of 2001, No. 142, item 1591, as amended; with Article 25c(1) of the Act of 5 June 1998 on county (*powiat*) self-government, Journal of Laws [Dz.U.] of 2001, No. 142, item 1592, as amended and in conjunction with Article 27c(1) of the Act of 5 June 1998 on voivodeship self-government, Journal of Laws [Dz.U.] of 2001, No. 142, item 1590, as amended; Article 18(1(1)) in conjunction with Article 2(1(3)) of the Act on CBA in conjunction with Article 1(1) and (2) of the Act of 21 June 1990 on the refund of benefits unlawfully obtained at the expense of the State Treasury or other state legal persons, Journal of Laws [Dz.U.] of 1990, No. 44, item 255, as amended; Article 18(1(1)) in conjunction with Article 2(1(4)) of the Act on CBA in conjunction with Article 200 of the Act of 29 January 2004: Public procurement law, Journal of Laws [Dz.U.] of 2010, No. 113, item 759, as amended; Article 46(1), Article 75(1) to (4) and Article 110(1) of the Act of 2 July 2004 on freedom of business activity, Journal of Laws [Dz.U.] of 2010, No. 220, item 1447, as amended and in conjunction of Article 3(1), Article 20a(1) to (3), Article 3la, Article 36(1), Article 39(1) and Article 69e of the Act of 30 August 1996 on commercialisation and privatisation, Journal of Laws [Dz.U.] of 2002, No. 171, item 1397, as amended; Article 18(1(1)) in conjunction with Article 2(1(6 and 7)) of the Act on CBA; Article 75d(1) in conjunction with para. 5 of the Act on CS in conjunction with Article 108 §2 and Article 109 FPC.

In the justification of its judgement, the Constitutional Tribunal explained that Article 28(1(1)) of the Act on ABW and AW, unlike the provisions of other acts (including the Act on the Police or the Act on fiscal control), excludes the obligation to obtain a court's consent, namely an obligation to issue a decision granting permission for the provision of telecommunications data to ABW officers. At the same time, the legislator did not envisage any alternative mechanisms of independent control over the process of obtaining data by ABW officers, which might be recognised as not meeting constitutional standards.

The Constitutional Tribunal did not determine what this control should be like and which body should perform it. The Tribunal only suggested that the introduction of a follow-up control as a rule should not be excluded. Interception and provision of various types of data can cause different interference into human rights and freedoms, and thus justify certain differentiation of mechanisms of control in relation to particular types of data. Regulating this mechanism, the legislator should especially take into account the specificity of particular services' operations and their statutory scope of tasks, urgent situations in which fast obtaining of telecommunications data may be indispensable for preventing the commission of crime or its fast detection. However, the Tribunal noticed arguments for the introduction, in some cases, of prior control. For example, it is necessary to mention the access to telecommunications data of persons doing jobs of public trust or situations when the services do not need to act urgently.

As the Tribunal noticed, the legislator granted ABW the right to obtain telecommunications data in a very broad range. It does not only concern recognition, detection and prosecution of crimes (which is regulated in Article 5(1(2)) of the Act on ABW and AW), but also other tasks referred to in Article 5(1) of the Act on ABW and AW. These include: recognition and fight against threats to internal security of the state and its constitutional order, especially sovereignty and international position, independence and inviolability of its territory as well as the state defence and prevention of such threats (para. 1), implementation, within the scope of its competence, of tasks connected with the protection of classified information and the fulfilment of the function of the national security authority in the field of the protection of classified information in international relations (para. 3), obtaining, analysing, processing and providing relevant state bodies with information that can be of crucial importance for the internal security of the state and its constitutional order (para. 4), and undertaking other activities specified in other acts and international agreements (para. 5). At the same time, some tasks such as recognition and detection listed in Article 5(1(2) of the Act on ABW and AW and prevention of those crimes were formulated in a very general way and, as a result, specific circumstances in which ABW officers may be given access to telecommunications data cannot be determined based o them.

The Constitutional Tribunal also emphasised that courts do not have to have control over the provision of telecommunications data. However, it is absolutely necessary for that supervisory body to be independent from the government and not to be in direct or indirect command hierarchy relations with the officers obtaining data.

Justifying its judgement, the Constitutional Tribunal emphasised that just the relatively general specification of the tasks of the public authority body (in this case ABW) is not in conflict with the Constitution. The problem occurs, however, when

the public authority bodies fulfilling those tasks can undertake activities interfering in individuals' rights and freedoms by obtaining data in a secret way. Whenever a public authority body is authorised to obtain information about an individual's private life, including communications data, it is necessary for the legislator to precisely determine the subjective scope of the possibilities of fulfilling this task. Taking into consideration an extremely broad range of circumstances in which ABW may be provided communications data, the exclusion of the necessity to obtain a court's permission and the lack of obligation to obtain a permission from any other independent body, the Tribunal held that the provision challenged does not contain even the minimum procedural guarantee necessary from the perspective of the compliance with the Constitution. In the Tribunal's opinion, this circumstance is sufficient to recognise that Article 28(1(1)) of the Act on ABW and AW is in conflict with Articles 47 and 49 in conjunction with Article 31(3) of the Constitution because it does not stipulate independent control over the provision of communications data referred to in Articles 180c and 180d TL.

It must be noted that the Constitutional Tribunal did not refer to all the objections filed by the Ombudsman and the Prosecutor General. There was no comment on the complaint that obtaining communications data is not subsidiary in nature. It is admissible in every case when the authorised services request that. The requirement for providing access to data is not the exhaustion of other less intrusive legal measures not violating privacy and secrecy of correspondence.

On the other hand, the Tribunal made detailed comments on the legislator's failure to specify special requirements for the protection of information that is subject to professional privilege (legal professional privilege, journalistic privilege, physician-patient privilege).[23] The Constitutional Tribunal explained that there are no grounds for unconditional exclusion of admissibility of surveillance operations, including obtaining information in the interception mode, for some categories of entities.

In the Tribunal's opinion, the Constitution of the Republic of Poland does not stipulate any subjective exemptions in this field. This does not mean, however, admissibility of obtaining information from everyone in the same mode, to the same extent and following the same rules. Persons performing the jobs of public trust should be subject to higher constitutionality standards of regulations concerning a low-key mode of obtaining information about them. Professional privilege and a guarantee that it will be respected in court proceedings are instruments of protecting trust. They include, inter alia, conditional and unconditional bans on

[23] With regard to the objection formulated by the Ombudsman, the Tribunal explained in its judgement substantiation that no arguments were presented to support it. The Ombudsman's motion does not meet, in the Tribunal's opinion, formal requirements laid down in Article 32(1(4)) of the Act on the Constitutional Tribunal, i.e. it does not contain justification and evidence supporting the objection. As a result, the proceedings in this matter shall be discontinued pursuant to Article 39(1(1)) of the Act on the Constitutional Tribunal. On the other hand, referring to the similar objection presented by the Prosecutor General, despite some deficiencies noted in argumentation, the Tribunal held that his intentions were clear enough. The content of the motion indicates that the essence of the objections presented consists in the imprecise regulation of operational control and failure to ensure sufficient protection of constitutional freedoms and rights of individuals, in the interest of which the obligation to keep professional confidentiality and the bans on evidence were established.

evidence in court proceedings. The Constitutional Tribunal drew attention to the fact that professional privilege and evidence bans in court proceedings that are strictly connected with it are not autotelic values.

Although confidentiality of persons doing the jobs of public trust must always be seen as an integral value of a democratic state ruled by law, their basic function is to protect constitutional freedoms and rights of individuals providing them with private information to be treated with discretion (compare the Constitutional Tribunal judgement of 2 July 2007, K 41/05, Part III, para. 7). Each time, professional privilege should be seen as an expression of the protection of an individual's freedoms and rights, especially the right to protect privacy (Article 47), information provision autonomy (Article 51(1)), the right to defence (Article 42(2)), the right to hearing before a court (Article 45(1), the freedom of conscience and religion (Article 53) or freedom to acquire information, including the freedom of the press (Article 54(1) of the Constitution). Because of this, referring to a solicitor's privilege, the Tribunal emphasised that not solicitors but their clients have the right to privacy and information confidentiality. However, a solicitor is obliged to respect that right (see, the Constitutional Tribunal judgement of 22 November 2004).[24] The Constitutional Tribunal explained that this interpretation also applies to other professional privileges. Moreover, it explained that the collision between the two values does not influence the fact that the protection of an individual's freedoms and rights, and indirectly also the professional privilege, must always be a priority. In relation to this area, the Tribunal referred to its former judgements[25] and explained that "general exclusion of entities obliged to keep professional secrets from operational control as well as exclusion of information recognised as professional secrets that are absolutely unavailable in this mode would lead to considerable difficulties in the collection of evidence in some types of crime, e.g. those committed with the use of modern technologies".

On this basis, the Tribunal held that "the point of gravity is moving towards ensuring some procedural guarantees eliminating groundless acquisition by policing entities and state security services of information that, because of its content and circumstances of its provision, should be protected by law". In the Tribunal's opinion, a model solution to this conflict between the two values is laid down in Article 180 §2 of the Criminal Procedure Code (CPC), which consists in a mechanism of exemption from professional confidentiality in a situation when it is necessary for the benefit of justice institution and a given circumstance cannot be established in any other way. Similar legal solutions should, in the Tribunal's opinion, also apply to the protection of professional privilege in the course of operational-surveillance activities, including operational control. Indeed, there are no substantiated grounds for using lower standards than those laid down in criminal procedure provisions. Just the opposite, it is necessary to recognise that those standards, because of the extra-procedural confidential character of control, should be at least identical to the standards of criminal proceedings.

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[24] SK 64/03, OTK ZU No. 10/A/2004, item 107, Part III, para. 3.

[25] See, the Constitutional Tribunal judgements of: 22 November 2004, SK 64/03, Part III, para. 3; 2 July 2007, K 41/05, Part III, para. 7; 13 December 2011, K 33/08, OTK ZU No. 10/A/2011, item 116, Part III, para. 6.4.

As it has been explained above, based on the Constitutional Tribunal judgement of 30 July 2014, K 23/11, the provision of Article 28 of the Act on ABW and AW, in the former wording, in the scope in which it did not envisage disposal of data insignificant for the conducted proceedings, was recognised to be in conflict with Article 51(2) in conjunction with Article 31(3) of the Constitution. The Constitutional Tribunal explained that the requirement for obtaining information on individuals, including their communications data, in a secret way is the establishment of the procedure of immediate selection and disposal of useless and inadmissible material. Such a solution prevents unauthorised use of legally collected information by the state services and their retention just in case they might be useful for other purposes. Not only a single instance of an individual's data acquisition (inter alia, in the mode laid down in Article 28(1) of the Act on ABW) but also each successive instance of processing of those data, including their retention and subsequent use in the curse of other proceedings, constitute interference in individuals' privacy. The legislator added a new provision of para. 7 to Article 28. In accordance with it, data referred to in para. 1 that are insignificant for criminal proceedings or the state security must be disposed of without delay, in the presence of a commission and be subject to reporting. The legislator did not stipulate the disposal of all other communications, postal and Internet data other than those that are insignificant for the conducted criminal proceedings. This way, the legislator allowed the retention of data specified as "significant for the state security".

4. NEW WORDING OF ARTICLE 28 ACT ON ABW AND AW

The subject of the Tribunal's judgement, the provision of Article 28 of the Act on ABW and AW did not regulate the proceedings concerning telecommunications data after retention pursuant to Article 28(1) of the Act on ABW and AW. The legislator did not lay down the procedure of dealing with the data collected in this mode. Thus, there are no legal grounds for relevant use of the provisions regulating disposal of data collected in the course of operational control or the provisions of CPC regulating interception and recording of conversations (Article 237 and the following CPC). This meant that on the basis of Article 28 of the Act on ABW, there were no regulations concerning verification and disposal of useless data. Therefore, it was not possible to exclude the retention of useless data in conducted proceedings, in the course of which they were requested, or in any other constitutionally justified purposes. The Constitutional Tribunal does not negate the admissibility of further retention (after their analysis and recognition of potential uselessness in the conducted proceedings in a given case) of communications data concerning foreigners being under the authority of the Republic of Poland, especially in case there are serious and justified suspicions that they might be involved in activities endangering the state security, including terrorism and organised crime. Such differentiation of the level of protection has grounds mainly in Article 51(2) and Article 37(2) of the Constitution.

In order to adjust the provisions derogated by the Constitutional Tribunal, the Act amending Act on the Police and some other acts was passed on 15 January

2016.[26] The Act adopted the new wording of Article 28(2)–(3) of the Act on ABW and AW. Pursuant to Article 28(2), a telecommunications business, a postal operator or a provider of electronic services are required to provide data referred to in Article 28(1) of the Act on ABW and AW free of charge:

1) to an ABW officer indicated in a written motion of the ABW Head or a person authorised by this body;
2) to an ABW officer being authorised in writing by the ABW Head on his verbal request;
3) to an ABW officer authorised by the ABW Head referred to in para. 2 via electronic telecommunications network.

In case of data provision based on a verbal request of an ABW officer authorised in writing by the ABW Head, the provision of data is conducted without the participation of the employees of the telecommunications business, postal operator or provider of electronic services or with their necessary cooperation, provided that the agreement between the ABW Head and this entity envisages that (Article 28(3) of the Act on ABW and AW).

Providing ABW with data referred to in Articles 180c and 180d TL may take place via telecommunications network, provided that the network safeguards:

1) the possibility of establishing the ABW officer obtaining data, their type and time when they have been obtained;
2) technical and organisational measures preventing an unauthorised person from getting access to those data (Article 28(4) of the Act on ABW and AW).

5. JUDICIAL CONTROL OVER THE ACQUISITION OF TELECOMMUNICATION DATA BY ABW

One of the objections of the Constitutional Tribunal concerning the Act on ABW and AW with regard to examination resulting from the motions filed by the Ombudsman and the Prosecutor General was the lack of judicial control over the acquisition of telecommunications data by ABW officers. It seems that it is the most important issue, which the Constitutional Tribunal discussed in its judgement. Because of its significance, the issue needs a separate analysis. The provision of telecommunications data for special services is of key importance from the perspective of interference into constitutional rights and freedoms, inter alia, the secrecy of correspondence and the freedom of communication. Therefore, it must be deemed that depriving courts of the control over those procedures and, in fact what the Tribunal noted, the lack of regulations safeguarding whatever control of the process independent from the government are highly undesirable phenomena. This does not match any constitutional standards established by the Polish legislator. Legislation does not provide any judicial or any other alternative mechanism of independent control over the acquisition of telecommunications data by ABW officers. Thus, due to the fact that the catalogue of circumstances that allow ABW officers to obtain telecommunications data is really broad, it is necessary to state that there were no even the minimum procedural guarantees that the constitutional standards were respected in this area.

[26] Journal of Laws [Dz.U.] of 2016, item 147.

In order to solve that problem, based on the discussed the Act of 15 January 2016, a new provision of Article 28a was added to the Act on ABW and AW. In accordance with that provision, the District Court in Warsaw has control over the acquisition of telecommunications, postal or Internet data by ABW officers (para. 1). In accordance with the provisions on the protection of classified information, the ABW Head provides the Court with mid-year reports on:

1) the number of cases of obtaining telecommunications, postal or Internet data and the type of those data in the period covered;
2) legal classification of acts in connection with which telecommunications, postal or Internet data have been requested (para. 2).

Within this control, the Court may get to know the materials justifying the provision of telecommunications, postal or Internet data for ABW. The Court informs the ABW Head about the results of the control within the period of 30 days from its completion (para. 3).

Thus, based on Article 28a of the Act on ABW and AW, the legislator introduced the preferred follow-up control of the provision of telecommunications data for ABW. In its judgement of 30 July 2014, K 23/11, the Constitutional Tribunal indicated that the general constitutional standard does not determine what the procedure of granting access to telecommunication data should look like, especially whether it should be necessary to obtain a permission for this provision in relation to every type of arrested data referred to in Articles 180c and 180d TL. Not all data of this type result in the same intensity of interference in human rights and freedoms. In the Constitutional Tribunal's opinion, the introduction of the follow-up control over the provision of telecommunications data in the course of operational-surveillance activities as a rule is not out of the question. Regulating this mechanism, the legislator should take into consideration, inter alia, the specificity of activities and the statutory scope of tasks of particular services, urgent situations when fast acquisition of telecommunications data is indispensible to prevent the commission of crime or its detection. In accordance with the constitutional principle of efficiency in the work of public bodies, which is laid down in the Preamble, it is necessary to create a mechanism allowing services responsible for the state security and public order to efficiently combat threats. However, the Tribunal notes arguments for the introduction of prior control in some cases. It may especially concern access to telecommunications data of persons doing jobs of public trust or when there is no urgent need for the services to act. The legislator should weigh the issues properly.

A few questions arise in relation to the new regulation. Firstly, it is necessary to analyse the effectiveness of the solution adopted. It is important to what extent judicial control will be real and not just illusory, because control is not obligatory but optional. Data that are subject to control will be provided periodically, in mid-year periods. The district court responsible for the control may, within its competence, get acquainted with the material that substantiates giving ABW access to telecommunications data, which will result in the submission of a court's report to ABW. The court's activity aimed at verifying the appropriateness of providing ABW with telecommunications data ends with the court's report submission. The legislator did not determine procedural issues related to potential further activities in

case a court recognises violation of regulations in the area. A court, having finished the control, may in fact only inform the service concerned about its control results. However, a court has no competence to rule the disposal of the data retained.[27]

Secondly, it is necessary to consider whether, from the point of view of the protection of citizens' rights and freedoms, but also in the interest of the services, it would not be a better solution to introduce, as a rule, a prior judicial control. It does not mean abandoning the follow-up control but its application in urgent situations requiring that ABW should act without delay. Such a solution would certainly improve the appropriateness of motions developed by ABW bodies and other services as well as would increase their number.

The above-presented doubts are also discussed in the CJEU judgement of 8 April 2014. The Court held that access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body. A court or an independent administrative body should limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued.[28] The CJEU clearly mentions prior control performed by an independent body.

It is also worth highlighting that in accordance with Article 28a(5) of the Act on ABW and AW, obtaining data based on Article 28a(1) of the Act on ABW and AW, is not subject to control. Pursuant to this provision, it concerns a broad scope of information including data:

1) from the list referred to in Article 179(9) TL;
2) referred to in Article 161 TL;
3) in case of a user who is not a natural person, the number of the network end device and the head office or location where business is done, the company or the name and organisational form of this user;
4) in case of public land-line telecommunications networks, also the name of town and street – where there is the network end device provided for the user.

6. CONCLUSIONS

The importance of case law for the practice of applying specified legal institutions does not raise doubts. Thus, it can be said that there is more to court judgements than meets the eye in every legal regulation because they shape the application of law in practice. It does not only concern common courts' decisions but also the Constitutional Tribunal judgements, to which the legislator assigned a basic role of examining and adjudicating on hierarchical conformity of legal acts.[29]

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[27] A similar solution was adopted in case of other entities authorised to conduct operational control. See, Article 18a of the Act on CBA; Article 36ba of the Act on FC; Article 20ca of the Act on the Police; Article 75da of the Act on CS; Article 10ba of the Act on BG; Article 32a Act on MCS and MIS; Article 30b of the Act on MP.

[28] Theses 60–62 of the CJEU judgement of 8 April 2014, OJ of 2014, L 105.

[29] See M. Zubik, *Status prawny sędziego Trybunału Konstytucyjnego* [Legal status of a judge of the Constitutional Tribunal], Warsaw 2011, p. 22.

The Constitutional Tribunal does not only establish but also often provides content in constitutional norms, which, as a rule, are at a higher level of generality than in case of standard acts. It should be acknowledged that the Tribunal is not only a restorer of the content of legal norms but, as a result of the binding power of its judgements, actually co-creates the content of a legal norm for the needs of constitutional practice. Moreover, in case of the assessment of the constitutionality of acts, it has a jurisdictional monopoly. Those entitlements of the Tribunal become especially significant in a situation when an act reviewed by the Tribunal implements constitutional provisions. There are no doubts that the Act on ABW and AW with regard to retention and provision of telecommunications data belongs to this category. It introduces limits on the exercise of the constitutional right to communication freedom, which, like any other freedoms, cannot be unlimited in nature. This would negate its essence and might lead to conflicts consisting in one person's interference into the freedom of another person or in the instrumental treatment and, as a result, the abuse of due freedom. The constitutional legislator, being aware of those threats, stipulated two constitutional bases for the limitation of communication freedom. One of them is laid down in Article 49 of the Constitution, i.e. the provision establishing this freedom. The content of this provision stipulates that any limitation to the freedom of communication may be imposed only in cases and in the manner specified by statute.[30] Therefore, the statutory limitation of the constitutional freedom of communication may be introduced when the exercise of this freedom might lead to the infringement of the rights and freedoms of another individual and other values protected by the Constitution.

Another basis is laid in Article 31(3) of the Constitution, which formulates general limits to the use of the constitutional rights and freedoms.[31] The provision is composed of two parts. The first of them is a general clause referring to the limitations upon the exercise of the constitutional freedoms and rights. The legislator adopted a principle commonly accepted in democratic constitutional systems, in accordance with which determination of boundaries of constitutional rights and freedoms may take place only in statute.[32] The other part of Article 31(3) of the

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[30] The norm laid down in Article 49, 2nd sentence of the Constitution indicates three consequences. Firstly, the legislator has the constitutionally granted right to decide on the scope of communication freedom. Secondly, the only act which can admit interference in the freedom of communication, is statute. Thirdly, a standard act should establish specific cases and methods of limitation. Thus, there is a requirement of specificity excluding the possibility of using general clauses. See, the Constitutional Tribunal judgement of 12 December 2005, K 32/04, OTK-A No. 11, item 132, 2005.

[31] It reads as follows: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

[32] Both in the literature and the case law, the phrase is interpreted similarly. Statute does not have to constitute the only source of limitation. There are situations admissible when only general elements of limitations are determined at the statute level. They are specified in detail in secondary legal acts, e.g. regulations or bylaws. Statutory regulations should, however, give those limitations basic shape and determine their scope. See, K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [Limits on statutory interference in the

Constitution is a specification of substantive premises admitting the limitation of rights and freedoms.[33] These are: security or public order, protection of the natural environment, health or public morals, or the freedoms and rights of other persons.

As the judgement of 30 July 2014, K 23/11, explains, the Constitutional Tribunal questioned the provisions of the Act on ABW and AW in connection with the legislator's failure to establish an independent system of controlling the provision of telecommunications data as well as disposing of data that are insignificant for the conducted proceedings. The judgement should be approved of. Firstly, every limitation upon the constitutional freedom to communicate is an exception to the constitutional principle and as such should be subject to control. In this area, it is necessary to agree with the proposal formulated in the literature, according to which the regulation of limitations on communication freedoms and their exercise should be subject to judicial review.[34] Secondly, having in mind that obtaining telecommunications data constitutes a departure from the secrecy of communication, which is a rule, it seems that immediate disposal of data that are insignificant for the proceedings is indispensible.

Making use of its entitlements, the Constitutional Tribunal ruled that the provisions recognised as unconstitutional should lose their legal force within the maximum period of 18 months after the promulgation of the judgement in the Journal of Laws. In the meantime, the legislator should undertake relevant legislative work in order to eliminate unconstitutional provisions. This is what actually happened. Based on Article 7 of the Act of 15 January 2016 amending the Act on the Police and some other acts, fulfilling the legal task assigned, the legislator introduced the required changes in the Act on ABW and AW, eliminating the provisions the Constitutional Tribunal recognised as unconstitutional.

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[33] See, the Constitutional Tribunal judgement of 25 February 1999, K 23/98, OTK No. 2, item 25, 1999.

[34] See, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Comentary], Warsaw 2012, p. 256.

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OBTAINING OF COMMUNICATIONS DATA BY THE INTERNAL SECURITY AGENCY AFTER THE CONSTITUTIONAL TRIBUNAL JUDGEMENT OF 30 JULY 2014

Summary

The Article aims to analyse the Constitutional Tribunal judgement of 30 July 2016 (file no. K 23/11), on the Internal Security Agency obtaining telecommunications billings and intercepting communications in order to obtain communications data. It is connected with the establishment of the legislator's legislative response to the content of the judgement and its recommendations as far as obtaining communications data by this agency is concerned. In order to conduct the analysis and meet the set objectives, the author uses a dogmatic-legal method and examines the content of legal acts and the Constitutional Tribunal judgements issued in relation to them. Based on that, it is established that the Constitutional Tribunal rightly recognised the provisions of the Act on the Internal Security Agency (ABW) and the Intelligence Agency (AW) as partly unconstitutional because the legislator did not envisage independent supervision of telecommunications data provision and did not regulate the destruction of data that are insignificant for conducted proceedings. Both deficiencies were rectified in the Act of 15 January 2016 amending the Act on the Police and some other acts.

