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CRIME OF ANIMAL ABUSE

MAREK MOZGAWA*

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1. HISTORY

Article 1 of the Regulation of the President of the Republic of Poland of 22 March 1928 on the protection of animals[1] banned animal abuse and defined the concept of animals[2]. Another provision (Article 2) defined the concept of animal abuse providing examples of abuse[3] (subparagraphs (a) to (i)); however, the above-mentio-

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1 Journal of Laws [Dz.U.] of 1932, No. 42, item 417, as amended. For more on the legislation concerning the protection of animals, compare A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, Prokuratura i Prawo No. 5, 2008, pp. 23–24.

2 The provision of Article 1 stipulated: "Animal abuse shall be prohibited. Animals, in the meaning of this Regulation, are all domestic and domesticated animals and birds as well as wild animals and birds, and fish, reptiles, insects, etc."

3 In accordance with Article 2, "Animal abuse should be understood as:

a) using sick, injured or lame animals to work and keeping them in the state of exceptional untidiness;
b) beating animals on the head, abdomen and lower parts of limbs;
c) beating animals with the use of hard and sharp objects or ones having devices designed to inflict extraordinary pain;
d) overloading draft or pack animals with loads that are inadequate to their strength or the state of routes, or forcing those animals to run too fast, inadequately to their strength;
e) transporting, carrying or herding animals in the way, in the position or in conditions causing unnecessary suffering;
f) using a harness, chains, tethers, etc. causing pain or using them in the way that may cause pain or body injury, with the exception of situations when the use of such objects is necessary because of and in the course of training in the interest of the public;
g) using animals for all types of experiments causing death, body injury or physical pain with the exception of cases laid down in Article 3;
h) conducting operations on animals with the use of inappropriate tools and without necessary carefulness and prudence in order to save them unnecessary pain;
i) malicious threatening or teasing animals;
j) inflicting all kinds of suffering on animals without really important and justified purposes".

ned listing was not exhaustive because in subparagraph (j) it was added that any cruelty to animals in general without a serious and real need constitutes abuse. The provision of Article 3 Regulation stipulated that experiments conducted for scientific purposes, provided they were necessary for serious scientific work and research and were conducted by authorised persons, did not constitute abuse. In accordance with Article 4, animal abuse could be subject to a fine of PLN 2,000 or imprisonment for up to six weeks, or both penalties combined. The owner of an animal who "consciously allows committing one of the acts referred to in Article 2 or causes the commission of such an act or forces someone into doing it" is subject to the same penalty. The same concerns an employer, a superior, an entrepreneur and any other person on whose order or in whose interest animals are used to work, provided they consciously let or allowed someone to commit one of the acts enumerated in Article 2 or induced or forced someone to commit them. In case of animal abuse committed in the way showing a perpetrator's extraordinary cruelty, he was subject to a penalty of imprisonment for up to one year, however, in the territory where the (Austrian) Criminal Act of 1852 was in force, close confinement was applied (Article 5) instead. In accordance with Article 6, "In case of the commission of the above-mentioned offences by minors below 14 years of age, parents or guardians guilty of failure to supervise them shall be subject to a fine of up to PLN 50". Article 7 penalised (a fine of up to PLN 1,000) scientific experiments on animals violating the provisions of Article 3 or regulations enacted based thereon.

Article VI para. 1 of the Act of 20 May 1971: Provisions introducing the Misdemeanour Code[4] repealed Articles 4, 6 and 8[5] Regulation of 22 March 1928, and the provisions concerning basic misdemeanours were transferred to the Act of 20 May 1971: Misdemeanour Code.[6] The offence classified in Article 5 (animal abuse with extraordinary cruelty) and the misdemeanour referred to in Article 7 (scientific experiments on animals violating the provisions in force) remained in the Regulation. The first version of Article 62 MC classified two misdemeanours. Article 62 §1 MC stipulated a misdemeanour (carrying a penalty of imprisonment, limitation of liberty, a fine or reprimand) consisting in animal abuse, especially beating an animal in an extraordinarily painful way, using a sick animal to work, overloading an animal or making an animal suffer physically in another way. In accordance with Article 62 §2, the owner of an animal or a person taking care of an animal, or a person using an animal to work or ordering this use and parents or guardians of a juvenile perpetrator, if they consciously allowed the commission of an act referred to in §1, were subject to the same penalty. Pursuant to Article 62 §3 MC, aiding and abetting an act referred to in §1 was subject to punishment.[7]

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4 In accordance with Article 8, "County courts (lower courts) shall have jurisdiction over offences laid down in this Regulation".

5 Journal of Laws [Dz.U.] of 1971, No. 12, item 115, as amended.

6 Uniform text: Journal of Laws [Dz.U.] of 2015, item 1094, as amended; hereinafter: MC.

7 As it is seen, the legislator noticed the importance of the issue and decided that animal abuse should carry a penalty of imprisonment, extended the group of persons liable for abuse and also decided that aiding and abetting should be punished. W. Radecki, *Ustawa o ochronie zwierząt z komentarzem*, Wrocław 1988, p. 11.

In accordance with Article 43 of the Act of 21 August 1997 on the protection of animals[8] (hereinafter: APA), the Regulation on the protection of animals of 22 March 1928 ceased to be effective and Article 62 MC was repealed (Article 41 APA). Penal aspects of the Act were laid down in Chapter 11 (Articles 35 to 40 APA) and offences were defined in Articles 35 and 36. Article 35 APA in the original version stipulated the following:

"1. Whoever kills an animal violating Article 6 para. 1, Article 33 or Article 34 paras. 1 to 4 or abuses it in the way laid down in Article 6 para. 2 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine.
2. If a perpetrator of an act referred to in para. 1 acts with extraordinary cruelty, he shall be subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine.
3. In case of a conviction for an offence referred to in para. 1, a court may adjudicate on the forfeiture of the animal, and in case of a conviction for an offence referred to in para. 2, a court shall adjudicate on the forfeiture of the animal provided the perpetrator is its owner.
4. In case of a conviction for an offence referred to in para. 1 or para. 2, a court may ban a perpetrator from entering a certain profession, doing a certain business or performing activities that require a licence connected with the use of animals or affecting them as well as adjudicate on the forfeiture of tools and objects used to commit a crime and objects obtained by the commission of a crime.
5. In case of a conviction for an offence referred to in para. 1 and para. 2, a court may award Towarzystwo Opieki nad Zwierzętami w Polsce (Society for Taking Care of Animals in Poland) PLN 25 to PLN 2,500 in damages or adjudicate on the sum to be paid for another purpose related to the protection of animals indicated by the court."

Originally, Article 36 para. 1 APA also classified an offence in the form of violation of a ban on keeping and breeding beasts of prey and venomous animals outside zoological gardens, scientific institutions and circuses (carrying a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year). On the other hand, Article 36 para. 2 APA penalises keeping, trading in and transporting across the border without the required permit animals, their parts and animal products that are subject to limitation based on international agreements concluded by the Republic of Poland.[9] Article 36 paras. 2 to 4 was repealed by Article 2 para. 3 of the Act of 7 December 2000 amending the Act on the protection of nature[10] that entered into force on 2 February 2001. Article 36 para. 1 APA, on the other hand, was repealed by Article 138 para. 3 of the Act of 16 April 2004 on the protection of nature[11] that entered into force on 1 May 2004.

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[8] Uniform text: Journal of Laws [Dz.U.] of 2017, item 1840.

[9] For more thoroughly on the issue, compare M. Mozgawa, *Prawnokarna ochrona zwierząt*, Lublin 2001, pp. 22–25.

[10] Journal of Laws [Dz.U.] of 2001, No. 3, item 21.

[11] Journal of Laws [Dz.U.] of 2016, item 2134, as amended.

Thus, further considerations will focus on the provisions of Article 35 APA, which were amended many times.[12] The first amendment was introduced by the Act of 6 June 1997: Regulations introducing the Criminal Code[13] and was organising in nature because it only laid down the sequence of sanctions[14] (in order to adjust it to the concept adopted in the Criminal Code). The second amendment was introduced by the Act of 6 June 2002 amending the Act on the protection of animals.[15] The Act extended the concept of abuse (by adding subparagraphs 14 and 15 to Article 6 para. 2 APA[16]) and laid down that the conduct referred to in Article 31 APA constitutes abuse (this way, penalisation was extended).[17] Apart from the word "kills", the Act introduced the concepts "slays an animal" and "butchers an animal" to Article 35 para. 1 APA.[18] The words "Towarzystwo Opieki nad Zwierzętami w Polsce (…) or for another (…)" meaning that damages might be awarded for the purpose related to the protection of animals were repealed from Article 35 para. 5 APA. The third amendment was introduced by the Act of 21 January 2005 on experiments on animals,[19] which repealed the indication of Article 31 APA from the description of an act (which resulted from repealing Chapter 9 of the Act, i.e. Articles 28 to 32).[20] The next amendment to Article 35 APA was introduced by the Act of 16 September 2011 amending the Act on the protection of animals and the Act on maintaining cleanliness and order in communes,[21] based on which the following changes were made:[22]

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[12] I focus on amendments concerning Article 35 APA and not on all amendments to the Act on the protection of animals. For all amendments to APA, compare W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warsaw 2015, pp. 18–24.

[13] Journal of Laws [Dz.U.] of 1997, No. 88, item 554, as amended; henceforth also: CC.

[14] In para. 1, instead of: "is subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine", there is: "is subject to a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year", and in Article 2, instead of: "is subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine", there is a phrase: "is subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years".

[15] Journal of Laws [Dz.U.] of 2002, No. 135, item 1141.

[16] This way, it was assumed that animal abuse also concerns: (subpara. 14) keeping animals on a chain, which causes bodily injury or suffering and does not provide the possibility of necessary movement, (subpara. 15) organising animal fights.

[17] The provision of Article 35 para. 1 APA was given the following wording: "Whoever kills, slays or butchers an animal violating the provisions of Article 6 para. 1, Article 33 or Article 34 paras. 1–4 or abuses an animal in the way determined in Article 6 para. 2 and Article 31 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine".

[18] As a result of that, the provision was given the wording: "Whoever kills, slays or butchers an animal violating the provisions of Article 6 para. 1, Article 33 or Article 34 paras. 1–4 or abuses it in the way determined in Article 6 para. 2 and Article 31 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine".

[19] Journal of Laws [Dz.U.] of 2005, No. 33, item 289, as amended.

[20] Subparagraphs (2) (experiments on animals inflicting suffering conducted with the violation of statutory provisions) and (13) (testing cleaning products and cosmetics on animals, which causes suffering when other alternative methods are known) were repealed from Article 6 para. 2 APA, which indicates examples of animal abuse. As W. Radecki states, "this way the area of criminalisation under Article 35 Act on the protection of animals has been narrowed down again, but instead adequate criminalisation was laid down in the Act on experiments on animals". W. Radecki, *Ustawy…*, p. 222.

[21] Journal of Laws [Dz.U.] No. 230, item 1373.

[22] Article 2 APA was also amended and, consequently, the provisions of the statute only regulate the treatment of vertebrates. Also Article 6 APA was amended and, as a result, the

1) two different types of offences were specified (unlawful killing of animals – Article 35 para. 1 APA and abuse of animals – Article 35 para. 1a APA) instead of one alternative approach ("whoever kills, slays or butchers an animal (…) or abuses it (…)"),
2) Article 35 para. 2 APA laid down a common aggravated type of both basic offences under Article 35 paras. 1 and 1a APA ("If a perpetrator of an act under Article 35 paras. 1 and 1a acts with extraordinary cruelty (…)"),
3) penalties for offences were raised,[23]
4) it was decided that a penal measure in the form of the forfeiture of an animal should be obligatory in case of a perpetrator who is the animal's owner,[24]
5) in accordance with the doctrine's suggestions, a penal measure in the form of a ban on possessing animals was introduced (Article 35 para. 3a APA)[25] and the range of damages was extended from the former amount of PLN 25–2,500 to PLN 500–100,000.[26]

The latest change was made by the Act of 6 March 2018 amending the Act on the protection of animals and the Act: Criminal Code[27] which introduced the following modifications:

1) penalties were raised,[28]

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relative ban on killing (para. 1) was separated from an absolute ban on abusing (para. 1a). Exceptions to the ban on killing animals were indicated in Article 6 para. 1 APA and Article 33 para. 1 APA was repealed. At the same time, the wording of some provisions of Article 6 para. 2 APA was modified and four new forms of abuse were added to the catalogue of example conduct: Article 6 para. 2(16) to (19): sexual intercourse with an animal (zoophilia); exposure of a domestic or farm animal to the influence of atmospheric conditions that are dangerous for its health or life; transporting or keeping live fish for sale without the necessary amount of water, which makes breathing impossible; keeping animals without appropriate food or water for a period exceeding the minimum needs typical of the species.

[23] In case of basic types, a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years were introduced instead of a fine, a penalty of limitation of liberty or deprivation of liberty for up to one year. On the other hand, in case of the aggravated type, a penalty of deprivation of liberty for up to three years was introduced instead of a fine, limitation of liberty or deprivation of liberty for up to two years.

[24] Formerly, it was facultative in case of a conviction for the offence under Article 35 para. 1 APA, and obligatory in case of a conviction for the offence under Article 35 para. 2 APA (of course, provided that a perpetrator is an animal's owner).

[25] Compare, M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna ochrona zwierząt – analiza dogmatyczna i praktyka ścigania przestępstw z art. 35 ustawy z 21.08.1997 r. o ochronie zwierząt*, Prawo w Działaniu No. 9, 2011, p. 80; S. Rogala-Walczyńska, *Prawnokarna ochrona zwierząt*, Prokurator No. 3–4, 2009, p. 107.

[26] According to the comments *de lege ferenda* by M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna…*, p. 80.

[27] Journal of Laws [Dz.U.] of 2018, item 663.

[28] Thus, in case of Article 35 para. 1, the penalty was a fine, limitation of liberty or deprivation of liberty for up to two years. After the amendment of 6 March 2018, it was a penalty of deprivation of liberty for up to three years. Due to the phrase in Article 35 para. 1a ("Whoever abuses an animal shall be subject to the same penalty"), the amendment also raised penalty for an offence of animal abuse to the same level (thus, it is a penalty of deprivation of liberty for up to three years). In case of an offence classified in Article 35 para. 2, it carried a penalty of deprivation of liberty for up to three years and after the amendment of 6 March 2018, a penalty of deprivation of liberty for a period from three months to five years.

2) Article 35 para. 3a laying down the use of a penal measure in the form of a ban on possessing animals was divided into two separate provisions (Article 35 para. 3a and Article 35 para. 3b[29]),
3) the wording of Article 35 para. 4 was changed modifying the scope of bans that can be imposed on perpetrators of acts classified in APA,
4) the provisions of Article 35 paras. 4a to 4c were added: (a) laying down obligatory adjudication on bans specified in Article 35 para. 2; (b) extending the time scope of bans (up to 15 years); (c) envisaging a possibility of adjudicating on the forfeiture of objects that were used or were intended for the commission of one of the offences under Article 35 APA, even if they were not owned by the perpetrator,
5) it was decided that the adjudication on damages should be obligatory in case of a conviction for one of the offences classified in Article 35 APA and the lowest rate of damages was raised (from PLN 500 to PLN 1,000), while the highest rate remained the same (PLN 100,000),
6) it was envisaged that it should be possible to impose a ban on possessing all animals or a specific type of animals for up to two years, provided that criminal proceedings were conditionally discontinued.

De lega lata, the provision of Article 35 para. 1 APA penalises killing, slaying or butchering animals, which violates the provisions of Article 6 para. 1, Article 33 or 34 paras. 1 to 4 APA.[30] Article 35 para. 1a APA classifies the offence of animal abuse and Article 35 para. 2 APA lays down an aggravated type (common for Article 35 para. 1 and Article 35 para. 1a), i.e. a perpetrator's act committed with extraordinary cruelty.[31] In accordance with the adopted assumption, the provisions of Article 35 paras. 1a and 2 APA will be subject to analysis.

It must be considered that the basic idea behind the new statute is expressed in Article 1, which stipulates that: "an animal, being a living creature able to suffer, is not a thing. A man should respect, protect and take care of it". Obviously, such an approach cannot lead to the conclusion that animals being the object of law shall automatically become the subject of law.[32] Thus, dereification of animals has not caused their personification resulting in empowerment and ability to obtain and have rights.[33] It must be remembered that the Act on the protection of animals

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[29] Article 35 para. 3a. A court may adjudicate a ban on possessing any animals whatsoever or a certain category of animals as a penal measure in case of a conviction for an offence laid down in para. 1 or 1a; para. 3b. A court shall adjudicate a ban on possessing any animals whatsoever or a particular category of animals as a penal measure in case of a conviction for an offence laid down in para. 2.

[30] What draws attention is the inappropriate edition of the penal provision in Article 35 para. 1 APA (in fact, the same as in Article 37 APA), where the specification of the features requires checking the provisions that were referred to. This causes trouble and interpretational problems; compare, W. Radecki, *Ustawa...*, p. 101 ff.

[31] For more on the issue of the offence under Article 35 para. 1 APA, compare M. Mozgawa, *Ustawa z 21.08.1997 r. o ochronie zwierząt*, [in:] M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku*, Warsaw 2017, p. 56 ff.

[32] P. Kozłowska, M. Szwarczyk, *Prawnokarna ochrona zwierząt*, Zamojskie Studia i Materiały No. 1, 2000, p. 62.

[33] M. Nazar, *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] M. Mozgawa (ed.), *Prawna ochrona zwierząt*, Lublin 2002, p. 138.

regulates the treatment of vertebrates,[34] including vertebrates used for scientific or educational purposes in the scope that is not regulated in the Act of 15 January 2015 on the protection of animals used for scientific and educational purposes (hereinafter: APAUSEP).[35]

2. ANALYSIS OF STATUTORY FEATURES OF THE OFFENCE OF ANIMAL ABUSE – BASIC TYPE UNDER ARTICLE 35 PARA. 1A APA

Animals' immunity from unnecessary pain and suffering caused by conduct that is statutorily defined as abuse is an object of protection.[36]

The provision of Article 35 para. 1a APA bans animal abuse, which means mainly all examples listed (which is confirmed by the phrase "in particular") in Article 6 para. 2 APA. Pursuant to this provision, animal abuse means inflicting or consciously letting someone to inflict pain or suffering, in particular:

1) consciously hurting or injuring an animal that does not constitute a lawful treatment or procedure in accordance with Article 2 para. 1(6) APAUSEP,[37] including identification marking of warm-blooded animals with the use of hot or freeze branding and all measures aimed at changing an animal's appearance conducted for the purpose other than saving its health or life, especially the removal of part of an animal's tail or ears (docking or cropping);
2) identification marking of warm-blooded animals with the use of hot or freeze branding;
3) using sick, too young or too old animals to work or for sporting or entertainment purposes and making them do things that may cause pain;
4) beating animals with the use of hard or sharp objects or such that are designed to inflict special pain, beating on the head, abdomen and lower parts of legs;

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[34] The particular, chapters of the statute concern: domestic animals (Chapter 2, Articles 9–11), farm animals (Chapter 3, Articles 12–14), animals used for the purpose of entertainment, shows, films, sport, and special needs (Chapter 4, Articles 15–18), animals living at large (Chapter 6, Articles 21–22a). Although the Act does not stipulate it directly, it undoubtedly also concerns treating other categories of animals not indicated therein (e.g. those kept in zoological gardens or alien to the given environment).

[35] Journal of Laws [Dz.U.] of 2015, item 266.

[36] W. Radecki, *Ustawy…*, p. 222. Also compare, W. Radecki, [in:] M. Bojarski, W. Radecki, *Przewodnik po pozakodeksowym prawie karnym*, Wrocław 1998, p. 169; W. Radecki, [in:] M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne*, Vol. II: *Przestępstwa gospodarcze oraz przeciwko środowisku. Komentarz*, Warsaw 2003, p. 356; M. Mozgawa, *Prawnokarna ochrona…*, 2001, p. 16; W. Kotowski, B. Kurzępa, *Przestępstwa pozakodeksowe. Komentarz*, Warsaw 2007, p. 171.

[37] Pursuant to Article 2 para. 1(6) APAUSEP, the procedure means any form of using animals for the purposes determined in Article 3, which may cause pain, suffering or distress to an animal or permanent damage to its body to the extent equal to or higher than a prick of a needle as well as activities that are aimed at causing or can cause a birth or hatching of animals or the creation and maintenance of a genetically modified line of animals in the conditions of pain, suffering, distress or permanent damage to the body to the extent equal to or higher than a prick of a needle; killing an animal only in order to use its organs or tissues for the purposes determined in Article 3 is not a procedure.

5) overloading draft or pack animals with loads that are inadequate to their strength and physical condition or the state of routes, or forcing those animals to run too fast;
6) transporting animals, including farm animals, meat animals and ones for sale on a market, carrying or herding them in the way causing unnecessary suffering and stress;
7) using a harness, chains, tethers, racks or other devices forcing an animal to stay in an unnatural position causing unnecessary pain, injury or death;
8) carrying out surgery by persons who have no required qualifications or not in conformity with the principles of medical and veterinary science, without necessary carefulness and prudence and in a manner causing pain that can be avoided;
9) malicious threatening or teasing animals;
10) keeping animals in inappropriate living conditions, including keeping them in the state of flagrant neglect or slovenliness or in enclosures or cages, in which they cannot maintain their natural positions;
11) abandoning animals, especially a dog or a cat, by an owner or another person taking care of an animal;
12) using cruel methods in animal breeding and rearing;
13) organising animal fights;
14) sexual intercourse with animals (zoophilia);[38]
15) exposing a domestic or farm animal to atmospheric conditions that pose a threat to its health or life;
16) transporting live fish or keeping them for sale without providing enough water for breathing;[39]
17) keeping an animal without appropriate food or water for a period exceeding the minimum needs typical of the given species.[40]

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[38] The fact that the legislator narrowed the scope of sexual conduct to sexual intercourse with an animal (thus, excluded other sexual activities) draws attention. The issue is discussed in the section analysing the concurrence of provisions.

[39] In the judgement of 13 December 2016, II KK 281/16, LEX No. 2237277, the Supreme Court stated: "The introduction of the provision of Article 6 para. 2(18) Act on the protection of animals of 1997 does not mean penalisation of the new conduct matching the features of abuse but is only a more detailed specification of the catalogue of activities recognised as animal abuse. Thus, the legislator's indication of this type of conduct as a form of fish abuse excludes the possibility of ignoring such circumstances at present as the features of an offence under Article 35 APA. However, in accordance with the wording of the statute before the amendment, any type of conduct listed in Article 6 para. 2 APA and any type of conduct not listed in this provision but leading to inflicting pain or suffering to an animal could be recognised as abuse. The catalogue laid down in this provision is open in nature and only indicates example and most characteristic forms of animal abuse.