Keywords: Telecommunications law, communications data, data retention, Internal Security Agency, Constitutional Tribunal

POZYSKIWANIE DANYCH TELEKOMUNIKACYJNYCH PRZEZ AGENCJĘ BEZPIECZEŃSTWA WEWNĘTRZNEGO PO WYROKU TRYBUNAŁU KONSTYTUCYJNEGO Z 30 LIPCA 2014 ROKU

Streszczenie

Celem tego artykułu jest analiza wyroku TK z dnia 30 lipca 2016 r. sygn. akt K 23/11 w sprawie bilingów i podsłuchów w zakresie, w jakim dotyczy on pozyskiwania danych telekomunikacyjnych przez Agencję Bezpieczeństwa Wewnętrznego. Wiąże się z tym ustalenie reakcji legislacyjnej ustawodawcy na treść tego wyroku i wytyczne trybunalskie w zakresie, w jakim odnosi się on do pozyskiwania danych telekomunikacyjnych przez tę właśnie służbę. Do przeprowadzenia badań nakierowanych na osiągnięcie założonych celów wykorzystano metodę dogmatyczno-prawną poprzez badanie treści aktów prawnych oraz wydawanego w tym zakresie orzecznictwa Trybunału Konstytucyjnego. Na podstawie przeprowadzonych rozważań ustalono, że Trybunał Konstytucyjny zasadnie uznał za niezgodne z Konstytucją przepisy ustawy o ABW i AW w zakresie, w jakim ustawodawca nie przewidział niezależnej kontroli udostępniania danych telekomunikacyjnych, jak również w zakresie, w jakim nie przewidziano zniszczenia danych niemających znaczenia dla prowadzonego postępowania. Oba te mankamenty zostały prawidłowo zmodyfikowane w ustawie z dnia 15 stycznia 2016 r. o zmianie ustawy o Policji i niektórych innych ustaw.

Słowa kluczowe: Prawo telekomunikacyjne, dane telekomunikacyjne, retencja danych, Agencja Bezpieczeństwa Wewnętrznego, Trybunał Konstytucyjny

SUBJECTIVE ELEMENT OF AN OFFENCE WITH A SPECIFIC PURPOSE

MARIUSZ NAWROCKI*

As the title of the article suggests, the subject of the analysis is the issue of a subjective element of a prohibited act with a specific purpose that is usually called an offence with a specific purpose in the criminal law dogma. The issue has not been the subject of deeper doctrinal analysis lately,[1] because most often, the description of an offence with a specific purpose, as far as the description of the subjective element features are concerned, is limited to an indication that it can be committed with direct intent having special features: *dolus directus coloratus*, which exclude its commission with oblique intent or, all the more, unintentionally.

It might seem that the task does not pose any problems because it consists in developing general comments on the nature of the concept signalled in the title. Unfortunately, it is a false assumption, especially if we consider the fact that even the issue of a subjective element of a prohibited act alone is one of the most complicated and often the most controversial in the whole criminal law. Undoubtedly, it is also problematic how we should interpret the element delimiting the nature of intent in case of offences with a specific purpose, i.e. what decides about the "specific purposefulness" of this category of acts, whether this is just a perpetrator's conduct or "something" more, i.e. a motive or perhaps an impulse. If it is justifiable to state that in order to classify a prohibited act as an offence with a specific purpose, it is necessary to attribute, obviously apart from conduct, acting with a specific aim, a motive or on impulse to a perpetrator, a question arises how we should define "aim", "motive" and "impulse" and, what is even more important, whether

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1 Of course, one cannot lose sight of a significant, from the point of view of this article, S. Frankowski's monograph entitled *Przestępstwa kierunkowe w teorii i praktyce* [Offences with a specific purpose: theory and practice], published in 1970 by Wydawnictwo Prawnicze. Undoubtedly, the book is an example of a complete opinion of jurisprudence concerning the issue but one cannot fail to notice that it originates from the early 1970s and uses concepts that are not used at present (due to the separation of guilt and the subjective side in the Criminal Code of 1997), such as e.g. "combined guilt", and refers to such concepts as "impulse", for which there is no substantiation in psychology.

criminal law specialists are entitled to develop those definitions, while the indicated concepts have an outstandingly psychological background.[2] In order to make the further discussion clear, it is necessary to make a few comments organising the interpretation of the concept of an "offence with a specific purpose" as well as the issue of a subjective element of a prohibited act.

1. CHARACTERISTIC FEATURES OF OFFENCES WITH A SPECIFIC PURPOSE

In the criminal law doctrine, there has for long been a division of offences with a specific purpose into those *sensu stricto* and *sensu largo*. According to S. Frankowski,[3] who proposed this distinction, the first category includes acts, the characteristic feature of which is a perpetrator's will that aims at a specific direction. This concerns crimes characterised by a motive understood as an objective, i.e. crimes in which a perpetrator directly strives to achieve an assumed result.[4] On the other hand, the second category includes acts in which an element of conscience is emphasised in particular, however, it is not an objective pursued by a perpetrator.[5] These are, inter alia, acts the features of which include especially subjective causative factors such as "invective", "derision", "humiliation", "management", "incitement" or "facilitation". According to S. Frankowski, "incitement" or "facilitation" must be the kind of conduct that is aimed at obtaining effects in the form of incitement or facilitation.[6] Another group of offences with a specific purpose *sensu largo* are acts with especially subjective features of a *modus operandi*: "deceit", "violence" or "threat"[7] and crimes of special awareness, the essence of which is emphasising a perpetrator's knowledge.[8]

Referring to the presented division of offences with a specific purpose, M. Budyn-Kulik indicated that offences with a specific purpose *sensu stricto* should also include those that the legislator clearly defines as ones characterised by an objective and motivation, and offences with a specific purpose *sensu largo* should include those that are characterised by motivation that the legislator does not directly articulate in statute. According to M. Budyn-Kulik, the element of knowledge distinguished by S. Frankowski may be only viewed on the plane of intent, and thus, it does not seem to be right to include this group in the category of offences with a specific purpose.[9]

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[2] See, M. Budyn-Kulik, *Umyślność w prawie karnym i psychologii. Teoria i praktyka sądowa* [Wilfulness in criminal law and psychology. Theory and judicial practice], Warsaw 2015, pp. 75–110, 276–288; M. Kowalewska-Łukuć, *Zamiar ewentualny w świetle psychologii* [*Dolus eventualis* in psychology], Poznań 2015, pp. 156–160.

[3] See, S. Frankowski, *Przestępstwa kierunkowe*... [Offences with a specific purpose…], pp. 33–35.

[4] *Ibid*., pp. 34–35.

[5] *Ibid*., p. 35.

[6] *Ibid*., p. 117.

[7] *Ibid*., pp. 121–123.

[8] *Ibid*., pp. 126–127.

[9] M. Budyn-Kulik, *Umyślność*… [Wilfulness…], pp. 400–401.

Nevertheless, it should be assumed that only those prohibited acts the features of which sufficiently enough indicate the possibility of their commission with *dolus directus coloratus* can be treated as offences with a specific purpose. They are the only ones that can be clearly differentiated from other intentional crimes. As a result, offences with a specific purpose, which will be further discussed below, are acts characterised by the aim of a perpetrator's action. Insofar as S. Frankowski is right that crimes with specially marked subjective features of the *modus operandi*, an action specifically characterised by a nuanced verb or a perpetrator's specific knowledge, have a specifically shaped subjective element, this does not mean that they constitute an example of offences with a specific purpose. Indeed, it must be remembered that the essence of offences with a specific purpose is a possibility of committing them only with direct intent of a special character, however, in case of the construction of offences with a specific purpose *sensu largo*, oblique intent is not excluded. In this context, it is worth drawing attention to the crime of offending religious feelings under Article 196 of the Criminal Code (hereinafter CC), the sense of which consists in offending the religious feelings of other persons by outraging in public an object of religious worship or a place dedicated to the public celebration of religious rites. Among the features of this act, one can also distinguish such ones that, according to S. Frankowski, indicate that a crime under Article 196 CC is an offence with a specific purpose in a broad sense. This is connected with the features of the verbs "offends" and "outraging". Nevertheless, in jurisprudence[10] as well as in the judicature[11], it is assumed that the crime discussed may be committed with direct intent or with oblique intent. The concept of aiding and abetting, which consists in facilitating the commission of crime by another person, should be looked at in a similar way. In this case, oblique intent is possible.[12] Similarly, it is necessary to perceive crimes characterised by clearly articulated perpetrator's knowledge.[13] On the other hand, a deceitful activity or one committed with the use of violence or threat is an intentional act but can be committed with no specific purpose.[14] This results in a conclusion that is more general in nature, namely that offences with a specific purpose require not only particular conduct of a perpetrator but also an additional element indicating an objective set by a perpetrator as the object of his/her pursuit.

It is worth emphasising that offences with a specific purpose have different features with respect to their unlawfulness, in this context, non-conformity with the norms of criminal law as well as within the scope of the subjective aspect, i.e. the intellectual-psychical attitude of a perpetrator to the act that he/she has

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[10] Ł. Pohl, S. Czepita, *Strona podmiotowa przestępstwa obrazy uczuć religijnych i jego formalny charakter* [Subjective element of the crime of offending religious feelings and its formal nature], Prokuratura i Prawo No. 12, 2012, pp. 73–78.

[11] Supreme Court resolution of 29/10/2012, I KZP 12/12, OSNKW No. 12, item 112, 2012.

[12] Supreme Court judgement of 15/10/2013, III KK 184/13, OSNKW No. 2, item 15, 2014.

[13] R.A. Stefański, *Prawo karne materialne. Część szczególna* [Substantive criminal law. Specific part], Warsaw 2009, p. 140.

[14] See, N. Kłączyńska, [in:] J. Giezek (ed.), D. Gruszecka, N. Kłączyńska, G. Łabuda, A. Muszyńska, T. Razowski, *Kodeks karny. Część szczególna. Komentarz* [Criminal Code. Specific part. Commentary], Warsaw 2014, comments on Article 203, thesis 12.

committed. The differences in the area of unlawfulness are manifested in the fact that subjective elements of offences with a specific purpose, such as malice, persistence or undertaking an act in order to achieve a financial benefit, co-determine the content of a sanctioned norm, which means that in case of their lack, an act loses its unlawful feature. On the other hand, as far as the subjective aspect is concerned, differences between offences with a specific purpose consist in, if we anticipate the discussion to follow, rejection of a possibility of their commission with oblique intent and unintentional conduct.[15]

Speaking about offences with a specific purpose, it is not possible to avoid the issue of defining the elements having impact on such a character of those crimes. Traditionally, the classification of offences with a specific purpose was based on the distinction of an aim, a motive and an impulse among their statutory features. So far, a motive has referred to a human idea (human thought) of the past, present time or the future, which makes one conduct oneself in a particular, strictly fixed, oriented way. Thus, a motive has been an element of a man's intellectual sphere because it has been expressed in his thought or imagination, or an element of volition since it might take the form of pursuit of a specific state. An impulse, on the other hand, has been referred to feeling(s) influencing a perpetrator's decision-making process. In other words, it has been a factor with an emotional content originating from the pursuit of the specific state. An aim, on the other hand, has been viewed as a certain future state, which a man wants to achieve through his/her entire conduct.[16]

At present, there is an opinion that the above-defined concepts do not fully reflect the current state of psychological knowledge. Thus, lawyers are blamed for developing such definitions disregarding the basic assumptions of psychology. The distinction between a motive and an impulse is unjustified. There are no grounds for it because attributing an impulse only a feature of an emotional feeling does not find substantiation in the findings of the research into motivation.[17] At present, in the assessment of a perpetrator of a prohibited act, the achievements of the psychology of motivation are taken into account. Experts emphasise that the concept of "motivation" may be interpreted in two ways. Firstly, as a "relatively constant human tendency to achieve specific aims, life tasks and values", and secondly, as a motivational process, which as a typical phenomenon lies "at the foundation of determined, particular human conduct". That is why, in order to understand the reasons behind human behaviour, it is necessary to ask a fundamental question: Why did a given person act in this particular way? This is a question that always concerns a man's motivation.[18]

The question can be answered (at least partially) by finding the aim a perpetrator wanted to achieve. As it was presented above, the aim is a certain specified future state, which a man pursuits though his/her entire conduct. According to G. Rejman,

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[15] M. Nawrocki, *Przestępstwa kierunkowe a zamiar niby-ewentualny* [Offence with a specific purpose and *quasi-eventualis* intent], Prokuratura i Prawo No. 5, 2012, p. 44.

[16] *Ibid.*, p. 42.

[17] J.K. Gierowski, T. Jaśkiewicz-Obydzińska, M. Najda, *Psychologia w postępowaniu karnym* [Psychology in criminal proceedings], Warsaw 2010, pp. 354–356.

[18] *Ibid.*, pp. 351–352.

in criminal law, an aim may fulfil different functions. Firstly, in the construction of a crime, it plays the function limiting the verb-related feature to those acts that match its content. An aim understood this way fulfils the function to precisely define the behaviour laid down in the definition of an offence described with the use of a verb. Not every instance of seizure constitutes a theft but only the one that leads to the aim of appropriation. According to the author, based on the examples of acts under Article 127 CC and Article 130 CC, the aim of some types of prohibited acts attributes the same term to many different activities, i.e. refers to the same feature from the point of view of the activity expressed with the same verb. And thus, a felony or a coup (Article 127 §1 CC) consists in undertaking, together with other perpetrators, an activity intended directly to achieve an aim to deprive the Republic of Poland of independence, to detach a portion of its territory, to overthrow by force its constitutional system. Thus, all activities undertaken in so determined aim are included in a collective description of "undertaking, in agreement with other persons, activities aiming at the materialisation of this purpose". Moreover, as a result of this aim, a number of perpetrators can commit the same crime, although they do not cooperate as accomplices, despite partially matching the features. G. Rejman presents an example of a crime under Article 310 §2 CC, i.e. the release into circulation counterfeit money, where alternative executive activities indicated in the provision (receiving, storing, transporting, carrying, dispatching or assisting in selling or concealing counterfeit or altered Polish or foreign money, other legal tender or a document which entitles one to obtain a sum of money or contains an obligation to pay capital, interest, share of profits, or verifies a share in a company, or removes a sign of cancellation from money or other legal tender) are made equivalent to release into circulation provided that they were committed with the aim of releasing into circulation. G. Rejman emphasises that the aim performs one more function, namely, in accordance with Article 115 §20 CC, divides the whole criminal law into criminal law characterised by a terrorist aim and criminal law without that aim.[19]

It seems that offences with a specific purpose characterised by the aim of a perpetrator's activity are most significant. It is so because offences with an aim constitute the biggest number of offences with a specific purpose.[20] Sometimes, the two categories are identified with one another. Nevertheless, it must be remembered that offences with an aim are just a sub-category of offences with a specific purpose.[21]

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[19] G. Rejman, *Zasady odpowiedzialności karnej. Art. 8–31 k.k. Komentarz* [Principles of criminal liability. Articles 8–31 CC. Commentary], Warsaw 2009, pp. 54–58.

[20] Offences with an aim are laid down, inter alia, in Articles 16 §1 CC, 24 CC, 118 §1 CC, 127 §1 CC, 128 §1 CC, 140 §1 CC, 200a §1 CC, 202 §3 CC, 204 §1 CC, 286 §1 CC, 287 §1 CC, 289 §1 CC, 290 §1 CC, 297 §1 CC or 298 §1 CC.

[21] An offence with a specific purpose which is not an offence with an aim is for example the type of a prohibited act under Article 302 §2 CC. Pursuant to this provision, it is committed by whoever who gives or promises to give a financial profit to a creditor in return for actions detrimental to other creditors in connection with insolvency proceedings or bankruptcy prevention proceedings. Thus, the activity of giving a financial profit or promising to give it is aimed to be detrimental to other creditors. See, the same opinion G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna…* [Criminal Code. Specific part...], comments on Article 302, thesis 22.

2. INTENTIONAL COMMISSION OF A PROHIBITED ACT

The assessment whether a perpetrator acted intentionally and with *dolus directus coloratus* is not an easy task. As T. Kaczmarek indicates, "thorough determination of the relation between intention and the features of objective elements of a prohibited act faces some specific difficulties. Their general reason is, inter alia, the fact that the scope of meaning of a perpetrator's 'psychical experiences', based on which we want to determine his/her attitude to an act committed, has not been established in psychology yet, in the same way as the mechanism of their influence on the conduct has not been fully recognised. Unlike the objective aspect of an act, externally perceived, available direct sensual observation, the subjective aspect of an act is implemented in a perpetrator's psyche, which constitutes the most difficult sphere of human life to examine."[22] Then, let us start from elementary issues. According to W. Wolter, an intention is a subjective bond between a perpetrator and his/her act.[23] The Criminal Code formulates its two forms: "volition" and "consent". Both consist in a certain act of will, which is called "intention". The act of will, i.e. intention, consisting in the fact that a perpetrator "directly wants" something is called direct intent (*dolus directus*) in comparison to an act, which a perpetrator does not directly want but he/she "gives consent to", which is called "oblique intent" (*dolus eventualis*).[24] It is necessary to draw special attention to A. Zoll's words here. He emphasises that Article 9 §1 CC introduces a technical, typical of criminal law only, definition of intention, not necessarily the same as the general interpretation of the word. According to this author, in colloquial language, intention is limited to this form of intent, which is called direct intent in law. In conformity with colloquial language, whoever acts in order to achieve a specific state, he/she acts intentionally. The introduction of oblique intent to the definition of a prohibited act committed intentionally is an extension of the meaning of intention for the needs of criminal law.[25]

Extending those comments, we might say that intent is the most important element of intentional commission of a prohibited act. It has substantial significance for awareness of a prohibited act perpetrator as well as influences this perpetrator's will to match the statutory features. It is commonly assumed in jurisprudence that intent has two aspects. On the one hand, it is intellectual in nature and requires that a perpetrator is aware of all circumstances constituting the features of a prohibited act. These are objective circumstances that can be subsumed under the features constituting a description of a prohibited act, thus they are *designata* of those

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[22] T. Kaczmarek, *Sporne problemy umyślności* [Disputable issues related to wilfulness], [in:] J. Majewski (ed.), *Umyślność i jej formy* [Wilfulness and its forms], Toruń 2011, p. 30.

[23] W. Wolter, *Prawo karne. Zarys wykładu systematycznego. Część ogólna* [Criminal law. Overview of the systemic discussion. General part], Warsaw 1947, p. 155.

[24] *Ibid*.

[25] A. Zoll, *Strona podmiotowa i wina w kodeksie karnym z 1997 r. i w projektach jego nowelizacji* [Subjective element and guilt in the Criminal Code of 1997 and in the drafts of its amendments], [in:] A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz (eds), *Prawo, społeczeństwo, jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu* [Law, society, individual. Professor Leszek Kubicki jubilee book], Wolters Kluwer, Warsaw 2003, p. 411.

features.[26] An important requirement is that awareness cannot be identified with knowledge. Knowledge is a collection of information about the surrounding reality. Without it, it is not possible to realise the specific state. In this sense, awareness constitutes updated knowledge.[27] The second element characterising intention is defined as a "volitional aspect", "voluntative aspect" or "volitive aspect". As the name suggests, it concerns the will occurring on the part of a perpetrator to match the features of a prohibited act. It is the emanation of a perpetrator's conscious decision to implement the statutory features and constitutes a process that takes place in the human psyche, which expresses his or her attitude to the reality related to those features.[28] Thus, will is a secondary element in relation to awareness. The intellectual aspect of intention to commit a prohibited act is a necessary condition for a man's possession of any type of volitional attitude towards an act. One who is not aware of the possibility of committing a prohibited act cannot have a volitional attitude towards that act.[29]

The distinction between an intellectual aspect and a volitional aspect has a deep sense because it shows the complexity of the subjective element of an intentionally committed prohibited act, obviously including an offence with a specific purpose. As it has been signalled above, a perpetrator can intentionally commit a prohibited act in two situations, i.e. when he/she wants to commit it and when he/she does not want it but gives consent to it. Thus, this double-form intention consists in the differences occurring between a volitional aspect of direct intent and oblique intent. With respect to this, intellectual aspect does not play a very important role.[30]

The discussion to follow will be devoted only to direct intent, which is directly connected with the fact that offences with a specific purpose cannot be committed with intent different than the one indicated. Due to a perpetrator's purposeful, especially motivated conduct, it is not possible to assume a possibility of committing a prohibited act with a specific purpose with oblique intent[31] or unintentionally.[32]

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[26] A. Zoll, [in:] G. Bogdan, Z. Ćwiąkalski, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Tom I. Komentarz do art. 1–116 k.k.* [Criminal Code. General part. Vol. I. Commentary on Articles 1–116 CC], Wolters Kluwer, Warsaw 2012, p. 141.

[27] *Ibid*., p. 142.

[28] J. Lachowski, [in:] R. Dębski (ed.), *System prawa karnego. Nauka o przestępstwie. Zasady odpowiedzialności* [Criminal law system. Discussion on crime. Principles of liability], Vol. III, C.H. Beck, Warsaw 2012, p. 530.

[29] Ł. Pohl, *Prawo karne. Wykład części ogólnej* [Criminal law. Discussion of the General part], LexisNexis, Warsaw 2013, p. 135.

[30] As J. Giezek indicated, on the intellectual plane, when a diagnosis of circumstances in which a perpetrator acts is formulated, the state occurs in the same way on the basis of conscious non-intention as well as oblique intent (and actually also direct intent). As a result, the author assumes that the state of awareness in connection with both types of intent and in conscious non-intention seems to be similar if not identical. Clearer differences concern, however, the volitional sphere. See, J. Giezek, *Świadomość sprawcy czynu zabronionego* [Awareness of a prohibited act perpetrator], Wolters Kluwer, Warsaw 2013, pp. 193–194.

[31] See, M. Kowalewska-Łukuć, *Zamiar ewentualny…* [*Dolus eventualis…*], pp. 159–160.

[32] M. Cieślak held a different opinion. He indicated that: "The opinion excluding oblique intent in offences with a specific purpose is correct only within the limitation that what is indicated as an aim of a perpetrator's action must be subject to direct intent. Similarly, it is not

Dolus directus consists in the fact that a perpetrator wants to commit a prohibited act. The "volition" as a volitional aspect of the subjective element means a will to materialise a specific state. As J. Lachowski indicates, "to want" means to feel like doing, to need, to wish.[33] As a result, a perpetrator's wish does not assume any hesitation but is an effect of an unambiguous decision to materialise the features of a prohibited act. The will is not conditional in this case because it does not contain whatever shade of doubt about the implementation of reality matching the statutory features.[34] In the criminal law doctrine, it is raised that "The object of volition must be expressed as the implementation of conduct matching the features of a prohibited act treated as a whole. Volition as a form of intent does not refer to particular features but to the whole conduct characterised by the features of a prohibited act".[35]

The intellectual aspect of direct intent looks a bit different. Describing intentional commission of a prohibited act, J. Giezek indicates its intellectual foundation, the essence of which is that a perpetrator must be aware of the actual circumstances in which he/she operates. Therefore, a perpetrator's (updated) knowledge must cover what is contained in the statutory features.[36] What is important, a perpetrator must be aware of all the circumstances that decide about the materialisation of the statutory features of the objective element of a prohibited act. A perpetrator's failure to realise any of those features makes him/her act within the limits of an error, which, on the other hand, causes that he/she cannot intentionally violate a criminal law ban.[37]

It is worth emphasising here that, while a perpetrator must be aware of the implementation of all the features of an act, it is not required that he/she "should think in the linguistic manner of statute". A thief's awareness does not have to contain the phrases used in Article 278 §1 CC: "wilfully takes", "with the purpose of appropriation", "somebody else's movable property". It is enough to be aware that he/she takes not his/her wallet from another man's pocket and may use the money in it for what he/she wants.[38] This way, the act realised matches the act's *designata*, which the legislator laid down in Article 278 §1 CC, however, perceived by a perpetrator with the use of different terms.[39] Explaining the phenomenon, T. Kaczmarek indicates that: "It most often happens because the perception of

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possible for a perpetrator to set a target and not to want it at the same time. However, as a rule, a perpetrator's triple-type voluntative attitude is possible towards any other feature of the type (except an aim): either a perpetrator wants it (which means that the circumstance fits him), or does not want it but accepts it just in case it comes true ("he gives consent"), or eventually does not want it and does not accept it but acts in a specific way in the hope that he will avoid the given circumstance." See, M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* [Polish criminal law. Systemic overview], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2011, pp. 262–263.

33 J. Lachowski, [in:] R. Dębski (ed.), *System prawa karnego*… [Criminal law system...], p. 535.

34 *Ibid*.

35 A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*… [Criminal Code. General part...], p. 145.

36 J. Giezek, [in:] N. Kłączyńska, G. Łabuda, J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. Commentary], Warsaw 2012, comments on Article 9, thesis 5.

37 *Ibid*.

38 T. Kaczmarek, *Sporne problemy*... [Disputable issues...], p. 32.

39 *Ibid*.

a perpetrator refers to actual physical reality. Therefore, committing a murder, a perpetrator does not realise what he/she did with the use of abstract phrases generalised by the legislator in statute but substitutes more specific and personalised phrases for the words: 'kills a human being'."[40]

J. Giezek draws attention to another issue connected with awareness of a prohibited act perpetrator. The author indicates that the elements constituting the objective aspect of a prohibited act may be diagnosed and predicted by a perpetrator. A diagnosis consists in the establishment of the already existing state and, thus, is a reconstruction. A prediction, on the other hand, is an opinion about the possibility of an imagined state occurrence within a specified future period on a time scale.[41] Skilful differentiation of a diagnosis (awareness of an actual state) from a prediction (awareness of circumstances that may occur in the future) makes it possible to draw a conclusion that a perpetrator diagnoses some features of a prohibited act and predicts some of them.[42]

Successive questions arise here. Namely, from what temporary perspective is it necessary to diagnose and formulate occurrence of a prediction of statutory features? Secondly, which elements of the objective aspect of a prohibited act can be diagnosed and which require predicting?