(…) Water is the most natural environment for fish. Thus, there should be a rule that fish should be transported and carried in water environment, which ensures appropriate living conditions for them, i.e. the possibility of existing in conformity with the species' needs.

(…) While retailers cannot be responsible for the way in which customers carry live fish when they leave a shop and they cannot have influence on the time of carrying them, for which individual customers can certainly be liable in case of potential charges, each retailer should have impact on the way in which live fish are packed when being sold. Not only inflicting pain or suffering to animals but also allowing to do so constitutes abuse".

[40] The Poland-wide empiric research (covering the period from 24 December 1997 to 30 June 1999), which I conducted, indicates that in case the features of animal abuse are matched (without

The Supreme Court in its judgement of 16 November 2009, V KK 187/09,[41] rightly stated that: "The phrase used in the definition in Article 6 para. 2 of the Act makes it possible to assume that not only a person who inflicts pain or suffering but also a person who consciously allows someone else to inflict pain or suffering to an animal is guilty of an offence of animal abuse (…). Allowing practically consists in failing to prevent, i.e. giving permission, and is conscious when a perpetrator is aware of the consequences of his conduct, i.e. that another person will act in the way referred to in Article 6 para. 2". Although the legislator rather clearly presented possible methods of animal abuse, the list is not exhaustive. As the Supreme Court rightly noticed in the already-mentioned judgement of 13 December 2016, II KK 281/16:[42] "The catalogue of Article 6 para. 2 Act of 1997 on the protection of animals is open and contains mainly the typical but not all cases of animal abuse. Thus, any instance of inflicting or allowing to inflict pain or suffering can be treated as animal abuse even if it is not directly referred to in any of the items of the provision. It is enough to indicate in such situations that the conduct was inhumane, thus failing to consider animals' needs or to provide them with care or protection". It should be deemed that in the practical application of the statute to assess whether certain conduct constitutes animal abuse it is necessary to apply the opinions worked out in the doctrine and case law based on the provision of Article 184 Criminal Code of 1969 and Article 207 Criminal Code of 1997, obviously taking into consideration the specificity of the object of the act. For example, based on the Supreme Court case law,[43] it can be stated that the statutory phrase "abuses an animal" means an action or omission consisting in intentional inflicting physical pain and, in exceptional cases, also moral suffering repeated or single but intense and lengthy. It is doubtful whether "severe moral suffering" can be considered in case of animal abuse (in the context of animals, psychical rather than moral suffering should be discussed). However, it seems that the legislator gave a positive answer to this question recognising that, e.g. malicious threatening or abandoning an animal (especially a dog or a cat) may be treated as animal abuse. For example, abandoning a faithful dog that for some reasons started to be a nuisance for its master is something different from inflicting psychical pain.[44] The Appellate Court in Kraków was right to express the opinion in its ruling of 8 September 2011, II AKo 36/11, that: "An animal's death is not typical

causing death), a general statement that a perpetrator abused an animal is the most frequent one in the description of an act (197 cases – 15.9% of the total of 1,242 cases examined). Among the frequent ways of matching the verb feature of "abusing animals", the following ones should be distinguished: keeping animals in inappropriate living conditions – 114 cases (9.2%); intentionally injuring or disabling – 50 cases (4.0%); shooting – 38 cases (3.1%); kicking – 24 cases (1.9%); abandoning – 19 cases (1.5%); abusing for sexual purposes – 7 cases (0.6%), leaving unattended – 6 cases (0.5%); throwing out through the window – 6 cases (0.5%). M. Mozgawa, *Prawnokarna ochrona…*, 2011, pp. 34–35.

41 LEX No. 553896.

42 LEX No. 2237277.

43 Compare, e.g. the administration of justice and court practice recommendations in the area of legal protection of a family (VI KZP13/75) of 9 June 1976, OSNKW 1976, 7–8, item 86.

44 M. Mozgawa, *O prawnokarnej ochronie zwierząt*, Rzeczpospolita of 28/02/2001, p. C3; M. Mozgawa, *Prawnokarne aspekty ochrony zwierząt*, [in:] M. Mozgawa (ed.), *Prawna ochrona zwierząt*, Lublin 2002, p. 172.

of the offence of animal abuse under Article 35 para. 1 Act of 21 August 1997 on the protection of animals (…) and if such a consequence occurs, it can be an aggravating circumstance for penalty imposition".[45]

One of the issues raised in the context of animal abuse (due to the open definition of abuse laid down in Article 6 para. 2 APA) is whether live-bait angling (i.e. the use of live fish as bait) may be treated as animal abuse. The Regulation of the Minister of Agriculture and Rural Areas Development of 12 November 2001 concerning fishing and the conditions for breeding, rearing and catching other creatures living in water,[46] in which §2(2(3)) definitely states that: "Amateur angling shall be practiced without the use of live fish as bait", is especially significant. As W. Radecki notices, "the introduction of this ban seemed to have modified one of the basic arguments presented in this commentary: the Act on the protection of animals cannot ban something that is allowed in the Act on fishing. Of course, angling as such cannot be banned by the Act on the protection of animals but live-bait angling can be because, although the Act on fishing does not, the Regulation implementing it does ban it".[47] It is worth highlighting, however, that before the cited Regulation entered into force, the lawfulness of live-bait angling had not been questioned in Poland (and it seems to have been a method commonly used by anglers). The same Regulation, which bans live-bait angling, in §11(2(4)), determines that the minimum mesh size of nets for catching fish with the use of bait should be 5 mm. Why does it do so if it bans the use of live fish as bait? According to W. Radecki, it can be explained in two ways. Firstly, anglers are not allowed to use live fish bait, however, fishermen are (yet it would be an obvious breach of the principle of equal rights). Secondly, it is allowed to catch fish with the use of dead fish bait (i.e. killed before it is put on a single, double or triple hook).[48] Undoubtedly, there was a positive motive behind the attempt to introduce a ban on live-bait angling, however, it is indicated in the doctrine, it was done incompetently (because of internal contradictions in the Regulation) as well as inappropriately (because a potential ban should be laid down in statute and not in a ministerial regulation).[49] Nevertheless, it must be admitted that after the Regulation of 12 November 2001 entered into force, there were justified doubts whether live-bait angling could be treated as animal abuse under Article 35 APA. As a result of anglers' protests, the Regulation of the Minister of Agriculture and Rural Areas Development of 17 January 2003 amended the Regulation concerning fishing and the conditions for breeding, rearing and catching other creatures living in water,[50] which repealed the controversial provision of §2(2(3)). Thus, *de lega lata*, there is no provision directly banning live-bait angling. Moreover, the Act of 18 April 1985 on fresh water fishing[51] does not list this method as banned (Article 8 para. 1) and Article 7 para. 1 allows "fishing with the use of

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45 KZS 2011/10, item 42.
46 Journal of Laws [Dz.U.] of 2001, No. 138, item 1559, as amended.
47 W. Radecki, *Ustawy*…, p. 225.
48 *Ibid*., p. 226.
49 *Ibid*., p. 226.
50 Journal of Laws [Dz.U.] of 2003, No. 17, item 160.
51 Journal of Laws [Dz.U.] of 2015, item 652, as amended.

bait and a scoop net" (thus, it legalises this controversial method of catching fish). Therefore, it can be assumed that in the present legal state, an angler using a live-bait method cannot incur criminal liability under Article 35 APA (for animal abuse), although the issue whether this method of fishing should be banned or not remains open. If it should happen, it should be introduced to statute (e.g. the Act on the protection of animals or the Act on fresh water fishing) and not in a legal act such as a ministerial regulation.[52]

The offence classified in Article 35 para. 1 APA is a common one that can be committed in the form of action (e.g. beating an animal) as well as omission (e.g. failure to feed an animal). It is a formal offence (because the criminal result does not belong to its features).[53] However, doubts arise in connection with the subjective aspect. As far as animal abuse is concerned (although mainly based on Article 207 CC, which may be transferred to the sphere of Article 35 para. 1a APA), the opinion that only direct intent can be considered seems to be dominating.[54] Also the Supreme Court stated in its judgement of 16 November 2009, V KK 187/09,[55] that the offence of animal abuse (under Article 35 para. 1a APA) may be committed only intentionally and only with direct intent[56] (although earlier, in accordance with Article 184 CC of 1969, also oblique intent was assumed[57]). However, it seems that the minority opinion is right as it is for the possibility of committing an offence under Article 35 para. 1a APA with both types of intent. One cannot exclude that a perpetrator, directly pursuing another objective (not necessarily a criminal one), at the same time agrees that his conduct will cause an animal's specific suffering (e.g. a truck driver transporting animals does not stop to give them water or food because he wants to reach the destination on time). A. Wąsek is right to state that the concept of abuse is so extensively tinged with respect to the subjective aspect that it is just misinterpretation.[58]

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[52] W. Radecki, *Ustawy*…, p. 226.

[53] M. Mozgawa, *Ustawa*…, p. 80.

[54] For this issue, compare M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 650; M. Szewczyk, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 117–277 k.k.*, Warsaw 2013, p. 894.

[55] LEX No. 553896.

[56] LEX No. 553896; the thesis of the judgement is the following: "An offence of animal abuse determined in Article 35 para. 1 of the Act of 21 August 1997 on the protection of animals may be committed only intentionally and only with direct intent. The phrase used in Article 6 para. 2 APA makes it possible to assume that not only a person who personally inflicts pain or suffering on an animal but also the one who consciously allows another person to inflict pain or suffering on an animal is liable for animal abuse. Abuse, on the other hand, is every instance of direct conduct towards an animal listed in Article 6 para. 2 APA that is subject to a perpetrator's direct intent; thus, intent refers just to the action and not causing pain or suffering. Allowing consists practically in failure to prevent, i.e. giving consent, and is conscious when a perpetrator realises the consequences of his conduct, i.e. that another person will behave in any of the ways listed in Article 6 para. 2".

[57] Supreme Court resolution of 9 June 1976, VI KZP 13/75, OSNKW 1976, 7–8, item 86.

[58] A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna*, Vol. 1, Warsaw 2004, p. 988.

3. AGGRAVATED TYPE: ANIMAL KILLING OR ABUSE WITH EXTRAORDINARY CRUELTY UNDER ARTICLE 35 PARA. 2

Article 35 para. 2 lays down an aggravated type of the offence when a perpetrator kills (slays or butchers) an animal or abuses it with extraordinary cruelty, which carries a penalty of deprivation of liberty for a period from three months to five years. The object of protection is the same as in case of Article 35 paras. 1 and 1a APA (animals' life and their immunity from unnecessary pain and suffering). The Act on the protection of animals defines the concept of extraordinary cruelty, which should be understood as undertaking activities characterised by drastic forms and methods, in particular acting in a sophisticated or slow way deliberately intended to increase suffering and its duration (Article 4 para. 12 APA). Due to the subject matter of the present article, the interpretation of the concept of "killing an animal with extraordinary cruelty" is not discussed.[59] As far as animal abuse with extraordinary cruelty is concerned, it seems that the feature of "extraordinary cruelty" in a perpetrator's conduct mainly refers to the type and method of acting rather than the results of an act. The feature should always be considered *in concreto*, with reference to a given animal, inter alia with regard to its health. The difference between abuse referred to in Article 35 para. 1a APA and extraordinary cruelty referred to in Article 35 para. 2 APA is expressed in the intensity of suffering inflicted on a given animal.[60] It should be noticed that the Act on the protection of animals as such refers to "cruel methods of breeding and rearing animals" (Article 4 para. 7) and "cruel treatment" of animals (Article 4 para. 8), and defines the terms (which has been mentioned above). Those cruel methods in breeding and rearing animals or cruel treatment of animals will usually imply a perpetrator's liability for animal abuse but, as a rule, will not lead to liability under Article 35 para. 2 APA because cruelty towards animals is not sufficient for the occurrence of this offence; this cruelty must be aggravated, i.e. extraordinary. As the Appellate Court in Kraków in its judgement of 11 July 2012, II AKa 99/12,[61] noticed: "The concept of 'extraordinary cruelty' is evaluative in nature. It should be referred to especially drastic and disgusting conduct and the feature classifying it is not 'cruelty' itself (common cruelty) but 'extraordinary' cruelty, which is a comparative description of this feature".

The offence classified in Article 35 para. 2 APA is common and may be committed only intentionally, in the form of both action and omission. Here, a certain problem also occurs with respect to forms of intent in case of abuse with extraordinary cruelty. Although there are opinions in the doctrine that it may be direct intent as well as oblique one, this is not so obvious.[62] W. Radecki states that: "it is possible to think of an offence under Article 35 para. 2 as one committed with oblique

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[59] For this issue, compare, e.g. M. Gabriel-Węglowski, *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, p. 104; M. Mozgawa, *Ustawa*…, p. 82. Also compare the judgement of the Appellate Court in Gdańsk 15 October 2015, II AKa 319/15, LEX No. 1993183.

[60] Compare considerations by M. Szewczyk based on Article 207 CC, [in:] A. Zoll (ed.), *Kodeks karny*…, p. 893.

[61] KZS 2012/7–8, item 51.

[62] P. Kozłowska, M. Szwarczyk, *Prawnokarna*..., p. 67.

intent if a perpetrator envisages and agrees that his conduct might be assessed as extraordinarily cruel in the perception of an ordinary man".[63] However, it should be noticed that extraordinary cruelty is a feature containing not only an objective but also a subjective element indicating a perpetrator's special attitude.[64] And this raises serious doubts concerning the possibility of assuming oblique intent in case of abuse with extraordinary cruelty.[65]

4. CONCURRENCE OF PROVISIONS

The analysed provisions of Article 35 paras. 1 and 1a APA may quite often be in real, typical concurrence with other provisions classifying offences (which can result in the adoption of cumulative classification). Thus, e.g. real, typical concurrence of provisions of Article 35 paras. 1a or 2 APA with Article 52 para. 4 of the Act of 13 October 1995: Hunting law[66] may occur in case a perpetrator breeds or keeps pedigree sighthounds or their crossbreeds without a permit and abuses them. Similarly, a perfect (single act) concurrence of a provision classifying a misdemeanour of breeding or keeping a breed of dogs recognised as aggressive without a permit (Article 37a para. 1 APA) with Article 35 paras. 1a or 2 APA is possible if a perpetrator abuses the dogs he breeds or keeps.

Also real, typical concurrence of the provisions of Article 35 paras. 1, 1a or 2 APA (mainly in the context of animal abuse) with the provisions of Article 128 para. 1 of the Act of 16 April 2004 on the protection of nature[67] is possible because it may happen that in the course of smuggling animals they are hidden (often anaesthetised with tied or taped up limbs or other parts of the body), which undoubtedly may constitute animal abuse (and sometimes even leads to an animal's death).[68]

The provisions of Article 35 paras. 1, 1a or 2 APA may be in cumulative classification with the provisions of Article 66 APAUSEP. For example, Article 66 para. 1(1) APAUSEP criminalises exposing animals to unnecessary pain, suffering, distress or permanent damage to their body as a result of activity of using animals for scientific or educational purposes, and Article 66 para. 2 APAUSEP lays down an aggravated type in the form of causing an animal's death in cases referred to in Article 66 para. 1 APAUSEP. Of course, experiments on animals are usually connected with certain hardship, pain or suffering (and even deprivation of life) but the point is that it should be limited to activities necessary and justified by

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63 W. Radecki, *Ustawy*…, p. 228.

64 A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny*…, p. 277.

65 M. Mozgawa, *Ustawa*…, p. 84.

66 Journal of Laws [Dz.U.] of 2017, item 1295.

67 In accordance with Article 128 Act on the protection of nature, "Whoever, without a document required pursuant to the provisions referred to in Article 61 para. 1 or with the violation of its conditions, transports an animal being the species that is protected pursuant to the provisions referred to in Article 6 para. 1 across the European Union borders (…) shall be subject to a penalty of deprivation of liberty for a period from three months to five years".

68 M. Gabriel-Węglowski, *Przestępstwa*…, p. 140; W. Radecki, *Ustawy*…, p. 231; M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna*…, pp. 50–51.

the interest of science, and distinguished from cases when in the course of those experiments there is misuse in the form of inflicting suffering (abuse). In the event a perpetrator consciously inflicts unnecessary pain or suffering on test animals (or those used for educational purposes) or exposes them to distress or permanent body damage, it is undoubtedly justified to apply cumulative classification (Article 66 para. 1 APAUSEP in concurrence with Article 35 paras. 1, 1a or 2 APA in conjunction with Article 11 §2 CC, and in case of causing an animal's death – Article 66 para. 2 APAUSEP in concurrence with Article 35 paras. 1, 1a or 2 APA in conjunction with Article 11 §2 CC).[69]

W. Radecki draws attention to an interesting issue concerning concurrence of provisions. He notes that Article 16 APA bans organising bull, dog and cock fights and the breach of this ban is a misdemeanour under Article 37 para. 1 APA. At the same time, the legislator recognised organising animal fights as animal abuse in accordance with Article 6 para. 2(15) APA, and each case of abuse is an offence under Article 35 APA. Therefore, a problem occurs whether a perpetrator organising, e.g. a dogfight should be liable for an offence under Article 35 paras. 1a or 2 APA and a misdemeanour under Article 37 APA being in the perfect (single act) concurrence. However, W. Radecki rightly states that: "the features of a misdemeanour do not contain anything else that is included in the features of an offence; that is why, the classification of an act as a misdemeanour is excluded based on the principle of consumption and a perpetrator is liable only for an offence under Article 35".[70]

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[69] For this issue, compare M. Gabriel-Węglowski, *Przestępstwa...*, p. 138. Of course, one can consider whether the principle of consumption is applicable here (thus, e.g. whether animal abuse, i.e. the phase of infringing an interest under Article 35 para. 1a APA, may cover exposing it to unnecessary pain, suffering, distress or permanent damage to the body under Article 66 para. 1(1) APAUSEP), however, the adoption of such a solution would make the penal-law assessment of an act incomplete (because the fact that an offence has been committed in connection with a business activity in the area of using animals for scientific and educational purposes would disappear from sight) so it should be negated.

[70] W. Radecki, *Ustawy…*, p. 231. In addition to the above considerations, just in passing, it should be pointed out that the Act on the protection of animals criminalises (in the form of misdemeanours) dozens of different types of conduct. Without an analysis of the issue of misdemeanours determined in detail in this Act, it should be highlighted that matching the features of some of them may be at the same time perceived as animal abuse, e.g. keeping domestic animals on chains for a period longer than non-stop 12 hours a day or in the way causing a body damage or suffering and not giving an animal a possibility of necessary movement (Article 37 para. 1 in conjunction with Article 9 para. 2 APA), forcing animals to perform activities that inflict pain or are in conflict with their nature (Article 37 para. 1 in conjunction with Article 17 para. 4 APA), taming animals in the way causing suffering (Article 37 para. 1 in conjunction with Article 17 para. 2 APA), breeding or rearing animals in the way that can inflict injuries and body damage or other suffering (Article 37 para. 1 in conjunction with Article 12 para. 2 APA). M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna…*, p. 58. Therefore, how to classify a perpetrator's act that matches the features of an offence and a misdemeanour at the same time (and the scope of features is the same)? It seems that in such a case, a perpetrator's liability shall be limited to an offence under Article 35 para. 1a APA (with respect to the principle of consumption), certainly, under the condition of intentionality. If a perpetrator does not act intentionally (if it is possible in the actual conditions at all), a perpetrator's liability shall be limited to a misdemeanour under Article 35 para. 1 APA because a misdemeanour (in accordance with a general rule under Article 5 MC) may be committed both intentionally and unintentionally. However, in case the features of an offence and a misdemeanour overlap, it is

Real typical concurrence of the provisions of Article 207 CC (abuse) and Article 35 paras. 1, 1a or 2 APA is possible. This is also the opinion of the Appellate Court in Katowice adjudicating in the case in which the accused caused the death of his children's guinea pig and a canary when shooting an airgun.[71] The court rightly stated: "The accused consciously and intentionally caused the death of those animals and it was an element of psychical abuse of his family members. In addition, his activity also resulted from his desire to upset his family members, an expression of his strength, the feeling of impunity and subordinating them to his will. The violence used in this case was addressed to the surrounding of the aggrieved, i.e. their animals, and was aimed at influencing their conscience and will. The accused party's acts were elements of the features of the offence of abuse referred to in Article 207 CC on the one hand, and they matched the features of an offence referred to in Article 35 para. 1 Act of 21 August 1997 on the protection of animals, on the other hand, so it was necessary to apply cumulative concurrence of statutory provisions based on the wording of Article 11 §2 CC".

Cumulative classification of the provision of Article 35 para. 1a (or para. 2) APA with Article 202 §3 CC cannot be excluded (producing, recording the hard pornography with the use of animals). It should be remembered that in accordance with Article 6 para. 2(16) APA, sexual intercourse with animals (zoophilia) is treated as abuse (regardless of whether an animal really feels pain because of that). It should be pointed out that it concerns only sexual intercourse, while other sexual activities are not covered by this provision (in the meaning of Article 197 §2 CC). In case of other sexual activities with animals (that are not sexual intercourse), every case must be analysed individually and just a fact of using animals to such activities cannot be interpreted directly as animal abuse (in some cases, it is necessary to request an expert opinion).[72]

Cumulative classification of Article 35 paras. 1, 1a or 2 APA with Article 196 CC is a rather unusual instance of real typical concurrence of provisions (hardly probable in the Polish reality) as it concerns the killing or abuse of an animal and at the same time insulting someone's religious feelings, of course provided that a given animal is an object of veneration in a given religion (e.g. cattle in Hinduism).[73]

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necessary to apply the rules of perfect (single act) concurrence of an offence and a misdemeanour. On the other hand, one cannot approve of M. Gabriel-Węglowski's incorrect opinion that in a situation in which a perpetrator has committed an act that has identical features of an offence and a misdemeanour, his act should be classified only as a misdemeanour in compliance with the *in dubio pro reo* principle. See, M. Gabriel-Węglowski, *Przestępstwa…*, pp. 176–177. Reference to the principle is inappropriate because we do not deal with a doubt (either legal or factual in nature) which cannot be removed. However, the issue does not raise doubts if an act is more than a misdemeanour, i.e. an offence. In such a situation, a perpetrator must be liable for "something more" than just a misdemeanour (i.e. an offence) and there are no arguments for rewarding him. M. Kulik, M. Mozgawa, *Zbieg przepisu art. 35 ustawy o ochronie zwierząt z przepisami typizującymi uszkodzenie rzeczy*, Prokuratura i Prawo No. 6, 2011, p. 23.

[71] Judgement of the Appellate Court in Katowice of 22 June 2006, II AKa 199/06, LEX No. 196090.

[72] M. Mozgawa, *Ustawa…*, p. 89.

[73] M. Gabriel-Węglowski mentions such a concurrence, see *Przestępstwa...*, p. 142.

However, the concurrence of the provisions of Article 35 APA with Article 288 CC (destruction of someone else's thing[74]) is the biggest problem. First of all, a question must be answered if an animal is a thing. The problem raises many controversies (although mainly in the foreign doctrine[75]) because the Polish Act on the protection of animals gives a negative answer to the question (in Article 1 para. 1). On the other hand, the provision of Article 1 para. 2 APA stipulates that in cases that are not regulated in statute, the provisions concerning things should be applied respectively. Thus, it should be assumed that the wording of the provision of Article 1 *in fine* APA stipulates that an animal can be the object of direct action within a series of prohibited acts against property because, based on criminal law, provisions concerning things are applied to it respectively.[76] Therefore, *prima facie*, there are no obstacles to an assumption that an animal can be an object of direct action within prohibited acts under Article 288 CC and Article 124 MC.[77] Of course, the above comments refer to a live animal. The provisions of the Act on the protection of animals are applied only to such animals, which results directly from the definition laid down in Article 1 APA. A dead animal constitutes a thing that may be an object of direct action of a crime under Article 288 CC (and a misdemeanour under Article 124 MC); however, the provisions of Article 35 APA are not applied to it.[78]

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[74] For more on this issue, compare M. Kulik, M. Mozgawa, *Zbieg*…, pp. 5–23.

[75] For this issue, compare especially E. Fraul, *Zum Tier als Sache i.S. des StGB*, Jus No. 2, 2000, pp. 215–220. The author analyses the issue focusing on the relations between the approach of civil law and criminal law to the concept of a thing, especially in the context of the change that resulted from introduction of §90a BGB by the Act of 20 August 1990 on the improvement of the legal position of animals in civil law (BGBl I, 1762), and stipulating that animals are not things. Still, more serious problems occur in French law, the example of which can be the analysis by J.P. Marguenaud, *L'animal dans le nouveau code penal*, Recueil Dalloz Sirey, 25 Cahier-Chronique, 1995, pp. 187–191. The author discusses the consequences of the assumption that animals are not things, which raises a series of important problems of legal and penal nature (inter alia, the issues of legal classification of an act of stealing an animal). The author also presents philosophical considerations: "If they [animals – note by M.M.] are no longer things, what are they? Are they a category that is not specified and being somewhere between things and people? Maybe, although one can bet (…) that the assumption of personification of animals, considerably strengthened by the new Criminal Code, will not last long.

Instead of being inclined to rejecting the assumption, would it not be better to focus the attempts on narrowing it [i.e. personification – note by M.M.] in the technical limits of jurisdiction already applied to moral persons and to protect against obscuring the issue by anthropomorphism? It would be less troublesome to grant animals certain personality, purely legal, than to mix it up with a human embryo in the criminal code" (J.P. Marguenaud, *L'animal*..., p. 191). There are also works on this issue in the Polish doctrine; compare, e.g. M. Nazar, *Normatywna dereifikacja*…, [in:] M. Mozgawa (ed.), *Prawna ochrona*…, pp. 129–151; M. Goettel, *Sytuacja prawna zwierząt w świetle przepisów kodeksu cywilnego o porzuceniu i zawłaszczeniu rzeczy*, [in:] J. Gołaczyński, P. Machnikowski (ed.), *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, Warsaw 2010, pp. 159–170; E. Łętowska, *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej*, Łódź 1997.

[76] M. Kulik, M. Mozgawa, *Zbieg*…, p. 7.

[77] It cannot raise doubts that animals may be the object of sale, gift, exchange, etc. in accordance with the provisions of civil law, compare M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna*…, p. 53.

[78] M. Kulik, M. Mozgawa, *Zbieg*…, p. 8.

As a rule,[79] it should be assumed that in every case when an animal does not constitute a perpetrator's property (i.e. is someone else's in the meaning of Article 288 CC) and its value (or the value of loss) exceeds one-fourth of the minimum remuneration (in accordance with Article 124 §1 MC) but the act is expressed as intentional (inhumane or unjustified) killing or body damage (as a result of abuse or an attempt to kill), there are grounds for the application of cumulative classification: Article 35 paras. 1, 1a or 2 APA in concurrence with Article 288 §1 (possibly §2) CC in conjunction with Article 11 §2 CC.[80]

5. PENALTIES

After the latest amendment to APA (of 6 March 2018), the commission of an offence under Article 35 para. 1a APA carries a penalty of deprivation of liberty for up to three years (formerly it was a fine, limitation of liberty or deprivation of liberty for up to two years). On the other hand, in case of an offence under Article 35 para. 2 APA, it is a penalty of deprivation of liberty for a period from three months to five years (before the latest amendment, it was a penalty of deprivation of liberty for up to three years). In accordance with Article 69 §1 CC, the execution of the penalty of deprivation of liberty for up to one year may be conditionally suspended (for a probation period from one year to three years – Article 70 §1 CC, and in case of a minor: from two to five years – Article 70 §2 CC). Due to maximum limits of sanctions laid down in Article 35 paras. 1a and 2 APA (not exceeding five years), conditional discontinuation of criminal proceedings is possible (in accordance with Article 66 §2 CC), of course provided that all other conditions laid down in Article 66 §1 CC are met. Discontinuing criminal proceedings conditionally, a court may adjudicate on a ban on possessing any animals whatsoever or a certain category of animals for up to two years (Article 35 para. 6 APA). It is also possible to refrain from imposing a penalty (in accordance with Article 59 CC) for an offence under Article 35 para. 1a APA, due to the fact that a potential penalty does not exceed three years of deprivation of liberty, provided that the social harmfulness of an act is not considerable. In such a case, a court adjudicates on a penal measure, forfeiture or compensation (provided that the measure meets the aim of punishment). It should be pointed

[79] The possibility of eliminating the provision of Article 124 MC or Article 288 §2 CC (a case of lesser significance) by Article 35 paras. 1, 1a or 2 APA cannot be excluded only in extraordinary situations. Due to the object of protection of prohibited acts in Article 124 MC and Article 288 CC, it is justified that the application of compensation should depend on the amount of loss; the bigger it is, the lower the possibility of eliminating the provision on damage made to a thing. It can happen, e.g. in case of killing an animal of a low financial value, e.g. a mouse, a guinea pig, a hamster. In such a case, it seems that the classification of a perpetrator's act under Article 35 APA is sufficient to express the whole criminal content of an act; see, M. Kulik, M. Mozgawa, *Zbieg*…, p. 21.

[80] In case of the value of an animal (or damage) below one-fourth of the minimum monthly remuneration (and fulfilling all other requirements of the provisions), we would deal with the perfect (single act) concurrence of an offence and a misdemeanour: Article 35 paras. 1, 1a or 2 APA in concurrence with Article 124 §1 MC in conjunction with Article 10 §1 MC; compare, M. Kulik, M. Mozgawa, *Zbieg*…, p. 21.

out that in case of offences laid down in Article 35 paras. 1a and 2 APA, it is possible to adjudicate on the mixed penalty (Article 37b CC) or an alternative sanction (Article 37a CC).

In case of a conviction for an offence laid down in Article 35 para. 1a APA, a court may adjudicate on a penal measure in the form of a ban on possessing any animals whatsoever or a particular category of animals (Article 35 para. 3a) and in case of a conviction for an offence laid down in Article 35 para. 2 APA, a court shall adjudicate on a penal measure in the form of a ban on possessing any animals whatsoever or a particular category of animals (Article 35 para. 3b). In case of an offence referred to in Article 35 para. 1a APA committed by a perpetrator in connection with his job, business or licensed activities that involve the use of animals or affecting them, a court may adjudicate penal measures in the form of a ban on: (1) performing all professions or particular professions, (2) conducting all or a particular type of business activities, or (3) performing all or particular types of licensed activities that involve the use of animals or affecting them (Article 35 para. 4). In case of an offence referred to in Article 35 para. 2 APA committed in connection with a perpetrator's profession, business activity or licensed activities that involve the use of animals or affecting them, the above-mentioned bans are obligatory (Article 35 para. 4a). The bans laid down in Article 35 paras. 3a to 4a shall be adjudicated for yearly periods, from one year to 15 years (Article 35 para. 4b). Attention should be drawn to the fact that in accordance with the amended Article 244 CC, failure to comply with the court bans on performing a profession, conducting business activities or licensed activities that involve the use of animals or affecting them or the ban on possessing any animals whatsoever or a particular category of animals constitutes an offence carrying a penalty of deprivation of liberty for a period of three months to five years.[81] A court may adjudicate on a forfeiture of objects used for or designed for the commission of an offence even if they are not a perpetrator's possession, provided that their owner or another person who was entitled to have them at their disposal based on accompanying circumstances envisaged or could envisage that they might be used to commit an offence (Article 35 para. 4c). In case of a conviction for an offence laid down in Article 35 paras. 1, 1a or 2 APA, a court adjudicates on compensation of PLN 1,000 to PLN 100,000 paid for an indicated aim connected with animal protection (Article 35 para. 5 APA). As far as other types of penal response laid down in the Criminal Code (which are applicable to APA based on Article 116 CC) are concerned, there are mainly: an obligation to redress the loss (Article 46 CC), forfeiture of profits obtained as a result of crime (Article 45 CC) or publicising of a sentence (Article 50 CC).

[81] The amendment was introduced by the Act of 6 March 2018 amending the Act on the protection of animals and the Act: Criminal Code (Journal of Laws [Dz.U.] of 2018, item 663). Formerly, it was rightly indicated in the doctrine that it was necessary to amend Article 244 CC so that a perpetrator breaking the ban on possessing animals could be made liable under this provision. Compare, C. Kąkol, *Lepsza, choć dziurawa ochrona zwierząt*, Rzeczpospolita of 1/06/2012.

Valid convictions for offences under the Act on the protection of animals in the period 2014–2016

	Convictions	Self-standing fine	Limitation of liberty	Suspended deprivation of liberty	Absolute deprivation of liberty	Penal measures
2014						
Total	568	134	126	277	31	
Article 35 para. 1	205	57	41	102	5	
Article 35 para. 1a	282	76	82	119	5	
Article 35 para. 2	81	1	3	56	21	
2015						
Total	536	167	120	209	39	
Article 35 para. 1	175	48	43	71	13	
Article 35 para. 1a	281	117	71	87	6	
Article 35 para. 2	80	2	6	51	20	
2016						
Total	592	187	183	164	56	2
Article 35 para. 1	223	76	71	57	18	1
Article 35 para. 1a	287	105	94	73	15	
Article 35 para. 2	82	6	18	34	23	1

Source: Ministry of Justice.

Analysing the presented statistics, one should take into consideration the fact that they refer to the period when the commission of an offence under Article 35 para. 1a APA carried an alternative penalty of a fine, limitation of liberty or deprivation of liberty for up to two years, and the commission of an act under Article 35 para. 2 – a penalty of deprivation of liberty for up to three years. According to the above

data, 1,696 people were convicted in Poland for offences under Article 35 paras. 1, 1a and 2 APA in the period 2014–2016, including 850 (50.1%) for animal abuse (in its basic type under Article 35 para. 1a).[82] In total 243 people were convicted for an aggravated offence (Article 35 para. 2), however, because of the fact that it is a common aggravated type for both basic types (killing and abuse), it is not possible to state in how many cases the conviction concerned animal abuse with extraordinary cruelty. Looking at the total number of convictions, one should notice that deprivation of liberty with conditional suspension of its execution (48.8% in 2014 and 39.0% in 2015) was the most common penalty in 2014 and 2015. The penalty of a fine was second most common (23.6% in 2014 and 31.2% in 2015) and limitation of liberty was third (22.2% in 2014 and 22.4% in 2015). The penalty of absolute deprivation of liberty was relatively rare (5.5% in 2014 and 7.3% in 2015). The situation changed considerably in 2016, which directly resulted from the fact that since 1 July 2015 a court has been able to suspend the execution of the penalty of deprivation of liberty for up to one year (and not for up to two years as it used to be). Therefore, a fine was the most frequent penalty in 2016 (31.6%), followed by the penalty of limitation of liberty (30.9%) and deprivation of liberty with conditional suspension of its execution (27.7%). The penalty of absolute deprivation of liberty was adjudicated more often than in previous years (9.5%), and in two cases a court adjudicated only on a penal measure. Focusing only on the offence of animal abuse (in its basic form – Article 35 para. 1a), one can see that the penalty of deprivation of liberty with the conditional suspension of its execution was the most frequent sentence in 2014 (42.2% of all convictions under Article 35 para. 1a APA), followed by the limitation of liberty (29.1%) and a fine (27.0%). The penalty of absolute deprivation of liberty was very seldom applied (1.8%). However, the situation changed in the successive years (2015–2016). Thus, in 2015 a fine was most common (41.6%), followed by the conditionally suspended penalty of deprivation of liberty (31.0%) and the limitation of liberty (25.3%). The application of absolute deprivation of liberty was as rare as in the past (2.1%). In 2016 (like in the former year), a fine was most frequently applied (36.6%), followed by the limitation of liberty (32.8%) and the conditionally suspended deprivation of liberty (25.4%). Courts applied the penalty of absolute deprivation of liberty much more often than in former years (5.2%). Based on the above data, it is difficult to unambiguously evaluate the penal policy of courts in cases concerning offences under APA (especially in the context of the 2015 amendments to CC). Undoubtedly, (in the analysed period) non-custodial penalties dominated, however, penalties of absolute deprivation of liberty were more often adjudicated, which can indicate that the justice system attaches more importance to humanitarian protection of animals.

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[82] As far as the Police data on offences under Article 35 APA are concerned, it should be pointed out that they are provided in total (thus, Article 35 para. 1 together with 1a and 2). Unfortunately, the data do not indicate the number of cases of animal abuse. Thus, 1,483 offences under Article 35 paras. 1–2 APA were registered in 2014; 860 offences were detected (58.0% detection rate). In 2015, the figures were 1,846, 1,191 and 64.5%, respectively, and in 2016: 1,673, 937 and 55.9%; see, statystyka.policja.pl/st/wybrane-statystyki/wybrane-ustawy-szczegol/ustawa-o-ochronie-zwier/50889,Ustawa-o-ochronie-zwierzat.html [accessed on 25/02/2018].

It should be deemed that the latest amendments to the Act on the protection of animals (in the context of stricter sanctions for offences classified there) are also going to have impact on courts' sentences for offences under Article 35 APA.

6. CONCLUSIONS

The present wording of the provisions of Article 35 paras. 1a and 2 APA does not raise serious interpretational doubts (unlike in case of an offence under Article 35 para. 1 APA). The amendments introduced by the Act of 16 September 2011[83] were especially important (and positive) because they laid down two separate types of offences (unlawful killing – Article 35 para. 1 APA and animal abuse – Article 35 para. 1a APA), instead of one alternative approach. Penalties for offences were raised, a penal measure in the form of a ban on possessing animals was introduced and compensation was considerably extended. The successive decisions to introduce stricter sanctions for offences classified in APA (Act of 6 March 2018) show that the significance of interests protected there is perceived as considerable. It seems that all this causes that the law provides appropriate measures for legal protection of animals against their abuse. Obviously, it must be remembered that development of relevant social awareness in this area is still a basic task, and attitude to animals and sensitivity to their harm is an important component of humanity.

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CRIME OF ANIMAL ABUSE

Summary

The offence of animal abuse is defined in the Act on the protection of animals under Article 35 para. 1a APA (basic type) and Article 35 para. 2 APA (aggravated type: killing and abuse of animals with extraordinary cruelty). The legislator understands animal abuse as inflicting or consciously allowing someone to inflict pain or suffering and lists the most typical instances of such conduct under Article 6 para. 1 APA. The crime under Article 35 para. 1a APA is a common offence that can be committed as both action and omission. It is an offence that is formal in nature. As far as the subjective aspect of it is concerned, both forms of intent can occur. The aggravated type of the offence referred to in Article 35 para. 2 APA can only be committed intentionally (direct intent) in both forms of an act (action and omission). The provisions of Article 35 paras. 1a and 2 are often in real typical concurrence with other provisions (e.g. Article 52(4) Act of 13 October 1995: Hunting law; Article 128(1) Act of 16 April 2004 on the protection of nature; Article 207 CC, Article 288 CC, and Article 202 §3 CC). It should be remembered that in accordance with Article 1 APA, "an animal, as a living creature able to feel pain, is not a thing"; however, dereification of animals has not resulted in their personification with a consequence of their empowerment and ability to obtain and possess rights.

Keywords: animal, abuse, extraordinary cruelty

PRZESTĘPSTWO ZNĘCANIA SIĘ NAD ZWIERZĘTAMI

Streszczenie

Przestępstwo znęcania się nad zwierzętami określone jest w ustawie o ochronie zwierząt w art. 35 ust. 1a (typ podstawowy) oraz art. 35 ust. 2 u.o.z. (typ kwalifikowany: zabijanie zwierzęcia lub znęcanie się nad nim ze szczególnym okrucieństwem). Przez znęcanie się nad zwierzętami ustawodawca rozumie zadawanie albo świadome dopuszczanie do zadawania bólu lub cierpień, wymieniając w art. 6 ust. 2 u.o.z. najbardziej typowe przypadki takich zachowań. Występek z art. 35 ust. 1a u.o.z. jest przestępstwem powszechnym, które może zostać popełnione zarówno w postaci działania, jak i zaniechania. Jest to przestępstwo o charakterze formalnym. W zakresie strony podmiotowej w grę wchodzi umyślność w obu postaciach zamiaru. Przestępstwo stypizowane w art. 35 ust. 2 u.o.z. (typ kwalifikowany) ma charakter powszechny oraz może zostać popełnione tylko umyślnie (w zamiarze bezpośrednim), zarówno w formie działania, jak i zaniechania. Często przepisy art. 35 ust. 1a i 2 pozostają w rzeczywistym właściwym zbiegu z innymi przepisami (np. z art. 52 pkt 4 ustawy z 13.10.1995 r. – Prawo łowieckie; z art. 128 pkt 1 ustawy z 16.04.2004 r. o ochronie przyrody; z art. 207 k.k., art. 288 k.k., art. 202 §3 k.k.). Należy pamiętać, że zgodnie z art. 1 u.o.z. „zwierzę, jako istota żyjąca, zdolna do odczuwania cierpienia, nie jest rzeczą", jednakże dereifikacja zwierząt nie spowodowała ich personifikacji ze skutkiem w postaci upodmiotowienia i zdolności nabywania i posiadania praw.

Słowa kluczowe: zwierzę, znęcanie się, szczególne okrucieństwo

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CONDITIONS FOR LAWFULNESS OF ABORTION

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1. VALUE OF HUMAN LIFE IN THE PRENATAL PHASE: INTRODUCTION

Opinions presented in literature and case law on the issue of the importance of human life have been in harmony for years.[1] It is almost unanimously raised that human life is not only the most important value in our culture and civilisation but also the interest that determines an individual's possession and exercise of other rights and freedoms.[2] Many statements in case law and the doctrine also emphasise that the right to life is inherent and thus not bestowed, and its placement in the first constitutional provision concerning personal freedoms and rights (Article 38 Constitution of the Republic of Poland) *prima facie* reflects its superior value.[3] It is worth pointing out that the wording of the above-mentioned Article 38 Constitution does not contain a typical phrase stating that everyone shall have the right to life but expresses an obligation of public authorities to ensure the necessary legal protection

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1 "Human life and the right to life is not subject to an agreement and negotiation but a fundamental right of every man and every democratic community should ensure its full and absolute protection". A. Szmyt, *Opinia prawna w sprawie poprawki do propozycji zmiany art. 38 Konstytucji*, Biuro Analiz Sejmowych No. 3, 2007, p. 88; H. Sokorowski, *Problematyka praw człowieka*, Warsaw 2005, p. 84; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warsaw 1990, p. 274.

2 The Constitutional Tribunal judgement of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126; M. Błażewicz, *Prawo do życia*, [in:] A. Florczak, B. Bolechów (ed.), *Prawa i wolności I i II generacji*, Toruń 1999, p. 35; M. Chmaj, *Konstytucyjna zasada godności człowieka i praktyka jej stosowania w orzecznictwie Trybunału Konstytucyjnego*, [in:] T. Gardocka, J. Sobczak (ed.), *Dylematy praw człowieka*, Toruń 2008, p. 35 ff; A. Preisner, *Prawo do ochrony życia i do zachowania naturalnej integralności psychofizycznej człowieka*, [in:] L. Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, Warsaw 2006, pp. 135–146.

3 The Constitutional Tribunal judgement of 9 July 2009, SK 48/05, OTK-A 2009, No. 7, item 108.

of this right.[4] The editorial form of the provision does not specify temporary limits to the protection of human life, either.[5] Thus, the general wording of this constitutional norm makes it possible to draw a conclusion that the protection of human life does not, in fact, have an absolute nature. Admissibility of differentiating the intensity of this protection has been expressly confirmed in the opinions of the Constitutional Tribunal, which emphasised that just "Stating that human life at its every stage of development constitutes a constitutional value that is subject to protection does not mean that the intensity of this protection at every stage of life and in all circumstances shall be the same. The intensity of legal protection and its type are not a direct consequence of the value of the protected interest. Beside the value of the protected interest, a whole series of different factors have impact on the intensity and the type of legal protection and deciding which type of legal protection and what intensity to choose, and the legislator must take them all into account. However, this protection should always be sufficient from the perspective of the protected interest".[6] Continuing this thread, in the further part of the opinion, at the same time directly referring to the issue of legalisation of abortion, the Constitutional Tribunal also stated that differentiating the protection of human life requires a detailed analysis establishing: "(…) (a) whether the interest the infringement of which the legislator

[4] As it was stated in case law: "(...) Article 38 indicates that public authorities are obliged to undertake steps to protect life. Hence, if the Constitution provides a certain objective system of values, the legislator is obliged to enact law with such provisions that would make it possible to protect and exercise those values to the broadest extent possible". The Constitutional Tribunal judgement of 23 March 1999, K 2/98, OTK 1999, No. 3, item 38; the Constitutional Tribunal judgement of 8 October 2002, K 36/00, OTK-A 2002, No. 5, item 63.