J. Giezek gives answers to both questions. Firstly, the author indicates that the moment the subject of the prohibited act starts implementing the action, i.e. violates the ban laid down in the sanctioned norm, is the most appropriate moment to assess

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[40] *Ibid*.

[41] J. Giezek, *Świadomość…* [Awareness...], p. 57–58.

[42] *Ibid*., p. 63, expanding this thought, J. Giezek states that: "Features describe, taking into account the dynamic aspect of a perpetrator's conduct, the present time (i.e. what is happening at present) and the future (i.e. what is going to materialise together with the occurrence of a state called a result). When an intention to commit a prohibited act develops, diagnostic awareness of the subject is limited to the elements of the starting point. Being on the 'threshold' of purposeful conduct, a perpetrator diagnoses such its elements that do not exist in that situation any more. Thus, he mainly notes circumstances in the light of which he becomes capable of committing a given type of a prohibited act. (…) Therefore, it may be said that at this stage a future perpetrator's awareness covers the features characterising the subject of a prohibited act, which is important, as a rule, mainly in connection with the individual crimes. Other features of the type that have not started to materialise yet may be only predicted because they are the future states of things. It concerns a final situation corresponding to intention in particular. In other words, a situation that a subject-perpetrator pursues, in fact being a set of predicted states, constitutes the object of his more or less 'vague' visions. The dynamic of conduct causes of course that its particular elements are successively materialised. Thus, at a certain moment a perpetrator starts materialising the conduct matching the description of the action (verbs), which was earlier only planned. (…) Next, when the conduct aimed at changing the starting point situation is materialised, its result occurs. It is necessary to add that information retained by the subject in the course of purposeful conduct implementation may verify the prediction made at the beginning in a positive or negative way, i.e. either confirm its rightfulness or indicate errors, which are either diagnostic (if they concern the existing states) or prognostic (if they relate to the future and result from erroneous predicting)." J. Giezek, *Świadomość…* [Awareness...], pp. 63–64. Also, see J. Giezek, *Dynamika stanu świadomości sprawcy czynu zabronionego oraz jej wpływ na odpowiedzialność karną* [Change of awareness of a prohibited act perpetrator and its impact on criminal liability], [in:] P. Kardas, T. Sroka and W. Wróbel, *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla* [State ruled by law and criminal law. Professor Andrzej Zoll jubilee book]. Vol. II, Wolters Kluwer, Warsaw 2012, p. 563 ff.

the statutory features in relation to a perpetrator's awareness. Secondly, from this perspective, it is noticeable that the features of the subject, the object of activity, conduct described with the use of a verb and some modal features (e.g. tools used to commit crime) can be diagnosed. On the other hand, the features of the effect and proximate cause (including its particular elements) as well as some modal features (especially if they contain an additional description of an effect) may be subject to prediction.[43]

3. DIRECT INTENT WITH A SPECIFIC PURPOSE

It is still necessary to say a few words to characterise direct intent with a specific purpose. Earlier, the essence of offences with a specific purpose has been discussed and the aim of a perpetrator's action, inter alia, defined. Here, on the other hand, it is necessary to focus on showing the position of this intent and the aim that is connected with it in the structure of crime. The essence of *dolus directus coloratus* consists in the fact that a perpetrator wants to commit a prohibited act and heads for a specified direction. Thus, he/she has a specific will and wish to commit a prohibited act and achieve a particular state. What is important, this state must constitute an element of the statutory features of a prohibited act and a perpetrator must strive to achieve it. He/she does not have to materialise it (e.g. the wish to obtain financial benefits when committing fraud under Article 286 §1 CC[44]). As it is emphasised in jurisprudence, an aim characterising direct intent with a specific purpose is an element of will and not awareness.[45] It must occur in a perpetrator's psyche, at the latest, at the moment of committing the act being part of the objective aspect. Thus, it may occur earlier but must be present at the moment of committing crime. If such an aim occurs after the implementation of the action, the legal assessment of the act changes.[46] It is clearly seen in case of the crime of fraud, where causing another person to disadvantageously dispose of their property by deception, taking advantage of a mistake or inability to adequately understand the action undertaken, has a legal sense only when it is undertaken in order to obtain financial benefits. If a perpetrator does not act with such an aim, the whole set of the features of the objective element is not materialised and, thus, an offence is not committed. In such a case, only civil liability is possible due to failure to perform an obligation or inappropriate performance of an obligation.[47]

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[43] J. Giezek, *Świadomość…* [Awareness...], pp. 76–77.

[44] M. Nawrocki, *Strona podmiotowa przestępstwa oszustwa klasycznego (art. 286 §1 k.k.)* [Subject of the crime of fraud (Article 286 §1 CC)], Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury issue 1, 2011, pp. 110–111; and *ibid*., *Oszustwo klasyczne (art. 286 §1 k.k.) jako przestępstwo kierunkowe* [Fraud (Article 286 §1 CC) as an offence with a specific purpose], Przegląd Sądowy No. 11–12, 2011, p. 84.

[45] J. Lachowski, [in:] R. Dębski (ed.), *System prawa karnego…* [Criminal law system...], p. 543.

[46] *Ibid*., p. 548.

[47] M. Nawrocki, *Przestępstwo oszustwa klasycznego a bezprawie cywilne* [The crime of fraud vs. civil lawlessness], Palestra No. 11–12, 2011, p. 83 ff.

The above leads to a conclusion that in case of offences with a specific purpose, the intellectual element, and the awareness of the existence of (diagnosed and predicted) objective features of a prohibited act as well as the volitional element, i.e. the wish to implement them in a particular direction (aim), must occur together at the moment, at the latest, when a perpetrator starts the performance of conduct that is legally relevant under criminal law, i.e. at the moment when he/she starts an action laid down among the features of a prohibited act.[48] Thus, there are no doubts that intention (including this with a specific purpose) requires awareness of all circumstances, objective in nature, that compose the characteristic features of this type of offence. However, it is quite commonly assumed that the elements of the objective side cannot be an object of a perpetrator's awareness.[49] Nevertheless, J. Giezek indicates that "it is possible to prove in many ways (…) that there are situations, quite frequent ones, when a subject (a perpetrator) becomes aware of the accompanying volitional processes. In fact, it should be even assumed that it usually happens because most often the subject 'knows what he/she wants'. If it is possible to relate a perpetrator's awareness to the features of the objective side, it would be justified to conduct an analysis aiming to state its lack, which might result, e.g. in establishing that a perpetrator is not aware e.g. that he/she wants something or gives consent to something, or does not realise that some specific emotions accompany him/her (e.g. compassion, fear or agitation). Making use of the rich output of cognitive psychology, we immediately notice that the exclusion of such a possibility would be premature and too far-reaching simplification".[50] As a result, one cannot negate the justification of an opinion that in case of subjective features, it is necessary for a perpetrator to be aware at least of the circumstances that are conditions for their occurrence.[51] Translating this into the statutory features of classical fraud (Article 286 §1 CC), we would say that a perpetrator, to be able to act to achieve financial benefits, must realise that causing another person to disadvantageously dispose of his property results in taking advantage by him or another entity. To generalise, the characteristic feature of the subjective side of the construction of offences with a specific purpose is that a perpetrator must be aware of the shape of objective features decisive for the specific nature of a committed act. Most often, this element will be an aim of criminal action but a perpetrator does not have to realise it directly. It is enough that a perpetrator realises there are circumstances that are conditions for its occurrence.

If a perpetrator of an offence with a specific purpose must be aware of at least the circumstances being conditions for occurrence of subjective features, especially

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[48] T. Kaczmarek held a little different opinion indicating that the updating of subjective features of a prohibited act in a perpetrator's conscience may, but does not have to, take place at the moment of an act commission. The more complicated the objective aspect, the less probable is that a perpetrator thinks about "everything" at the moment of the act. See, T. Kaczmarek, *Sporne problemy*... [Disputable issues...], p. 32.

[49] See, inter alia, A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*… [Criminal Code. General part...], p. 141.

[50] J. Giezek, *Świadomość*… [Awareness...], p. 96.

[51] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*… [Criminal Code. General part...], p. 141.

those deciding on the direction of an action, a question arises whether this awareness must be diagnosis-like or prediction-like. As it has been indicated above, a diagnosis constitutes a reconstruction of the reality in a perpetrator's mind, and a prediction is a perpetrator's assessment of the probability of occurrence of the imagined state. It seems that, on the basis of offences with a specific purpose, the aim (direction) of an action may have a dual nature, i.e. it can be diagnostic-predictive. Therefore, based on the example of classical fraud again, let us draw attention to the fact that a perpetrator, misleading the aggrieved, is aware of what he/she wants to achieve: take possession of property that is subject to disadvantageous disposal. A perpetrator of an act under Article 286 §1 CC, applying to a bank for a loan and obtaining it under false pretences, is fully aware that his/her activity leads to gaining a financial benefit, which must be equivalent to the property disadvantageously disposed of. Thus, the subject of diagnosis is the reality of a perpetrator's state of mind demonstrating itself in his/her conscious striving for a specific direction. This corresponds to J. Giezek's opinion that a perpetrator "knows what he/she wants". From the point of view of the present analysis, a predictive element is also important. It has been stated that a perpetrator wants to take possession of property that is subject to disadvantageous disposal. In other words, a perpetrator diagnoses the existence of property and, what is also important, knows that his/her activity leads to gaining profits, which correspond to the value of the property disadvantageously disposed of. He/she cannot, however, diagnose whether the activity (undertaken in a specific direction) will result in the desired effects, i.e. in the achievement of the assumed aim (in our example: gaining benefits equivalent to the value of property disadvantageously disposed of). A classical fraudster may only presume, with more or less precision, the financial benefit of a certain value. This corresponds to a statement that a perpetrator of an offence with a specific purpose must strive to achieve an aim but does not have to materialise it. This means that a perpetrator must predict the probability of achieving the object of his pursuit, i.e. a substrate of the direction (aim), but the accuracy of the prediction (i.e. its value calculated, e.g. as a percentage) is not a condition of criminal liability. Let me repeat, in order to assign liability for an offence with a specific purpose, it is enough to prove that a perpetrator has acted in order to achieve a certain aim, without the necessity of its materialisation.

4. SUDDEN AND PREMEDITATED INTENT

There are other problematic issues in connection with the subjective side of an offence with a specific purpose formulated above. Namely, a question must be asked whether it is possible to commit an offence with a specific purpose with a premeditated or sudden intent. In other words, is it possible for the two different types of direct intent, specific intent with premeditated intent as well as specific intent with sudden intent, to overlap?

The discussion of the issue should start from the indication that the above-mentioned distinction, introduced on the basis of direct intent, is justified

methodologically as well as from the point of view of criminal law. The notice is necessary because one can also find an opinion in the literature that "There are no (…) legal and factual grounds for distinguishing the sudden intent and premeditated intent within the subjective element of a prohibited act".[52] It seems that this is an isolated opinion, especially when it is noted that in assessing the level of social harmfulness, in accordance with Article 115 §2 CC, it is necessary to take into account, inter alia, the form of intent; and a practical aspect of this distinction, which plays a significant role in penalty imposition.[53] Making an attempt to characterise the two forms of *dolus directus*, it is necessary to point out that premeditated intent (*dolus praemeditatus*) occurs when an idea of crime commission matures in a perpetrator's psyche, i.e. he/she considers a prohibited act commission and then takes a decision to materialise the statutory features. Thus, the construction covers a perpetrator's thinking processes preceding a decision to commit a prohibited act and planning the method of committing it after the intent occurred, thus already after the decision to commit an act was taken.[54] On the other hand, the characteristic feature of sudden intent is the fact that it occurs in situations when a perpetrator acts without the typical process of the fight of motives, which is connected with the lack of sufficient amount of time and conditions for thinking an act over thoroughly. Thus, a perpetrator takes a decision on a conduct in a specific way, which would probably not be undertaken in other conditions. The decision is taken rapidly, under the influence of emotions, without the possibility of rational analysis of circumstances, consideration of which might lead to a different conduct.[55]

It seems that answering the question whether direct intent and premeditated intent can overlap is simple. Indeed, an action planned to unavoidably lead to the achievement of the set aim (constituting a statutory feature of a committed act) is a natural feature of a perpetrator's conduct characterised by direct intent with a specific purpose. To generalise, it can be said that premeditated intent usually accompanies intent with a specific purpose.

Therefore, how should we answer the question about the possibility that a perpetrator has sudden intent and intent with a specific purpose? It seems that, due to the elements of *dolus repentinus*, the variant in which a perpetrator might act purposefully and at the same time rapidly, without considering all circumstances

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[52] *Ibid*., p. 151.

[53] In case law, there are no examples of differentiating direct intent as the premeditated one and the sudden one, and drawing consequences on the basis of the level of guilt, and as a result penalty imposition – see, the Supreme Court judgement of 18/03/1949, K 1135/48, OSN(K) No. 2 item 51, 1949, LEX No. 161446; Supreme Court judgement of 26/01/1966, IV KR 222/65, OSNKW No. 8, item 82, 1966, LEX No. 114627; Supreme Court judgement of 27/10/1995, III KRN 118/95, LEX No. 24861; judgement of the Appellate Court in Warsaw of 10/10/2012, II AKa 276/12, LEX No. 1238292; judgement of the Appellate Court in Kraków of 22/11/2012, II AKa 184/12, KZS issue 2, item 45, 2013, LEX No. 1315305; and KZS issue 2, item 46, 2013, LEX No. 1315308; judgement of the Appellate Court in Krakow of 6/11/2013, II AKa 203/13, KZS issue 12, item 36, 2013, LEX No. 1444533.

[54] J. Lachowski, [in:] R. Dębski (ed.), *System prawa karnego*… [Criminal law system...], p. 537. Also, see M. Budyn-Kulik, *Umyślność*… [Wilfulness…], pp. 61–64.

[55] Judgement of the Appellate Court in Wrocław of 18/09/2013, II AKa 242/13, LEX No. 1378922; also, see M. Budyn-Kulik, *Umyślność*… [Wilfulness…], pp. 64–66.

accompanying the materialisation of the features of a prohibited act with a specific purpose, should be excluded. It has been indicated above that a perpetrator of such an offence must be aware of the complete set of the objective features and at least the circumstances conditioning the occurrence of an aim (constituting a feature of this type of a prohibited act). Taking into account the fact that a perpetrator lacks time and conditions for thoroughly thinking over an act that characterises sudden intent, one can doubt if he/she will be able to become aware of the features described above, especially if they are expended on the objective side. As far as this is concerned, T. Kaczmarek's words about updating all features of a prohibited act in a perpetrator's awareness at the moment of an act commission gain a new value.

Despite the above, one cannot exclude the commission of an offence with a specific purpose with sudden intent. For example, a theft under Article 278 §1 CC is a classical situation commonly called "crime of opportunity". Let us imagine a situation in which someone in a shop putting his/her wallet into the bag does not notice that the wallet does not actually get to the bag but falls on the floor. Another person notices the fact and picks the wallet to come into possession of the content. Although the perpetrator notices the moment when the wallet falls on the ground by accident and reacts extremely fast, nobody is going to make him exempt from criminal liability for appropriation under Article 278 §1 CC. It is certainly due to the fact that everybody (unfortunately, also a judge adjudicating in such a case), although it is not possible to verify a perpetrator's psychical relation to his conduct, intuitively feels that every instance of picking up somebody else's wallet and failure to undertake activities to give it back to the owner must be treated as an activity undertaken in order to come into possession of its content. It corresponds to the comments made earlier about the state of a perpetrator's awareness of the features of the objective side, where it was indicated that he does not have to directly achieve the aim of his conduct but only the circumstances of its occurrence. As a result, J. Giezek is also right to indicate that: "sudden intent (...) occurs (…) when a stream of information flowing to the subject of information induces to take a decision that it is absolutely necessary to (immediately) behave in a particular way. The subject notices a sudden need to achieve a certain aim. Thus, it is hard to imagine that a state neutral for the subject, the occurrence of which the subject only accepts, might be an object of his sudden intent".[56] It would be difficult to imagine that the perpetrator in the example presented picking up a wallet and failing to return it was indifferent to what was in it.

As it was shown above, it is possible to commit an offence with a specific purpose with sudden intent in a situation when the statutory features are not numerous. But how about a situation, as T. Kaczmarek asks, when the objective side of the type of a prohibited act is more complex? Is it possible that a perpetrator of classical fraud (Article 286 §1 CC) or robbery with the use of violence (Article 281 CC) commits them with sudden intent? In both cases, we deal with the two-act crimes, which the legislator constructed with the use of two verbs instead of one and they must

[56] J. Giezek, *Świadomość…* [Awareness...], p. 98.

be materialised in conjunction.[57] In case of robbery with the use of violence, there is one more element, namely the subjective side regulated in a special way reflected in a perpetrator's conduct pursuing two aims. First, a perpetrator undertakes steps aimed at taking somebody's property with the purpose of appropriation and next, after coming into possession of the object, undertakes activities consisting in the use of violence against that person, threatening to use it immediately or causing a person to become unconscious or helpless in order to maintain possession of the stolen property.[58]

The above leads to a conclusion that while in case of prohibited acts with uncomplicated objective elements (and looking through the prism of robbery with the use of violence, including the subjective side), it is possible to commit an offence with a specific purpose with sudden intent, in case of the types in which the objective side (and sometimes also the subjective one) is complex, there may be justified doubts concerning the possibility of their commission with *dolus repentinus*. One cannot forget the fact that sudden intent is characterised by rapidity of action and materialisation, which excludes the possibility that a perpetrator will become aware of all the statutory features, including those that co-determine the direction of action, especially if the action is complex and the aim is not single.

On the basis of offences with specific intent, also the specific nature of the types of prohibited acts that are characterised by numeral features may constitute a problematic issue. To keep the presentation in the right order, I will demonstrate that, in accordance with the dominating opinion in this area, a numeral feature constitutes an element of the objective side and should consist in a perpetrator's prediction in the same way as other objective features.[59] Although the numeral amount assessment is characterised by full accuracy, it may cause some difficulties in the subjective area, i.e. in the field of determining whether a perpetrator of intentional crime must also cover the numeral feature with his intention. In W. Wolter's opinion, awareness of a number is not a necessary requirement for liability for intentional crime, which means it is enough if a perpetrator is aware that in colloquial meaning it concerns something substantial, greater, which numbers express.[60] In connection with this opinion, the Supreme Court judgements, on the basis of the crime of appropriation, which was an offence with a specific

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[57] M. Nawrocki, *Czas popełnienia czynu zabronionego w polskim prawie karnym. Podstawowe zagadnienia materialno-prawne* [Time of commission of a prohibited act in the Polish criminal law. Basic substantive and legal issues], Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin 2014, p. 142. It is worth mentioning that robbery with the use of violence has also the features of a complex crime because particular elements of this action are laid down in Article 281 CC and, taken in separation, correspond still to other criminal law provisions, e.g. Article 278 §1 CC, Article 190 §1 CC, and Article 157 §1 CC.

[58] Judgement of the Appellate Court in Białystok of 19/03/2013, II AKa 42/13, LEX No. 1311930.

[59] I. Andrejew, *Ustawowe znamiona przestępstwa* [Statutory features of a crime], Warsaw 1959, pp. 232–233; W. Wolter, *Nauka o przestępstwie* [Discussion on crime], PWN, Warsaw 1973, pp. 227–228; Ł. Pohl, *Błąd co do okoliczności stanowiącej znamię czynu zabronionego w polskim prawie karnym (zagadnienia ogólne)* [Error as to a circumstance being the feature of a prohibited act in the Polish criminal law (general issues)], Ars Boni et aegui, Poznań 2013, pp. 101–102.

[60] W. Wolter, *Nauka*… [Discussion...], p. 229.

purpose,[61] admit a construction assuming that a perpetrator's direct intent refers to appropriation only; on the other hand, the considerable value of the property stolen may only be related to oblique intent. In other words, the subjective side of an offence is materialised even when a perpetrator predicts that the value of appropriated property may be considerable and he gives consent to that.[62] This opinion is, however, hard to approve of. M. Dąbrowska-Kardas and P. Kardas are right that numeral features, which in accordance with Article 294 §1 CC and Article 294 §2 CC are also classifying features, supplement the statutory description of a prohibited act type. Thus, they constitute an element of the subjective side of the given type. As far as the aggravated types under Article 294 §1 CC and Article 294 §2 CC are concerned, their objective side is determined each time in the provision laying down the basic type. As a result, the features must be subject to intention in the form adequate to the given type of crime against property that is the basis for determining an aggravated type.[63] The authors' opinion is consistent and right that with regard to offences with a specific purpose such as theft or fraud, the aggravating feature in the form of property of considerable value or of significant cultural value must be subject to a specific purpose of a perpetrator's activity.[64] Supplementing these arguments, it is necessary to indicate that if numeral features constitute elements of the objective side of the type of a prohibited act and as such are not subject to internal (in this group of features) assessment, they should not be differentiated with regard to the subjective side, either, by classifying some under the concept of direct intent and others "only" oblique intent. There are no legal grounds for such treatment.

5. CONCLUSIONS

The above considerations have aimed to characterise the subjective side of offences with a specific purpose. To sum up, it is first of all necessary to emphasise that offences with a specific purpose are not one unique group of prohibited acts. They contain the offences with specific intent but, as it has been demonstrated, there are also offences with a specific purpose that are not characterised by such features as the aim of a perpetrator's action. What is important is the fact that the construction signalled in the title requires intention characterised by direct intent

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[61] See, J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz. Tom II. Część szczególna* [Criminal Code. Commentary. Vol. II. Specific part], PWN, Warsaw 1987, pp. 227–228.

[62] In the Supreme Court judgement of 10/10/1974, III KR 95/74, OSNKW No. 1, item 7, 1975, LEX No. 18909; the Supreme Court judgement of 19/03/1984, II KR 49/84, OSNKW No. 11–12, item 118, 1984, LEX No. 19989; and the Supreme Court judgement of 14/10/1988, IV KR 186/88, OSNKW No. 1, item 7, 1989, LEX No. 20334.

[63] M. Dąbrowska-Kardas, P. Kardas, [in:] A. Barczak-Oplustil, G. Bogdan, Z. Ćwiąkalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k.* [Criminal Code. Specific part. Vol. III. Commentary on Articles 278–363 CC], Wolters Kluwer, Kraków, Kraków 2006, p. 488.

[64] *Ibid.*, pp. 488–489.

of specific nature concerning all objective features and at least circumstances being a requirement for the occurrence of the direction (aim) of a perpetrator's activity. In this last case, we deal with the specifically understood perpetrator's awareness of the features of the subjective side of the committed act. As the comments made in the article show, offences with a specific purpose reveal differences not only with regard to the subjectively perceived elements connected with the subjective side of a prohibited act but also with regard to the objective side. It turns out that there are such offences with a specific purpose the commission of which with sudden intent is excluded because of the size of objective features. A perpetrator, despite the necessity of being aware of them, has no actual opportunity for that mainly because of the lack of time necessary to become aware of those features. Thus, offences with a specific purpose turn out to be a construction much more complicated than it is commonly thought. The article, although it may seem to be too brief in some aspects, is a modest attempt at presenting the real function of the construction concerned.

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SUBJECTIVE ELEMENT OF AN OFFENCE WITH A SPECIFIC PURPOSE

Summary

The article discusses the issue of a subjective element of an offence with a specific purpose. The issue has not been the subject of broader scientific analysis. Its characteristic is most often limited to indicating that an offence with a specific purpose can be committed only with direct intent, which excludes its commission with oblique intent and, all the more, unintentionally. The article explains the issue taking into consideration the possibility of committing an offence with a specific purpose with sudden and premeditated intent and distinguishing what a perpetrator diagnoses and predicts among the statutory features in his or her conscience.

Keywords: offence with a specific purpose, subjective element, intent, wilfulness

STRONA PODMIOTOWA PRZESTĘPSTWA KIERUNKOWEGO

Streszczenie

Niniejszy artykuł dotyczy zagadnienia strony podmiotowej przestępstwa kierunkowego. Zagadnienie to nie było przedmiotem szerszych rozważań naukowych. Najczęściej jego charakterystyka ogranicza się do wskazania, że przestępstwo kierunkowe można popełnić tylko w zamiarze bezpośrednim, co wyklucza jego popełnienie z zamiarem ewentualnym, a tym bardziej nieumyślnie. W artykule przybliżono tę problematykę, ze szczególnym uwzględnieniem możliwości popełnienia przestępstwa kierunkowego w zamiarze nagłym i przemyślanym, a także z rozróżnieniem tego, co sprawca spośród znamion ustawowych diagnozuje a co prognozuje w swojej świadomości.