[5] See, the Supreme Court judgement of 26 November 2014, III CSK 307/13, OSNC 2015, No. 12, item 147, which states that: "The right to life constitutes a constitutional value, Article 38 Constitution ensures legal protection of life of every man. The protection of this right is also laid down in the provisions of the International Covenant on Civil and Political Rights open to be signed in New York on 19 December 1966 (see, Article 6, Journal of Laws [Dz.U.] of 1977, No. 38, item 167), the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989 (see, Article 6, Journal of Laws [Dz.U.] of 1991, No. 120, item 526, as amended) and the Convention on the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950 (see, Article 2, Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended). In accordance with Article 1 of the Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (Journal of Laws [Dz.U.] No. 17, item 78, as amended), the right to life is subject to protection, including life at the prenatal stage within the limits laid down in statute. Also, the provisions of the Civil Code ensure the protection of an unborn child. For example, Article 446 Civil Code, in accordance with which a born child can seek redress for damage incurred before birth, or Article 927 §2 Civil Code, in accordance with which a child already conceived at the moment of inheritance opening may be an heir if he/she is born alive. On the other hand, in accordance with Article 182 Family and Guardianship Code, a guardian may be appointed for a conceived but not yet born child in order to secure the child's future rights. Finally, the Criminal Code protects the right to life at the prenatal stage as its Articles 152–154 penalise abortion violating the provisions of statute and assisting a pregnant woman in abortion or inciting her to do it, and lay down aggravated sanctions in a situation when a conceived child obtained the possibility of living outside a mother's body". Also see, the Supreme Court judgement of 13 May 2015, III CSK 286/14, OSNC 2016, No. 4, item 45.

[6] The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19; also see, E. Zielińska, *Opinia prawna o poselskim projekcie zmiany art. 38 Konstytucji RP*, Biuro Analiz Sejmowych No. 3, 2007, p. 11.

legalises constitutes a constitutional value, (b) whether legalisation of the infringement of the interest is justified on the basis of constitutional values, in particular being the expression of the resolution of the collision of particular values, rights and freedoms guaranteed in the Constitution, and (c) whether the legislator has satisfied the constitutional criteria for resolving the collision, especially whether the legislator has fulfilled the requirement of maintaining proportionality when resolving collisions between constitutionally protected interests, rights and freedoms, which has been repeatedly determined by the Constitutional Tribunal based on Article 1 of the Constitution (the principle of a democratic state of law)".[7] In the context of the judgement, one may conclude that although human life at its prenatal stage undoubtedly constitutes a considerable constitutional value, the presented assumption does not prejudge *per se* that in some extraordinary circumstances the protection of this value may be limited or even excluded, provided that the necessity to protect or exercise other constitutional rights or freedoms is justified. However, it is unquestionable that the legislator's decision on this matter may take the form of a discretionary or, in other words, arbitrary solution. It is rightly emphasised that the criteria determining the scope of admissibility of infringement of an individual's rights should be adequate to the essence of the collision resolved.[8]

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[7] The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[8] *Ibid*. In the face of considerations presented here, it is worth mentioning the opinions presented in literature and case law connected with an undoubtedly sensitive issue concerning the possibility of determining the moment when full legal protection of human life starts. As far as this is concerned, various criteria were used, inter alia, ones referring to: obtaining the possibility of living independently outside a mother's body, labour pains occurrence, the moment of separating a child from a mother's body, a baby's first intake of breath. K. Daszkiewicz, *Zabójstwo dziecka w okresie porodu*, Nowe Prawo No. 9, 1976, p. 1233; B. Kieres, *Początek życia ludzkiego w aspekcie ochrony prawnokarnej*, Nowe Prawo No. 2, 1976, p. 209; T. Hanausek, *Z problematyki dzieciobójstwa*, Państwo i Prawo No. 2, 1962, pp. 686–687; O. Sitarz, *Ochrona prawna dziecka w polskim prawie karnym na tle postanowień Konwencji Praw Dziecka*, Katowice 2004, p. 44; J. Giezek, R. Kokot, *Granice ludzkiego życia a jego prawna ochrona*, [in:] B. Banaszak, A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warsaw 2002, pp. 107–108; V. Konarska-Wrzosek, *Ochrona dziecka w polskim prawie karnym*, Toruń 1999, p. 9. For the same issue, also see W. Lang, *Ochrona prawna płodu ludzkiego. Materiały III Krajowej Konferencji Lekarzy i Humanistów*, Gdańsk 1981, pp. 94–97; by the same author, *W sprawie prawnego statusu nasciturusa*, Państwo i Prawo No. 6, 1993, pp. 103–104. Moreover, the issues also constituted the subject matter of analysis of judicial decisions. In accordance with the Supreme Court opinion: "An unborn child has the right to full legal protection of health and life: (a) from the moment (natural) delivery starts, (b) in case of caesarean delivery terminating pregnancy on a pregnant woman's demand, from the moment the first medical activity starts in order to perform this surgery, (c) in case of medical necessity to perform caesarean delivery or another alternative termination of pregnancy, from the moment when medical indications for such treatment occur". The Supreme Court decision of 30 October 2008, 13/08, OSNKW 2008, No. 11, item 90; the Supreme Court resolution of 26 October 2006, I KZP 18/06, OSNKW 2006, No. 11, item 97; the Supreme Court decision of 25 November 2009, V KK 150/09, Legalis No. 304121. In the light of the presented stand, not only a "born" child is subject to full legal protection but also, in certain indicated circumstances, a child "being born". See, judgement of the Appellate Court in Łódź of 27 November 2012, I ACa 856/12, LEX No. 1267346.

2. CONDITIONS FOR LEGALISING ABORTION IN THE LIGHT OF THE ACT OF 7 JANUARY 1993 ON PLANNING A FAMILY, THE PROTECTION OF A HUMAN FOETUS AND THE CONDITIONS FOR ADMISSIBILITY OF ABORTION

The conditions for legalising abortion are not directly laid down in the provisions of the Criminal Code (hereinafter: CC) but in the Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (hereinafter: APF)[9]. However, the above model of regulation is not in conflict with the principles of legislative technique. It is rightly reminded in the judicature that: "There are situations (…) known in criminal law in which the description of a prohibited act is not complete and requires specification (supplementing) in a separate provision laid down in another legal act. It does not always have to be a legal act in the area of criminal law in the strict sense. It does not have to be a statutory normative act; it can be a lower-rank act. The adoption of the feature of a prohibited act in the form of 'abortion with the violation of statute' laid down in Article 152 CC does not mean the infringement of the *nullum crimen sine lege* principle as the conditions for admissibility of abortion are laid down in statute and there is a lack of a requirement for statute to be a criminal law act".[10]

In accordance with the provisions of the above-mentioned statute, abortion is admissible in the following cases: (1) when pregnancy constitutes a threat to the life or health of the pregnant woman (Article 4a para. 1(1) APF), (2) prenatal examinations or other medical indications suggest that there is a high probability of severe and irreversible damage to the foetus or incurable disease endangering its life (Article 4a para. 1(2) APF), (3) there is a justified suspicion that the pregnancy resulted from a prohibited act (Article 4a para. 1(3) APF).

At the same time, it is worth highlighting that the regulation determining the conditions for admissibility of abortion is applicable to extraordinary circumstances in which, in fact, it legalises extraordinary conduct that is in general classified as unlawful. Thus, when assessing the relation between the general ban on abortion and the exceptions to it, it should be stated that the ban on abortion turns to be primary and the above-mentioned statute only lays down some exceptions to the ban.[11] As a result, one might say that except for the cases listed in statute, a physician's failure to perform abortion can never be treated as unlawful conduct.[12]

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[9] Journal of Laws [Dz.U.] No. 17, item 78, as amended.

[10] The Supreme Court decision of 25 May 2016, IV KK 156/16, LEX No. 2071606; also see, the Supreme Court decision of 29 January 2009, I KZP 29/08, OSNKW 2009, No. 2, item 15, in which it is stated that: "It is admissible and sometimes even necessary to specify in more detail the statutory features of some prohibited acts in legal regulations of lower rank, i.e. sub-statutory regulations. Such legislator's action does not infringe the *nullum crimen sine lege* principle laid down in Article 1 §1 CC". Also see, the Supreme Court judgement of 21 December 1995, II KRN 158/95, LEX No. 24869; the Constitutional Tribunal judgement of 20 February 2001, P 2/00, OTK 2001, No. 2, item 32; the Constitutional Tribunal judgement of 8 July 2003, P 10/02, OTK-A 2003, No. 6, item 62.

[11] The Constitutional Tribunal ruling of 15 January 1991, U 8/90, OTK 1991, No. 1, item 8.

[12] The Constitutional Tribunal resolution of 17 March 1993, W 16/92, OTK 1993, item 16. From the perspective of civil law solutions, it should be mentioned here that: "In the Polish

As far as the first of the conditions for legalisation of abortion is concerned, i.e. a situation when pregnancy constitutes a threat to life or health of the pregnant woman (Article 4a para. 1(1) APF), it should be stated that the legislator was satisfied with a very general statement indicating that this type of medical treatment is admissible if pregnancy constitutes a threat to a mother's life or health. In such

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legal system, it is admissible to pursue compensation by parents, based on Article 4a para. 1(2) Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (Journal of Laws [Dz.U.] of 1993, No. 17, item 78) in conjunction with Article 24 Civil Code and Article 448 Civil Code in a situation when a pregnant 'woman is illegally deprived of the possibility of performing abortion in case the law admits it. The claim is the equivalent of the 'wrongful birth' claim defined in the American case law, i.e. a legal cause of action in which the parents of a child with serious genetic abnormalities is born as a result of a defendant's, most often a physician's fault (faulty prenatal diagnosis, failure to inform parents about the possible genetic defects or other serious diseases of the foetus). It is aimed at providing compensation for depriving parents of the right to decide on abortion. It is a claim to redress financial loss and harm incurred (pain, suffering, emotional stress, child treatment expenditures, increase in the cost of maintenance, etc.). In accordance with the Polish law, it is also possible to claim compensation for the increased cost of maintenance of the impaired child based on the provision of Article 415 Civil Code. In the Polish legal system, the right of a child to claim compensation for depriving his/her mother of the possibility of performing lawful abortion (an equivalent of the American legal action called 'wrongful life', i.e. an impaired child's claim of compensation for 'bad quality life', 'unhappy existence', the fact of being born, which would not have occurred but for the accused sued physician) is not admissible. A minor does not have the right not to be born in the event his/her foetus is impaired". See, the judgement of the Appellate Court in Białystok of 24 April 2013, I ACa 787/12, Legalis No. 998801; the Supreme Court judgement of 6 May 2010, II CSK 580/09, Legalis No. 248326; judgement of the Appellate Court in Białystok of 4 July 2008, I ACa 278/08, Legalis No. 158117; the Supreme Court resolution of 22 February 2006, III CZP 8/06, Legalis No. 72852; the Supreme Court judgement of 21 November 2003, V CK 16/03, Legalis No. 62304. However, in the context of the discussed issue, there is a problem of a conscience clause (Article 39 Act of 5 December 1996 on the professions of a physician and a dentist, uniform text of 10 March 2015, Journal of Laws [Dz.U.] item 464, as amended), which, inter alia, gives a physician the right to refuse to perform abortion. A conscience clause is interpreted as a possibility of not undertaking due action, which is in compliance with the law but in conflict with the worldview. In accordance with the Constitutional Tribunal judgement of 7 October 2015, K 12/14, OTK-A 2015, No. 9, item 143: "1. Article 39 first sentence in conjunction with Article 30 Act of 5 December 1996 on the professions of a physician and a dentist (Journal of Laws [Dz.U.] of 2015, item 464) in the scope in which it imposes on a physician an obligation to perform a medical procedure that is in conflict with his conscience in 'other urgent cases' is in conflict with the principle of appropriate legislation derived from Article 2 Constitution of the Republic of Poland and Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution; 2. Article 39 first sentence of the Act referred to in 1. in the scope in which it imposes on a physician refraining from performing a medical service procedure that is in conflict with his conscience an obligation to indicate real possibilities of obtaining such a service from another physician or another medical institution is in conflict with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution. 3. Article 39 second sentence of the Act referred to in 1. in the scope in which it obliges a physician doing the job based on an employment contract or as a service who exercises his right to refuse to perform a medical procedure that is in conflict with his conscience to advance notification of his superior in writing: (a) is in compliance with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution, (b) is in conflict with Article 53 para. 7 Constitution. 4. Article 39 first sentence of the Act referred to in 1. in the scope in which it obliges a physician exercising the right to refuse to perform a medical procedure that is in conflict with his conscience to justify and register the fact in medical documents: (a) is in compliance with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution, (b) is in conflict with Article 53 para. 7 Constitution".

situations, a physician must perform a medical operation in hospital (Article 4a para. 3 APF), and a physician other than the one who is to perform the surgery should recognise the threat to a mother's life or health, unless there is a direct danger to the woman's life (Article 4a para. 5 APF). In such a case, the Act does not lay down any time limits, which means that abortion based on medical indications is possible, regardless of the stage of pregnancy.

The normative attitude revealed in this condition clearly indicates its flexibility allowing a physician to maintain, as it seems necessary in this situation, discretion to assess a pregnant woman's state of health. It must be added that it would be really difficult to make a list of threats to a pregnant woman's life or health, which would enumerate cases justifying abortion for the discussed reason. Also, a proposal opting for the need to "more precisely specify" the condition does not seem very convincing because the statutory "threat to health" of the mother would have to be "serious".[13] This term is undoubtedly evaluative in nature and, as a result, it would only strengthen blurred nature of the discussed indication.[14]

In accordance with the legislator's intention, abortion is also admissible when it is recognised ("prenatal examinations or other medical indications" confirm *verba legis*) that there is a high probability of serious and irreversible damage to the foetus or incurable disease endangering its life (Article 4a para. 1(2) APF). In such a situation, it is possible to perform the procedure before the foetus reaches the stage in which life outside the pregnant woman's body is possible (Article 4a para. 2 APF). Even a cursory analysis of this condition makes it possible to notice that its statutory edition is full of indefinite phrases, which unavoidably results in the occurrence of a series of interpretational controversies.

Due to the above-mentioned difficulties and some specific axiological reasons, in the legislative work undertaken relatively recently, there were proposals opting not only for the justification of its modification but also for the repealing of this condition. With reference, first of all, to the attempt to interfere in the content of the abortion indication presented by the Criminal Law Codification Commission in 2013, it should be remembered that in accordance with the project, abortion for teratologic (eugenic) reasons would be admissible in case of recognition of serious and irreversible damage to a conceived child (Article 152a §1(2) Bill amending CC).[15]

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[13] According to the authors of the proposal: "(…) at present, literal interpretation of the provisions of the Act on planning a family, the protection of a human foetus and the conditions for admissibility of abortion of 7 January 1993 may lead to a conclusion that every type of threat of an even short-term and reversible disorder of (mental and physical) health may justify abortion, even at the last stage just before birth". Justification for the Bill amending the Act: Criminal Code and some other acts, p. 31, https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013 [accessed on 15/10/2016]. Also see, J. Kulesza, *Prawnokarna ochrona życia człowieka w fazie prenatalnej (w projekcie Komisji Kodyfikacyjnej Prawa Karnego)*, Państwo i Prawo No. 7, 2015, p. 68; M. Urbaniak, R.Z. Spaczyński, *Wybrane aspekty prawne ochrony dziecka poczętego w świetle projektu nowelizacji Kodeku Karnego*, Ginekologia i Położnictwo No. 86, 2015, pp. 787–790.

[14] A.M. Kania, *Kontrowersje związane z kryminalizacją przerywania ciąży. Część I*, Nowa Kodyfikacja Prawa Karnego Vol. XXVII, 2011, p. 100.

[15] "A more concise phrase 'a conceived child's impairment' was substituted for the former phrase 'impairment of a foetus or incurable disease endangering life'. It was assumed that there

However, taking into consideration the proposed wording of the teratologic condition, one cannot share the belief of the Bill authors who, adding value to its "synthetic form", stated that the new approach would eliminate the former interpretational doubts which always accompany the discussed condition. It seems that the only result of the planned amendment would, in fact, be the narrowing of admissibility of abortion.[16]

On the other hand, the citizens' Bill, also developed in 2013, proposed a much more far-reaching amendment in the context of the discussed condition. Striving to eliminate the abortion indication completely, its authors suggested that in the present legal state the conceived children are differentiated based on their state of health, which is unjustified and in conflict with the provisions of the Constitution of the Republic of Poland. This type of discrimination, according to those authors, should not take place either in case of a conceived child's defects one can live with for many years or lethal defects. The arguments presented also draw attention to too many indefinite phrases in the present wording of the condition. Their indefiniteness was strongly criticised and it was stated that they are used to depreciate the contemporary medical advancements.[17] Justifying the necessity of interfering in the previous shape of abortion law, the authors indicated that allowing selective abortion, which takes place based on the present condition, is not supported by the popular arguments that law does not require its addressees to be "morally perfect" but, quite the opposite, imposes less demanding obligations on them than ethics.[18] Questioning also this assumption, they presented an opinion that giving birth to a child with defects should not be classified as the reflection of a heroic attitude because this fact is not connected in particular with the absolute obligation to take care of that child personally.[19] The opinion was finished with a conclusion that:

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were no reasons for the introduction of a procedural element such as the specification of the level of probability of occurrence of the statutory factual circumstances (medical indications suggesting high probability) to substantive legal grounds of admissibility of abortion. The issue of a justified way of drawing conclusions concerning the occurrence of serious and irreversible impairment of a conceived child and the level of probability sufficient to assume certain factual circumstances in this area to be established should not be regulated in substantive law but is the domain of procedural law". Justification for the Bill amending the Act: Criminal Code and some other acts, p. 32, https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013 [accessed on 15/10/2016].

[16] L. Gardocki, *Uwagi do projektu Komisji Kodyfikacyjnej dotyczącego zmian przepisów o aborcji*, Prawo i Medycyna No. 1, 2014, p. 11; also see, J. Kulesza, *Prawnokarna ochrona*…, pp. 69–71.

[17] Justification for the citizens' Bill amending the Act on planning a family, the protection of a human foetus and the conditions for admissibility of abortion, Sejm paper no. 1654, pp. 3–6; http://orka.sejm.gov.pl/Druki7ka.nsf/0/5821FF7D4C575A91C1257BD400566FA1/%24File/1654.pdf, pp. 2–6 [accessed on 15/10/2016].

[18] F. Ciepły, *Aborcja eugeniczna a dyskryminacja osób niepełnosprawnych*, Czasopismo Prawa Karnego i Nauk Penalnych No. 2, 2014, p. 82.

[19] See, *Ibid.*, p. 83; F. Ciepły, *Status prawny płodu upośledzonego*, Roczniki Nauk Prawnych No. 4, 2014, p. 35; L. Dyczewski, *Prawo do życia nienarodzonych dobrem osobistym i społecznym*, [in:] A. Dębiński et al. (ed.), *Hominum causa omne ius constitutum est. Księga jubileuszowa ku czci Profesor Alicji Grześkowiak*, Lublin 2006, p. 288; also see, W. Wróbel, *Konstytucyjne gwarancje ochrony życia a przesłanki dopuszczalności aborcji*, [in:] M. Królikowski, M. Bajor-Stachańczyk, W. Odrowąż-Sypniewski (ed.), *Konstytucyjna formuła ochrony życia*, Warsaw 2007, p. 32.

"On the basis of the eugenic condition, the life of the impaired foetus competes with the indefinite interest of a pregnant woman (motherhood undisturbed by a child's illness, mental comfort), which can mean that the condition is getting closer to a type of social condition, the compliance of which with the principle of a democratic state of the rule of law was questioned by the Constitutional Tribunal".[20]

Taking into consideration the above-presented directions of change to the teratologic condition and, at the same time, losing from sight the particular sensitivity of the discussed condition, it is also worth mentioning absolutely less radical opinions concerning its binding normative form, in which it was noticed that legal permission to perform abortion for teratologic reasons does not automatically oblige anybody to undergo a surgery terminating pregnancy. In accordance with, in fact, more liberal argumentation, a woman who learns that she will give birth to an impaired child does not have to undergo abortion. She still has a choice, which she would be deprived of as a result of outlawing abortion for teratologic reasons.[21] Moreover, it was also emphasised that consideration of the teratologic condition on the basis of uncompromising weighing "sanctity of life against quality of life"[22] diminishes all the other socially critical problems. It is in particular indicated that in the discourse concerning the condition, which in fact against some suggestions does not generate interpretational freedom,[23] one should not ignore the aspect of a woman's generosity and devotion in case she decides to give birth to an impaired child.[24] Thus, it should be said here that a state that guarantees legal protection of life in the provisions of its constitution should appreciate such an attitude and, as a result, ensure appropriate support that would implement the constitutionally declared protection of life.[25] Adequate care in this area should, inter alia, cover access to healthcare services, including prenatal diagnosis, as well as create real possibility of using pro-family policy instruments prepared especially for the implementation of this aim.[26]

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[20] F. Ciepły, *Aborcja eugeniczna a dyskryminacja...*, p. 83.

[21] M. Szczepaniec, *Etyczne i prawne aspekty dopuszczalności aborcji ze względów eugenicznych*, Białostockie Studia Prawnicze No. 13, 2013, p. 82.

[22] See, W. Jedlecka, J. Policiewicz, *Prawne i moralne aspekty aborcji i eutanazji (świętość czy jakość życia?)*, [in:] K. Nowacki (ed.), *Status i pozycja jednostki w prawie publicznym. Studia i rozprawy*, Prawo CCLXVII, Acta Universitatis Wratislaviensis No. 2169, Wrocław 1999, p. 299 ff.

[23] M. Królikowski, *Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerywania ciąży*, [in:] L. Bosek, M. Królikowski (ed.), *Współczesne wyzwania bioetyczne*, Warsaw 2010, p. 175 ff.

[24] M. Szczepaniec, *Etyczne i prawne…*, p. 83.

[25] What deserves attention is the government announcement of October 2016 about the development (until the end of that year) of a programme of support for families and mothers who decide to give birth to children from "difficult pregnancies" and rear them; https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-beata-szydlo-rzad-zrobi-wszystko-zeby-chronic-ludzkie-zycie.html [accessed on 24/10/2016]. The announcement came to fruition, see the next footnote.

[26] The justification for the "For Life" Bill of 4 November 2016 on the support of pregnant women and their families (Journal of Laws [Dz.U.] item 1860) emphasises that the addressees of the legal, organisational and financial solutions proposed in the legal act are pregnant women and families rearing children with serious health problems or handicapped ones. Thus, the Bill aims, inter alia, to: enable children until 18 years of age with serious and irreversible impairment

The justified suspicion that pregnancy results from a prohibited act (Article 4a para. 1(3) APF) is the last condition for legalising abortion. Abortion based on these grounds is admissible only until the 12th week of pregnancy (Article 4a para. 2 APF). The formulation of the condition suggests that all types of prohibited acts should be taken into account (thus, not only ones that are classified as crimes) resulting in a victim's pregnancy. Therefore, it is rightly emphasised that these will be conduct addressed against sexual liberty (inter alia, rape, incest, abuse of power and control) but also other types of prohibited acts. For example, these can also be: coercing into prostitution (Article 203 CC), bigamy (Article 206 CC), bribery in the form of providing personal gain (Article 229 CC) or performance of medical treatment consisting in in-vitro fertilisation without a patient's consent (Article 192 CC).[27] In accordance with the statutory provisions, in order to perform abortion in such cases, it would be necessary to obtain an appropriate certificate issued by a prosecutor. However, this raises a question whether in case of offences prosecuted based on a motion (see, Article 192 §2 CC) it would be necessary to file a motion to prosecute, which would result in a condition for obtaining the above-mentioned certificate. It seems that relying just on the statutory "authentication" of a statement that pregnancy results from a prohibited act and, at the same time, depriving prosecuting bodies of the possibility of verifying the fact in the course of preparatory proceedings might often prove to be insufficient.[28]

To sum up the facts established so far, it should be pointed out that the above-presented conditions legalising abortion are characterised by semantic openness, which unavoidably implies certain controversies connected with their unambiguous interpretation. Indefinite phrases used create, seemingly because of their nature, inevitable area of interpretational freedom.[29] However, it is hard to treat this statutory construction in terms of a legislative defect because equalising the use of those indefinite phrases and arbitrariness of judgement is unjustified.[30] It also

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or incurable disease endangering life that occurred at the prenatal stage or during the delivery to use palliative or hospice care services in a short order, and to ensure access to medical products specified in separate provisions on refunds up to the limit of funding from public funds determined in those provisions and a possibility of using healthcare services and pharmaceutical services provided by pharmacies in a short order. The provisions of the Bill envisage a one-off benefit of PLN 4,000 in case of giving birth to a child diagnosed as having serious and irreversible impairment or incurable disease endangering his/her life that occurred at the prenatal stage or during the delivery. See, *Uzasadnienie rządowego projektu ustawy o wsparciu kobiet w ciąży i ich rodzin „Za życiem"*, Sejm paper no. 968, pp. 1–4, http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=968 [accessed on 03/11/2016].

[27] R. Krajewski, *Problemy prawne wokół tzw. ciąży z gwałtu*, Diariusz Prawniczy No. 10–11, 2009, p. 98; J. Majewski, W. Wróbel, *Prawnokarna ochrona dziecka poczętego*, Państwo i Prawo No. 5, 1993, p. 41.

[28] R. Krajewski, *Problemy prawne…*, p. 99. According to the author, taking steps referred to in Article 308 Criminal Procedure Code could also prove to be insufficient in this area; however, see, M. Filar, *Lekarskie prawo karne*, Kraków 2000, p. 194; J. Warylewski, *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warsaw 2001, p. 67.

[29] See, W. Wróbel, *Konstytucyjne gwarancje ochrony życia a przesłanki dopuszczalności aborcji*, Biuro Analiz Sejmowych No. 3, 2007, pp. 30–33.

[30] The Constitutional Tribunal judgement of 8 May 2006, P 18/05, OTK-A 2006, No. 5, item 53.

seems that the present form of conditions for legalising abortion, in fact, constitutes an example of a compromise solution, the features of which cannot be attributed in particular to the relatively recently proposed "competitive" citizens' bills of 2016, which were rejected in the first reading. Their authors called for ensuring that women have the unconditional right to terminate pregnancy up to the 12th week, on the one hand, and for the introduction of a complete ban on abortion, on the other hand. It is worth reminding that in the justification for the more liberal abortion law in the Bill on the rights of women and conscious motherhood, it was, inter alia, raised that the binding legal solutions do not ensure sufficient possibilities of exercising reproductive rights, are unconstitutional and contribute to the development of the "abortion underground".[31] On the other hand, the other bill negated all present conditions for admissibility of abortion,[32] expressing general opposition to the binding normative solutions. It is worth mentioning that with respect to the condition for legalisation of abortion because of the threat to a pregnant woman's life or health, the justification for the Bill stated, inter alia, that contemporary medicine does not know cases that would justify depriving a conceived child of life in order to save a mother's health. Approving of, although completely exceptionally, admissibility of sacrificing a conceived child's life in order to save a mother's life, the further part of the justification introduces a restriction: it might occur exclusively in a situation when "(…) abortion surgery is the only possible way objectively making it possible to save a mother's life".[33] However, the Bill authors were unambiguously critical of the teratologic reasons treating them as discriminatory as well as the criminal conditions emphasising that there is no "right to refuse to give birth to a child".[34]

3. ADMISSIBILITY OF ABORTION IN THE LIGHT OF PUBLIC OPINION

Justifying the proposed legislative solutions by pointing to the present attitude of the public, even if they are free from populist manipulation, requires far-reaching carefulness.[35] One should approve of an assumption that a rational legislator should

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[31] Justification for the citizens' Bill on the rights of women and conscious parenthood, Sejm paper no. 830, p. 13 ff, http://orka.sejm.gov.pl/Druki8ka.nsf/0/3C2A10A649B1C39EC12580290048DCD3/%24File/830.pdf [accessed on 24/10/2016].

[32] Justification for the citizens' Bill amending the Act of 7 January 1993 on planning a family, the protection of a human foetus and the condition for admissibility of abortion and the Act of 6 June 1997: Criminal Code, Sejm paper no. 784, p. 9 ff, http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=784 [accessed on 15/10/2016].

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

[34] *Ibid*., p. 12.

[35] What remains an especially dangerous phenomenon in this area is penal populism with the use of which public opinion is instrumentally used. Then, the moods manipulated by the media serve to justify the introduction of certain legal and penal solutions. For this issue, see inter alia Ch. Pfeiffer, M. Windzio, M. Kleimann, *Media, zło i społeczeństwo. Wykorzystanie mediów i ich wpływ na postrzeganie przestępczości i postawy wobec polityki karnej*, Archiwum Kryminologii Vol. XXVIII, 2005–2006, p. 39; H. Gajewska-Kraczkowska, *O audiowizualnych rejestracjach rozprawy głównej – de lege ferenda*, [in:] S. Waltoś (ed.), *Problemy kodyfikacji prawa karnego. Księga ku czci*

not come under pressure from the public and be governed by those feelings of society that are "from the point of view of the contemporary knowledge of rational law, downright anachronistic".[36] A legislator's task is not to come under pressure of the public but to strive to shape it in the right way by means of enacted law.

On the other hand, it should also be taken into account that imposed normative solutions that do not find supporters in the community will not only fail to fulfil their tasks in shaping the legal awareness of the public but, what is more important, may have quite anti-educational influence.[37] Thus, a typical compromise prescribes assuming that, although public opinion is "an extraordinarily fussy phenomenon",[38] its voice cannot be a priori depreciated. Due to that, it seems that a legislator should not be indifferent to public opinion but "(…) based on reasonable selection, pick up its constructive elements".[39]

A certain moderate attitude to the role of public opinion in the process of enacting law suggested above, on the one hand, and justified fear concerning future efficiency of the proposed solutions that do not enjoy public support, on the other hand, suggest referring to the presented opinion polls illustrating public opinion on the conditions for admissibility of abortion.

The opinion poll conducted by CBOS in 2016[40] provides undoubtedly significant information about social expectations concerning the shape of abortion regulations. Within the survey, a representative group of adult citizens of Poland were asked not only to express their opinion on the conditions for admissibility of abortion but also to state what their attitude was to other reasons for lawful abortion that are unknown to Polish law.

As a form of introduction to the issue, first the respondents were asked to express their opinion on the scope of human life protection. 66% of the respondents gave a positive answer to the question: "Are you of the opinion that people who say that human life from conception to natural death should always and regardless of circumstances be protected are right?" (the rate refers to the answers: "absolutely yes" and "rather yes"). Only 28% of the respondents did not agree (gave the

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Profesora Mariana Cieślaka, Kraków 1993, p. 498; Z. Ćwiąkalski, *Głos w dyskusji*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny i jego przejawy w Polsce. Materiały z Ogólnopolskiego Zjazdu Katedr Prawa Karnego, Szklarska Poręba, 24–27 września 2008 r.*, Wrocław 2009, p. 79; T. Kaczmarek, *Racjonalny ustawodawca wobec opinii społecznej a populizm penalny*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny…*, p. 34 ff; W. Zalewski, *Populizm penalny – próba zdefiniowania zjawiska*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny…*, p. 24; A. Zoll, *Głos w dyskusji*, [in:] A. Marek, T. Oczkowski (ed.), *Problem spójności prawa karnego z perspektywy jego nowelizacji. Materiały Ogólnopolskiego Zjazdu Katedr Prawa Karnego, Toruń 20–22 września 2010 r.*, Warsaw 2011, p. 111; by this author, [in:] T. Bojarski et al. (ed.), *System Prawa Karnego. Źródła prawa karnego.* Vol. 2, Warsaw 2011, p. 233.

36 T. Kaczmarek, *Racjonalny ustawodawca wobec opinii społecznej a populizm penalny*, Archiwum Kryminologii Vol. XXIX–XXX, 2007–2008, p. 522.

37 S. Zabłocki, *Glosa do wyroku Sądu Najwyższego z dn. 22 III 1974 r., IV KRN 6/74*, Państwo i Prawo No. 10, 1975, pp. 180–181.

38 T. Kaczmarek, *Sędziowski wymiar kary w Polskiej Rzeczypospolitej Ludowej w świetle badań ankietowych*, Wrocław–Warsaw–Kraków–Gdańsk 1972, pp. 287–288.

39 *Ibid*.

40 *Komunikat z badań CBOS. Opinie o dopuszczalności aborcji*, No. 51/2016, Warsaw 2016, pp. 1–14.

answers: "absolutely not" or "rather not"). One in seventeen respondents (6% of the total number) did not have an opinion. The findings showed the volatility of public opinion in this area at the same time. In comparison with the former survey of 2011, the percentage of respondents giving a positive answer to the question decreased (by 20%) and the number of people disagreeing with the statement that human life should be protected from conception to natural death increased (from 9% to 28%).[41]

Going on to the essence of the matter, it is necessary to present public opinion concerning the binding circumstances and proposed cases in which abortion should be admissible.

The empirical data obtained make it possible to state that the highest rate of the respondents approves of abortion in situations that are in conformity with the standards of the national legislation. The first of the conditions presented in the table below met with the highest social consent. In March 2016, 80% of the respondents approved of admissibility of abortion when the life of a mother is in danger. Taking into account the answers given formerly, it should be pointed out that the result was the lowest over the last 24 years.[42] However, it is worth mentioning that the rate rose by 4% (to 84%) in the opinion poll conducted a month later.[43]

On the other hand, the condition for legal abortion based on a threat to a mother's health gained fewer supporters (71%).[44] However, it should be made clear that the latest survey showed an increase (by 5%) in support to this condition for abortion (76%).[45] Also, the survey of October 2016 confirms the increasing level of permissiveness towards abortion for the discussed reasons. 86% of the respondents declared support for admissibility of abortion in case of a threat to life and 77% in case of a threat to a mother's health.[46]

As far as other conditions for lawful abortion in Polish law are concerned, the teratologic reason gained the fewest supporters. Its statutory wording was simplified for the needs of the survey and the respondents were asked to assess admissibility of abortion if it was known that a child would be born impaired. Based on the empirical data collected, it was found that 53% of the respondents supported abortion in such cases, which was, at the same time, the lowest result obtained over the last twenty years.[47]

In the context of the discussed condition, it is also worth mentioning that the above version of the question was modified in a survey conducted a month later. This time, the respondents were asked to answer a question whether abortion should be admissible if, based on medical examinations, it was known that a child would be born with serious impairments. Then, 61% of the respondents gave a positive answer. In the commentary to the survey, it was stated that the increase in support

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41 *Ibid*, p. 1.

42 *Ibid*., p. 5.

43 *Komunikat z badań CBOS. Dopuszczalność aborcji w różnych sytuacjach*, No. 71/2016, Warsaw 2016, p. 2.

44 *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 5.

45 *Komunikat z badań CBOS. Dopuszczalność aborcji…*, pp. 2–3.

46 *Komunikat z badań CBOS. Jakiego prawa aborcyjnego oczekują Polacy?*, No. 144/2016, Warsaw 2016, p. 1.

47 *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 4.

could result from, in fact, very broad meaning of the term "serious impairments", which covers various diseases.[48]

On the other hand, taking into account the latest analysis in which the question about the assessment of admissibility of abortion when it is known that a child will be born impaired was repeated, it is necessary to point out that 60% of the respondents gave a positive answer,[49] which undoubtedly matches the general increasing social tendency to approve of pregnancy termination surgeries.

The criminal reasons, formulated in a slightly different way from their statutory wording, gained even higher support of the public than the teratologic condition. It must be highlighted here that also the wording of this condition was considerably simplified for the needs of the survey. While statute stipulates that abortion is admissible in case pregnancy results from a prohibited act, the question the respondents were asked was limited to its two (statistically most common) types, i.e. rape and incest.[50] The survey finding suggests that 73% of the respondents approve of abortion in such circumstances. It is worth mentioning that the research conducted later, this time a more detailed one, indicated that when pregnancy results from rape, abortion gains stronger support of the public (74%) than when it results from incest (58%).[51] At the same time, it should be mentioned that the latest research makes it possible to observe an increase in the support of the public for abortion based on that condition (the survey of October 2016 indicates that 79% of the respondents approve of abortion if it results from a prohibited act).[52]

However, as far as the questions of the present research concerning circumstances that are not listed in the binding law as ones justifying abortion are concerned, it must be stated that a difficult financial situation (20% approval), a difficult personal situation (17% approval) as well as unwillingness to have children (14% approval) should not constitute conditions for lawful abortion in the opinion of the majority of respondents.[53] The respondents presented similar attitudes towards unconditional admissibility of abortion (i.e. without giving a reason) after the 12th week of pregnancy (only 13% approval).[54] What is important, the presented proportions of opinions occurred in the whole population examined, which means also among

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[48] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 4.

[49] *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 1.

[50] *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 4.

[51] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 5.

[52] *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 1.

[53] *Ibid.*, p. 3. It is worth mentioning that in the context of the challenged in 1997 condition for admissibility of abortion for the reason of difficult living conditions or a difficult personal situation, the Constitutional Tribunal stated that indefiniteness of those phrases: "(…) causes that it is not possible to determine the nature of constitutionally protected values because of which the legislator decides to legalise the infringement of another constitutional value. It is inadmissible, especially as based on them human life is taken, thus there is an infringement, as the same legislator indicates in the Preamble, of the fundamental human value". The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[54] The latest survey indicates even lower public support for abortion for the above-mentioned non-statutory reasons: 11%, 11%, 12% and 13% of the respondents gave a positive answer to the questions about the above-mentioned circumstances, respectively. *Komunikat z badań CBOS. Dopuszczalność aborcji…*, pp. 7–8.

women in reproductive age, which is in fact worth emphasising.[55] The latest opinion poll findings also confirm negative assessment of non-statutory conditions for abortion. Other successive reasons, not mentioned in the CBOS surveys before, did not meet with positive opinions. The empirical material collected made it possible to establish that only one in five respondents believed that abortion should be admissible when a mother is under age (20%). A little more people (30%) expressed readiness to approve of lawful abortion in case of both parents' impairment that prevents them from taking care of a child.[56]

Thus, the conducted surveys indicate that the present abortion law in Poland, in general, satisfies the expectations of the public,[57] which, as a result, correlates with the opinion of the Constitutional Tribunal that: "Legal norms should be based on the system of values accepted by the community, especially when it concerns fundamental values".[58] Moreover, in the light of the above-presented findings, one can state that the compromise worked out over twenty years ago, although not fully satisfactory for any of the parties to the discussion on the scope of legal protection of a conceived child,[59] *in genere* proved to be the right solution meeting social preferences in this area. The essentially positive assessment of the binding abortion law makes it also possible to notice that excessive liberalisation as well as excessive tightening of the rules of abortion admissibility do not reflect the mentality of the Polish society. Due to that, it seems that any attempts to extend admissibility of abortion as well as narrowing or eliminating admissibility of such treatment would be hard to justify with the "will of the public opinion".[60]

4. CONCLUSIONS

Normative regulation of pregnancy termination surgeries is sometimes connected with an accusation addressed to the legislator and concerns the infringement of the individual sphere of citizens' liberties, the freedom of man's choice or the adopted

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[55] *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 7.

[56] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 6.

[57] According to the survey of October 2016, the majority of the respondents (62%) were for the maintaining of the abortion law status quo and, this way, expressed their belief that the binding statute should not be amended. However, below a quarter of the respondents (23%) opted for liberalisation of abortion law. On the other hand, 7% of the respondents stated that the binding statute should be aggravated. *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 6. It must be pointed out, however, that the support for this opinion decreased slightly in the light of the latest survey conducted in November 2016 (58% of the respondents were for maintenance of unchanged regulations, 27% were for liberalisation and 7% for their aggravation). *Komunikat z badań CBOS. Polacy o prawach kobiet, „czarnych protestach" i prawie aborcyjnym*, No. 165/2016, Warsaw 2016, p. 16.

[58] The Constitutional Tribunal decision of 7 October 1992, U 1/92, OTK 1992, No. 2, item 38.

[59] A. Zoll, *Ochrona dziecka poczętego w fazie prenatalnej w pracach komisji kodyfikacyjnej prawa karnego*, Studia Prawnicze KUL No. 2, 2013, p. 126.

[60] It must be highlighted that, although the research covered a representative group of adult citizens of Poland, the knowledge obtained based on it is much more reliable than knowledge based on random-instinctive cognition.

worldview. As a result, a question arises whether the law, regulating the issue of abortion, does not appropriate the space that, in fact, should be left to moral and ethical assessment. Giving a positive answer to the question, one states that the introduction of a certain normative regulation does not immediately translate into giving up one's own often well-established ideological beliefs. Thus, it would mean that for the opponents of abortion as well as for its supporters, any changes aimed at liberalisation or tightening of the binding abortion provisions would not lead, in fact, to the change of individual moral assessment of abortion only because the legislator made this or that decision. Consequently, it should be pointed out that in the light of the presented situation, the law would not only be deprived of the possibility of forcing citizens to make choices being in conflict with moral beliefs of the public but would also have to tolerate and, this way, refrain from introducing sanctions if the citizens' conduct were not in conformity with the given moral standards.

In the context of the present discussion, another doubt occurs and makes us consider whether the law should really be or can be axiologically indifferent at all. The revival of the question turns to be apparent because, already *prima facie*, it is hard to imagine moral neutrality of legal provisions that are designed to disregard respecting and, this way, ensuring specific support for certain ethical values and rules.[61] Taking into account worldview pluralism, especially ethically differentiated social assessment of some types of human conduct, one should share the opinion presented in literature that we should, in fact, expect the legislator to present "(…) not just moral neutrality but mainly solutions based on reasonable compromise, which, in (…) the protection of moral values, would take into consideration the functioning of a rule and an exception".[62] Therefore, in conclusion, it should be stated that, although not all moral obligations and bans may be strengthened with the use of a sanction, especially a penal law sanction,[63] it would be hard to recognise a complete lack of legal protection, including penal law protection, as an optimum solution.[64]

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[61] W. Sadurski, *Neutralność moralna prawa*, Państwo i Prawo No. 7, 1990, p. 28 ff.

[62] T. Kaczmarek, *Prawo karne wobec moralności. Spory wokół moralnego i prawnego statusu płodu ludzkiego*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warsaw 2007, p. 91.

[63] According to T. Kaczmarek: "The supporters of absolute legal ban on the termination of pregnancy, even that resulted from rape or incest, sometimes refer to the evangelic principle of 'a good Samaritan', who should show love to a child conceived as a result of a prohibited act and seem not to notice that expecting a raped mother to show such a heroic moral attitude, undoubtedly deserving moral appreciation, cannot be coerced by the state. The obligation to be 'a good Samaritan', like the obligation to love a neighbour, is only a moral must and not a legal one. Forced with the use of the state coercive measures, it would not only be in conflict with the internal morality of law but would also depreciate the depth and charm of Christian values", *ibid.*, p. 96. Also see, the Constitutional Tribunal decision of 7 October 1992, U 1/92, OTK 1992, No. 2, item 38, in which it was raised that: "Collections of legal norms and ethical norms are not identical and form two relatively independent circles. Thus, there are no grounds for stating that an ethical norm must be in agreement with a legal norm. Such a statement would assume the priority of legal norms over ethical norms. However, it is the law that should have ethical legitimisation. Ethics does not need legislative legitimisation".

[64] It is worth pointing out that the Constitutional Tribunal case law draws attention to the fact that: "(…) the stronger the link of the given right or freedom with the essence of

Respondents' answers according to the time of survey

Do you think abortion should be legally admissible when:	March 1992		June 1999		October 2002		January 2005		November 2006		September 2007		June 2010		August 2011		November 2012		March 2016		October 2016	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
	%																					
a mother's life is in danger	88	6	86	6	85	8	88	8	86	8	91	5	87	7	87	7	81	11	80	11	86	7
a mother's health is in danger	82	11	77	14	77	14	80	14	77	15	85	9	78	14	79	14	71	18	71	18	77	14
pregnancy results from rape or incest	80	10	72	16	73	15	77	15	73	16	79	12	78	12	78	13	78	13	73	16	79	14
it is known that a child will be born impaired	71	15	61	24	65	21	66	22	62	24	66	21	60	25	59	27	61	23	53	30	60	25
a woman is in a very difficult financial situation	47	39	38	47	44	44	42	46	27	59	34	55	26	63	24	65	16	73	14	75	20	72
a woman is in a very difficult personal situation	–	–	–	–	38	47	36	51	21	64	30	56	23	65	21	67	13	74	13	75	17	74
a woman simply does not want to have a child	–	–	–	–	28	58	28	60	16	72	23	66	18	73	16	75	14	75	13	76	14	28

Source: *Komunikat z badań CBOS. Jakiego prawa aborcyjnego oczekują Polacy?*, No. 144/2016 [CBOS communique: What kind of abortion law is expected by Poles?], Warsaw 2016, p. 3.