Słowa kluczowe: przestępstwo kierunkowe, strona podmiotowa, zamiar, umyślność

Ius Novum
3/2017

BETWEEN A CHILD'S WELFARE AND THE LETTER OF LAW: DETERMINING THE CONTENT OF A BIRTH CERTIFICATE OF A TRANS-FATHER'S CHILD. DISCUSSION IN THE CONTEXT OF ON THE RULING OF THE APPELLATE COURT IN WROCŁAW OF 7 MARCH 2016, I ACA 1830/15*

MAŁGORZATA SZEROCZYŃSKA**

1. INRODUCTION

Writing a gloss on the Supreme Court ruling of 6 December 2013 in the case I CSK 146/13 concerning the recognition of a transsexual person's gender[1] and indicating that children born by transsexual persons will have a legal interest in suing their parents for gender determination because otherwise it will not be possible to develop their birth certificates in accordance with the provisions binding in Poland, I had a ray of hope that before a child was given birth by a trans-father in Poland, a legal act on gender determination would be passed and it would unambiguously establish the method of developing birth certificates of such children. Unfortunately, my hope proved to be vain and the anticipated problems with filling in such a certificate[2] came true. Courts in Wrocław has had to address the issue recently.

* The author would like to thank the employees of the Ombudsman office for their assistance in giving access to anonymous documents concerning the discussed cases and providing information about their course.

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1 M. Szeroczyńska, *„Dzieci powstaną przeciw rodzicom" – glosa do wyroku Sądu Najwyższego z 6 grudnia 2013 r. w sprawie I CSK 146/13* ["Children will rise up against parents" – a gloss on the Supreme Court ruling of 6 December 2013, in case I CSK 146/13], Prawa człowieka w orzecznictwie sądów polskich, 29 April 2014, http://prawaczlowieka.edu.pl/index.php?dok=301377d6f91551c76bdeceb505896fd2d31b918e-d3 [accessed on 1 March 2017].

2 M. Szeroczyńska, *Rodzicielstwo prawne w wypadkach medycznie wspomaganej prokreacji – między genetyką, fizjologią a wolą posiadania dziecka* [Legal parenthood in cases of medically-assisted

It is typical of a first instance adjudicating court to adopt a legal-human attitude and act in the child's best interest. However, the court of second instance made an attempt to dogmatically apply regulations, which proved to be inefficient but directly infringed the principle of the child's welfare exposing the child to discrimination. It is also sad that it was the prosecutor who tried to adjust the persons involved, the child and the father who gave birth to the child, to the reality of the written law regulations forgetting about his primary duty to care for human rights.[3]

The judgements have their origin in the tragic history of Konrad.[4]

2. BACKGROUND

Konrad was born in a female body. His transsexuality was recognised and his male gender was determined by court. As a result, he changed his female name for a male one. At the same time, he underwent medical treatment of sex reassignment: hormone therapy and bilateral mastectomy. However, due to insufficient financial resources, he did not undergo hysterectomy.

Three years after the issue of the ruling determining his male gender, Konrad was raped, got pregnant and gave birth to a child. The criminal proceedings were discontinued because Konrad did not file a motion to prosecute the perpetrator (at the time when he was raped, the criminal regulations in force concerning a crime under Article 197 §1 of the Criminal Code stipulated prosecution on the motion of the aggrieved). Regardless of this fact, the rapist's data remained unknown.

The Civil Registration clerk who was reported of the birth of Konrad's child refused to develop a birth certificate and filed a motion to a competent court, the Regional Court Family and Minors Chamber to determine the content of the birth certificate. The clerk indicated in the motion that the certificate could not be developed because, pursuant to Article 61^9 of the Family and Guardianship Code (hereinafter FGC), the name of a mother in the certificate must be the name of a woman who gave birth to a child, and in this particular case a person who gave birth to the child, from the legal point of view, was a man.

The Regional Court referred the case to the District Court as one that is difficult to adjudicate on. The District Court notified a prosecutor, who joined the proceedings.[5]

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reproduction – genetics, physiology and will of having a child], Przegląd Filozoficzny. Nowa seria, No. 2, 2009, pp. 241–243.

[3] Compare the Council of Europe Recommendation Rec (2000)19 on the role of public prosecution in the criminal justice system of 6 October 2000; International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of 23 April 1999; 6th Conference of Prosecutors General of Europe, European guidelines concerning ethics and conduct for public prosecutors – "Budapest Guidelines" of 31 May 2005; Opinion No. 9 (2014) Consultative Council of European Prosecutors (CCPE) to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors of 17 December 2014 (Rome Charter).

[4] The name has been changed for the purpose of this article.

[5] At the same time, the prosecutor applied for the reopening of the proceedings concerning the determination of Konrad's gender. The Court dismissed the motion due to the time of five years that had passed from the ruling. The prosecutor appealed against the decision but after the

Moreover, also the Ombudsman and a non-governmental organisation: Fundacja Instytutu na Rzecz Kultury Prawnej Ordo Iuris in Warsaw joined in. The District Court summoned the child concerned represented by a guardian *ad litem* appointed by the Regional Court Family and Minors Chamber.

3. STAND OF THE PARTIES TO THE PROCEEDINGS

The child's guardian *ad litem* indicated before court that Konrad should be entered into the birth certificate as a mother because he actually was the person who gave birth to the child. In the guardian's opinion it was less important to determine whether the name to be entered should be his present masculine name: Konrad or his former feminine name: Anna.[6] The guardian *ad litem* also asked the court to take into consideration a possibility of reopening the proceedings concerning Konrad's gender determination.

On the other hand, Konrad applied for entering his present data as a father into the birth certificate of his child. He indicated that he gave birth to his child as a man and it should be reflected in the child's birth certificate. He also applied for entering the name chosen by him as the mother's name (by the way, he chose his former name: Anna) and his family name into the certificate. He also applied for entering an additional note informing about the proceedings of his gender determination and the change of name into the certificate. According to Konrad, such a birth certificate would respect his interests (recognising him as a father, who he feels he is, although he gave birth to the child) and the child's interests (eliminating the risk of discrimination and unequal treatment, which a different birth certificate would pose).

Moreover, Karol opposed the reopening of the proceedings concerning his gender determination, indicating that he has been functioning in the community as a man for years, and has fatherly bonds with his child and his partner. The reopening of the proceedings would infringe his right to sexual identity and, as a result, his dignity.

The Ombudsman fully supported Konrad's stand. In the substantiation, he mainly raised that the lack of the birth certificate for the period of a year since the child's birth has infringed his rights resulting from the UN Convention on the Rights of the Child and the Constitution of the Republic of Poland, including the right to respect for dignity, citizenship, as well as family and private life. With regard to that, he indicated the necessity of developing the birth certificate concerned as quickly as possible. Moreover, in the Ombudsman's opinion, in the event of the lack of provisions directly regulating the actual situation, it is necessary to apply

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deadline he also filed an application for reinstatement of a time limit. The Court dismissed the motion to reinstate the time limit and refused to reopen the proceedings, which the prosecutor appealed against. The Appellate Court reversed the District Court decisions and reinstated the time limit and then quashed the decision refusing to reopen the proceedings. At the time of the development of this article, the proceedings concerning Konrad's gender determination was reopened before the court of first instance and was in progress.

[6] The name has been changed for the purpose of this article.

proceedings by analogy with the provisions concerning adoption by one person or development of a certificate of birth given by unknown parent so that the solution would limit the level of the discrimination against or stigmatisation of the child to the minimum. According to the Ombudsman, the only such solution was to enter the present Konrad's data as the father's ones with an additional note concerning his gender determination and the change of name, and the name chosen by Konrad and his family name as the mother's data (by analogy with what is done in case of unknown father).

Fundacja Instytutu na Rzecz Kultury Prawnej Ordo Iuris in Warsaw indicated three possible options in its opinion:

1) reopening the proceedings determining Konrad's gender;
2) filing a suit against Konrad in order to determine his gender as female;
3) developing a certificate of the child's birth from unknown parents and then adoption of the child by Konrad as an adoptive father.

4. FIRST INSTANCE COURT RULING

The District Court in Wrocław, in the ruling of 24 September 2015, determined the content of the birth certificate as follows: Konrad's data should be entered into the certificate as father's data, the given name Anna and Konrad's family name provided by Konrad should be entered as mother's data. Moreover, the Court ruled that two additional notes should be entered, too: firstly, the judicial determination of Konrad's gender as male and the change of his given name from a feminine one to a masculine one; and secondly, information concerning the origin of mother's name: the father's will. The Court prohibited disclosure of the judicial determination of Konrad's gender and his change of name in the abbreviated copy of the birth certificate.

The District Court rejected the suggestion of developing a certificate of birth from unknown parents and the child's adoption by Konrad. There are no doubts in the case that Konrad is a biological parent and acts of civil registration must reflect the actual state, at least as far as possible. In this case, it is not possible to speak about an unknown origin of the child and the adequacy of adoption – Konrad not only gave birth to the child but also (at the stage of this ruling) took care of and reared the child, while an idea behind adoption is recognition of someone else's child as one's own. It is necessary to fully approve of the Court's opinion that the issue of a certificate of birth from unknown parents and next adoption would make Konrad and his child unnaturally submit to legal norms that did not envisage their family situation only in order to develop a birth certificate with the literal application of the provisions of law but without its spirit and aim. The District Court clearly expressed its stand that law should serve people and not vice versa, and that is why it dismissed the motion, which is worth approving of.

Referring directly to the issue of entering Konrad's data to his child's birth certificate, in the substantiation of the ruling, the Court emphasised that in accordance with Article 61^9 FGC, the only and at the same time indispensable and

sufficient requirement for determining maternity is the fact of bearing a child. On the other hand, the Court pointed out that pursuant to this provision, the mother's data should be female ones. In the case, undoubtedly Konrad gave birth to the child; yet although biologically capable of getting pregnant and giving birth, from the legal point of view he was a man. In the first instance Court's opinion, the fact of judicial determination of Konrad's gender makes it impossible to enter his data as mother's data to the birth certificate.

Moreover, the District Court clearly held that entering Konrad's present data, i.e. male ones, into the certificate in the place dedicated for the mother's data, would have influence on the child's entire life and it would be legally inadmissible influence posing a threat of stigmatisation as well as discrimination. Thus, acting in the best interest of the chid, which is a superior principle in all proceedings concerning children, the Court decided to reveal the civil state and origin in a different way. According to the first instance Court, entering Konrad's data as the father's ones makes it possible, while revealing the actual biological origin of the child, to exercise the child's right to privacy on the one hand, and on the other hand, respect Konrad's need to live in conformity with his gender identity recognised by law.[7] Due to the same reason, recognising the importance of the additional notes concerning the judicial determination of Konrad's gender as male and his change of name from a feminine one to a masculine one, the Court prohibited revealing them in the abbreviated copies of the child's birth certificate. The District Court assumed, by the way absolutely rightly, that revealing the information in every copy of the child's birth certificate would be stigmatising, especially in contacts with state bodies and religious institutions which require a copy of this act. The conclusion made by the first instance Court is absolutely appropriate because the provision of this information in abbreviated copies would undermine the result of the protection of the best interest of the child, which the Court wanted to achieve by formulating the content of the birth certificate indicating the data of the person giving birth to the child as his father's data.

In the District Court's opinion, the provisions that regulate establishing paternity do not contradict entering Konrad's data as the father's ones. However, the Court did not substantiate this stand in a broad way, indicating only that FGC makes the establishment of paternity conditional upon the determination of maternity. It did not take into account, however, the determination of maternity in this particular factual state; it only emphasised the lack of the presumption of paternity from marriage (as Konrad, before his gender was determined as male, was not married) and the lack of other methods of paternity establishment (in the event of the child's origin from rape committed by an unidentified man).

The District Court rightly held that the potential reopening of the proceedings to determine Konrad's gender does not have influence on the establishment of the content of the child's birth certificate. It is true that the main argument used

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[7] Similarly, M. Boratyńska, *Glosa do postanowienia Sądu Apelacyjnego we Wrocławiu z 7 marca 2016 r., sygn. I ACa 1830/15* [Gloss on the ruling of the Appellate Court in Wrocław of 7 March 2016, I ACa 1830/15], Prawo i Medycyna No. 4, 2016, pp. 142–143.

here was the fact of refusal to reopen the proceedings until the ruling concerning the certificate is issued, however, the District Court also indicated that the sex reassignment surgery does not result in the judicial determination of gender but vice versa – it results from the judicial determination of gender,[8] and Konrad abandoned hysterectomy because of financial reasons. Based on those facts, the District Court seems to rightly suggest, although does not state that directly, that the fact of giving birth to a child resulting from rape could not be a reason for the change of the ruling determining Konrad's gender, and thus, even in the event of the potential reopening of the proceedings, the ruling would not be changed and would not have influence on the content of the child's birth certificate.

Taking a decision to enter Konrad's data as the father's ones into the certificate, the District Court had to take a decision on the mother's data to be entered. The Court assumed the necessity of applying a procedure by analogy with the regulation concerning entering the data of an unknown father. Therefore, the Court decided to enter Konrad's family name as the mother's surname and the name indicated by Konrad as her first name, which was described in the additional note. It was Konrad's choice to enter his former feminine name by analogy with the procedure of entering the name of an unknown father. The District Court had no influence on the choice of the mother's name. Undoubtedly, it was the Court's intention to suggest that the child originated from a single person, although the people who had known Konrad before the judicial determination of his gender might draw such a conclusion from the content of the certificate.

Taking into consideration how much space the District Court devoted to the explanation of the application of analogy in the procedure of entering the mother's name into the certificate concerned in the event of the lack of regulations to be applied directly, it is a great pity that the Court did not present a similar reasoning in connection with the determination of paternity without prior establishment of maternity. In this case, there are no regulations to be applied directly, either, so the Court should have explained the reasons for proceedings by analogy and with what regulations. The District Court might have used the arguments provided by the Ombudsman, who indicated that the provisions concerning civil status allow the application of legal fiction in order to prevent discrimination and stigmatisation, suggested the application of cover data like in case of a birth certificate for a child whose parents are unknown, and first of all, what was the best analogy, by the way actually applied by the District Court, the development of a birth certificate like in case of an unknown father. It is hard not to have an impression that, giving up the analysis of the possibility of determining paternity without determining maternity and the reasons for abandoning the direct application of those regulations, the District Court gave the court of second instance grounds for changing the ruling.

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[8] The requirement of sterilisation before the judicial determination of gender was recognised by the Court in Strasbourg as violating human rights, case *Y.Y. v. Turkey* of 10 March 2015, Application No. 14793/08.

5. REASONS FOR APPEAL

The prosecutor appealed against the ruling. The prosecutor claimed: the procedural law provisions were infringed because the paternity was determined in the non-litigious proceedings, while the issue of such a ruling requires a trial; an error in establishing facts: based on evidence, Konrad is not the father, the rapist is, however, he is unknown; and the infringement of substantive law by groundless application of analogy and indication of the mother's data by the father. The prosecutor applied for reversing the ruling and referring the case to the first instance court for rehearing.

The prosecutor mainly raised that entering Konrad's name as the father's name into the birth certificate was not the statement of a fact but the establishment of the paternity bond between him and the child, which can only be established in the course of a paternity filiation suit. Thus, he accused the District Court of abusing its competence in the non-litigious proceedings to establish the content of a birth certificate. Although the charge is just a formal one, it indicates that there is no father-child relationship between Konrad and his child and so it cannot be registered in a birth certificate because it is not an objective fact. According to the prosecutor, the entry of Konrad's name as the father's name in fact constituted granting him this status (which can be done only in the course of litigation) and not a description of the actual state. By the way, in the prosecutor's opinion, it was an erroneously granted status because the real father (the rapist) remained unknown.

Unlike the first instance Court in the ruling, the prosecutor in the appeal broadly presented a rule that only a woman can be a mother and only a man can be a father and did not find any exceptions to that principle in case law.[9] Based on this exceptionless principle, the prosecutor drew a conclusion that the only possible solution was to enter a woman's data as the mother's name in a birth certificate. Thus, he emphasised that it was justified to make the content of the certificate depend on the reopening of the proceedings to determine Konrad's gender, which was at the stage of hearing the appeal against the refusal to reopen it. According to the prosecutor, the reopening of the proceedings to determine Konrad's gender would create a possibility of establishing that Konrad is a woman and would make it possible to enter the mother's feminine data to the certificate.[10] The prosecutor emphasised that only such a birth certificate would reflect the actual family relationship between Konrad and the child and would ensure respect for the child's

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[9] This is reflected in rulings refusing to transcribe British birth certificates of a child registered as born from two women, compare J. Gierak-Onoszko, *Polska cię nie chce, dziecko* [Poland does not want you, child], Polityka No. 4, 2015.

[10] By the way, it is necessary to agree with M. Boratyńska that the prosecutor's motion to reopen the proceedings was his abuse of procedural law. Konrad is a man and the fact that he was raped and as a result gave birth does not change it. His morally proper conduct and the fact that he did not have abortion, although had the right to it, cannot be the grounds for challenging the ruling determining his male gender. M. Boratyńska is absolutely right stating that only medical reasons (e.g. new evidence confirming that the person in not transsexual) could be the premises of challenging this judgement, which did not take place in this case; compare, M. Boratyńska, *Glosa do postanowienia…* [Gloss on the ruling…], pp. 150–151.

rights. Paradoxically, the latest statement should be approved of, however, it must be remembered that it would entirely deprive Konrad of his rights.

Moreover, the prosecutor challenged the District Court conclusion that the fact that no man seeks paternity in this case makes it possible to enter Konrad's data as the father's data into the certificate. He indicated that the origin of the child from rape does not exclude the potential possibility of initiating a paternity rights establishment lawsuit by the biological father, which would negate Konrad's paternity.

The prosecutor's final charge concerned the groundlessness of the application of analogy in connection with the mother's data. The prosecutor broadly presented his arguments – he was against the application of analogy in any part of the solution adopted. In his opinion, the factual state was simple; it was clear who had given birth to the child and so who the mother is. It is also obvious that the father is unknown. Thus, the provisions concerning parenthood should be applied directly without the necessity of applying any provisions by analogy with anything because there is no loophole, especially if we wait until Konrad is re-granted female data as a result of the reopening of the proceedings to determine his gender. What is typical of the prosecutor's stand is that he constantly emphasised the child's right to establish genetic origin in conformity with the actual state and the obligation to enter female data as the mother's ones into the certificate. It means that he did not acknowledge that even if the proceedings was reopened (what finally happened), a court would determine Konrad's gender as male again and, as a result, the dilemma how to develop a birth certificate and avoid exposing the child to discrimination and stigmatisation would not disappear.

During the proceedings before the Appellate Court, the prosecutor supported the appeal and filed an alternative motion to reverse the first instance court ruling and dismiss the motion to determine the certificate content. The prosecutor's stand was obviously absurd because it literally meant a demand that the Appellate Court should refuse to determine the child's birth certificate, which is impossible from the legal point of view as well as would infringe all the rights of the child. One can only guess that the prosecutor did not mean the dismissal of the motion to determine the certificate content but the dismissal of Konrad's (and the Ombudsman's) motions concerning the method of establishing its content. However, if so, the prosecutor should have clearly indicated how the content of the certificate should be determined, in his opinion. The prosecutor did not present such proposals, which is especially interesting in the context that he did not present his stand before the first instance court, either, although he declared his participation in the proceedings. This shows that the prosecutor was not able to propose such a solution to the case that would ensure the protection of lawfulness and human rights (the child's as well as Konrad's ones), which he in fact was to safeguard in the proceedings.

The guardian *ad litem* supported the prosecutor's stand.

On the other hand, Konrad filed a motion to dismiss the prosecutor's appeal.

In response to the prosecutor's appeal, the Ombudsman applied for upholding the District Court decision appealed against, which the Commissioner for Children's Rights, who joined the proceedings at the appeal stage, supported.

In his procedural statement, the Ombudsman held that regardless of the prosecutor's statements concerning the case, it does not concern the determination of the child's origin (paternity) because Konrad's parenthood is unquestionable. By the way, the Ombudsman rightly raised that Konrad, in accordance with Polish provisions, would not be able to establish his paternity because the child was born out of wedlock and Konrad is not the child's mother's husband; he cannot be recognised one because this requires the child's mother's consent and the child has no mother from the legal point of view as Konrad gave birth to this child; Konrad cannot apply for denial of paternity and then for determination of his paternity either because the birth certificate has not been determined and there is nothing to deny (regardless of the issue that he would not be able, because of the wording of Article 85 §1 FGC, to prove that he had sexual intercourse with the mother, and the fact of the child's birth alone would not be sufficient for the court determining paternity if the fact is a requirement for determination of maternity).[11]

As regards the prosecutor's argument that the biological father may try to assert his paternity, the Ombudsman rightly demonstrated that the argument is totally inaccurate from the point of view of practical life realities (it does not happen that rapists claim their paternal rights and duties at least because they do not want their crime commission to be revealed) or from the legal perspective (because the possibility of challenging a birth certificate either by denial of paternity or maternity or by establishment of paternity or adoption of a child, and in case of a child registered as originating from unknown father, never constitutes grounds for refusal to develop a birth certificate containing false or fictitious data).

In the Ombudsman's opinion, the birth certificate determined by the court of first instance fully reflected the child's genetic bonds and through the additional note about the father's transsexuality provided full knowledge about the child's origin. Moreover, the Ombudsman expressed approval of the application of analogy by the court of first instance. The Polish legal system does not regulate the development of a birth certificate for a child when a transsexual person gave birth and at the same time regulates other situations in which, in order to prevent discrimination or stigmatisation, the data entered into a birth certificate are fictitious. That is why, in the event of the lack of regulations, it is justified to apply those other regulations to obtain the same aim: ensure respect for the child's welfare.[12]

Moreover, the Ombudsman opposed postponing the development of the child's birth certificate until the decision on the potential reopening of the proceedings to determine Konrad's gender. He pointed out that it was absolutely necessary to immediately develop a birth certificate and there was no interdependence between the certificate content and the ruling determining Konrad's gender, which as a rule

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[11] Similarly, M. Szeroczyńska, *Rodzicielstwo prawne…* [Legal parenthood…], pp. 241–242; M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian prawnych dotyczących osób transpłciowych w prawie polskim* [Proposed legal changes concerning transsexual persons in the Polish law], [in:] W. Dynarski, K. Śmiszek (ed.), *Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycja zmian* [Legal status of transsexual persons in Poland. Report on the research and proposed changes], trans-fuzja, PTPA, Warsaw 2013 p. 208 ff.

[12] Similarly, M. Boratyńska, *Glosa do postanowienia…* [Gloss on the ruling…], p. 149.

should not influence the content of the birth certificate of a transsexual person's children. In addition, the Ombudsman emphasised that, paradoxically, even if the proceedings were reopened and Konrad's gender was determined as female, this would not have influence on the content of the child's birth certificate developed in accordance with the first instance court ruling because if Konrad was given the name Anna again, there would be no need to change the certificate because he chose this name (and the proper family name) to be entered into the child's birth certificate.

6. SECOND INSTANCE COURT RULING

The Appellate Court in Wrocław, in the ruling of 7 March 2016, reversed the ruling of the court of first instance in the following way:

1) mother's first name shall be Konrad,
2) father's first name shall be Jakub,[13]
3) the birth certificate shall contain an additional note that father's surname is the mother's surname, and the father's first name was given by the Court,
4) all other notes shall be deleted, including information about judicial determination of Konrad's gender and the change of his name from a feminine one into a masculine one.

The rest of the certificate shall remain unchanged.

The Appellate Court established two new facts. Firstly, after the first instance court ruling was issued, the prosecutor was relieved from the effects of the expiration of the time for appeal against the refusal to reopen the proceedings concerning the determination of Konrad's gender and the decision on dismissal of the motion was quashed. Secondly, Konrad made a declaration before a family court giving consent to his child's future adoption without the indication of the potential adoptive parent.[14]

It is hard to resist having an impression that the two circumstances, especially the decision to put the child up for adoption, influenced the Appellate Court ruling.

Recognising the prosecutor's appeal as justified, the second instance court emphasised that the District Court did not determine the content of the birth certificate in conformity with the actually recognised facts: the Court recognised the data of the person who gave birth to the child but did not reveal them in the certificate as the mother's data; on the other hand, the Court revealed the father's data, while the real father remains unknown. According to the Appellate Court,

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[13] The name has been changed for the purpose of this article.

[14] It is hard to resist the feeling that Konrad did not manage to cope with the social pressure and the fight for his paternity. Most probably, if the proceedings had not taken so long and had not been connected with the reopening of the proceedings concerning his gender determination, Konrad would not have taken such a decision. The fact that the justice system caused Konrad to make this decision is a shameful side-effect of the proceedings, a consequence which certainly has little in common with the child's welfare and the protection of his/her rights to privacy and life in a genetic family.

knowing such facts, it was inadmissible to adopt fictitious circumstances that the mother is unknown and the father is known.

It is typical of the court of second instance, like of the prosecutor, to hold in the ruling that it is a fundamental principle to protect social interests and to that end maintain a coherent system of family law, and reveal the real data of parents in accordance with the child's genetic origin. The court of second instance, emphasising that it is in the interest of the child to reveal his/her genetic origin, without hesitation accepted the fact that there will be male data in the place provided in the certificate for the mother's data. It did not take into consideration the issue of the child's stigmatisation and as a result a justified risk of being unequally treated or even discriminated against. One can really feel that the Appellate Court decided that putting the child up to the full adoption will lead to the development of a completely new birth certificate for the child with the data of adoptive parents without a possibility of revealing the content of the primary certificate. Thus, in fact, the child will not be stigmatised because he/she will use a new "standard" birth certificate. This way of drawing conclusions, although absolutely illegitimate and showing objective treatment of Konrad and his child, let the Appellate Court choose the principle of public order before the child's welfare, which – as we can speculate, "thanks to adoption" – will be maintained. The Appellate Court felt released from the obligation to protect the child's interest. As the developed birth certificate was to be temporary, the court could devote itself to creating a document as compatible with the provisions in force as possible.