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human dignity is, the better (more efficiently) should public authorities protect it". See, the Constitutional Tribunal judgement of 30 October 2006, P 10/06, OTK-A 2006, No. 9, item 128; the Constitutional Tribunal judgement of 20 March 2006, K 17/05, LEX No. 182494; also see, L. Gardocki, *Subsydiarność prawa karnego oraz in dubio pro libertate – jako zasady kryminalizacji*, Państwo i Prawo No. 12, 1989, p. 65; R. Kokot, J. Jasińska, *Kilka uwag o ochronie życia poczętego w kontekście projektowanych zmian kodeksu karnego*, Nowa Kodyfikacja Prawa Karnego Vol. XXXI, 2014, p. 34.

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CONDITIONS FOR LAWFULNESS OF ABORTION

Summary

The paper is devoted to selected issues concerning legal and empirical aspects of conditions for lawfulness of abortion. During the applicable analyses, first of all, reference is made to the binding Polish legislation which allows performing abortion for reasons of medical, teratologic and criminal nature. Due to the recently proposed amendments (in this regard, Bills of 2013 and 2016 are considered) aimed at changing those regulations, the further part of the article attempts to highlight the contemporary views of the Polish society on the grounds for admissible abortion laid down in the domestic legislation and legal changes being prepared. The analysis of the available survey results made it possible to note that the present form of the abortion law is an example of a solution generally accepted by the community, which means that "the demands of public opinion" cannot justify its "drastic" modification, and it might even be perceived as some kind of abuse.

Keywords: termination of pregnancy, conditions for lawfulness of abortion, public opinion vs abortion

WARUNKI LEGALNOŚCI PRZERYWANIA CIĄŻY

Streszczenie

Niniejsze opracowanie poświęcono wybranym zagadnieniom z zakresu prawno-empirycznej problematyki warunków legalności przerywania ciąży. Podejmując stosowne w tym zakresie analizy, w pierwszej kolejności odwołano się do obowiązującego w Polsce ustawodawstwa, zezwalającego na przeprowadzenie zabiegów przerywania ciąży z przyczyn o charakterze medycznym, teratologicznym oraz kryminalnym. Wobec przygotowanych propozycji nowelizacyjnych (w tym zakresie nawiązano do projektów z 2013 r. i 2016 r.), zmierzających do zmiany wspomnianych regulacji, w dalszej części artykułu starano się naświetlić prezentowane wówczas poglądy polskiego społeczeństwa na temat obowiązujących w rodzimym ustawodawstwie przesłanek dopuszczalnej aborcji oraz projektowanych zmian prawnych. Analiza badań sondażowych pozwoliła zauważyć, że obecny kształt tzw. prawa aborcyjnego stanowi w istocie przykład rozwiązania ogólnie aprobowanego społecznie, co w konsekwencji oznaczałoby, iż uzasadnianie konieczności jego „drastycznego" przemodelowania „wolą opinii publicznej" pozostawałoby mało przekonujące, a wręcz świadczące o pewnego rodzaju nadużyciu.

Słowa kluczowe: przerywanie ciąży, warunki legalności przerywania ciąży, opinia publiczna a aborcja

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STATUTORY LIMITS TO PENALTY FOR MISDEMEANOURS AGAINST THE PROVISIONS OF THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

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1. INTRODUCTION

The provisions of the Act of 20 July 2017 amending the Act on employment promotion and labour market institutions and some other acts[1] entered into force on 1 January 2018. These are substantive[2] as well as procedural[3] provisions concerning penalties for misdemeanours connected with employment. They undoubtedly have considerable influence on the practice of law application by courts, the National Labour Inspectorate and the Border Guard.

A cursory examination of the provisions of Articles 119–123 of the Act on employment promotion and labour market institutions[4] confirms that penalties for misdemeanours classified there are extremely severe and it is hard to find a reason that made the legislator determine the limits to penalties for the above-mentioned misdemeanours. However, the statutory penalty, beside the scope of penalisation, the system of sanctions and the judicial imposition of a penalty, is one of the most important determinants of the level of repressiveness of a given branch of

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1 Journal of Laws [Dz.U.] of 2017, item 1543; hereinafter also: AAAEP.

2 Article 1(22) AAAEP.

3 Article 3 AAAEP.

4 Act of 20 April 2004 on employment promotion and labour market institutions, uniform text, Journal of Laws [Dz.U.] of 2017, item 1065, as amended; hereinafter also: AEPLMI.

law.[5] On the other hand, a deepened analysis of the provisions, as far as penal sanctions are concerned, clearly confirms the indicated drawbacks and, in addition, results in negative assessment of too narrowly treated limits to some sanctions and incoherence of some of them with the regulations concerning misdemeanours against employees' rights and misdemeanours connected with the infringements of the provisions concerning other institutions of social support than the Labour Fund.

It should be added that the importance of this analysis of statutory limits to penalties for misdemeanours classified in the Act on employment promotion and labour market institutions should not be limited only to the issue of the practice of applying those provisions or to indication of the direction of desired legislative changes. Undoubtedly, it can also contribute to consideration whether and to what extent the model of sanctions for misdemeanours against the provisions of statute should be maintained, especially if the infringements concern the activities of employment agencies placing people in a company.[6] Due to the subject matter and the scope of the article, the issue may only be signalled.

2. MISDEMEANOURS LAID DOWN IN THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

Chapter 20 entitled "Liability for misdemeanours against the statutory provisions" of the Act on employment promotion and labour market institutions classifies 27 types of misdemeanours:[7]

1) failure to notify employment authorities about earning a wage (Article 119 para. 2 AEPLMI),
2) employing a foreigner without a work permit (Article 120 para. 1 AEPLMI),
3) a foreigner's illegal work (Article 120 para. 2 AEPLMI),
4) making a foreigner work illegally (Article 120 para. 3 AEPLMI),
5) demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI),
6) making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI),

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[5] J. Jakubowska-Hara, *Ustawowy wymiar kary w części szczególnej prawa wykroczeń (kary zasadnicze)*, Przegląd Prawa Karnego No. 1, 1990, p. 57.

[6] In literature, there have been lively discussions recently concerning the relations between prohibited acts and penal sanctions for crimes and misdemeanours and fines imposed on entities that are subject to administrative law for infringements of that law; for more on this issue, see e.g. articles in a monograph by M. Kolendowska-Matejczuk, V. Vachev (ed.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warsaw 2016. In this context, from the point of view of the hardship related to a sanction, it is indicated that, on the one hand, the role of an administrative sanction is growing and often reaches amounts exceeding fines imposed for crimes and, on the other hand, it is rightly emphasised that the limits to a fine for misdemeanours determined many years ago are often inadequate to current requirements of appropriate punishment; compare, e.g. W. Radecki, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 274; T. Grzegorczyk, *Kodeks wykroczeń. Komentarz*, Warsaw 2013, p. 25.

[7] Compare, Article 125 para. 1 AEPLMI.

7) an employer's failure to fulfil informative obligations concerning the employment of a foreigner (Article 120 para. 6 AEPLMI),
8) employing a foreigner recommended for employment by an entity that is not an employment agency (Article 120 para. 7 AEPLMI),
9) failure to fulfil an obligation to notify a head of a county authorities (*starosta*) about circumstances connected with the employment of a foreigner possessing a seasonal work permit to do another job not requiring obtaining a new work permit (Article 120 para. 8 AEPLMI),
10) failure to fulfil an obligation to obtain a work permit (Article 120 para. 9 AEPLMI),
11) failure to fulfil an obligation to notify competent county employment authorities about the circumstances concerning a declaration that entered a registry or referring false information about starting work, failure to start work or finishing work by a foreigner based on a declaration of employing a foreigner (Article 120 para. 10 AEPLMI),
12) failure to fulfil an obligation to conclude a written employment contract with a foreigner who is exempt from the obligation to have a work permit or failure to present a foreigner with a copy of that contract translated into a language understandable to him before its conclusion (Article 120 para. 11 AEPLMI),
13) running an employment agency without a licence (Article 121 para. 1 AEPLMI),
14) running a foreign company without a required notification (Article 121 para. 1a AEPLMI),
15) charging an unemployed with fees that are not statutory (Article 121 para. 2 AEPLMI),
16) violating a ban on discrimination when running a business regulated in statute (Article 121 para. 3 AEPLMI),
17) a foreign entrepreneur's failure to inform about the change of data connected with doing business in the territory of the Republic of Poland (Article 121 para. 3a AEPLMI),
18) an employment agency's failure to conclude a contract with a person sent to work abroad for a foreign employer (Article 121 para. 6 AEPLMI),
19) failure to conclude a contract with a foreign employer (Article 121 para. 7 AEPLMI),
20) failure to send a foreigner directly to entities doing business in the territory of the Republic of Poland against an obligation or with the infringement of obligations concerned (Article 121 para. 8 AEPLMI),
21) charging students and graduates with fees connected with their internship or job placement that are not statutory (Article 121a AEPLMI),
22) failure to conclude a statutory contract with a person sent abroad to a foreign entity in order to acquire practical skills (Article 121b AEPLMI),
23) failure to present adequate information to a person undertaking employment abroad, temporary employment and a person sent abroad to acquire practical skills (Article 121c AEPLMI),
24) failure to pay a contribution to the Labour Fund (Article 122 para. 1(1) AEPLMI),

25) failure to report required data having impact on the calculation of the contribution to the Labour Fund (Article 122 para. 1(2) AEPLMI),
26) refusal to provide or providing false explanation concerning data having impact on the calculation of the contribution to the Labour Fund (Article 122 para. 1(2) AEPLMI),
27) refusal to employ a candidate for a vacancy resulting from the infringement of the ban on discrimination (Article 123 AEPLMI).

The interpretation of the features of the above-listed misdemeanours and the application of the provisions of Chapter 20 AEPLMI is often a hard task. The misdemeanours indicated above do not include conduct that even a person without adequate legal knowledge can notice, select and describe as deserving condemnation. In the majority of cases, a perpetrator's conduct results from various circumstances or a decision taken in the course of his business activities, however, beside many others of much more importance than the one which leads to matching the statutory features of a prohibited act. Moreover, avoiding the commission of many of those above-presented types of misdemeanours requires that persons involved in the employment of foreigners or employment promotion have very good knowledge of the provisions of law, not only those listed in the Act on employment promotion and labour market institutions. On the other hand, the recognition of many of the misdemeanours classified in the discussed Act requires that bodies proceeding in cases of misdemeanours should have extraordinary knowledge of broadly understood labour law.

The pattern of sanctions for misdemeanours classified in the Act of employment promotion and labour market institutions is uniform: it is a simple sanction of a fine.[8] In the doctrine and case law, a fine is recognised to be the most appropriate instrument in the fight of relatively petty infringements of law such as misdemeanours.[9]

What is typical of the above-mentioned misdemeanours is extremely severe statutory penalty for some of them. For example, running an employment agency without entry into the registry of employment agencies and providing services in the field of temporary employment or sending a person to work abroad for a foreign employer is a misdemeanour carrying a penalty of a fine of PLN 3,000 to PLN 100,000,[10] and a misdemeanour of failure to pay a contribution to the Labour Fund the value of which sometimes accounts for just a few dozen zlotys carries a penalty of a fine of PLN 3,000 to PLN 5,000.[11]

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[8] O. Włodkowski, *Przepisy karne ustawy o promocji zatrudnienia i instytucjach rynku pracy – uwagi „de lege lata" i propozycje „de lege ferenda"*, Monitor Prawa Pracy No. 2, 2014, p. 79.

[9] J. Jakubowska-Hara, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, LEX/el., thesis no. 1 to Article 24.

[10] Article 121 para. 1(2) AEPLMI.

[11] Article 122 para. 1(1) AEPLMI in conjunction with Article 24 §1 Misdemeanour Code (henceforth also: MC). For more, see S. Kowalski, *Wykroczenie nieterminowego opłacania składek*, Służba Pracownicza No. 3, 2009, p. 5.

3. PENALTIES FOR MISDEMEANOURS AGAINST AEPLMI PROVISIONS IN RELATION TO LIMITS TO A FINE UNDER THE MISDEMEANOUR CODE

All misdemeanours against the provisions of the Act on employment promotion and labour market institutions carry a penalty of a fine. The Misdemeanour Code lays down a principle that a fine should account for PLN 20 to PLN 5,000. The legislator signals the possibility of some exceptions to the rule in Article 24 §1 MC. They are also laid down in the Misdemeanour Code where the legislator lowered the statutory maximum fine[12] or increased the statutory minimum fine[13]. However, the legislator did not lower the minimum fine for any misdemeanours below PLN 20 and did not increase the maximum fine over PLN 5,000.[14] Such statutory regulation of the limits to the penalties of a fine for misdemeanours classified in the Misdemeanour Code corresponds to the regulation laid down in Article 7 §3 Criminal Code (hereinafter also: CC), in which a prohibited act carrying a penalty of a fine of over 30 daily rates or over PLN 5,000[15] is classified as a crime.

The legislator eagerly used the possibility of autonomous regulation of statutory limits to a penalty of a fine for misdemeanours that are not classified in the Misdemeanour Code in the Act on employment promotion and labour market institutions, applying a mechanism of special determination of statutory limits to a fine for all misdemeanours indicated above with the exception of one of them: the misdemeanour under Article 120 para. 10 AEPLMI. It is worth adding that the legislator unambiguously determined that prohibited acts classified in Articles 119–123 AEPLMI are really misdemeanours and stipulated in Article 125 para. 1 AEPLMI that adjudicating in cases concerning such acts shall be based on the Misdemeanour Procedure Code (hereinafter: MPC).[16] Such a legislative solution matches the stipulation in the provision of §81 Annex to the Regulation of the President of the Council of Ministers of 20 June 2002 concerning "Rules of legislative technique".[17]

The differentiation of the statutory limits to penalties for particular misdemeanours in AEPLMI in relation to the principle laid down in Article 24 §1 MC may be divided into three groups including sanctions characterised by:

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[12] See, e.g. Articles: 78, 79 §1, 81 or 95 MC.

[13] See, Articles: 50a §1 and 87 §1 MC.

[14] See, the Supreme Court judgement of 8 February 2012, V KK 294/11, OSNKW 2012, No. 6, item 59.

[15] This does not mean, however, that all prohibited acts carrying a fine exceeding PLN 5,000 are crimes.

[16] See, the Supreme Court ruling of 24 February 2006, I KZP 52/05, OSNKW 2006, No. 3, item 23.

[17] Journal of Laws [Dz.U.] of 2016, item 283. It is worth adding that, e.g. in the Labour Code (henceforth also: LC), there is a lack of a similar regulation with regard to misdemeanours listed in Section Thirteen of the Act, although a penalty of a fine for the listed acts considerably exceeds the limits determined in Article 24 §1 MC. What decides that the indicated acts are misdemeanours is the title of the above-mentioned Section and the contents of the provisions in the Misdemeanour Procedure Code: Articles 17 §2 and 96 §1b MPC.

1) the increased minimum statutory limit to penalties for misdemeanours classified in Article 119 para. 2, Article 120 paras. 2 and 6–7, Article 121 paras. 2–8, Article 121a–123,
2) the increased minimum and maximum limits to statutory penalties for misdemeanours classified in Article 120 paras. 1, 3–5, Article 121 para. 1,
3) the increased minimum and lowered maximum limits to penalties for misdemeanours classified in Article 120 paras. 8–9 and 11.

The legislator laid down the most severe penalty of up to PLN 100,000 for a misdemeanour of running an employment agency without a licence combined with the provision of services in the field of temporary employment or sending a person to work abroad for foreign employers (Article 121 para. 1(2) AEPLMI) and for a misdemeanour of running a foreign company involved in the same type of business without a notification[18] of the Marshal of the Voivodeship (Article 121 para. 1a in conjunction with Article 121 para. 1(2) AEPLMI). The statutory limits to the penalty for the indicated misdemeanours are really broad because the minimum limit accounts for PLN 3,000.

The very severe penalties stipulated for the above-mentioned misdemeanours must raise controversies. Not only does the maximum limit to a penalty for those misdemeanours exceed a thousand times the value of the highest fine imposed with the application of the daily rate system[19] but it is also higher than the maximum limit to a fine for a crime classified in Article 81 of the Act of 5 July 1996 on tax consultancy.[20] At the same time, comparing the provisions of Article 1 §2 CC and Article 1 MC, one can draw a conclusion that the legislator's assumption is that the difference between a crime and a misdemeanour should be perceived in terms of quantity, regardless of the fact that misdemeanour law is not homogenous and covers misdemeanours of administrative origin (misdemeanours get the negative social weight from the infringement of administrative obligations and bans or because, assessed not on a single but a massive scale, they lead to the increase in undesired social phenomena or can generate serious negative effects because of the change of human conduct).[21]

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[18] It concerns a notification submitted to the Marshal of the Voivodeship having jurisdiction over the place where a company provides services before it starts operating as an employment, personal counselling or professional advice agency in the territory of the Republic of Poland, containing the following data: (1) the name of an entrepreneur's state of origin, (2) an entrepreneur identification and head office, (3) planned place and period of service provision as well as types of services provided in the territory of the Republic of Poland (Article 19i para. 1 AEPLMI).

[19] See, Article 33 §§1 and 3 CC.

[20] Journal of Laws [Dz.U.] of 2016, item 794, as amended; hereinafter: ATC. Compare, the judgement of the District Court in Gliwice of 18 April 2014, VI Ka 1224/13, Legalis No. 1501709 with a gloss by R. Bernat, *Wykonywanie czynności doradztwa podatkowego bez uprawnień*, Monitor Podatkowy No. 9, 2016.

[21] T. Bojarski, [in:] A. Korobowicz, L. Leszczyński, A. Pieniążek (ed.), *Państwo. Prawo. Myśl prawnicza. Prace dedykowane Profesorowi Grzegorzowi Leopoldowi Seidlerowi w dziewięćdziesiątą rocznicę urodzin*, Lublin 2003, pp. 49–51; W. Kozielewicz, *Wykroczenia z ustawy z dnia 27 września 1990 r. o wyborze Prezydenta Rzeczypospolitej Polskiej – kwestie sporne oraz propozycje zmian*, [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (ed.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011, p. 645.

It must be emphasised that misdemeanours classified in Article 121 para. 1(2) AEPLMI and Article 121 para. 1a in conjunction with Article 121 para. 1(2) AEPLMI are formal misdemeanours that can be committed unintentionally. The justification for the Bill introducing such severe penalties for misdemeanours classified in the above-mentioned provisions does not provide grounds for this solution and does not discuss the amendments but only signals that their introduction is fully deliberate.[22]

The most lenient penalties are laid down for misdemeanours introduced to the Act on employment promotion and labour market institutions on 1 January 2018: failure to fulfil an obligation to notify a *starosta* about the circumstances connected with the employment of a foreigner possessing a seasonal work permit to do another job not requiring obtaining a new work permit (Article 120 para. 8 AEPLMI), failure to obtain a work permit (Article 120 para. 9 AEPLMI) and failure to fulfil an obligation to conclude a written employment contract with a foreigner who is exempt from the obligation to have a work permit or failure to present a foreigner with a copy of that contract translated into a language understandable to him before its conclusion (Article 120 para. 11 AEPLMI). The above misdemeanours carry a penalty of a fine from PLN 200 to PLN 2,000.

The extremely high, from the perspective of Article 24 §1 MC, minimum limit to a penalty for most misdemeanours classified in AEPLMI raises doubts about abandoning prosecution of misdemeanours with a minimum level of social harmfulness. As everyone knows, the principle of legalism does not have to be applied in the misdemeanour proceedings.[23] It is strictly connected with the belief that in misdemeanour cases there is no need to demand negative penal consequences in case of every infringement of the binding norms but the opinion that it is necessary and purposeful to punish a perpetrator is decisive.[24] That is why, as a result, Article 41 MC makes it possible to use non-penal measures towards perpetrators of misdemeanours, regardless of the type of a misdemeanour committed, if a body authorised to detect misdemeanours and file motions to punish decides that this type of response will not play its educative role.[25] Obviously, a question must arise whether the legislator, who lays down a penalty of a minimum fine of PLN 3,000, really assumes the possibility of applying Article 41 MC. Although determination of the minimum fine for a misdemeanour at this level does not exclude the application of the solution included in the above-mentioned provision, it seems that it can be interpreted as a signal that, because a misdemeanour carries the lowest fine of as much as PLN 3,000, the legislator assumes its commission is so blameworthy that every instance deserves punishment.

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[22] Sejm of the Republic of Poland – 8th term, paper no. 1274.

[23] The conclusion should be drawn from the fact that the provision of Article 8 MPC evidently does not adopt the regulation laid down in Article 10 §1 CPC on the ground of misdemeanour procedure.

[24] See, J. Bafia, D. Egierska, I. Śmietanka, *Kodeks wykroczeń. Komentarz*, Warsaw 1980, pp. 99–101; J. Skupiński, *Kierunki doskonalenia polskiego prawa wykroczeń*, Studia Prawnicze No. 4, 1981, p. 3; T. Grzegorczyk, A. Gubiński, *Prawo wykroczeń*, Warsaw 1995, pp. 263–264.

[25] V. Konarska-Wrzosek, *Dyrektywy wymiaru kary w polskim ustawodawstwie karnym*, Toruń 2002, pp. 194–195.

4. STATUTORY PENALTIES FOR SOME MISDEMEANOURS LAID DOWN IN AEPLMI IN RELATION TO PENALTIES UNDER THE LABOUR CODE

The maximum limit to a fine was determined at the level of PLN 30,000 for the following misdemeanours: employment of a foreigner illegally (Article 120 para. 1 AEPLMI), making a foreigner work illegally (Article 120 para. 3 AEPLMI), demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI) and making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI). The increase in the maximum limit to a statutory penalty for the above-mentioned misdemeanours is based on the provisions of the Act of 20 July 2017 amending the Act on employment promotion and labour market institutions and some other acts. However, it is hard to find the reasons for the increase in the limit to fines and the level of PLN 30,000 in the justification for the amendment.

The regulation stipulating the maximum limit to a fine for the above-mentioned misdemeanours matches the regulation laying down the statutory limit to fines for misdemeanours against employees' rights (Articles 281–283 LC). In the past, the increase in the limit to penalties for misdemeanours classified in the Labour Code was introduced in the Act of 13 April 2007 on the National Labour Inspectorate.[26] The content of the justification for the Bill suggested that the reason for the increase was the observed practical economic profit obtained from the infringement of employees' rights. It means that it was "profitable" to pay a fine because its amount was lower than the "gains" obtained from the infringement of the rights.[27] It seems that the determination of the maximum level of a fine laid down in Article 120 para. 1 and Article 120 paras. 3–5 AEPLMI may be justified in the same way. However, one can imagine that obtaining gains from illegal employment of a foreigner may provide such high profits that, *in concreto*, it would be profitable to risk such employment if this misdemeanour carried a maximum penalty of a fine laid down in Article 24 §1 MC or even up to PLN 10,000,[28] as it was stipulated before the changes introduced by AAAEP of 20 July 2017. Employing a foreigner illegally, making a foreigner work illegally, demanding financial gains for helping to obtain a work permit or making another person employ a foreigner illegally consists in an employee's work and an increase in an employer's property, and thus, incompliance with the provisions regulating the provision of labour. In this sense, the nature of these misdemeanours is similar to misdemeanours classified in the Labour Code.

The legislator treats misdemeanours against employees' rights laid down in the Labour Code and misdemeanours laid down in AEPLMI in a similar way and it is already noticed in court proceedings. The legislator decided that a labour inspector (Article 17 §2 MPC) must be a public prosecutor in those misdemeanour cases and, in addition, laid down uniform possibilities of punishing a perpetrator in a fine

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[26] Journal of Laws [Dz.U.] of 2017, item 786, as amended.

[27] Compare, the justification for the Bill on the National Labour Inspectorate, Sejm of the Republic of Poland, 5th term, paper no. 712.

[28] Especially, in the context of the provision of Article 9 MC.

imposing proceedings for those misdemeanours to a larger extent than in case of other misdemeanours (Article 96 §1a(1) MPC).[29]

However, looking for the justification for the maximum limit to a fine for misdemeanours classified in AEPLMI determined at the amount of PLN 30,000 in their certain similarity to misdemeanours classified in the Labour Code, one should critically assess the minimum limit to a fine for misdemeanours of making a foreigner work illegally (Article 120 para. 3 AEPLMI), demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI), and making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI) at the level of PLN 3,000. In my opinion, the minimum level of a penalty determined in this way does not find justification. Indeed, it is hard to understand why Polish misdemeanour law stipulates that just demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI) carries a fine of at least PLN 3,000 and making groundless deductions from the remuneration of a Polish employee having an employment contract carries a penalty of a fine of at least PLN 1,000 (Article 282 §1(1) LC).[30] There are many similar examples.

The justification for such a high minimum limit to a fine reaching PLN 3,000 can be found in other similar regulations laid down in the same the Act and determining the minimum limit to a fine at the same level. However, the point is that it is hard to find relevant grounds for those regulations,[31] and the legislator did not indicate them in the justification for the bills introducing such minimum statutory limits to penalties for some misdemeanours laid down in AEPLMI.

5. TOO NARROW LIMITS TO PENAL SANCTIONS

Even a cursory analysis of the limits to the statutory penalty for misdemeanours classified in Chapter 20 AEPLMI leads to a conclusion that the limits to penalties for quite a big number of misdemeanours were shaped in such a way that the scope of adjudication on a penalty for those misdemeanours within the statutory limits is very narrow. It concerns misdemeanours carrying a fine from PLN 3,000 to PLN 5,000[32] and from PLN 4,000 to PLN 5,000[33].

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[29] Only with regard to the special regulation concerning the maximum limit to a fine in a fine imposing proceedings laid down in Article 96 §1b MPC, the legislator admits labour inspectors' extraordinary rights exclusively in case of imposing penalties for misdemeanours against employees' rights classified in Articles 281–283 LC. Moreover, it is worth adding that the legislator noticed some misdemeanours classified in AEPLMI are also subject to prosecution by the officers of the Border Guard and, in the scope concerning those officers, included a special regulation in Article 96 §1a(3) MPC making it possible to impose punishment for the listed misdemeanours within a fine imposing proceedings as they take place in case of misdemeanours against an employee's rights.

[30] The maximum statutory limit to a penalty for the indicated misdemeanours is the same and reaches PLN 30,000.

[31] Compare, comments in the next part of the article.

[32] See, Articles: 120 para. 7, 121 paras. 2–3a, 121a, 121c, 122 para. 1, and 123 AEPLMI.

[33] See, Articles: 121 paras. 6–8 and 121b AEPLMI.

The Act on employment promotion and labour market institutions does not indicate circumstances that have to be taken into account for the imposition of a penalty. They are indicated in the Misdemeanour Code. The directives for the imposition of penalties for misdemeanours are laid down in the provisions of Article 33 MC. General rules are very close to the rules of imposing penalties for crimes: an adjudicating body imposes a penalty at its discretion but within the limits laid down in statute for a given misdemeanour, having assessed the level of social harmfulness of an act and having taken into account the aims of a penalty within the scope of social impact and preventive and educative objectives which are to be achieved in relation to the punished person.[34] What draws special attention is the content of the provisions of Article 33 §3 MC containing an open catalogue of extenuating circumstances and Article 33 §4 MC, which contains an open catalogue of aggravating circumstances to be taken into account when imposing a penalty.

If we consider just the fact that misdemeanours laid down in AEPLMI were classified as non-consecutive acts and, as a rule, misdemeanours may be committed intentionally as well as unintentionally (Article 5 MC), it comes to mind *prima vista* that the indicated types of misdemeanours may cover many types of conduct at a different level of social harmfulness of an act and guilt. For example, the conduct of a person who sends another person abroad to a foreign entity in order to acquire practical skills, which is not employment or another type of work for remuneration, and does not conclude a contract referred to in Article 85 para. 2 AEPLMI, if such conduct results from negligence at the stage of implementing a bigger project within which several people are sent abroad to serve apprenticeship, should be assessed in a different way than the conduct that results from cooperation and in agreement with other people for the purpose of obtaining gains and the person has the knowledge that the trip is badly organised and the probability of acquiring expected knowledge and skills abroad is scarce. Each type of such conduct matches the features of a prohibited act under Article 121b AEPLMI but some exemplary circumstances indicated above give grounds for a different assessment of social harmfulness and a perpetrator's guilt. However, the legislator laid down a penalty of a fine from PLN 4,000 to PLN 5,000 for the indicated misdemeanours. The example shows that the difference between the minimum and maximum limit to a statutory penalty is inadequate to circumstances that may be covered by the assessment of culpability of a given act, the level of a perpetrator's guilt and other circumstances listed in Article 33 §1 MC, which a court must, not only can, take into account when it imposes a penalty for a misdemeanour. Based on the provisions of Article 33 MC, it is downright obvious that adjudicating on a penalty of a fine for a misdemeanour cannot result from a simplified pattern but requires a thorough analysis of an act's nature and circumstances, the scale of negative consequences of a misdemeanour, a perpetrator's financial conditions and possibilities as well as social effects of a penalty.[35]

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[34] W. Marek emphasised that the legislator by analogy determined the principles and directives on imposing penalties for crimes and misdemeanours, see [in:] *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2012, p. 77.

[35] *Ibid.*, p. 84.

The legislator, determining penalties in the provisions classifying misdemeanours, indicates the minimum and maximum penalty for a given misdemeanour and a court imposes a penalty within those limits taking into account the directives for a penalty imposition, which are formulated in the way making it possible to fulfil the aims of a penalty determined by the legislator: just punishment, impact on a perpetrator and social effects of a penalty.[36] If a legislator determines in AEPLMI the limits to the statutory penalty in such a way that the difference between them accounts for PLN 2,000 and the minimum limit to a penalty is higher by half, it is hard to assume that a court has possibilities of following those directives within those limits in every case. It is even more difficult to follow the directives in case of imposing a penalty for misdemeanours when the difference between the minimum and maximum limits to the statutory penalty is PLN 1,000 and the minimum limit to a penalty is four times more. In my opinion, in both cases it can be assumed that it is simply impossible in relation to misdemeanours classified in AEPLMI, which are generally characterised by a big number of circumstances of a given act commission that determine the assessment of the degree of social harmfulness of an act and guilt.

6. PENAL SANCTION FOR MISDEMEANOURS INFRINGING PROVISIONS ON THE LABOUR FUND IN RELATION TO STATUTORY SANCTIONS FOR MISDEMEANOURS AGAINST PROVISIONS ON SOCIAL INSURANCE

The AEPLMI provisions contain, inter alia, those regulating the status and financing of the Labour Fund.[37] Obligatory contributions to the Labour Fund are of critical importance for the income of that Fund;[38] that is why, the legislator decided to ensure the fulfilment of this obligation with the use of penal provisions. Since the Act on employment promotion and labour market institutions entered into force, its Article 122 para. 1(1) classifying a misdemeanour of failure to pay contributions in due time has been binding, although the introduction of this provision was unnecessary because of the content of Article 98 para. 2 of the Act of 13 October 1998 on social insurance system,[39] which was binding on the date that Act entered into force.[40]

Apart from social insurance, health insurance and the Guaranteed Employee Benefits Fund contributions, the contributions to the Labour Fund belong to the most common charges paid by contribution-payers to support social insurance institutions, for the collection of which the Social Insurance Institution (ZUS) is

[36] *Ibid.*, p. 95. This author rightly indicates that the directives on imposing a penalty constitute a normative instrument of fulfilling the aims of punishment.

[37] Article 103 and the following AEPLMI.

[38] Compare, Article 106 para. 1 AEPLMI.

[39] Journal of Laws [Dz.U.] of 1998, No. 137, item 887, as amended; hereinafter also: ASIS.

[40] The provision had an identical wording as the currently binding provision of Article 98 para. 3 ASIS.

authorised.[41] Introducing the Act on the social insurance system, the legislator undoubtedly wanted to entirely regulate liability for misdemeanours of failure to pay contributions for the above-mentioned forms of social insurance because the then Article 98 para. 1(1) ASIS, constituting an equivalent of the presently binding Article 98 para. 1(1a) ASIS,[42] determined liability of the contribution-payers or persons obliged to act on their behalf for failure to pay social insurance contributions,[43] and the still binding Article 98 para. 3 ASIS specifies the type of misdemeanour of failure to pay contributions for other purposes than social insurance, which ZUS is authorised to collect. The provisions of Article 98 para. 1(1a) ASIS and Article 98 para. 3 ASIS lay down a penal sanction for misdemeanours classified therein within the range from PLN 1 to PLN 5,000.[44]

At the time when the indicated provisions were in force, introducing new acts regulating the operation of the Labour Fund and health insurance, the legislator first separately, in Article 122 para. 1(1) AEPLMI, classified a misdemeanour of failure to pay contributions to the Labour Fund carrying a penalty of a fine from PLN 3,000 to PLN 5,000, and then, in Article 193 para. 3 of the Act of 27 August 2004 on the provision of healthcare services financed from public funds,[45] a misdemeanour of failure to pay health insurance contributions carrying a penalty of a fine from PLN 20 to PLN 5,000.[46] Undoubtedly, the two provisions are special in relation to Article 98 para. 3 ASIS.

As it is known, most contribution-payers are obliged to pay previously calculated social insurance, health insurance and the Labour Fund contributions every month.[47] In such a situation, the amount of social insurance and health insurance contributions is much higher than the amount of the contribution to the Labour Fund. At the same time, a misdemeanour of failing to pay the contribution to the Labour Fund carries a penalty of a fine from PLN 3,000 to PLN 5,000 and a misdemeanour of failing to pay social insurance contributions carries a penalty of a fine from PLN 1 to PLN 5,000. This differentiation of penal sanctions, noticeable just in the relation to the two indicated provisions, is not justified by anything.

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41 See, Article 32 ASIS.

42 For more on this issue, see S. Kowalski, *Znowelizowane reguły karania za naruszenie obowiązku opłacania składek*, Monitor Prawa Pracy No. 10, 2012, *passim*.

43 For more, see inter alia: U. Kalina-Prasznic, *Odpowiedzialność karna płatnika składek na ubezpieczenie społeczne*, [in:] J. Sawicki, K. Łucarz (ed.), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, Vol. I, Wrocław 2016, pp. 206–207; K. Ślebzak, J. Kosonoga, *Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne*, Ius Novum No. 3, 2016, pp. 286–292.

44 In my opinion, the indication of the penal sanction in the provision of Article 98 para. 1 ASIS with the use of a phrase "is subject to a penalty of a fine of PLN 5,000" constitutes a completely autonomous (from Article 24 §1 MC) regulation of the limits to a fine imposed in PLN in the amount indicated in Article 98 para. 1 ASIS.

45 Uniform text, Journal of Laws [Dz.U.] of 2017, item 1938, as amended.

46 In the provision, the legislator only indicated that a perpetrator of a misdemeanour "is subject to a penalty of a fine", which results in the application of the legal norm laid down in Article 24 §1 MC, and this is in accordance with Article 48 MC; compare, the Supreme Court judgement of 8 February 2012, V KK 294/11, OSNKW 2012, No. 6, item 59.

47 See, Article 104 AEPLMI.

It is hard to assume that paying the contribution to the Labour Fund on time is more important for the state than paying social insurance contributions on time. Moreover, it is common knowledge that the size of the sanction laid down in Article 122 para. 1(1) AEPLMI most often precludes the fulfilment of the aims of punishment referred to in Article 33 MC within the statutory limits to a penalty for that misdemeanour. As a result, courts often apply punishment degression, although in accordance with misdemeanour law, extraordinary mitigation of punishment as well as renouncement of punishment should be applied only exceptionally.[48]

An issue that is worth noticing is also making it possible to avoid liability for a misdemeanour in case the contribution is paid late but before a control procedure is initiated in accordance with Article 122 para. 2 AEPLMI and is limited to failure to pay contributions to the Labour Fund. This clearly confirms that there is no complex conception regulating the issue of broadly understood criminal liability for failure to pay contributions to social insurance institutions. It is hard to find rational justification for the situation in which a person who pays the contribution of a few hundred zlotys to the Labour Fund with a few months delay is not subject to punishment, while a person who is a few days late with the payment of the social insurance contribution of a few thousand zlotys is subject to punishment, although in both cases the payment has been made before a control procedure is initiated.

It should be added that it is not understandable, either, why the statutory limits to a penalty for a misdemeanour of failing to report the required data that have impact on the amount of contributions to the Labour Fund (Article 122 para. 1(2) AEPLMI) and the refusal to provide or providing false explanations concerning the data that have impact on the amount of contributions to the Labour Fund (Article 122 para. 1(2) AEPLMI) were determined at the level of PLN 3,000 to PLN 5,000. The twin types of misdemeanours are classified in Article 98 para. 1(2) ASIS and carry a penalty of a fine from PLN 1 to 5,000 and they are often committed simultaneously when a declaration concerning, e.g. social insurance and the Labour Fund, is submitted to ZUS. It is not possible to assume that the indicated conduct consisting in the infringement of the obligations resulting from social insurance provisions is less culpable than the same conduct consisting in the infringement of the provisions on the Labour Fund. Obviously, the part of arguments concerning those relations that were presented earlier remains up-to-date.

7. CONCLUSIONS

1) Penalties for misdemeanours classified in the Act on employment promotion and labour market institutions are very severe in comparison with those for misdemeanours classified in the Misdemeanour Code and in relation to the statutory limits to penalties for those misdemeanours under the regulation laid down in Article 24 §1 MC determining general limits to a fine for a misdemeanour.

[48] Compare, A. Marek, *Prawo*..., pp. 104–105.

2) The only provision determining the minimum limit to a fine at the level of PLN 20, and thus the amount in general constituting the minimum limit to a fine in accordance with Article 24 §1 MC is Article 120 para. 10 AEPLMI classifying a misdemeanour of failing to fulfil an obligation to notify the competent county labour authorities about the circumstances concerning a declaration entered into the registry or the provision of false information on starting work, failing to start work or stopping to work by a foreigner based on a declaration of employing a foreigner.
3) The provisions concerning six types of misdemeanours stipulated in Articles 120 para. 1, 120 paras. 3–5, 121 paras. 1(1–2) AEPLMI lay down a fine exceeding PLN 5,000 which, in accordance with the provision of Article 24 §1 MC, in general constitutes the maximum limit to the statutory fine for a misdemeanour.
4) The legislator lays down the maximum limit to a penalty at a higher level than the maximum limit to a penalty for a crime under Article 81 ATC in case of two misdemeanours classified in Article 121 para. 1a AEPLMI and in Article 121 para. 1(2) AEPLMI.
5) The misdemeanours classified in the provisions of Articles 120 para. 7, 121 paras. 2–3a, 121a, 121c, 122 para. 1, 123 AEPLMI carry a penalty of a fine of PLN 3,000 to PLN 5,000, and misdemeanours classified in Articles 121 paras. 6–8, 121b AEPLMI: PLN 4,000 to PLN 5,000. The difference between the maximum and the minimum limits to a penalty is in those cases inadequate to the circumstances that might be taken into account in the assessment of blameworthiness of a given act, the level of a perpetrator's guilt and other circumstances listed in Article 33 §1 MC, which a court must take into consideration when imposing a penalty for a misdemeanour.
6) The statutory limits to a penalty for a misdemeanour directly connected with a foreigner's work for remuneration defined in Article 120 paras. 3–5 AEPLMI are incoherent with the regulations concerning misdemeanours against employees' rights laid down in the Labour Code because the minimum limit to a penalty for each of those misdemeanours is three times higher than the minimum limit to a penalty for a misdemeanour under Articles 281–283 LC.
7) The statutory limits to a penalty for misdemeanours directly connected with the infringement of the provisions concerning employers' obligations with respect to the Labour Fund laid down in the provisions of Article 122 para. 1 AEPLMI should have statutory limits to penalties harmonised with the provisions classifying twin misdemeanours concerning the infringement of obligations towards social insurance institutions laid down in the provisions of Article 98 ASIS.

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Ustawa z dnia 20 lipca 2017 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy oraz niektórych innych ustaw [Act of 20 July 2017 amending the Act on employment promotion and labour market institutions and some other acts], promulgated on 17 August 2017, Journal of Laws [Dz.U.] of 2017, item 1543.

Case law
Supreme Court ruling of 24 February 2006, I KZP 52/05, OSNKW 2006, No. 3, item 23.
Supreme Court judgement of 8 February 2012, V KK 294/11, OSNKW 2012, No. 6, item 59.
Judgement of the District Court in Gliwice of 18 April 2014, VI Ka 1224/13, Legalis No. 1501709.

STATUTORY LIMITS TO PENALTY FOR MISDEMEANOURS AGAINST THE PROVISIONS OF THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

Summary

The study contains an analysis of statutory limits to the penalty of a fine for misdemeanours classified in the Act on employment promotion and labour market institutions. The characteristic feature of those sanctions is their exceptional severity. The author points out that as a result of the amendments to the provisions of the Act on employment promotion and labour market institutions introduced by the acts passed in 2017, there is an excessive aggravation of penalties for the discussed misdemeanours, and in case of two of them, the maximum limit to the statutory penalty was determined at a higher level than for some crimes. Apart from the extremely high limits to most penalties classified in AEPLMI, subject of criticism are also too narrowly established limits to some penal sanctions as well as the lack of coherence of some of them with the regulations pertaining to misdemeanours against employees' rights and misdemeanours consisting in failing to pay contributions to other types of social insurance than the Labour Fund.

Keywords: misdemeanour, out-of-code misdemeanours, penal sanction, employment promotion, Labour Fund

USTAWOWE GRANICE KARY ZA WYKROCZENIA PRZECIWKO PRZEPISOM USTAWY O PROMOCJI ZATRUDNIENIA I INSTYTUCJACH RYNKU PRACY

Streszczenie

Opracowanie zawiera analizę ustawowych granic kar grzywny przewidzianych za wykroczenia stypizowane w ustawie o promocji zatrudnienia i instytucjach rynku pracy. Cechą szczególną tych sankcji jest ich wyjątkowa surowość. Autor zwraca uwagę na fakt, że w następstwie nowelizacji przepisów ustawy o promocji zatrudnienia i instytucjach rynku pracy dokonanych ustawami uchwalonymi w 2017 r. doszło do nadmiernego zaostrzenia kar za wymienione wykroczenia, a w przypadku dwóch z nich górna granica ustawowego zagrożenia karą została określona na poziomie wyższym niż dla niektórych przestępstw. Oprócz nader wysokich granic kar przewidzianych za większość wykroczeń stypizowanych w ustawie o promocji zatrudnienia i instytucjach rynku pracy negatywnej ocenie poddane zostały również: zbyt wąsko ujęte granice niektórych sankcji karnych, a także brak spójności części z nich z regulacjami dotyczącymi wykroczeń przeciwko prawom pracownika oraz wykroczeń polegających na nieopłacaniu składek na innego rodzaju niż Fundusz Pracy formy zabezpieczenia społecznego.

Słowa kluczowe: wykroczenie, wykroczenia pozakodeksowe, sankcja karna, promocja zatrudnienia, Fundusz Pracy

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FORMAL DEFENCE IN DISCIPLINARY PROCEEDINGS AGAINST LEGAL COUNSELS

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1. INTRODUCTION

Numerous representatives of the doctrine are interested in the issue of disciplinary proceedings. And although specialists in constitutional, criminal and administrative law conduct their analyses from completely different perspectives, they all emphasise the consequences those proceedings may have for the rights of liable entities. The legislator who lays down a series of guarantee formulas within disciplinary proceedings also notices dangers connected with excessive interference into this sphere. Disciplinary proceedings against a legal counsel are part of such legislative practice. Although their structure is only based on partial regulation of the Act of 6 July 1982 on legal counsels[1] and a broad reference to application of the Criminal Code[2] and the Criminal Procedure Code[3] by analogy, there are no doubts that, what is based on those references, "(…) the adoption of instruments originating from criminal law and criminal procedure in disciplinary proceedings is to serve [exactly – note by K.D.] the purposes of protection".[4]

The legislator notices a specific "(…) connection between disciplinary liability and criminal liability – the aim of criminal penalty and disciplinary penalty is repression

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1 Journal of Laws [Dz.U.] of 2016, item 233, as amended; hereinafter: ALC.