Obviously, the Appellate Court failed to develop such a document because it could not succeed in doing so. The second instance Court assumed that the only requirement for the determination of maternity is the fact of giving birth to a child, which also, in the Court's opinion, determines the content of the birth certificate and obliges to enter the data of a person who gave birth to the child as the mother's ones. The Court does not mention the requirement laid down in Article 61^9 FGC stipulating that only a woman can be a mother. Thus, in the place provided in the certificate for the mother's name, there should be a feminine first name. Quite the opposite, the Appellate Court directly holds that the masculine name Konrad does not constitute any obstacle to have it entered into the space dedicated for the mother's data.

Moreover, the Appellate Court does not see any problems with entering Konrad's data in the birth certificate as mother's data and determines that a mother is a person who, from the legal point of view, is a man. The Court does not see the problem because the determination of Konrad's gender is for the Court insignificant at that moment. As the Court writes in the justification: "biologically, Konrad remaines a woman because he still has female reproductive organs, was able to conceive and carry a baby to full term, and gave birth to a child". For the Appellate Court, despite the judicial determination of Konrad's gender as male, Konrad remains a woman and thus, there are no contraindications to revealing his data as the mother's ones, i.e. the woman's who gave birth to the child.

The above statements of the Appellate Court completely depreciate the judicial determination of Konrad's gender on the one hand, and on the other hand, what is even most important and saddest about the ruling, it undermines Konrad's gender identity treating it as a solely biological fact concerning the possession of female

reproductive organs and the ability to conceive and bear children. The statement is not only abusive to Konrad but also infringes his subjective right to gender identity, which is not challenged by anybody at present.[15] By the way, if we generalised the Appellate Court's conclusions in accordance with sentence logics, we would have to state that in its opinion, persons who do not have female reproductive organs are not able to conceive and carry a baby to full term are not women. A big number of women who are unable to conceive or bear a child, including some who do not possess reproductive organs (sometimes born without them), shows that the statement is not right and should be assessed as offensive not only to Konrad but to all women, who were assigned a biological reproductive function.[16]

It is worth knowing that this statement of the second instance Court had a direct impact on Konrad's life. When the proceedings concerning determination of his gender was reopened, fearing that the District Court would follow the Appellate Court's biological interpretation, Konrad borrowed money and underwent sex reassignment surgery. Thus, the Appellate Curt's ruling played the role of psychical coercion in Konrad's life, which is inadmissible as such if we take into consideration the above-mentioned judgement of the Court in Strasbourg, pursuant to which coercing transsexual people to deprive themselves of the ability to procreate as a requirement for recognising their psychical gender constitutes the violation of their right to privacy.[17]

As regards the father's data, the Appellate Court established that he remained unknown because, as it directly stated, "the child's mother did not reveal[18] him and paternity was not established in another mode", and refused to enter the name indicated by Konrad (i.e. his name) because then the data of both parents would be identical and suggest that the child originates from one person. That is why, the Court chose a masculine first name to be entered into the certificate. This way, the first birth certificate with both parents' masculine first names was developed in Poland.

However, the Appellate Court rightly refused to postpone the adjudication until the decision was made on reopening the proceedings concerning Konrad's gender determination. The Court indicated that the lack of the child's birth certificate for so long infringes the child's rights, including the right to citizenship and privacy. It is a great pity that the Appellate Court noticed the issue of privacy only in this context and forgot about the child's right to keep the fact of the parent's transsexuality private in every situation when it is necessary to use a birth certificate or an identification document.

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[15] A. Śledzińska-Simon, *Międzynarodowe standardy ochrony praw osób transpłciowych* [International standards of protection of transsexual persons' rights], [in:] W. Dynarski, K. Śmiszek (ed.), *Sytuacja prawna…* [Legal status…], p. 80 ff and legal acts and case law quoted therein.

[16] Similarly, M. Boratyńska, *Glosa do postanowienia…* [Gloss on the ruling…], pp. 143–144.

[17] Judgement in the *Y.Y. v. Turkey* case; compare A. Śledzińska-Simon, *Międzynarodowe standardy…* [International standards…], p. 80 ff.

[18] This, unfortunately, was also offensive to Konrad who was the victim of rape. Moreover, the phrase was completely useless because, in accordance with Polish law, the indication of a child's father by a mother does not result in entering him into a child's birth certificate but requires that he should acknowledge that child is his or the court establish his paternity.

7. CONCLUSIONS

First of all, it is necessary to agree with the Ombudsman's stand, and thus the rulings of both courts, that the lack of the child's birth certificate for a period of over a year, as it happened in the case discussed, violates the child's rights to privacy and citizenship laid down in the Convention on the Rights of the Child, the European Convention of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Poland. Because of the lack of a birth certificate, the child did not have access to public healthcare services, social insurance and other guaranteed entitlements (e.g. crèche childcare). Konrad could not benefit from other entitlements such as a childbirth benefit or parental leave because he could not submit his child's birth certificate to his employer or any public administration authorities and indicate whether he was entitled to the mother's rights or father's rights, which is in Polish law connected with gender and not the fact of childbirth (this is essential because of the difference between the maternity and paternity leave). Therefore, the lengthiness of the proceedings and the lack of temporary decisions (e.g. the assignment of the PESEL number without a birth certificate) violated the child and Konrad's subjective rights.[19]

Similarly, it is necessary to agree with the Ombudsman that the judicial determination of Konrad's gender as male obliges state bodies to respectively reflect his gender in official documents, including his child's birth certificate. If we assume the existence of subjective rights to gender identity, and the judicial determination of gender confirms this stand, we must be consistent in the entire official treatment of the given person. State bodies cannot choose whether and when they treat a given person as a man and when as a woman. Entering Konrad's data into his child's birth certificate in the space dedicated for the mother's ones indicates this kind of selectiveness and arbitrariness in gender determination, which the Court clearly stated in its ruling justification, writing that these are biological features (ability to conceive and bear a child) and not the legal status (judicial determination of gender) that decide in this case on Konrad's social and legal role. What is the judicial determination of gender for if the same courts do not respect their constitutive rulings binding them? This inconsistence unambiguously infringed Konrad's right to gender identity and, what is more and most important in the discussed case, the child's rights to privacy and non-discrimination.

We might agree for the infringement of Konrad's rights if it served his child's welfare. In case of the conflict of subjective rights of the two persons, the rights of one of them might be limited and the protection of the more important rights chosen. Undoubtedly, the child's rights should prevail, which the Ombudsman rightly indicated as a principle of the Convention on the Rights of the Child as well as the Polish legal system. In the factual state of this case, however, there was no conflict like this. Quite the opposite, Konrad's and his child's interests were concurrent, despite the different stand of the guardian *ad litem*, who did not represent the child's best interest, it seems. The best solution for the child would be to enter Konrad's name as the father's one. This would indicate a biological bond with the real parent, on the

[19] Similarly, M. Boratyńska, *Glosa do postanowienia…* [Gloss on the ruling…], p. 142.

one hand, and on the other hand, it would protect the child against stigmatisation and unequal treatment, which in our community results from a birth certificate where the mother's name is masculine. Due to this ruling, the child will have an ID in which everybody (we often show this document in many different, also private, situations) will be able to read that his/her mother was a man, which will make him/her constantly explain his/her father's transsexuality (provided the child is not to be adopted and be given a new birth certificate, which should not influence the court's reasoning in any way). Even the possible exposure to such necessity infringes the child's right to privacy, regardless of the very probable negative, at least sneering, if not scornful or even aggressive, reactions of other people (schoolmates, teachers, a religion teacher, an employer, physicians, etc.) who, in our community, are not prepared to respect and accept diversity.[20] The Appellate Court adjudicating in this case lacked not only courage and will to base directly on human rights laid down in the Constitution and international law but also mainly ordinary human empathy. The Court forgot that its rulings are to serve people and not the formal letter of law, which could not have been followed in the discussed case, and it did not fulfil the purposefulness function of the provisions regulating civil status documents.

Certainly, the District Court ruling was not ideal. It could not be such because of the loophole in the law practically making it impossible to register the trans-father's child in compliance with law (that is also confirmed by the Appellate Court's ruling, which is not in conformity with the law in force, either). The idea to apply the procedure of registering the child's birth by analogy with the provisions concerning a child whose father is unknown was in this particular situation the best solution for the child's welfare. Only the certificate as ruled by the District Court, regardless of its incompatibility with the provisions in force, fully safeguarded the child's interests, respected privacy and dignity and protected the child against stigmatisation and discrimination as well as respected Konrad's rights and dignity. It is a great pity that the Appellate Court did not substantiate its choice in a more convincing way.

8. PROPOSALS *DE LEGE FERENDA*

Finally, it is worth considering what the optimum systemic solution to such situations would be because it cannot be assumed that we dealt with an event, which will never reoccur.

I personally think that the best solution to this situation, respecting a child's rights and a transsexual parent's rights, would be to withdraw from the use of the names of parents' roles determined by gender. We might use the terms "parent 1" and "parent 2" as is practiced in the UK.[21] Paradoxically, it would make life easier not only for the children of transsexual parents but also for the children born in same-sex partnerships, who are denied by Polish courts at present the right to transcribe their birth certificates

[20] Similarly, *ibid*., p. 149.

[21] M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian…* [Proposed legal changes…], pp. 210–211.

issued abroad, which limits their right to citizenship and many other subjective rights the exercise of which requires the possession of the PESEL number and ID.

The story of what happened to Konrad and his child strengthens my belief that the indication of gender in legal acts and documents should be abolished[22] because it does not serve safeguarding anybody's rights (which should not be differentiated with regard to gender in accordance with the principle of equal treatment) and, as the discussed case shows, it only leads to doctrinal disputes, in which the transsexual person's as well as the child's welfare is lost. One cannot forget, as the Appellate Court did, that the provisions (especially those concerning registration, and civil status acts are such) should be constructed and applied to serve people and respect their dignity and subjective rights resulting from it; and that nobody's dignity and subjective rights can be infringed in order to adjust a man to registration norms unsuitable for the reality.

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[22] M. Szeroczyńska, *Procedura zmiany płci metrykalnej transseksualistów a ochrona prawa do życia prywatnego w prawie polskim i zagranicznym* [Procedure of changing gender in birth certificates in case of transsexuals vs. protection of privacy in Polish and international law], Studia Prawnicze No. 1–2, 2009, pp. 279–280; M. Szeroczyńska, A. Śledzińska-Simon, *Założenia zmian…* [Proposed legal changes…], p. 186.

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BETWEEN A CHILD'S WELFARE AND THE LETTER OF LAW: DETERMINING THE CONTENT OF A BIRTH CERTIFICATE OF A TRANS-FATHER'S CHILD. DISCUSSION IN THE CONTEXT OF THE RULING OF THE APPELLATE COURT IN WROCŁAW OF 7 MARCH 2016, I ACA 1830/15

Summary

The article discusses the rulings of the District Court and the Appellate Court in Wrocław issued in the first case in Poland concerning the development of a birth certificate of a child when a person who has given birth, from the legal point of view is a man. The author points out unsuitability of Polish family law regulations in force for the legal situation of transsexual fathers. She also proves that the literal application of those provisions inadequate to the reality leads to the violation of subjective rights of the child as well as the transsexual father, which has not only doctrinal importance but mainly, what is evident in the discussed case, has a direct influence on human decisions and even their life.

Keywords: transsexuality, legal parent, determination of the content of a birth certificate

MIĘDZY DOBREM DZIECKA A LITERĄ PRAWA – USTALENIE TREŚCI AKTU URODZENIA DZIECKA URODZONEGO PRZEZ TRANS-OJCA. ROZWAŻANIA NA TLE POSTANOWIENIA SĄDU APELACYJNEGO WE WROCŁAWIU Z DNIA 7 MARCA 2016 R., SYGN. I ACA 1830/15

Streszczenie

Artykuł omawia postanowienia Sądu Okręgowego i Sądu Apelacyjnego we Wrocławiu wydane w pierwszej w Polsce sprawie sporządzenia aktu urodzenia dziecka przez osobę będącą z prawnego punktu widzenia mężczyzną. Autorka wskazuje na nieprzystosowanie obowiązujących w Polsce przepisów prawa rodzinnego do sytuacji prawnej transpłciowych ojców. Wykazuje również, jak trzymanie się literalnie takich niedostosowanych do realiów przepisów, prowadzi do naruszenia praw podmiotowych, zarówno dziecka, jak i transpłciowego ojca, co ma znaczenie nie tylko doktrynalne, ale przede wszystkim – co w przedmiotowej sprawie widać bardzo wyraźnie – wywiera bezpośredni wpływ na decyzje ludzkie, a wręcz ich życie.

Słowa kluczowe: transpłciowość, rodzic prawny, ustalenie treści aktu urodzenia

Ius Novum
3/2017

REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER ON SUBSTANTIVE CRIMINAL LAW OF 2016

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CRIMINAL CODE

1. RESTING OF THE PERIOD OF LIMITATION (ARTICLE 104 §1 CC)

Pursuant to Article 104 §1 of the Criminal Code (hereinafter CC), limitation does not run if a provision of law does not permit the criminal proceedings to be instituted or to continue, with the exception of a lack of motion or a private charge. This concerns legal obstacles resulting from statute, which do not allow the initiation or continuation of the criminal proceedings, and not factual obstacles, e.g. a perpetrator's illness or inability to apprehend him/her.[1] Resting of the period of limitation results, inter alia, from the formal immunities. They consist in the fact that a person granted such immunity can face criminal liability after an authorised body gives consent or permission, e.g. in case of an MP – the Sejm (Article 105(1) of the Constitution of the Republic of Poland), in case of a judge – a disciplinary court (Article 80(1) of the Act of 27 July 2001: Law on the system of common courts[2]).

In order to stop the running of the period of limitation, it is important to establish the moment from which it should start. There are four different attitudes towards this matter in jurisprudence and the case law. According to them, the resting of the period of limitation starts:

1) when a judgement on refusal of such consent becomes final and valid.[3] It is indicated that the resting of the period of limitation started earlier might result

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[1] Supreme Court ruling of 24 October 2016, II KK 296/16, Prok. i Pr. – wkł. 2017, No. 1, item 3.

[2] Journal of Laws [Dz.U.] of 2016, item 2062, as amended.

[3] Supreme Court resolution of 30 August 2007, SNO 44/07, OSNKW 2007, issue. 11, item 84 with critical glosses by R. Kmiecik, PiP No. 7, 2008, pp. 130–135, K. Marszał, WPP No. 3, 2008, pp. 111–118, and partly critical by W. Wróbel, PiP No. 7, 2008, pp. 135–140; Supreme Court ruling

in prolonging it in such a way that it would exceed even the longest periods of limitation laid down in the Criminal Code. It would also take place in a situation when a perpetrator has not yet referred to formal immunity and reference to this immunity has not been envisaged in the future. The resting of the period of limitation would depend on a solely abstract circumstance and not a real legal obstacle. It would create a state of permanent uncertainty concerning the legal status of the given group of entities and would be in conflict with axiological assumptions of the Criminal Code;

2) at the moment of lodging a motion to an authorised body to give consent or permission to hold an immunised person liable for a criminal act;[4]
3) from a crime commission if the perpetrator was immunised at the moment of that crime commission;[5] when a disciplinary court gives permission to prosecute, the period of limitation starts running or continues and the resting stops;

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of 10 January 2008, SNO 84/07, OSNSD 2008, item 1; Supreme Court judgement of 10 June 2008, SNO 40/08, OSNSD 2008, item 59; W. Michalski, *Immunitety w polskim procesie karnym* [Immunity in the Polish criminal proceedings], Warsaw 1970, p. 121; W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów. Komentarz* [Disciplinary liability of judges: Commentary], Warsaw 2005, p. 58; A. Wąsek, [in:] O. Górniok, M. Kalitowski, S.M. Przyjmeski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. II, Gdańsk 2005, p. 745.

[4] Supreme Court ruling of 18 February 2015, V KK 296/14, OSNKW 2015, issue 6, item 52 with glosses: partly critical by M. Kulik, PiP No. 10, 2016, pp. 141–146; of approval by J. Kosonoga, Ius Novum No. 4, 2015, pp. 145–153; K. Marszał, *Problemy spoczywania terminów przedawnienia karalności* [Issues of limitation of punishability], [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Z. Świdy* [Fair trial. Professor Z. Świda jubilee book], Warsaw 2009, p. 329; B. Janusz-Pohl, *Immunitety w polskim postępowaniu karnym* [Immunity in the Polish criminal proceedings], Warsaw 2009, pp. 222–223; B. Janusz-Pohl, *Spoczywanie biegu terminu przedawnienia karalności a ochrona immunitetowa* [Resting of the period of limitation versus immunity], PS No. 2, 2010, p. 79 ff.

[5] R. Kmiecik, *Gloss on the Supreme Court resolution of 30 August 2007, SNO 44/07*, PiP No. 7, 2008, pp. 133–135; R. Kmiecik, *„Spoczywanie" przedawnienia karalności przestępstw* ["Resting" of limitation of crime punishability], PiP No. 9, 2010, p. 11; R. Kmiecik, *Przedawnienie karalności* [Limitation of punishability], [in:] M. Jeż-Ludwichowska, A. Lach (eds), *System prawa karnego procesowego* [Criminal procedure law system], Vol. IV: *Dopuszczalność procesu* [Trial admissibility], Warsaw 2015, pp. 870–871; M. Kulik, *Początek okresu spoczywania biegu terminu przedawnienia karalności w związku ze względnym immunitetem procesowym na przykładzie sędziowskiego immunitetu formalnego* [Beginning of resting of the course of limitation in connection with procedural immunity exemplified by formal immunity of a judge], WPP No. 4, 2012, pp. 191–192; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym* [Limitation of punishability and limitation of penalty execution in Polish criminal law], Warsaw 2015, p. 465 ff; M. Kulik, *Wpływ bierności oskarżyciela publicznego i organu prowadzącego postępowanie przygotowawcze na bieg terminu przedawnienia karalności* [Influence of a public prosecutor and a preparatory proceeding body's passiveness on the course of limitation], [in:] B. Dudzik, J. Kosowski, I. Nowikowski (ed.), *Zasada legalizmu w procesie karnym* [Principle of legalism in a criminal trial], Vol. I, Lublin 2015, pp. 267–268; K. Banasik, *Przedawnienie w prawie karanym w systemie kontynentalnym i angielskim* [Limitation in criminal law in the continental and English systems], Warsaw 2013, p. 340; L. Peiper, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 1936, p. 213; S. Śliwiński, *Prawo karne* [Criminal law], Warsaw 1946, p. 534; K. Marszał, *Spoczywanie terminu przedawnienia* [Resting of the period of limitation], RPEiS No. 2, 1966, p. 88; K. Marszał, *Przedawnienie w prawie karnym* [Limitation in criminal law], Warsaw 1972, pp. 181–182, p. 192; I. Andrejew, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem* [Criminal Code with a commentary], Warsaw 1973, p. 355; M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz* [Criminal Code and

4) at the moment when a perpetrator is given a status of a suspect, i.e. when there are grounds for detention on remand or proceedings start against the immunised person.[6]

The Supreme Court dealt with the problem following the motion of the First President of the Supreme Court, who referred the issue of law interpretation to the Court, asking a question: Does the period of limitation stop running (Article 104(1) CC) at the moment when a motion is filed to a disciplinary court to give consent or permission to hold a judge or a prosecutor liable for a criminal act or when a resolution refusing such a permission becomes valid?

The Supreme Court, in the bench of seven judges, adopted a resolution on 25 February 2016, I KZP 14/15,[7] in which it explained that: **"The period of limitation stops running (Article 104(1) CC) on the day when a motion to give consent or permission to hold a judge or a prosecutor liable for the commission of a criminal act is lodged at a disciplinary court"**. The opinion met with approval in the literature but was supported with additional arguments,[8] although it raised justified doubts.

In the justification, the Supreme Court emphasised that the periods of limitation are the same for all entities subject to criminal liability and the statutory difference between them consists in the type of penalty for a given type of crime (Article 101 §1–§4 CC). The obstacle to proceedings includes, inter alia, formal immunity because holding a public post by an immunised person makes it impossible to hold that person liable, unless an authorised body gives consent or permission to do this in a given case. In the Court's opinion, immunity does not constitute an obstacle to conduct proceedings at the *in rem* stage, and due to that does not constitute a procedural obstacle in any way. Thus, there are no arguments justifying the resting of the period of limitation at this stage of the proceedings. It comes into being at the moment when the evidence gathered in the case justifies a suspicion that an immunised person has committed a crime, which results in the necessity to lay charges. At that moment, it is necessary to lodge a motion to give consent or

misdemeanour law: Commentary], Warsaw 1965, p. 135; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 1977, p. 291; W. Daszkiewicz, *Prawo karne procesowe – zagadnienia ogólne* [Procedural criminal law – general issues], Vol. I, Bydgoszcz 2000, pp. 154–155; J. Grajewski (ed.), *Prawo karne procesowe – część ogólna* [Procedural criminal law – General Part], Warsaw 2007, p. 158; T.W. Michalski, *Immunitety…* [Immunity...] p. 121; M. Leciak, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, p. 609.

[6] K. Sychta, *Okres spoczywania biegu terminu przedawnienia karalności przestępstw popełnionych przez osoby chronione względnym immunitetem* [Period of resting of limitation of punishability for crimes committed by persons protected by the relative immunity], [in:] A. Przyborowska-Klimczak, A. Taracha (eds), *Iudicium et Scientia. Księga jubileuszowa Profesora Romualda Kmiecika* [Iudicium et Scientia. Professor Romuald Kmiecik jubilee book], Warsaw 2011, pp. 181–183.

[7] OSNKW 2016 No. 4, item 22.

[8] A. Górski, K. Michalak, *Spoczywanie biegu przedawnienia a ochrona immunitetowa. Rozważania na tle orzecznictwa Sądu Najwyższego* [Resting of the period of limitation versus immunity: Considerations based on the Supreme Court rulings], [in:] B. Namysłowska-Gabrysiak (ed.), K. Syroka-Marczewska, A. Walczak-Żochowska, *Prawo wobec problemów społecznych. Księga jubileuszowa Profesor E. Zielińskiej* [Law and social issues. Professor E. Zielińska jubilee book], Warsaw 2016, pp. 107–108; A. Górski, Gloss on this resolution, LEX/el. 2016.

permission to hold an immunised person liable for the commission of a criminal act. The lodging of the motion means a legal obstacle referred to in Article 104 §1 CC has occurred. It exists until the issue of a valid decision concerning the consent or permission to hold the person liable.

The opinion is not right. One cannot agree with the statement that immunity does not constitute an obstacle to proceedings at the *in rem* stage. It is in conflict with Article 17 §2 of the Criminal Procedure Code (hereinafter CPC), which limits the scope of activities to those that must be undertaken without delay in order to protect evidence and to activities aimed to explain whether the permission will be given. This means that not all activities necessary to start an investigation or inquiry can be performed and they are limited by the requirement that they must be performed without delay or aim to explain the grounds for the motion.

In fact, such specification of the term makes the start of resting depend on the body authorised to file the motion to give consent or permission, because a public prosecutor is not required to file such motion without delay.

It is rightly emphasised in jurisprudence that the provisions concerning the resting of the period of limitation are not applied "in the period of negotiating the issue of permission with the authorised body".[9] Moreover, the decision of the authorised body on giving consent or permission to hold a person liable is the most important element of the proceedings concerning the permission to hold an immunised person liable.[10] A decision on refusal to give consent or permission to hold an immunised person liable constitutes the authorised body's confirmation that the obstacle in the form of immunity exists, and with respect to consequences laid down in Article 104 §1 CC, it is an important circumstance.

2. SCOPE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION (ARTICLE 113 CC)

The principle of universal jurisdiction expressed in Article 113 CC[11] allows the application of the Polish statute notwithstanding regulations in force in the place of commission of an offence to a Polish citizen or an alien, to whom no decision on extradition has been taken, in the case of the commission of an offence abroad that the Republic of Poland is obliged to prosecute under international agreements, or a crime referred to in the Rome Statute of the International Criminal Court adopted in Rome on 17 July 1998.[12]

In the light of this provision, a problem arose whether it applies to crimes classified in Article 56(1) and (3) of the Act of 29 July 2005 on preventing drug addiction[13] consisting in smuggling and trafficking in big amounts of intoxicants

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[9] L. Peiper, *Kodeks karny...* [Criminal Code...], p. 213.

[10] Supreme Court resolution of 30 August 2007, SNO 44/07, OSNKW 2007, No. 11, item 84.

[11] Z. Kukuła, *Kilka uwag na temat zasady represji wszechświatowej* [Some comments on the principle of universal jurisdiction] WPP No. 1, 2011, pp. 3–18.

[12] Journal of Laws [Dz.U.] of 2003, item 708.

[13] Journal of Laws [Dz.U.] of 2017, item 783, as amended.

exclusively outside Poland. The doubt results from the fact that Article 56 of the Act on preventing drug addiction makes reference to the provisions of this statute, which might suggest that it should be applied only to acts committed in the territory of Poland.

The Supreme Court, on the basis of the Act on preventing drug addiction that is not in force, stated that "the place of commission of an act referred to in Article 43 of the Act of 23 April 1997 on preventing drug addiction (Journal of Laws [Dz.U.] of 2003, No. 24, item 198, as amended) may also be in the territory of a foreign country. The feature 'notwithstanding regulations' should be interpreted as regulations that are in force in the place of commission of the offence".[14]

On the other hand, in the light of the Act that is currently in force, opinions of the judicature differ. It is stated that:

– "The analysis of the features of an act under Article 55(1) of the Act of 2005 on preventing drug addiction directly proves that the place of commission of the offence may be both the territory of Poland and the territory of another country".[15]
– "The conviction of the accused for an act under Article 56(1) and (3) committed outside the territory of Poland results in the obligation to prosecute trafficking in drugs, which results from the international conventions ratified by Poland, especially the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988, ratified in 1995 (Journal of Laws [Dz.U.] No. 15, item 69) – Article 113 CC".[16]
– There is an opinion presented in the literature and the judicature that the place of commission of an offence under Article 56 of the Act on preventing drug addiction may only be in the territory of the Republic of Poland;[17] thus, the commission of such an act outside Poland does not constitute a crime, although there are different opinions, too.[18]

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[14] Supreme Court ruling of 21 May 2004, I KZP 42/03, with a critical gloss by S. Kosmowski, PS No. 7–8, 2005, p. 265; a gloss of approval by M. Bojarski, OSP No. 1, item 7, 2005, and comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej oraz Wojskowej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2004 r.* [Review of the Supreme Court Criminal and Military Chambers resolutions on substantive criminal law, penalty execution law, fiscal penal law and misdemeanour law for 2004], WPP No. 1, 2005, pp. 121–126; A. Barczak-Oplustil, *Przegląd orzecznictwa Sądu Najwyższego i Sądów Apelacyjnych* [Review of the Supreme Court and appellate courts judgements], CzPKiNP No. 2, 2004, p. 199.

[15] Supreme Court judgement of 20 October 2011, III KK 120/11, LEX No. 1101661.

[16] Judgement of the Appellate Court in Warsaw of 12 June 2013, II AKa 170/13, LEX No. 1409347.

[17] K. Łucarz, A. Muszyńska, *Ustawa o przeciwdziałaniu narkomanii. Komentarz* [Act on preventing drug addiction: Commentary], Warsaw 2008, pp. 504–505; T. Srogosz, *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warsaw 2008, p. 394; P. Kładoczny, B. Wilamowska, P. Kubaszewski, *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych* [Act on preventing drug addiction: Commentary on selected criminal law provisions], Warsaw 2013, pp. 59–61; judgement of the Appellate Court in Katowice of 20 December 2012, II AKa 409/12, LEX No. 1246644; judgement of the Appellate Court in Warsaw of 4 September 2013, II AKa 251/13, LEX No. 1372473.

[18] P. Żak, *Odpowiedzialność karna za przemyt narkotyków poza obszarem Unii Europejskiej* [Criminal liability for narcotic drugs smuggling outside the European Union territory], Prok. i Pr. No. 4, 2014, pp. 72–81.

Resolving the problem, the Supreme Court in its ruling of 28 January 2016, I KZP 11/15,[19] rightly held that: **"Article 113 CC applies to crimes under Article 56(1) and (3) of the Act of 29 July 2005 on preventing drug addiction (Journal of Laws [Dz.U.] No. 179, item 1485) committed by a perpetrator operating exclusively outside the territory of Poland"**.

In the justification, the Court rightly emphasised that, based on the principle of universal jurisdiction, a trial may take place before a Polish court when:

– the crime was committed outside Poland;
– the perpetrator is a Polish citizen or an alien, with respect to whom no decision on extradition has been taken;
– the offence belongs to those that the Republic of Poland is obliged to prosecute under international agreements, or a crime referred to in the Rome Statute of the International Criminal Court.

The "double criminality" of the act is not required. Undoubtedly, an act referred to in Article 56(1) and (3) of the Act on preventing drug addiction is the a convention-related crime. It results from the fulfilment of obligations laid down in the conventions ratified by the Republic of Poland:

– Single Convention on Narcotic Drugs adopted in New York on 30 March 1961,[20] requiring that the signatory States undertake action ensuring that, inter alia, offering, offering for sale, popularising, purchasing, selling, delivering on any terms, brokerage of intoxicating substances contrary to the provisions of the Convention and any other action that, in the opinion of the given Party, may be contrary to the provisions of the Convention should be recognised as punishable offences when committed intentionally, and should be subject to adequate punishment, especially imprisonment or another penalty of deprivation of liberty (Article 36(1)). Moreover, each of the above-mentioned offences is recognised as a distinct offence if committed in different countries. The above-mentioned more serious offences, regardless of whether they have been committed by the citizens of the country or by aliens, should be prosecuted by the country where the offence was committed or the country in which a perpetrator was arrested if extradition is not possible because of the national legislation in force in the country to which a motion was lodged, and if such an offender has not already been prosecuted and the judgement given (Article 36(2)). The above regulation does not affect the principle that the offences to which it refers are defined, prosecuted and punished in conformity with the domestic law of the Party (Article 36 (1);
– Convention on Psychotropic Substances adopted in Vienna on 21 February 1971;[21]
– United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 20 December 1988,[22] in accordance with which each Party must adopt such measures as may be necessary to establish

[19] OSNKW 2016, No. 3, item 18.
[20] Journal of Laws [Dz.U.] of 1966, No. 45, item 277, as amended.
[21] Journal of Laws [Dz.U.] of 1976, No. 31, item 180.
[22] Journal of Laws [Dz.U.] of 1995, No. 15, item 69.

a criminal offence under its domestic law, when committed intentionally, of offering, offering for sale, distribution, selling, delivery on any terms, brokerage of narcotic drugs or psychotropic substances contrary to the provisions of the 1961 Convention as amended or the 1971 Convention (Article 3(1)).

The provisions of the Conventions oblige the States-Parties not only to criminalisation of the listed offences, inter alia, consisting in trafficking in narcotic drugs but also to recognise them as crimes the perpetrators of which are subject to extradition.

3. SIMILARITY OF CRIMES (ARTICLE 115 §3 CC)

The issue of similarity of crimes has been given much attention in the literature and in case law. However, some issues still cause trouble in practice. One of such problems was referred to the Supreme Court for adjudication. Namely, it is a question whether the offences of the same type include offences against the same legal interest or also offences against different legal interests, and what criteria are decisive in the assessment of two not identical legal interests as interests of the same category. It concerned determination whether a crime under Article 209 §1 CC is similar to crime under Article 207 §1 CC. A far as this issue is concerned, the Supreme Court had already presented its opinion and it is that: "The offence of persistently evading the duty to pay for the support of a next of kin (Article 209 §1 CC) is not always similar to an offence of mistreating the next of kin or a person in a state of dependence to the perpetrator, or a minor or a person who is vulnerable in the meaning of Article 207 §1 CC."[23] The Court indicated that statute recognises offences as similar when they are against the same protected legal interest; from the point of view of the interest of a family, understood as an object of legal protection, both mistreating the family (Article 2017 §1 CC) and evading maintenance payment (Article 209 §1 CC) are against the spiritual and material interests of a family and endanger its proper functioning and security of its members.[24]

The Supreme Court, in a ruling of 30 March 2016, I KZP 23/15[25] held that:

1) **The issue of similarity of offences in the meaning of Article 115 §3 CC cannot be assessed from an abstract perspective – as a "similarity" of the types of prohibited acts, but exclusively from a real perspective. Therefore, real acts matching the features of the types of prohibited acts are the subject of assessment. It must be taken into consideration that a given type of a prohibited act may protect different legal interests, and only the assessment of particular conduct makes it possible to establish which protected interest has been infringed or endangered.**

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[23] Supreme Court ruling of 20 April 2001, V KKN 47/01, with a gloss of approval by A. Wąsek, OSP No. 3, item 43, 2002.

[24] Supreme Court ruling of 6 November 1997, II KKN 277/96, Prok. i Pr. – suppl. No. 6, item 3, 1998.

[25] OSNKW 2016, No. 3, item 19.

2) In case of a prohibited act referred to in Article 209 §1 CC committed by one of the parents who has a duty to pay maintenance of a minor child, the legal interest infringed is both the relation of taking care and proper functioning of the family.

This is a right opinion and it was rightly approved of in the literature.[26] Justifying its stand, the Supreme Court drew attention to the fact that there is no doubt in jurisprudence and case law that the criterion of "similarity" is met when offences are committed against identical legal interests.[27] Moreover, the Court noticed that the issue of similarity of offences in the meaning of Article 115 §3 CC cannot be assessed from an abstract perspective – as a "similarity" of the types of prohibited acts, but only from the real perspective. Real acts matching the features of the types of prohibited acts are the subject of assessment, and a given type of a prohibited act may protect various legal interests. Only the assessment of specific conduct allows establishing which of the protected interests was infringed or endangered by that act. It is necessary to thoroughly determine the nature of the legal interests and the relations between them. The Supreme Court had already emphasised that earlier stating that the similarities of offences must be established and assessed in

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[26] M. Małecki, Gloss on this ruling, OSP No. 3, item 30, 2017.

[27] A. Wąsek, *Gloss on the Supreme Court ruling of 20 April 2001, V KKN 47/01*, OSP No. 3, 2002, pp. 164–165; P. Daniluk, *Gloss on the Supreme Court ruling of 23 May 2013, IV KK 68/13*, OSP No. 5, 2014, pp. 637–643; P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, pp. 670–672; D. Pleńska, *Przedmiotowe podobieństwo przestępstw* [Objective similarity of offences], NP No. 10, pp. 1415–1424; D. Pleńska, *Zagadnienia recydywy w prawie karnym* [Issue of relapse into crime in criminal law], Warsaw 1974, pp. 111–132; K. Daszkiewicz, *Przestępstwa popełnione z tych samych pobudek i przestępstwa tego samego rodzaju* [Offences committed for the same reasons and offences of the same type], NP No. 7–8, pp. 1023–1029; A. Rybak, *Kontrowersje wokół przestępstwa podobnego* [Controversies over a similar crime], RPEiS No. 2, pp. 71–91; A. Kabat, *Przestępstwa podobne w ujęciu Kodeksu karnego* [Similar offences in accordance with the Criminal Code], NP No. 11, 1970 pp. 1580–1590; A. Kabat, *Tożsamość rodzajowa przestępstw i jej krytyka w świetle orzecznictwa Sądu Najwyższego* [Offence type identity and its criticism in the light of the Supreme Court rulings], Pal. No. 12, 1967, pp. 44–53; A. Zoll, *Przestępstwa podobne* [Similar offences], PiP No. 3, pp. 76–87; W. Grzeszczyk, *Pojęcie przestępstwa podobnego w Kodeksie karnym* [Similar offence concept in the Criminal Code], Prok. i Pr. No. 9, 2001, pp. 147–151; J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2012, p. 457; J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 53–116* [Criminal Code. General Part: Commentary on Articles 53–116], Warsaw 2016, p. 961; M. Siwek, *Gloss on the judgement of the Appellate Court in Katowice of 3 July 2003, II AKa 214/03*, Lex/el. 2011; S. Tarapata, *Kontrowersje wokół wyznaczania granic dobra prawnego – uwagi na marginesie postanowienia Sądu Najwyższego z 23 września 2009 r. (sygn. I KZP 15/09)* [Controversies over determining the limits of legal interests: comments in connection with the Supreme Court ruling of 23 September 2009 (I KZP 15/09)], CzPKiNP No. 1, 2012, p. 91 ff; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. II, Warsaw 2015, p. 769; A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. II, Warsaw 2015, p. 290; R. Hałas, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, p. 733; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016; G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny...* [Criminal Code...], p. 457; A. Marek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2010, p. 310.

a substantial and not abstract way.[28] It concerns the similarity of offences and not the types of prohibited acts.[29]

Offences under Article 207 §1 and Article 209 §1 CC are against family. As a result, according to the Court, one of the fundamental constitutional relations of the concept of "family" is the relationship between parents and children. The duty of parental care that the parents have towards children is an essential element of that relationship. Failure to fulfil that duty at the same time constitutes a violation of the proper functioning of a family. Therefore, in case of the commission of a prohibited act referred to in Article 209 §1 CC by one of the parents who has the duty to pay maintenance for a minor child, the legal interest infringed is the duty of parental care as well as the proper functioning of a family. The Supreme Court continued noting that, from the point of view of the legal interest, which "family" and "duty of parental care" are, one cannot treat the two terms in separation. Taking care is an element of social relations constituting a family. Particular conduct matching the features of offences referred to in Chapter XXVI CC may violate the duty of parental care and the proper functioning of a family at the same time, however, sometimes the duty of parental care does not result from family relations and then this act, matching the features of an offence under Article 209 §1 CC, although it infringes a legal interest in the form of "the relation of parental care", does not infringe a legal interest, which a "family" is. Thus, the Court held that an offence under Article 207 §1 CC consisting in mistreatment of the wife of the accused is against the family; it clearly infringes the functioning of a family and spouses' relations. In accordance with Article 23 of the Family and Guardianship Code, spouses are obliged to cohabit, support each other, be faithful and cooperate for the benefit of the family, which they started. A duty to respect a spouse is not only moral in nature, but also strictly normative, creating a specified group of rights and obligations, which may be protected by law and also exercised.[30] The Supreme Court is right that "the classification of two or more offences as 'the same type' depends on the legal interest which the offences are against. Single-type offences are those committed against legal interests of the same type, not necessarily identical ones".[31]

4. A PERSON LIVING IN COHABITATION (ARTICLE 115 §11 CC)

In accordance with Article 115 §11 CC, next of kin is, inter alia, "a person actually living in co-habitation". The interpretation of the term is not uniform either in jurisprudence or in case law, and differences concern mainly whether persons of the same gender may be living in co-habitation. It is assumed that cohabitation includes:

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[28] Supreme Court ruling of 6 November 1997, II KKN 277/96, Prok. i Pr. – suppl. No. 6, item 3, 1998; ruling of 20 April 2001, V KKN 47/01, OSNKW No. 7–8, item 54, 2001.

[29] K. Buchała, *Prawo karne materialne* [Substantive criminal law], Warsaw 1989, p. 201; D. Pleńska, *Przedmiotowe podobieństwo…* [Objective similarity...], p. 1415; A. Zoll, *Przestępstwa podobne…* [Similar offences...], p. 80; P. Kozłowska, *Gloss on Supreme Court ruling of 6 October 1995, II KRN 114/95*, Prok. i Pr. No. 12, 1997, p. 73; A. Rybak, *Kontrowersje…* [Controversies...], pp. 76–77; W. Grzeszczyk, *Pojęcie przestępstwa podobnego…* [Similar offence concept...], p. 148.

[30] Supreme Court judgement of 25 August 1982, III CRN 182/82, LEX No. 8448.

[31] Supreme Court ruling of 23 May 2013, IV KK 68/13, OSNKW issue 9, item 77, 2013.

– a relationship of two persons of different gender without a formal bond of marriage but characterised by the existence of emotional, physical and economic bonds;[32]

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[32] S. Zimoch, *Osoba najbliższa w prawie karnym* [Next of kin in criminal law], NP No. 9, 1971, p. 1303; Z. Czeszejko, *Kilka uwag na temat pojęcia „faktycznego wspólnego pożycia" w prawie karnym* [Some comments of the concept of "actual co-habitation" in criminal law], Pal. No. 3, 1972, p. 51; J. Stańda, *Stanowisko świadka w polskim procesie karnym* [Position of a witness in a Polish criminal trial], Warsaw 1976, p. 99; W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny...* [Criminal Code...], Warsaw 1973, p. 377, A. Szlęzak, *Gloss on the Supreme Court judgement of 31 March 1988, I KR 50/88*, OSPiKA No. 4, 1989, p. 205; E. Skrętowicz, [in:] J. Grajewski, E. Skrętowicz, *Kodeks postępowania karnego z komentarzem* [Criminal Procedure Code with commentary], Gdańsk 1996, p. 144; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. I, Warsaw 1987, p. 361; Z. Doda, A. Gaberle, *Orzecznictwo Sądu Najwyższego. Komentarz. Dowody w procesie karnym* [Supreme Court rulings: Commentary. Evidence in criminal proceedings], Warsaw 1995, p. 215 ff; R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański (ed.), S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2003, pp. 819–820; R.A. Stefański, *Prawo odmowy zeznań w nowym kodeksie postępowania karnego* [Right to refuse to testify in the new Criminal Procedure Code], Prok. i Pr. No. 7–8, 1998, p. 118; P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym* [Witness's right to refuse to testify in a criminal trial], Warsaw 2004, p. 38; A. Wąsek, [in:] O. Górniok. S. Hoc, M. Kalinowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz* [Criminal Code: Commentary], Vol. I, Gdańsk 2005, p. 841; J. Mętel, *Prawo do odmowy zeznań w kodeksie postępowania karnego z 1997 r.* [Right to refuse to testify in the Criminal Code of 1997], Nowa Kodyfikacja Prawa Karnego Vol. VIII, 2001, p. 177; O. Górniok, [in:] O. Górniok (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2006, pp. 428–429; R. Góral, *Kodeks karny. Praktyczny komentarz z orzecznictwem* [Criminal Code: Practical commentary with case law], Warsaw 2005, p. 206; A. Zoll, [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Kraków 1998, p. 634; A. Zoll, [in:] K. Buchała, Z. Ćwiąkalski, M. Szewczyk, A. Zoll, *Komentarz do kodeksu karnego. Cześć ogólna* [Commentary on the Criminal Code: General Part], Warsaw 1994, p. 508; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2011, p. 1011; M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Vol. I, Warsaw 2013, p. 591; R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna* [Criminal Code. General Part], Vol. II, Warsaw 2015, p. 780; Supreme Court judgement of 5 September 1973, IV KR 197/73, Lex No. 63773; Supreme Court judgement of 15 October1975, V KR 93/75, Lex No. 63538; Supreme Court judgement of 12 November 1975, V KR 203/75, OSP No. 10, item 187, 1976, with comments by M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (I półrocze 1976 r.)* [Review of the Supreme Court rulings on criminal proceedings (1st half of 1976)], Pal. No. 12, 1976, p. 61, and A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego za rok 1976 (część pierwsza)* [Review of the Supreme Court rulings concerning criminal proceedings in 1976 (Part one)], NP No. 2, 1978, pp. 277–278; Supreme Court judgement of 13 August 1987, II KR 187/87, OSNKW No. 1, item 11, 1988; Supreme Court judgement of 31 March 1988, I KR 50/88, OSNKW No 9–10, item 71, 1988; Supreme Court judgement of 9 November 1990, WR 203/90, OSP No. 9, item 205, 1991, with a gloss by L. Stecki, OSP No. 9, item 205, 1991, and comments by Z. Doda, J. Grajewski, *Węzłowe problemy postępowania karnego w świetle orzecznictwa Sądu Najwyższego (lata 1995–1996)* [Key issues in criminal proceedings in the light of the Supreme Court rulings (1995–1996)], PS No. 5, 1996, p. 29 ff; Supreme Court judgement of 3 March 2015, IV KO 1/15, Biul. PK No. 3, 2015, pp. 59–63 with a gloss of approval by A. Skowron, LEX/el. 2015; Supreme Court ruling of 4 February 2010, V KK 296/09, OSNKW No. 6, item 51, 2010; Supreme Court ruling of 7 July 2004, II KK 176/04, Lex No. 121668; Supreme Court ruling of 27 May 2003, IV KK 63/03, Lex No. 80281; judgement of the Appellate Court in Kraków of 11 December 1997, II AKa 226/97, KZS No. 2, item 26, 1998; judgement of the Appellate Court in Lublin of 30 December 1997, II AKa 51/97, Apelacja Lubelska No. 1,

– persons who, regardless of gender and age, live together and share a household and have certain psychical bonds;[33]
– apart from the obvious presumption resulting from the institution of marriage, persons who are not married but are bound in an emotional, physical and economic way as well as persons whose relations, because of living together for a long time and adopting a certain lifestyle, became the same as the relations between the next of kin referred to in Article 115 §11, e.g. relations between parents and children or between siblings".[34]

The Supreme Court, in a resolution of seven judges of 25 February 2016, I KZP 20/15,[35] explained that: **"the term 'a person living in cohabitation' used in Article 115 §11 CC defines a person who lives with another person in an actual relation in which there are spiritual (emotional), physical and economic bonds between them. Determining the existence of such a relation, i.e. 'living in cohabitation', is possible also when lack of a certain bond is objectively justified. A different gender of persons being in such a relation is not a requirement for recognition of living in cohabitation in the meaning of Article 115 §11 CC."**

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item 7, 1998; judgement of the Appellate Court in Warsaw of 5 December 1995, II AKr 459/95, OSA No. 4, item 15, 1996; judgement of the Appellate Court in Szczecin of 21 December 2006, II AKa 157/06, Lex No. 283401; judgement of the Appellate Court in Katowice of 15 March 2007, II AKa 24/07, KZS No. 7–8, 2007, p. 109; judgement of the Appellate Court in Kraków of 27 June 2002, II AKa 135/02, KZS No. 7–8, 2002, p. 52.

[33] Supreme Court judgement of 21 March 2013, III KK 268/12, Lex No. 1311768; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo* [Criminal Code: Commentary. Case law], Warsaw 1998, p. 206; M. Jachimowicz, *Prawo do odmowy składania zeznań przez osobę najbliższą* [Next of kin's right to refuse to testify], Prokurator No. 1, 2007, p. 72; R. Krajewski, *Osoba najbliższa w prawie karnym* [Next of kin in criminal law], PS No. 3, 2009, pp. 112–113; A. Marek, *Kodeks karny…* [Criminal Code...], pp. 316–317; I. Haÿduk-Hawrylak, S. Szołucha, *Wybrane zagadnienia prawa do odmowy składania zeznań* [Selected aspects of the right to refuse to testify], [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego* [Key issues of criminal proceedings], Warsaw 2010, pp. 1009–1010; A. Siostrzonek-Sergiel, *Partnerzy w związkach homoseksualnych a „osoby najbliższe" w prawie karnym* [Partners in homosexual relationships and "next of kin" in criminal law], PiP No. 4, 2011, p. 82; J. Giezek [in:] J. Giezek (ed.), *Kodeks karny...* [Criminal Code...], p. 705; J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2013, pp. 266–268; P. Rogoziński, *Dopuszczalność i zakres badania przez organ procesowy istnienia przesłanek warunkujących uchylenie się świadka od zeznawania* [Admissibility and scope of examining by the procedural body a witness's reasons for refusing to testify], Ius Novum No. 1, 2014, p. 121; P. Daniluk, *Wspólne pożycie jako pojęcie karnoprawne* [Cohabitation as a legal term], Prok. i Pr. No. 6, 2015, p. 5 ff; P. Daniluk, [in:] *Kodeks karny…* [Criminal Code...], p. 690; V. Konarska-Wrzosek, [in:] J. Warylewski (ed.), *System prawa karnego. Przestępstwa przeciwko dobrom indywidualnym* [Criminal law system: Offences against individual interest], Warsaw 2012, p. 916; R.A. Stefański, *Znaczenie związku partnerskiego osób tej samej płci w prawie i procesie karnym* [Importance of same-sex civil unions in law and in a criminal trial], [in:] T. Gardocka, D. Jagiełło, P. Herbowski (eds), *Zamęt w wymiarze sprawiedliwości karnej* [Confusion in criminal justice institution], Warsaw 2016, pp. 145–157; T. Oczkowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, p. 587; D. Gruszecka, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2016, p. 401.

[34] Supreme Court ruling of 4 March 2015, IV KO 98/14, OSNKW No. 8, item 67, 2015.

[35] OSNKW 2016, No. 3, item 19.

It is a right opinion and supported by broad and deepened substantiation. It is mostly approved of in the literature,[36] although there are also critical opinions.[37]

The content of Article 18 of the Constitution, which stipulates that: "Marriage, being a union of a man and a woman, (…) shall be placed under the protection and care of the Republic of Poland" is an argument limiting the scope of cohabitation to the relations between persons of the same gender. From this provision, it is deduced that concubinage is a relationship similar to marriage but without the formal tie, i.e. exclusively a relation between a man and a woman.[38]

It is not an obvious argument. The Constitutional Tribunal rightly noticed that "the only normative element that can be decoded from Article 18 of the Constitution is the heterosexuality of marriage"[39] and the provision obliges the State to undertake action that will strengthen the bonds between persons composing a family, especially bonds between parents and children and between spouses.[40] On the basis of criminal law, there are no evident reasons for stating that the differentiation with regard to gender is purposeful and justified.[41] It is necessary to agree with the statement that Article 18 is not an obstacle to legalise both heterosexual and homosexual relationships, however, in a form different than marriage, because in order to ban such unions, they would have to be explicitly banned by a provision of the Constitution.[42]

Also, it is not convincing that informal partnerships are in conflict with the constitutional value of the protection of a family, including its stability that constitutes an important element of the pro-family policy of the State, because they can be established and dissolved with greater ease and they are treated as specific relationships on trial, which can make them more attractive than the traditional marriage in the era of a certain crisis of the institution of marriage and a family, and because of that can depreciate marriage and its social significance to a greater extent.[43] In the doctrine, it is rightly believed that Article 1 of the Constitution, which stipulates that: "The Republic of Poland shall be the common good of all its citizens", indicates that public authorities cannot ignore citizens' needs and their role is to serve citizens.[44] Therefore, public authorities are obliged to undertake

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[36] See, glosses of approval on this resolution by P. Daniluk, Pal. No. 1–2, 2017, pp. 156–161; M. Popiel, M. Tokarska, Pal. No. 1–2, 2017, pp. 170–173; A. Skowron, LEX/el. 2016; J. Nowak, OSP No. 4, item 32, 2017; R.A. Stefański, *Znaczenie związku partnerskiego*… [Importance of same-sex civil unions...], p. 156.

[37] See, a critical gloss on this resolution by J. Kędzierski, Pal. No. 1–2, 2017, pp. 162–169.

[38] J. Izydorczyk, *Rozbieżność orzecznictwa – czy próba zmiany prawa* [Differences in judicial decisions or an attempt to change the law], Pal. No. 1–2, 2016, p. 157.

[39] Constitutional Tribunal judgement of 9 November 2010, SK 10/08, OTK-A No. 9, item 99, 2010.

[40] Constitutional Tribunal judgement of 18 May 2005, K 16/04, OTK ZU No. 5A, item 51, 2005.

[41] A. Siostrzonek-Sergiel, *Partnerzy*… [Partners in...], pp. 79–82.

[42] R. Piotrowski, *Opinia w sprawie projektu ustawy o związkach partnerskich* [Opinion on the Bill on civil unions], Przegląd Sejmowy No. 4, 2012, p. 187.

[43] D. Dudek, *Opinia w sprawie projektu ustawy o związkach partnerskich* [Opinion on the Bill on civil unions], Przegląd Sejmowy No. 4, 2012, p. 175.

[44] M. Grzybowski, *Zasada suwerenności narodu* [National sovereignty principle], [in:] M. Grzybowski (ed.), *Prawo konstytucyjne* [Constitutional law], Białystok 2009, p. 74; Z. Witkowski,

respective legislative activities.[45] Article 1 of the Constitution means that the State is under an obligation not to ignore citizens' needs and to act to improve their living conditions, and not discriminate against them on any grounds in the course of performing public tasks. The State is also obliged to take care of homosexual persons even if they constitute a minority in the mostly heterosexual community. The State should strive to satisfy various needs of those persons, including the need to enter into formal relationships.[46] A democratic State is obliged to respect the rights and freedoms of a person and a citizen, including the rights and freedoms of social groups that have a weaker position in the State.[47]

Another argument for limitation of cohabitation of people to those of different gender is derived from the ban on the application of broadened interpretation of Article 115 §11 CC in relation to Article 182 §1 CPC because the latter is exceptional in nature.[48] It is not right because the application of the term cohabitation to persons of the same gender does not mean broadened interpretation of the provision, which linguistic interpretation, presented below, confirms. It is hard to agree with an argument that in the Polish language "cohabitation" has always meant a bond existing between a man and a woman.[49] It is true that for many years cohabitation was believed to concern only persons of different gender, but it is necessary to take into account changes that have taken place in the Polish society, in which an evident revolution has observed with respect to the homosexual partnerships assessment.

Also emphasising the linguistic meaning of cohabitation in Polish, which suggests two persons' physical intercourse connected with a sexual intercourse, which can occur only between men and women, is not a reasonable argument.[50]

The Supreme Court rightly noted in the above-mentioned resolution that, in accordance with the Family and Guardianship Code, cohabitation of spouses consists in spiritual (emotional), physical (sexual) and economic (common household) bonds that constitute the objective of marriage and make it possible to meet its basic tasks.[51]

Wybrane zasady ustroju Rzeczypospolitej [Selected principles of the political system of the Republic of Poland], [in:] Z. Witkowski (ed.), *Prawo konstytucyjne* [Constitutional law], Toruń 2011, p. 81.

[45] R. Piotrowski, *Opinia*... [Opinion...], pp. 187–188.

[46] *Ibid*., p. 192.

[47] R. Piotrowski, *Opinia*… [Opinion...], p. 186; P. Tuleja, *Demokracja* [Democracy], [in:] W. Skrzydło, S. Grabowska, R. Grabowski (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny* [Constitution of the Republic of Poland: Encyclopaedic commentary], Warsaw 2009, pp. 136–137; T. Litwin, *Instytucja związków partnerskich w świetle przepisów Konstytucji z 1997 roku* [Institution of civil unions in the light of the Polish Constitution of 1997], Miscellanea Historico-Iuridica Vol. 13, book 2, Białystok 2014, p. 179.

[48] J. Izydorczyk, *Rozbieżność*… [Differences...], p. 157.

[49] *Ibid*.

[50] M. Derlatka, *Wspólne pozycie a prawo do odmowy zeznań* [Cohabitation versus the right to refuse to testify], Pal. No. 1–2, 2016, pp. 159–160.

[51] Supreme Court resolution of 28 May 1955, I CO 5/56, OSNCK No. 3, item 46, 1955; Supreme Court resolution of 28 May 1973, III CZP 26/73, No. 4, item 65, OSNCP 1974; Supreme Court judgement of 14 December 1984, III CRN 272/84, OSNCP No. 9, item 135, 1985; Supreme Court judgement of 27 September 1997, II CKN 329/97, Lex No. 12227829; Supreme Court judgement of 22 October 1999, III CKN 396/98, Lex No. 1217913, S. Breyer, S. Gross, [in:] J. Ignatowicz (ed.), *Kodeks rodzinny i opiekuńczy. Komentar*z [Family and Guardianship Code: Commentary], Warsaw 1966, p. 62; J.S. Piątkowski, [in:] J.S. Piątkowski (ed.), *System prawa*

The linguistic interpretation is for covering mainly heterosexual relationships with the term cohabitation. In the Polish language "cohabitation" (*pożycie*) means "(1) a social intercourse, being in close relation with a family member, some kind of emotional bond, or residing together (…); (2) a physical, sexual intercourse of two persons";[52] "cohabitation" does not only mean a social intercourse, being together, residing with another person but also a physical, sexual intercourse of two persons, especially in marriage.[53] It is rightly emphasised that in the light of linguistic interpretational directives, there are no grounds for stating that cohabitation may only be associated with the relationship of people of different gender.[54] Apart from that, the existence of actual stable relations between persons of the same gender is a social fact, which cannot be ignored on the juridical plane.[55]

It is rightly noticed that Article 115 §11 CC does not indicate that it applies only to heterosexual relationships. The provision does not make any reference to the issue of gender of the persons concerned. Therefore, it also allows granting homosexual partners the right to refuse to testify if their relationship constitutes cohabitation.[56]

The Supreme Court, in the resolution discussed, rightly drew attention to the fact that Article 115 §11 CC lacks specification indicating that it covers only the relationship between persons of different sex (a heterosexual relationship). The phrase "in cohabitation" is not defined by the addition of an adjective "marital" and, therefore, in compliance with the directive *lege non distinguente nec nostrum est distinguere*, the differentiation cannot be introduced based on interpretation.

As it has already been signalled, the changes that are taking place in social awareness are not insignificant. Informal partnerships take new forms with the

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rodzinnego i opiekuńczego. Część pierwsza [Family and guardianship law system. Part one], Warsaw 1985, pp. 232–233; S. Grzybowski, *Prawo rodzinne. Zarys wykładu* [Family law: lecture overview], Warsaw 1980, p. 70; J. Ignatowicz, *Prawo rodzinne. Zarys wykładu* [Family law – lecture overview], Warsaw 1996, pp. 80–81; J. Ignatowicz, K. Piasecki, J. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with a commentary], Warsaw 1990, pp. 121–122; J. Winiarz, J. Gajda, *Prawo rodzinne* [Family law], Warsaw 2001, p. 86; A. Zieliński, *Prawo rodzinne i opiekuńcze w zarysie* [Family and guardianship law – overview], Warsaw 2011, p. 62; T. Sokołowski, [in:] M. Andrzejewski, H. Dolecki, J. Haberko, A. Lutkiewicz-Rucińska, A. Olejniczak, T. Sokołowski, A. Sylwestrzak, A. Zielonacki, *Kodeks rodzinny i opiekuńczy* [Family and Guardianship Code], Warsaw 2013, p. 95; J. Gajda, [in:] K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary], Warsaw 2015, p. 211; W. Borysiuk, [in:] J. Wierciński (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary], Warsaw 2014, pp. 221–222.

[52] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny* [Practical dictionary of the contemporary Polish language], Vol. 32, Poznań 2001, p. 124.

[53] S. Dubisz, *Uniwersalny słownik języka polskiego* [General dictionary of the Polish language], Vol. III, Warsaw 2003, p. 828; M. Szymczak (ed.), *Słownik języka polskiego* [Dictionary of the Polish language], Vol. II, Warsaw 1999, p. 855.

[54] J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General Part: Commentary], Vol. I, Warsaw 2012, pp. 1394–1396; I. Haÿduk-Hawrylak, S. Szołucha, *Wybrane zagadnienia prawa do odmowy…* [Selected aspects of the right...], p. 1007.

[55] A. Siostrzonek-Sergiej, *Partnerzy…* [Partners in...], p. 73 ff.

[56] B. Rodak, *Gloss on ECtHR judgement of 3 April 2012, 42857/05*, LEX/el. 2012.

change of life realities.[57] There are examples of registered domestic partnerships of persons of the same gender.[58] The development of societies indicates the evolution of opinions about cohabitation of persons of the same gender. In the historical development, an intimate intercourse of persons of the same gender was gradually released from penalisation; life in a chosen way has become accepted, provided that it is not overtly displayed. It has also been slowly integrated in the system of kinship and the system of law. With the decreasing social opposition, a process of granting homosexual partnerships rights equal to heterosexual marriages is taking place and a possibility of registering homosexual cohabitation has been introduced.[59] Also same-sex marriages became admissible in some countries, e.g. the Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Island (2010) and Portugal (2010).

5. LEGAL PROTECTION OF A PHYSICIAN (ARTICLE 226 §1 CC)

In accordance with Article 44 of the Act of 5 December 1996 on the jobs of a physician and a dentist,[60] a physician who performs activities in emergency services or in case delay in providing medical assistance might result in a threat of death, a severe damage to the body or a severe health disorder, and other emergency situations, is entitled to legal protection as a public official. Physicians providing first aid, specialist first aid and undertaking medical life saving activities are entitled to the same protection (Article 5(1) of the Act of 8 September 2006 on the State Medical Rescue Service[61]).

The regulation raised doubts whether a physician on duty in a hospital emergency ward as a member of an ambulance staff waiting on call is also subject to this protection.

The Supreme Court in a ruling of 28 April 2016, I KZP 24/15,[62] rightly held that: **"Legal protection for a public official granted to a physician in Article 44 of the Act of 5 December 1996 on the jobs of a physician and a dentist, Journal of Laws of 2015, item 464, and in Article 5(1) of the Act of 8 September 2006 on the State Medical Rescue Service, Journal of Laws of 2013, item 757 as amended, does not cover situations other than providing emergency assistance (i.e. first aid and medical rescue activities) or medical aid if delay in its provision might result in a threat of death, a severe damage to the body or a severe health disorder, and**

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[57] F. Hartwich, *Związki partnerskie. Aspekty prawne* [Civil unions: Legal aspects], Warsaw 2011, p. 17.

[58] P. Szukalski, *Rejestrowane związki osób tej samej płci we współczesnej Europie. Dysfunkcje Rodziny* [Registration of same-sex unions in contemporary Europe: Family dysfunctions], Roczniki Socjologii Rodziny UAM, Vol. XXI, Poznań 2011, p. 169.

[59] P. Szukalski, *Rejestrowane…* [Registration of...], pp. 169–183. Also, see J. Pawliczak, *Zarejestrowany związek partnerski a małżeństwo* [Registered civil union versus marriage], Warsaw 2014.

[60] Journal of Laws [Dz.U.] of 2017, item 125, as amended.

[61] Journal of Laws [Dz.U.] of 2016, item 1868, as amended.

[62] OSNKW 2016, No. 7, item 4.

other emergency situations. The activities performed in this scope also include those directly leading to their provision from the moment of an individual call to provide them or from the moment a physician undertakes adequate action on his/her own initiative. The protection does not cover the period of being on duty in the hospital emergency ward if it consists in waiting for a call to join the ambulance staff."

Justifying the opinion, the Supreme Court indicated that the scope of a physician's protection laid down in Article 44 of the Act of the jobs of a physician and a dentist and Article 5 of the Act on the State Medical Rescue Service was strictly limited to the performance of specific activities.

It concerns situations in which a physician really and at a particular moment provides emergency medical assistance or performs his/her duties laid down in Article 30 of the Act on the jobs of a physician and a dentist. Moreover, the features of an offence under Article 226 §1 CC include being insulted "in the course of and in connection with the performance of official duties". In fact, it does not mean an absolute time correlation of the act of insulting a physician and a physician's performance of emergency aid or activities referred to in Article 30 of the Act on the jobs of a physician and a dentist, but can also cover situations in which the activities have already been performed or will be performed soon.[63] The Court, taking into consideration the protection of a physician as a public official *ratio legis*, decided that there are no grounds for extending the scope of that protection, even if the extraordinary significance of the work of a medical rescue physician is taken into account.

6. OBJECT OF PROTECTION UNDER THE PROVISION CONCERNING A CRIME OF MATERIAL FORGERY (ARTICLE 270 §1 CC)

The Supreme Court, analysing the status of a person whose signature on a tax return was forged, also referred to the object of protection under Article 270 §1 CC.

The Court in the ruling of 24 August 2016, I KZP 5/16,[64] held that: **"The direct object of protection under Article 270 §1 CC is trust to a document as a formal way of confirming the existence of law, a legal relation or a circumstance that may be legally important, and not just law or a legal relation in which a given entity sees one's own interest. Thus, the interest, if at all, is infringed or endangered only in an indirect way that is not directly specified by the features of the act concerned."**

It is a right opinion, appropriately substantiated and has been approved of in the literature.[65] It is in conformity with case law that Article 270 §1 CC protects only the general legal interest, not the interests of an individual.

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[63] Constitutional Tribunal judgement of 11 October 2006, P 3/06, OTK-A No. 9, item 121, 2006; and Supreme Court judgement of 9 February 2010, II KK 176/09, OSNKW No. 7, item 61, 2010.

[64] OSNKW 2016, No. 10, item 66.

[65] D. Krakowiak, Gloss on this ruling, LEX/el. 2016.

The Supreme Court held that:
- "The category of objects of protection under the provisions of Chapter XXXIV of the Criminal Code ('Crimes against the credibility of documents') is certainty of legal relations based on trust in documents, credibility of official documents and public trust in documents";[66]
- "The object of protection of the norm referred to in Article 270 §1 CC is credibility of documents and certainty of legal relations resulting from them";[67]
- "The offence under Article 270 §1 CC is against credibility of documents and the interest of the object, the document of which was forged, is not a general, or category-related, or individual object of protection; and the act, due to its nature, does not directly infringe the legal interest of a particular person".[68]

ACT OF 19 NOVEMBER 2009 ON GAMBLING GAMES (JOURNAL OF LAWS [DZ.U.] OF 2016, ITEM 471, AS AMENDED)

7. DOING BUSINESS IN THE FIELD OF CYLINDRICAL GAMES, CARD GAMES, DICE GAMES, MACHINE GAMES (ARTICLE 6)

In accordance with Article 6 of the Act on gambling games, doing business in the field of cylindrical games, card games, dice games and machine games is admissible after obtaining a casino licence with the exception of games on which the State has a monopoly: number games, cash lotteries, telebingo, machine games outside casinos and gambling on the Internet with the exception of a betting pool and promotional lotteries as well as poker tournaments organised outside casinos. As far as this provision is concerned, a legal question was referred to the Supreme Court whether, due to the lack of notification of Article 6(1) of the Act on gambling games, which has been recognised as a technical provision so far, while there was a provision of information about Article 14(1)–(3) of the Act on gambling games (in the wording of the Act of 12 June 2015 amending the Act on gambling games),

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[66] Supreme Court ruling of 30 September 2013, IV KK 209/13, Biul. SN No. 10, item 1.2.7, 2013.

[67] Supreme Court judgement of 4 August 2005, II KK 163/05, Biul. PK No. 4, item 1.2.3, 2005; Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – suppl. No. 7–8, item 10, 2008; Supreme Court judgement of 4 September 2008, V KK 171/08, Prok. i Pr. – suppl. No. 1, item 6, 2009, with a gloss of approval by P. Iwaniuk, Prokurator No. 3–4, 2009, pp. 126–134; Supreme Court judgement of 26 November 2008, IV KK 164/08, Prok. i Pr. – suppl. No. 5, item 11, 2009, with a gloss of approval by D. Jagiełło, Pal. No. 3, 2010, pp. 271–277; Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – suppl., No. 7–8, item 10, 2008; Supreme Court judgement of 8 January 2009, WK 24/08, OSNwSK No. 1, item 47, 2009; Supreme Court judgement of 12 January 2010, WK 28/09, OSNwSK No. 1, item 31, 2010; Supreme Court ruling of 24 May 2011, II KK 13/11, Biul. PK No. 10, item 1.2. 9, 2011; Supreme Court ruling of 9 July 2014, II KK 152/14 LEX No. 1488795; Supreme Court ruling of 25 March 2015, II KK 302/14, LEX No. 1666887; Judgement of the Appellate Court in Szczecin of 16 January 2014, II AKa 213/13, Prok. i Pr. – suppl., No. 11–12, item 23, 2014.

[68] Supreme Court judgement of 3 October 2013, II KK 117/13, Prok. i Pr. – suppl., No. 1, item 10, 2014.

there are grounds for the application of Article 107 §1 FPC in criminal cases if the norms supplementing a blank rule under Article 107 §1 FPC should be referred to together with Article 6 and Article 14 of the Act on gambling games.

Resolving the problem, the Supreme Court in the ruling of 29 November 2016, I KZP 8/16,[69] rightly held that: **"The provision of Article 6(1) of the Act on gambling games, Journal of Laws of 2016, item 471, in the light of the Court of Justice of the European Union judgement of 13 October 2016 in the case C-303/15, is not classified in the group of technical regulations in the meaning of Article 1 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998."**

ACT OF 12 JUNE 2015 AMENDING THE ACT ON GAMBLING GAMES (JOURNAL OF LAWS [DZ.U.] OF 2015, ITEM 1201)

8. THE PERIOD OF ADJUSTING A BUSINESS IN THE FIELD OF SOME GAMES TO THE AMENDED PROVISIONS (ARTICLE 4)

In accordance with Article 4 of the Act of 12 June 2015 amending the Act on gambling games,[70] entities doing business in the field of cylindrical games, card games, dice games, machine games, bingo, a betting pool or audio-text lotteries on the date of the Act entry into force must adjust to the requirements laid down in the Act of 19 November 2009 on gambling games in the wording of the Act until 1 July 2016.

The provision raised doubts whether it applies to entities doing business in the field of machine games, regardless of whether they did that business in accordance with the provisions of the Act of 19 November 2009 being in force then or regardless of its conformity with the provisions.

The Supreme Court, in the judgement of 28 June 2016, I KZP 1/16,[71] rightly held that: **"The provision of Article 4 of the Act of 12 June 2015 amending the Act on gambling games (Journal of Laws 2015, item 1201), allowing entities doing business in the field referred to in Article 6(1) to (3) or in Article 7(2) of the amended Act, to adjust to the requirements laid down in the amended Act on gambling games until 1 July 2016, applies exclusively to entities that did such business in compliance with the Act on gambling games of 3 September 2015 based on a licence or permission)."**

In the justification, the Court indicated that the statutory specification of addressees in Article 4 of the amending Act as: "entities doing business in the field referred to in Article 6(1) to (3) or Article 7(2) on the date of the Act entry into force", applies only to the entities that on that day met the requirements referred to in the quoted provisions on gambling games. The types of activities were not listed, however, reference was made to those specified in Article 6(1) to (3) or Article 7(2). The Supreme Court drew a right conclusion that this applies to only to entities that

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[69] OSNKW 2016, No. 12, item 84.
[70] Journal of Laws [Dz.U.] of 2015, item 1201.
[71] OSNKW 2016, No. 6, item 36.

on the day of the Act entry into force did business in the whole field covered by the indicated regulations. According to the Court, the linguistic interpretation of Article 4 is in conformity with the systemic interpretation based on the whole Act on gambling games. As the requirements for doing business in the field of gambling games were modified or new ones added by the amended provisions, the entities doing business based on the licences that had been issued earlier, should have time to meet them. Moreover, if we held that the period for adjustment applied not only to entities doing business based on the already granted casino licences but also an unlimited group of entities, it would be in conflict with the legal order in this area.

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER ON SUBSTANTIVE CRIMINAL LAW OF 2016

Summary

The article analyses resolutions and judgements of the Supreme Court concerning substantive criminal law issues submitted as legal queries to the Supreme Court by appellate courts and court adjudicating bodies. The article discusses the issues concerning: resting of the period of limitation (Article 104 §1 CC), the scope of the principle of universal jurisdiction (Article 113 CC), similarity of crimes (Article 115 §3 CC), a person living in cohabitation (Article 115 §11 CC), legal protection of a physician (Article 226 §1 CC), the object of protection under the provision concerning a crime of material forgery (Article 270 §1 CC), doing business in the field of cylindrical games, card games, dice games, machine games, number games, cash lotteries, telebingo, machine games outside casinos, gambling on the Internet (Article 6 of the Act of 19 November 2009 on gambling games), and the period of adjusting a business in the field of some games to the amended provisions (Article 4 of the Act amending the Act on gambling games).

Keywords: document forgery, gambling game, similarity of crimes, judgement, limitation, universal jurisdiction, Supreme Court, resolution, cohabitation

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO MATERIALNEGO ZA 2016 R.

Streszczenie

W artykule została przeprowadzana analiza uchwał i postanowień wydanych przez Sąd Najwyższy w zakresie prawa karnego materialnego w sprawach, które zostały przedstawione w formie zagadnienia prawnego przez sądy odwoławcze i składy orzekające Sądu Najwyższego. Przedmiot rozważań stanowią: spoczywanie biegu przedawnienia (art. 104 §1 k.k.), zakres zasady represji wszechświatowej (art. 113 k.k.), podobieństwo przestępstw (art. 115 §3 k.k.), osoba pozostająca we wspólnym pożyciu (art. 115 §11 k.k.), ochrona prawnokarna lekarza (art. 226 §1 k.k.), przedmiot ochrony przepisu określającego przestępstwo fałszerstwa materialnego (art. 270 §1 k.k.), prowadzenie działalności w zakresie gier cylindrycznych, gier w karty, gier w kości i gier na automatach, gier liczbowych, loterii pieniężnych, gry telebingo, gier na automatach poza kasynem gry, gier hazardowych przez sieć Internet (art. 6 z dnia 19 listopada 2009 r. o grach hazardowych) oraz okres dostosowania działalności w zakresie niektórych gier do zmienionych przepisów (art. 4 ustawy o zmianie ustawy o grach hazardowych).

Słowa kluczowe: fałszerstwo dokumentu, gra hazardowa, podobieństwo przestępstw, postanowienie, przedawnienie, represja wszechświatowa, Sąd Najwyższy, uchwała, wspólne pożycie

MAŁGORZATA SEKUŁA-LELENO*

GLOSS
on the Supreme Court judgement of 21 July 2016, II CSK 604/15[1]
Admissibility of issuing a preliminary ruling by a court in a non-litigious procedure

The matter of admissibility of issuing a preliminary ruling does not constitute a novelty in the Supreme Court judgements. The general stand indicates admissibility of issuing preliminary rulings in a non-litigious procedure in accordance with general rules and there are no strict premises excluding such admissibility. This stand, although dominant, is not unquestionable and the main axis of the dispute is the scope of application of Article 318 §1 Code of Civil Procedure (CCP) in conjunction with Article 13 §2 CCP. Pursuant to Article 318 §1 CCP, a court may issue a preliminary ruling if it recognises that the claims have justified grounds. This means that the preliminary ruling cannot be issued only in cases concerning awarding performance or establishment of a legal relation or a right, and its issue is admissible only when both the grounds for claims and the amount are in question. As the Supreme Court rightly indicated in the judgement of 11 December 1999, I PKN401/99,[2] the issue of a preliminary ruling aims to avoid further purposeless work of a court connected with the establishment of the amount of the claims in a situation when the grounds for claims are doubtful. The aim is to implement the call for speed and effectiveness of proceedings laid down in Article 6 CCP and the principle of the economics of trials, which must be applied in a non-litigious procedure, too.

On the basis of a non-litigious procedure, the possibility of issuing a preliminary ruling is laid down in Articles 618 §1, 685 and 567 §2 CCP. The provisions determine also the scope of a court's cognition in those cases.

The judgements allowing the possibility of issuing preliminary rulings in a non-litigious procedure concerned proceedings the subject matter of which indicated the possibility of adequate application of Article 567 §2 CCP (i.e. in connection with the establishment of unequal share in the spouses' joint property), Article 618 §1 CCP

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1 LEX No. 2094779.

2 OSNP No. 8, item 259, 2001.

(i.e. in a dispute between co-owners concerning the right to apply for dissolution of the co-ownership or concerning the right of co-ownership), or Article 685 CCP (with respect to the right to claim distribution of inheritance and belonging of a given thing to the inheritance).[3]

There is a controversy in jurisprudence and the judicature over the issue whether a court can adopt a preliminary ruling in a non-litigious procedure also in cases other than those indicated, applying Article 318 §1 in conjunction with Article 13 §2 CCP, respectively. The Supreme Court expressed a positive opinion on this issue in resolutions of 9 May 1967, III CZP 37/67,[4] and of 7 July 1971, III CZP 35/71,[5] and then in a ruling of 21 October 1999, I CKN 169/98[6].

The Supreme Court adopted a different stand in the justification for the resolution of seven judges of 26 February 1968, III CZP 101/67,[7] in which it substantiated inadmissibility of respective application of Article 318 CCP in a non-litigious procedure and stated that in the event of a lack of the above special provisions, matters indicated in them should be heard in a trial and regulations being exceptional in nature should be interpreted precisely, institutions typical only of a trial should not be transferred to the area of a non-litigious procedure, and a ruling that is constitutive in nature cannot be issued in a non-litigious procedure (e.g. the determination of a heir's unworthiness to inherit) if a ruling issued in a non-litigious procedure is declarative (e.g. confirmation of the acquisition of an inheritance). The arguments did not meet with approval from jurisprudence and the judicature.

However, the decision that is discussed in the gloss deserves attention because earlier the Supreme Court did not analyse a possibility of issuing a preliminary ruling in a case concerning establishing transmission servitude and acquisitive prescription claimed by the party to the proceedings, especially in a situation when there is a lack of regulations providing for such a solution. Thus, the Supreme Court's attempt to solve the above problem should be appreciated because it influences rational assessment of the appropriateness of non-litigious proceedings and the economics of trials. A preliminary ruling may be issued only when reasons related to the economics of trials are arguments for ruling on a given right or a legal relationship.[8]

It is worth taking into consideration the resolution of 7 May 2010, III CZP 34/10,[9] in which the Supreme Court expressed an opinion that in the case concerning

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[3] See, the Supreme Court rulings of: 8 November 2013, I CSK 732/12, 22 October 2009, III CSK 21/09 and the Supreme Court resolution of 7 May 2010, III CZP 34/10.

[4] OSNCP No. 11, item 198, 1967.

[5] OSNCP No. 1, item 4, 1972.

[6] See, more about this issue in: K. Piasecki, *Postępowanie sporne rozpoznawcze* [Preliminary proceedings in disputed grounds for a claim], Warsaw 2004, pp. 352–354; W. Broniewicz, *Postępowanie cywilne w zarysie* [Overview of civil procedure], Warsaw 2008, p. 240; W. Siedlecki, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1988, p. 76; K. Korzan, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1997, p. 156.

[7] OSNC No. 12, item 203, 1968.

[8] [Sic:] the Supreme Court in the ruling of 17 April 2000, V CKN 23/00, LEX No. 1218605.

[9] OSNC No. 12, item 160, 2010.

distribution of joint property after the termination of spouses' joint property, a court adjudicates on claims under Article 231 of the Civil Code (CC) in a judgement concluding the proceedings. However, a court may issue a partial or preliminary ruling if there are justifying circumstances. Thus, the Supreme Court admitted the issue of a preliminary or a partial ruling in matters other than indicated *numerus clausus* in Article 567 §2, Article 618 §1 and Article 685 CCP. It is indicated also that a court should use the possibility of issuing a partial or a preliminary ruling when it is purposeful and will allow the court to adjudicate in a case partially or will cause adjudication on the disputed grounds for a claim or another secondary issue that is subject to adjudication, without the conducting proceedings in other matters, which is not necessary in order to issue a partial ruling or may turn out to be useless if the partial ruling proved to be defective.

CASE BACKGROUND

In the discussed case, the petitioner applied for the establishment of transmission servitude of the real property for the benefit of a business entity: Mazowiecka Spółka Gazownictwa with respect to the gas pipeline on its plot of land.

In the preliminary ruling of 5 December 2014, the Regional Court recognised that the motion had justified grounds. The Court established that the real estate had been entered into the land and mortgage register and the petitioner was a registered owner. Neither the petitioner nor the former owners had given their consent to build a gas pipeline on their land.

Analysing the legal situation, the Regional Court expressed an opinion that because the party to the proceedings challenged the grounds for motion to establish transmission servitude, there were reasons for issuing a preliminary ruling in accordance with Article 318 §1 in conjunction with Article 13 §2 CCP. According to the Court, all the requirements for claims laid down in Article 305^1 and Article 305^2 §2 CC were met in principle.

The District Court in Łódź in the decision of 29 May 2015 dismissed the appeal of the party to the proceedings. The Court held that, although the possibility of issuing a preliminary ruling in a non-litigious procedure based on Article 318 §1 in conjunction with Article 13 §2 CCP raised doubts in case law, the judicature admitted such a possibility because the Supreme Court in the resolution of 7 May 2010, III CZP 34/10[10] admitted the issue of a preliminary or partial ruling in cases other than indicated *numerus clausus* in Article 567 §2, Article 618 §1 and Article 685 CCP.

The Court also indicated the a court should use the possibility of issuing a partial or preliminary ruling when it is purposeful and will allow a court to adjudicate partially in the case or will cause a court to adjudicate in a case partially or will cause adjudication on the disputed grounds for a claim or another secondary issue that is subject to adjudication, without conducting proceedings in other matters,

[10] OSNC 2010, No. 12, item 160, 2010.

which is not necessary in order to issue a partial ruling or may turn out to be useless if the partial ruling proved to be defective. In the Court's opinion, such a situation occurred in the case because the adjudication on justified grounds for a claim allowed the Regional Court to adjudicate on the claim of the servitude acquisitive prescription.

In the cassation appeal, the party to the proceedings first of all claimed that the provisions of Article 318 §1 in conjunction with Article 13 §2 CCP were infringed because the provisions of Article 318 §1 CCP concerning a trial were applied to a non-litigious procedure. This made it possible to issue a preliminary ruling in a situation when in a non-litigious procedure, there are special regulations concerning admissibility of issuing preliminary rulings, and this resulted in the recognition of admissibility of issuing a preliminary ruling in the proceedings to establish transmission servitude, for which there is a lack of special regulations providing for such a possibility.

The Supreme Court in the theses of its ruling stated that:

(1) Preliminary rulings laid down in Article 567 §2, Article 618 §1 and Article 685 CCP differ from preliminary judgements in the meaning of Article 318 §1 CCP because they adjudicate independently, finally and completely on the matters that are significant for the main case without referring the parties to the litigation mode.
(2) Preliminary rulings adjudicating on prejudicial issues may be adopted only in distributing proceedings and not in other cases heard in this mode, and in order to issue a "classical" preliminary ruling in a non-litigious procedure, the requirements laid down in Article 3118 §1 in conjunction with Article 13 §2 CCP must be met.
(3) In the light of the provisions implementing the principle of the proceeding continuity and integrity, Article 318 §1 CCP is recognised as an exception to it because it leads to the division of the proceedings into two separate stages. Such nature requires, in accordance with the principle *exceptiones non sunt extendae*, that it should be precisely interpreted and the interpretation should take into consideration the aim of the norm contained in it, which is to serve the economics of trials.
(4) The Court disapproved of the opinion that what determines whether a given matter may be subject to adjudication with the use of a preliminary ruling is its significance for the main claim and the need to issue a final ruling, which means the need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between "grounds and amount" is insufficient.

The Supreme Court indicated that, although in a non-litigious procedure a preliminary ruling can be issued based on general rules (Article 318 §1 in conjunction with Article 13 §2 CCP), in this case, the respective application of this procedural instrument cannot mean its extension based on an unjustified interpretation. According to the Court, the argument for such precise interpretation of Article 318 §1 CCP is, first of all, the principle of a non-litigious procedure that is no dispute between the parties concerned. The Court disapproved of the opinion expressed in the literature that: "whether a given issue may be subject to adjudication in the form

of a preliminary ruling is its significance for the main claim and the need to issue a final ruling, which means the need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between 'grounds and amount' is insufficient". The Court justified this opinion mainly quoting the binding stand on the legal principle expressed in the resolution of seven judges of the Supreme Court of 26 February 1968, III CZP 101/67, and stated that approval of such a stand "would give a court a possibility of issuing preliminary rulings in many cases, regardless of the lack of the requirement of disputability of the grounds for the claim and its amount laid down in Article 318 §1 CCP".

GLOSS

The judicature recognises the provision of Article 318 §1 CCP as an exception to the principle of the trial continuity and integrity because it leads to the division of a trial into two separate substantive stages. At the same time, in accordance with the principle *exceptiones non sunt extendae*, this nature of the proceedings requires its precise interpretation, which should take into account the aim of the norm contained in it that is to serve the economics of trials.[11] This criterion allows former adjudication of the issues in dispute before adjudicating on the essence of a claim.

In the light of Article 318 §1 CCP, issuing a preliminary ruling is admissible and also justified when the grounds for a claim are, in accordance with the opinion of the first instance court, doubtful and subject to litigation and when the claim amount is also in dispute and its establishment involves laborious, often also costly, evidence-taking proceedings, which might turn out to be useless in case the petitioner's claims were found groundless by the court of second instance.

The interpretation of "grounds for a claim" was the subject matter of opinions expressed in jurisprudence as well as in the Supreme Court judgements.[12] What follows is a stand that the term means a specific right or a legal relationship and not a legal or actual opinion, which a court wants to express in its ruling.[13]

In a non-litigious procedure, there are two types of preliminary rulings. The first group includes those that can be issued based directly on the provisions regulating a non-litigious procedure (e.g. Articles 618 and 688 in conjunction with Articles 618, and 567 §3 in conjunction with Articles 688 and 618 CCP). The second group concerns the possibility of issuing a preliminary ruling with a respective application of Article 318 via Article 13 §2 CCP.[14]

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[11] [Sic:] the Supreme Court in the ruling of 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010, LEX No. 533567.

[12] See, justification of the resolution of the Supreme Court of 19 November 1957, 4 CO 15/57, OSN No. 4, item 114, 1958; the Supreme Court judgement of 28 June 1982, IV CR 230/82, OSNCP No. 2–3, item 42, 1983.

[13] Supreme Court judgement of 4 February 2000, II CKN 738/98, OSNC No. 7–8, item 146, 2000.

[14] See, M. Manowska, [in:] *Komentarz do art. 318 kodeksu postępowania cywilnego* [Commentary on Article 318 CCP], LEX Nb 6; and with respect to this issue: the Supreme Court resolutions of:

As concerns the claims of a cassation appeal, first of all it is necessary to examine whether it was admissible to issue a preliminary ruling in the case based on Article 318 §1 CCP and if it could apply to the party's claim concerning acquisitive prescription of servitude. This, on the other hand, raises a more general question about admissibility of preliminary rulings in a non-litigious procedure in cases other than those clearly listed under Title II, Book II of the Code of Civil Procedure.

The special nature of the introductory provisions laid down in Articles 567, 618 and 685 CCP differentiates them from preliminary rulings in the meaning of Article 318 §1 CCP. They adjudicate on their own on litigious issues that have prejudicial significance for the main case without referring the parties to the litigation mode.[15]

The Supreme Court, in the justification of its stand, rightly drew attention to the argument raised in the literature that "regardless of the concurrence of the name, the preliminary rulings issued in distributing proceedings are not rulings that are equivalent to preliminary rulings in the meaning of Article 318 §1 CCP. A court applies them to adjudicate on claims and secondary issues related to the main claim, which in case of dispute must be adjudicated before the main subject of the proceedings. The decisions included in them are final and prejudicial in relation to the main subject in dispute. Thus, unlike 'classical' preliminary rulings, they may also contain negative content. With the use of those rulings, a court issues a final and complete adjudication in the dispute and not only on the grounds for a claim like in general preliminary rulings. Thus, the subject of the ruling here is not only adjudicating on the grounds but a final solution to a given issue within the scope indicated in a special provision, which is important for the final adjudication in a distributing proceedings".[16]

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7 May 2010, III CZP 34/10, OSNC No. 12, item 160, 2010; 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008; 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; and the Supreme Court rulings of: 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; 8 November 2013, I CSK 723/12, LEX No. 1439378.

[15] [Sic:] the Supreme Court ruling of 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; See, the Supreme Court rulings of: 22 October 2009, III CSK 21/09, OSNC No. 4, item 61, 2010; 8 November 2013, I CSK 723/12, LEX No. 1439378; and 25 November 2009, III CSK 21/09, LEX No. 533567.

[16] See, K. Markiewicz, *Zasady orzekania w postępowaniu nieprocesowym* [Principles of adjudicating in a non-litigious procedure], Warsaw 2013, pp. 163–166; J. Gudowski, [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Vol. III, Warsaw 2012, p. 76; W. Siedlecki, [in:] J. Policzkiewicz, W. Siedlecki, E. Wengerek, *Postępowanie nieprocesowe* [Non-litigious procedure], Warsaw 1980, p. 74; J. Krajewski, *Postępowanie nieprocesowe* [[Non-litigious procedure], Toruń 1973, pp. 56–57; K. Korzan, *Postępowanie nieprocesowe...* [Non-litigious procedure...], Warsaw 2004, pp. 181–182; A. Stempniak, *Postępowanie o dział spadku* [Proceedings concerning distribution of inheritance], Warsaw 2010, p. 412; M. Sychowicz, *Problematyka art. 618 k.p.c. (część I)* [Issues under Article 618 CCP (Part I)], Nowe Prawo No. 1, 1972, p. 54; I. Kunicki, *Glosa do uchwały SN z dnia 16.3.2007 r., III CZP 17/07* [Gloss on the resolution of the Supreme Court of 16 March 2007, III CZP 17/07], OSP No. 9, 2009, p. 644; T. Misiuk, *Problemy integracyjne postępowania działowego* [Issues related to combining the procedures in dissolution of co-ownership], Part 2, Palestra 1973, p. 6; J. Jagieła, *Dopuszczalność wydania wyroku wstępnego w procesie cywilnym. Zagadnienia wybrane* [Admissibility of a preliminary judgement. Selected issues], Polski Proces Cywilny No. 1, 2010, pp. 26–27; with respect to this issue, also compare the Supreme Court resolutions of: 28 April 2010, III CZP 9/10, OSNC No. 10, item 136, 2010, p. 30; and 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008.

In the literature, and also in the judicature, a difference in opinions occurred concerning the question whether a court may issue a preliminary ruling in a non-litigious procedure also in other cases based on appropriately applied provisions, in the meaning of Article 13 §2 CCP, Article 318 §1 CCP.

With respect to this question, the Supreme Court rightly indicted in the justification of its ruling that "The Code of Civil Procedure, striving to concentrate disputes between the parties to the proceedings concerning dissolution of co-ownership, division of joint property and distribution of an inheritance under one procedure, instead of introducing the norm that was in force before and making it possible to refer the parties to the proceedings to the litigation mode, introduced a new, formerly unknown in a non-litigious procedure, instrument of preliminary rulings. If there were no such provisions, the issues, as ones clearly not referred to a non-litigious procedure, would have to be heard in a trial (Article 13 §1 CCP). Even this circumstance indicates that the instrument of preliminary rulings cannot be extended over cases that the legislator did not envisage. Exceptions strictly defined in statute cannot constitute a general rule". The arguments should be recognised as accurate.

In general, the Supreme Court admits the issue of a preliminary ruling in non-litigious procedures also in cases other than the above-mentioned or in the same cases but in different situations when there is a possibility and purposefulness of a preliminary ruling "as to the grounds".[17] However, it is possible only in conditions that are required in case of a preliminary judgement, thus, if the subject of the proceedings concerns ruling of a claim amount or its establishment, and the claim is in dispute as to its grounds and its amount.[18]

The regulation laid down in Article 618 §1 CCP, providing for the issue of a preliminary ruling in the cases indicated in this provision, different from those under Article 318 §1 CCP, excludes the possibility of issuing, in accordance with Article 318 §1 in conjunction with Article 13 §2 CCP, a preliminary ruling in other cases departing from the scope of Article 318 §1 CCP, especially the possibility of

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[17] [Sic:] the Supreme Court in resolution of 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; the Supreme Court ruling of 21 October 1999, I CKN 169/98, OSNC No. 5, item 86, 2000.

[18] [Sic:] Also, W. Siedlecki, *Postępowanie nieprocesowe...* [Non-litigious procedure...], p. 76; by the same author, [in:] W. Berutowicz, Z. Resich (ed.), *System prawa procesowego cywilnego* [System of the civil procedure law], Vol. II: *Postępowanie rozpoznawcze przed sądami pierwszej instancji* [Preliminary procedure before first instance courts], Ossolineum, Warsaw 1987, p. 652; T. Misiuk, *Problemy integracyjne...* [Issues related...], p. 9; J. Gudowski, [in:] T. Ereciński (ed.), *Kodeks...* [Code...], Vol. III, Warsaw 2012, p. 76; K. Korzan, *Postępowanie nieprocesowe...* [Non-litigious procedure...], Warsaw 2004, pp. 181–183; B. Dobrzański, [in:] Z. Resich, W. Siedlecki (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Vol. I, Warsaw 1975, p. 804; J. Jodłowski, [in:] J. Jodłowski, K. Piasecki (ed.), *Kodeks postępowania cywilnego z komentarzem* [Code of Civil Procedure with a commentary], Vol. III, Warsaw 1989, pp. 854–855; I. Kunicki, *Glosa do uchwały SN z 16.3.2007 r., III CZP 17/07* [Gloss on the resolution of the Supreme Court of 16 March 2007, III CZP 17/07], No. 9, OSP 2009, p. 643; K. Markiewicz, *Zasady orzekania...* [Principles of adjudicating...], pp. 166–173.

issuing a preliminary ruling in the case concerning the establishment of transmission servitude.[19]

It is rightly raised in the literature that the structure of a preliminary judgement is determined by the possible separation of the two areas of jurisdictional activities: the establishment of the grounds and then, in the further course of a trial, adjudication on a sanction consisting, in case of allowance of a claim for performance, in its adjudication on a justified amount. The issuing of such a judgment always depends on a court's discretion: it is an establishing judgement within a lawsuit concerning awarding a claim amount, and its content may only be positive. However, if a ruling as to the grounds is to be negative, a court issues a final judgement dismissing the claim. A preliminary ruling cannot be issued if only the claim grounds are in dispute and there is no litigation concerning a claim amount or when the performance amount is established *ex lege*.

Thus, the Supreme Court rightly concluded that "although neither in the literature, nor in the judicature there are doubts over the stand that a preliminary ruling can be issued in a non-litigious procedure based on the general rules (Article 318 §1 in conjunction with Article 13 §2 CCP), respective application of this procedural instrument in such a case cannot mean extending it in the course of unjustified interpretation". The argument raised in the literature that the principle of a non-litigious procedure is a lack of dispute between the parties to the proceedings is an argument for an even more precise interpretation of Article 318 §1 CCP in case of its relevant application to rulings on the essence of a claim issued in this mode, but does not rule out the application of this provision. Due to that, there is criticism of the stand expressed in the literature that "*argumentum a contrario* requires special carefulness and is justified not only when logical premises allowing a conclusion that the legislator's intention aimed at that end support it".[20]

In accordance with the opinion expressed in the literature, whether a given issue may be subject of adjudication with the use of a preliminary ruling depends on its significance for the main claim and the need to issue a final ruling. The adoption of this conception means a need to adjudicate *ad casum* on such possibility to particular types of cases (e.g. in the case concerning the establishment of the right-of-way) and the use of an argument of the lack of dependence between "the grounds and the amount" is insufficient.[21] The Supreme Court, it seems, rightly recognised this stand as inaccurate and indicated, first of all, its incompatibility with the binding opinion

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[19] See, the Supreme Court ruling of 30 September 2004, IV CK 455/04, Biuletyn SN No. 2, 2005, p. 15.

[20] [Sic:] B. Dobrzański, *Glosa do uchwały SN z dnia 9 maja 1967 r., III CZP 37/67* [Gloss on the Supreme Court resolution of 9 May 1967, III CZP 37/67], OSPiKA No. 2, item 30, 1968.

[21] [Sic:] K. Markiewicz, [in:] *Kodeks postępowania cywilnego*. Vol. I. *Komentarz do art. 318* [Code of Civil Procedure. Commentary on Article 318], Legalis Nb 12; with respect to this issue, compare K. Markiewicz, *Zasady orzekania...* [Principles of adjudicating...], pp. 172–173; similarly J. Gwiazdomorski, *Glosa do uchwały SN z 10.5.1967 r., III CZP 31/67* [Gloss on the resolution of the Supreme Court of 10 May 1967, III CZP 31/67], Nowe Prawo No. 6, 1968, p. 1048, see the same point of view in the Supreme Court resolution of 9 May 1967, III CZP 37/67, OSNCP No. 11, item 198, 1967; similarly B. Dobrzański, *Glosa do uchwały SN z 9.5.1967 r., III CZP 37/67* [Gloss on the Supreme Court resolution of 9 May 1967, III CZP 37/67], OSPiKA issue 2, 1968, p. 65.

of the Supreme Court expressed in the resolution of seven judges, a legal principle, of 26 February 1968, III CZP 101/67. Its adoption would give a court a possibility of issuing preliminary rulings in many cases, regardless of the lack of premises of disputability of the claim grounds and its amount laid down in Article 318 §1 CCP.

The Supreme Court decided in this resolution that a preliminary ruling in the case concerning the establishment of the acquisition of an inheritance is inadmissible. The Supreme Court also explained that the essence and the nature of a claim to establish the acquisition of an inheritance oppose the division of this claim into the grounds and the amount. Thus, Article 318 §1 CCP should be recognised as useless in the proceedings concerning the acquisition of an inheritance. The justification of the resolution provides a conclusion that a preliminary ruling adjudicating on prejudicial matters may be issued only in the distributing proceedings and not other cases heard in this mode. Secondly, in order to make it possible to issue a "classical" preliminary ruling in a non-litigious procedure, the requirements laid down in Article 318 §1 CCP in conjunction with Article 13 §2 CCP must be met. The instrument of preliminary rulings cannot be extended over cases the legislator did not envisage, which means that exceptions strictly defined in statute cannot constitute a general principle.[22]

CONCLUSIONS

The application of the provisions concerning litigation in a non-litigious procedure is appropriate and must respect the specificity of this procedure.

Preliminary rulings concern their own independent subject of adjudication. They are independent adjudications on the grounds of prejudicial issues.

Relevant application of Article 318 §1 CCP in a non-litigious procedure is admissible only in situations under this provision, i.e. when in the case heard in a non-litigious mode, a court, based on premises, must establish the existence of a given legal relationship or a right, and adjudicate on a claim performance, and both the claim grounds and its amount are in dispute.[23]

The right to acquisitive prescription of servitude claimed by the party to the proceedings, in the light of the ruling discussed in the gloss, does not constitute an element of grounds for the petitioner's claim to establish transmission servitude (Articles 305^1–305^2 CC), and thus, this factual state, as the Supreme Court rightly held, does not materialise a hypothesis of a norm resulting from Article 318 §1 in conjunction with Article 13 §2 CCP.

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[22] Compare, e.g. the Supreme Court ruling of 8 November 2013, I CSK 723/12, LEX No. 1439378.

[23] Compare, the Supreme Court resolution of 16 March 2007, III CZP 17/07, OSNC No. 2, item 20, 2008.

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Resolution of seven judges of the Supreme Court of 26 February 1968, III CZP 101/67, OSNC No. 12, item 203, 1968

GLOSS ON THE SUPREME COURT JUDGEMENT OF 21 JULY 2016, II CSK 604/15 – ADMISSIBILITY OF ISSUING A PRELIMINARY RULING BY A COURT IN A NON-LITIGIOUS PROCEDURE

Summary

The use of regulations on litigation in a non-litigious procedure is a corresponding application and must respect the specificity of that procedure. The preliminary rulings have their own independent object of adjudication and are independent substantial judgements on prejudicial issues. Respective application of Article 318 of the Code of Civil Procedure in a non-litigious procedure is admissible only in situations concerning that provision, i.e. when a court hearing a case in a non-litigious mode must, based on prerequisites, establish the existence of a given legal relationship or right and rule a claim amount where the claim grounds as well as the claim amount constitute a matter in dispute.

Keywords: non-litigious procedure, preliminary rulings

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 21 LIPCA 2016 R., II CSK 604/15 – DOPUSZCZALNOŚĆ WYDANIA PRZEZ SĄD POSTANOWIENIA WSTĘPNEGO W POSTĘPOWANIU NIEPROCESOWYM

Streszczenie

W postępowaniu nieprocesowym stosowanie przepisów o procesie jest stosowaniem odpowiednim i musi respektować specyfikę tego postępowania. Postanowienia wstępne mają własny, samodzielny przedmiot orzekania, są samodzielnymi rozstrzygnięciami merytorycznymi zagadnień prejudycjalnych. Odpowiednie stosowanie art. 318 k.p.c. w postępowaniu nieprocesowym jest dopuszczalne tylko w sytuacjach odpowiadających dyspozycji tego przepisu, to jest wówczas, gdy w sprawie rozpoznawanej w trybie nieprocesowym sąd przesłankowo musi ustalić istnienie określonego stosunku prawnego lub prawa i zasądzić roszczenie, a sporne są zarówno sama zasada, jak i wysokość roszczenia

Słowa kluczowe: postępowanie nieprocesowe, postanowienia wstępne

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