2 Act of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] of 2016, item 1137, as amended; hereinafter: CC.

3 Act of 6 June 1997: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2016, item 1749, as amended; hereinafter: CPC.

4 W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warsaw 2016, p. 29.

and not prevention".[5] That is why, a number of procedural guarantees may also be applied in disciplinary proceedings.[6] Although their form cannot be unreflectively copied,[7] experience gained throughout years of their operation in the area of criminal procedure makes it possible to include them in the framework of significant measures of protection of fundamental rights and freedoms. The right to defence is one of such procedural guarantees and not only does it "(…) constitute a fundamental principle of the criminal procedure but it is also an elementary standard of a democratic state of the rule of law. Thus, undoubtedly, it is one of those procedural guarantees for the accused that should be ensured within each disciplinary proceedings".[8]

The legislator seems to recognise the same and emphasises the suspected legal counsel's right to defence in Article 68 para. 4 ALC. Despite this declaration, many issues concerning the right to defence remain controversial and doubtful. Divergent justification for criminal and disciplinary liability[9] connected with the lack of commonly accepted rules of interpretation of the provisions referring to other regulations[10] causes a typical interpretational chaos. The legitimised, within application by analogy, broad possibility of modifying norms, or even refusing to apply them, causes that even such basic issues as the suspected legal counsel's right to a defence counsel appointed *ex officio* or a translator's assistance are points of disagreement.

This article, noticing the above-mentioned difficulties, aims to present a clear picture of the formal aspect of the suspected legal counsel's defence. It should be highlighted that the observed diversified frameworks of the instrument, developed *a casu ad casum*, raise doubts about its guarantee nature, especially in the context of maintaining an appropriate level of predictability of the procedural bodies' activities.[11] That is why, with respect to the aim of the present considerations, an analysis of the essence of the right to defence will be their necessary staring point. Next, noticing the significant dependence of the research subject matter on the accepted rules of interpreting provisions referring to other regulations, I present my own conception of interpreting the discussed structure. Then, using the rules of exegesis, I conduct a more detailed analysis of the formal aspects of the suspected legal counsel's defence. It must be highlighted that, due to the limited size of the article, I cannot thoroughly discuss international legal standards concerning the formal aspect of the suspected legal counsel's defence.

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[5] P. Przybysz, *Prawo do sądu w sprawach dyscyplinarnych*, Studia Iuridica Lublinensia No. 3, 2016, p. 68.

[6] See, P. Chlebowicz, *Odpowiedzialność dyscyplinarna radców prawnych*, Radca Prawny. Zeszyty naukowe No. 2, 2017, p. 125 ff.

[7] Compare, Ł. Chojniak, *Realizacja zasady trafnej reakcji dyscyplinarnej w postępowaniu dyscyplinarnym adwokatów – wybrane problemy,* Palestra No. 10, 2016, p. 74 ff.

[8] P. Czarnecki, *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warsaw 2011, p. 326; also see, Constitutional Tribunal judgement of 6 November 2012, K 21/11, OTK-A 2012, No. 10, item 119.

[9] See, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, pp. 27–28; P. Skuczyński, *Niereprezyjne funkcje odpowiedzialności dyscyplinarnej a model postępowania w sprawach dyscyplinarnych,* Przegląd Legislacyjny No. 3, 2017, pp. 36–40.

[10] See, P. Czarnecki, *Stosowanie kodeksu karnego w postępowaniach dyscyplinarnych,* Państwo i Prawo No. 10, 2017 p. 104 ff.

[11] Compare, M. Wojciechowski, *Pewność prawa,* Gdańsk 2014, pp. 9–12.

2. RIGHT TO DEFENCE: INTRODUCTORY REMARKS

The construct of the right to defence is a formula strictly connected with the present form of disciplinary proceedings. While the selection of a model or models of disciplinary proceedings remains disputable,[12] the doctrine and case law in the same way extend the scope of its application onto all forms of repressive liability.[13] That is why, remaining the guardian of the most valuable legal interests and a guarantee of the minimum level of just proceedings,[14] the construct of the right to defence constitutes one of the pillars of contemporary disciplinary proceedings. Despite the role it plays in the development of numerous procedural instruments, especially in the context of perceiving it as a typical value of the system, the doctrine has not worked out a uniform framework describing its essence. For some, "(…) it provides the accused with a possibility of conducting his own defence against charges and their legal consequences as well as using a defence counsel's assistance".[15] Others, emphasising the relative nature of the right, indicate that: "The right to defence, in its nature, contains the right to look for the most favourable solution to the issue of liability with the use of legally available measures".[16]

However, on the basis of the present article, I assume that the essence of the right to defence is best described as: "(…) undertaking activities aimed at defending the accused [the defendant – K.D.] against charges with the use of granted procedural rights".[17] The definition, thanks to the fact of being based on Article 42 para. 2 Constitution,[18] seems to be a typically constitutional one. Due to its abstract form obtained thanks to its separation from detailed regulations, it seems to realistically reflect the essence of the discussed construct. Maintaining its validity for analysing specific instruments of the criminal procedure as well as in case of abstract discourse on the models of repressive proceedings, the presented definition has a feature of broad universality. That is why, it seems fully rational to use it also in this article.

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[12] Compare, P. Czarnecki, *Model postępowania dyscyplinarnego w polskim systemie prawa*, [in:] P. Czarnecki (ed.), *Postępowanie karne a inne postępowania represyjne*, Warsaw 2016, p. 253; M. Zubik, M. Wiącek, *O spornych zagadnieniach z zakresu odpowiedzialności dyscyplinarnej sędziów Trybunału Konstytucyjnego – polemika*, Przegląd Sejmowy No. 3, 2007, p. 69 ff.

[13] Compare, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, p. 26; compare, P. Czarnecki, *Postępowanie dyscyplinarne…*, p. 327; T. Sroka, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. I: *Komentarz do art. 1–86*, Warsaw 2016, p. 1019 ff; the Constitutional Tribunal judgement of 1 March 1994, U 7/93, OTK 1994, No. 1, item 5; the Constitutional Tribunal judgement of 26 November 2003, SK 22/02, OTK-A 2003, No. 9, item 97.

[14] Compare, J. Znamierowski, *Konstytucyjne i karnoprocesowe ujęcie prawa do obrony quasi-oskarżonych*, Państwo i Prawo No. 6, 2015, p. 83; P. Wiliński, *Dwa modele rzetelnego procesu karnego*, Państwo i Prawo No. 7, 2006, p. 43 ff.

[15] R.A. Stefański, *Obrona obowiązkowa – prawo czy konieczność*, [in:] J. Skorupka, I. Hajduk-Harwylak (ed.), *Współczesne tendencje w rozwoju procesu karnego z perspektywy dogmatyki oraz teorii i filozofii prawa*, Warsaw 2011, p. 108.

[16] P. Wiliński, *Prawo do obrony*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. III: *Zasady procesu karnego*, Warsaw 2014, p. 1481.

[17] P. Wiliński, *Proces karny w świetle Konstytucji*, Warsaw 2011, p. 176; similarly: P. Sarnecki, *Komentarz do art. 42 Konstytucji*, [in:] L. Garlicki, *Konstytucja. Komentarz*, Warsaw 2003, p. 8.

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

It should be indicated that sometimes: "The right to defence is defined in a broader way and the concept covers not only the entirety of the accused's rights serving the protection of his interests but also the entirety of the obligations of the justice administration bodies corresponding to those rights".[19] Nevertheless, it seems that the inclusion of the procedural bodies' obligations into this definition is unjustified. Extending the *definiens*, and as a result decreasing its readability, and increasing the potential area of disputes and doubts, the formulation does not introduce whatever new normative content. Every right occurs because of another entity's obligation.[20] That is why, it seems justifiable to assume that a liable entity's specified rights always accompany the above-mentioned procedural bodies' obligations. And although their detailed characteristics are differentiated, because some of them will be updated on the liable body's motion and some are specific *lex imperfecta* in nature, it is rational to treat them uniformly as the right of a liable person.

However, it should be noticed that the adopted formula of the right to defence is not uniform in nature. Both the doctrine and case law "(…) differentiate between substantive defence and formal defence. At the same time, there is no agreement on the uniform meaning of this division and justification for its existence".[21] Although rationality of the presented division will not be thoroughly discussed and its substantial substrate thoroughly characterised,[22] due to the tradition of its extensive occurrence, this division is *a priori* adopted in the present article. Nevertheless, because of the difference in the interpretation of the terms "formal defence" or "formal aspect of the right to defence",[23] it seems necessary to present the grounds for the mentioned differentiation.

The construct of the right to defence, co-formed by a number of procedural instruments, is in fact an original conglomerate of rights. Their detailed characteristics underline not only their diversity but also emphasise numerous links between them. This causes that, despite the distinction between formal and substantive aspects of defence, all elements permeate and supplement each other so that only their co-existence makes it possible "(…) to say that the right to defence (…) is something real and realistic". [24] Due to the interrelation of the two aspects, it is often difficult to classify a particular procedural right. The difficulties in this area correspond to the problems in defining the formal aspect of defence. While it is uniformly indicated that the substantive aspect of defence is manifested in all constructs serving to oppose prosecution charges,[25] there is a lack of broader approval of a particular

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[19] R.A. Stefański, *Obrona obowiązkowa…*, p. 109.

[20] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa,* Poznań 2001, pp. 103–104.

[21] P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym,* Kraków 2006, p. 202.

[22] This, inter alia, concerns the assessment of the postulate for differentiation between the formal and substantial aspects of defence and not the right to defence (compare, P. Wiliński, *Zasada…*, p. 211).

[23] In the present article, they are synonymous.

[24] Compare, the Supreme Court judgement of 1 December 1997, III KKN 168/97 (unpublished).

[25] Compare, inter alia, M. Mazur (ed.), *Kodeks postępowania karnego – komentarz*, Warsaw 1976, p. 44; A. Sakowicz, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego – komentarz*, Warsaw

approach to formal defence. For some, it consists in the use of a defence counsel's assistance,[26] and some indicate that "(…) the formal right to defence means *sensu stricto* the accused person's right to appoint and have counsel for the defence, and *sensu largo* also any procedural activity of the counsel for the defence".[27] At the same time, also rightly, "(…) it is highlighted in the doctrine that the defence cannot be identified with the right to have a counsel for the defence".[28] It seems that, among the rights constituting the formal aspect of defence, one can also certainly distinguish the right to a translator's assistance or the right to claim a refund of costs incurred for defence.

Approval of the above seems to result in the assumption that the borderline between the substantive and formal aspects of defence is an element of directness between the procedural activity and refuting prosecution charges. In case of the manifestation of substantive defence, such as the right to initiate evidence taking proceedings, the right to silence or the right to appeal, they are all aimed at refuting prosecution charges, although it is necessary to admit that they are applied in a varied way. On the other hand, the instruments of the formal aspect of defence only indirectly strive to obtain such an objective. The right to appoint a counsel for the defence or the right to have a translator's assistance, although they constitute important procedural guarantees, first of all, seem to aim to provide the accused person with a real possibility of exercising all rights he is entitled to. At the same time, the differentiation between the substantive and formal defence described above seems to be relatively precise. That is why, its formula will be taken into account in the discussion below both as a determinant of the scope and typical standard of assessment. It seems that the whole construct of the right to defence would be considerably violated in case the accused did not have instruments making it possible to use it, regardless of the formal existence of a series of procedural rights.

3. APPLICATION BY ANALOGY: ORGANISING COMMENTS

Shaping disciplinary proceedings against a legal counsel, the legislator included a reference to the application of CPC by analogy in its formula. And although *prima facie* such a solution, thanks to the unification of the two procedures, is conducive to the clearness of the regulation, if the detailed perspective is considered, its application hampers considerably the reconstruction of a series of procedural instruments, including the adopted formula of the right to defence.[29] As the Constitutional Tribunal, considering the issue of constitutional guarantees in disciplinary proceedings,

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2015, pp. 34–35; For a different stand, compare the Constitutional Tribunal judgement of 9 July 2009, K 31/08, OTK-A 2009, No. 7, item 107.

[26] Thus, inter alia, B. Daniuk et al., *Prawo do obrony w postępowaniu przygotowawczym na tle dostępu do pomocy prawnej w postępowaniu karnym*, Warsaw 2006, p. 9.

[27] A. Demenko, *Prawo do obrony formalnej w transgranicznym postępowaniu karnym w Unii Europejskiej,* Warsaw 2013, p. 65.

[28] R.A. Stefański, *Obrona obowiązkowa…*, p. 115.

[29] Compare, P. Czarnecki, *Stosowanie kodeksu karnego…*, p. 104.

rightly noted: "One cannot (…) ignore the fact that their main role is to create particular guarantees for the accused in the course of a trial".[30] That is why, "(…) one cannot transfer all guarantee norms created for the needs of criminal liability onto the ground of disciplinary proceedings".[31] As the Constitutional Tribunal indicates, the distinction between disciplinary proceedings and criminal proceedings only inspires application of the normative framework of procedural guarantees by analogy, on the same grounds.[32] It is necessary to remember about the doctrinal "(…) self-government function of disciplinary law where excessive right to defence, adopted directly under the Criminal Procedure Code, would paralyse its course (…)".[33] As a result, not only the shape of particular procedural instruments but also the rules of exegesis of the provisions referring to the application by analogy, which directly determine them, remain the central category of the discourse on the formal aspect of a legal counsel's right to defence.

However, the construct of the application by analogy is still not uniformly understood. For some, "(…) the formula of application by analogy is a legislative solution that, because of a given interpretational problem, serves to find an adequate legal norm in a given factual state by comparing two or more provisions in a particular normative act or acts".[34] Others indicate that: "The obligation to apply the provisions of the Criminal Procedure Code by analogy means the obligation to use the analogy from statute as a way of applying law in cases indicated in a provision referring to another regulation".[35] At the same time, the conception seems to be one of the oldest because, in the context of reference to application by analogy, already J. Wróblewski wrote that: "Such reference may be interpreted as an obligation to use the analogy of statute as a way of applying law in cases indicated in a provision referring to another regulation".[36]

Still, without discussing the theoretical essence of the mechanism of application by analogy, it is necessary to admit that "(…) a closer examination shows that application of the provisions referred to 'by analogy' is not a uniform activity. Generally speaking, three groups of cases can be distinguished because of a different effect or result when some provisions are applied 'by analogy'. As a result, even the

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[30] The Constitutional Tribunal judgement of 4 July 2002, P 12/01, OTK-A 2002, No. 4, item 50.

[31] The Constitutional Tribunal judgement of 11 September 2001, SK 17/00, OTK 2001, No. 6, item 165.

[32] Compare, the Constitutional Tribunal judgement of 11 September 2001, SK 17/00, OTK 2001, No. 6, item 165; the Constitutional Tribunal judgement of 6 November 2012, K 21/11, OTK-A 2012, No. 10, item 119; the Constitutional Tribunal judgement of 29 January 2013, SK 28/11, OTK-A 2013, No. 1, item 5.

[33] Ł. Chojniak, *Prawo do obrony w dochodzeniu dyscyplinarnym adwokatów – wybrane zagadnienia z uwzględnieniem ostatniej nowelizacji prawa o adwokaturze,* Palestra No. 3–4, 2015, p. 96.

[34] P. Czarnecki, *Odpowiednie…*, p. 16.

[35] K. Dudka, *Odpowiedzialność dyscyplinarna oraz zakres stosowania przepisów k.p.k. w postępowaniu dyscyplinarnym wobec nauczycieli akademickich,* Studia Iuridica Lublinensia No. 9, 2007, p. 14; also see, M. Hauser, *Przepisy odsyłające. Zagadnienia ogólne,* Przegląd Legislacyjny No. 4, 2003, pp. 88–89.

[36] J. Wróblewski, *Przepisy odsyłające,* ZNUŁ Nauki Humanistyczne, Seria I No. 35, 1964, p. 9.

phrase 'application by analogy' is not unambiguous".[37] That is why, it also seems erroneous to look for a general essence of the formula without referring to particular consequences of it being in force.

From this perspective, the construct of application by analogy may result in normative consequences that may be classified in one of three groups. "The first group contains cases where the legal provisions referred to are to be applied and, in fact, often are applied to another scope of reference without any changes. (…) The second group contains those cases where the provisions referred to that are to be applied by analogy are used with some changes. (…) The third group contains all the legal provisions that cannot and are not applied to another scope of reference at all because of their irrelevance or their absolute conflict with the provisions enacted for the relations to which they were to be applied by analogy (…)".[38] At the same time, the group seems to be enlarged by cases in which a norm applied by analogy is in conflict with superior norms, including especially those shaping the rules of the legislator's interference into the sphere of human rights and freedoms, or flagrantly in conflict with the values of its "secondary" normative environment.

It is necessary to draw attention to the fact that sometimes it is also stated that "(…) the nature of legal norms decides on inadmissibility of their application. This especially concerns those provisions that interfere into human rights and freedoms, for example, the provisions concerning a search or interception of correspondence as well as the provisions regulating the use of coercive measures. Their application would undoubtedly be an infringement of an appropriate proportion".[39] However, it seems that the point in the described case is not the nature of the norm but its conflict with the norms of higher rank, especially the principle of proportionality. That is why, the above-presented extension of justification for non-application of particular norms does not seem to be necessary.

Although the above-presented approach to the application by analogy is very general, it clearly emphasises that "(…) the application of the provisions referring to other regulations by analogy concerns not only the stage of the application of the legal norm of the basic provision but also the preceding stage of constructing that legal norm".[40] Despite that, the doctrine has not yet worked out the rules of reconstructing the norm applied by analogy. Frankly, one can find two conceptions of pragmatic exegesis of this type of constructs but their shape seems to be insufficient. The model of interpretation worked out by M. Hauser[41] seems to be too general and not formulating the rules of obtaining

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[37] J. Nowacki, *„Odpowiednie" stosowanie przepisów prawa*, Państwo i Prawo No. 3, 1964, pp. 370–371.

[38] *Ibid*.

[39] K. Dudka, *Odpowiedzialność…*, p. 15.

[40] M. Hauser, *Odesłania w postępowaniu przed Trybunałem Konstytucyjnym*, Warsaw 2008, p. 67.

[41] The author distinguishes seven stages of interpreting the provisions referring to application of other regulations by analogy, i.e.: "(1) identification of a provision referring to other regulations with the reservation of application by analogy; (2) assessment of the state of regulation of the examined relations in accordance with the legal provisions regulating them and assessment to what extent there are no regulations for given cases; (3) establishment of the scope of reference made and the scope of what is referred to; (4) identification of a provision (or provisions) of reference; (5) assessment of the usefulness of the provision of reference for the examined relations and whether and to what extent it is necessary to make some changes in the

the norm applied by analogy. On the other hand, P. Czarnecki's conception assuming the existence of two specific directives on the interpretation of provisions referring to other regulations,[42] although very interesting, is too fragmentary because it does not present the relations between the directives and general conceptions of law interpretation[43] or particular stages of interpretation proceedings.[44] Also looking for a clear and coherent conception of the exegesis of the discussed legislative construct is to no avail.[45]

That is why, in the face of the indicated lack of uniformity, in this article, I adopt my own new conception of interpreting the provisions referring to other regulations by analogy. At the same time, I assume that there are two stages of this interpretation; the first one constitutes the interpretation of the provision referring to another regulation, the second one is a direct reconstruction of the norm applied by analogy. Building this pattern of the exegesis based on the assumption of the derivative conception of interpretation, I recognise that the first stage, putting it in a simplified way, aims to interpret the norm of the structure: in case Y, an interpreter is obliged to apply/apply by analogy norm N within the scope of X, where X and Y are substitutes. At the same time, I admit that, although it is necessary to consider the rules of interpreting such a norm, due to the limited scope of this article, it must be omitted. However, I highlight that, in connection with the disciplinary proceedings against a legal counsel, inter alia, the terms of the accused and suspected remain substitutes. On the other hand, the second stage assumes interpretation of the norm coded in the provision referred to and, successively, application of substitutes and interpretation *sensu stricto*, i.e. the use of the directives on linguistic, functional and systemic interpretation.

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provision referred to; checking whether the possibly modified and "adjusted" provision really matches the examined relations; (6) reconstruction of the legal norm regulating the considered cases taking into account the basic provisions regulating those relations and the provisions of reference, possibly appropriately modified; and finally (7) application of the norm established this way". (M. Hauser, *Odesłania…*, pp. 75–76).

[42] The author indicates that the interpretation of the discussed structure is subject to two directives: the directive on optimum adaptation and the directive on firmness. The first one "(…) prescribes taking maximum account of the specificity of the legal act containing the provision referred to and, at the same time, taking into consideration the functions of the provisions that should be applied by analogy. The second one, on the other hand, (…) is subsidiary (auxiliary) in nature because it is applicable only when the results of the use of the directive on optimum application are hard to approve of. The directive prescribes application of provisions directly in case of doubts". (P. Czarnecki, *Odpowiednie…*, pp. 20–21).

[43] This concerns, inter alia, the issues whether the idea is based on the derivative conception of interpretation and the principle of *omnia sunt interpretanda*, or there are different bases.

[44] This concerns, inter alia, the issue of relations between the above-mentioned directives and the stages of linguistic, functional and systemic interpretation, i.e. whether the indicated directives exclude their application or only supplement them, and if so, what their sequence is.

[45] See, inter alia, the Supreme Court ruling of 21 April 2017, VI KS 1/17, LEX No. 2281284; the Supreme Court judgement of 25 July 2013, SDI 12/13, LEX No. 1363207, in which the Supreme Court totally ignored the issue of adopted directives on the interpretation of the provisions referring to other regulations; and also, the Supreme Court ruling of 15 November 2012, VI KZ 14/12, LEX No. 1228526, and the Supreme Court judgement of 13 January 2017, SDI 42/16, Biul. SN 2017/4/15–16, in which the Supreme Court, based on the similar legal state because of the almost completely different directives on the interpretation of the provisions referring to other regulations, drew diverse conclusions concerning admissibility of resumption of disciplinary proceedings.

4. FORMAL ASPECTS OF A SUSPECTED LEGAL COUNSEL'S DEFENCE

Having in mind the assumptions presented above and willing to create a picture of the formal aspect of a suspected legal counsel's defence, one should consider at least such issues as the right to have a counsel for the defence, the right to have a translator's assistance or the right to claim a refund of costs incurred for the defence. The shape of all these rights, due to the conciseness of ALC, seems to be built based on the provisions of CPC applied by analogy.[46]

From this perspective, the right to choose one's own counsel for the defence remains unquestionable, which results from the provisions of Article 83 CPC applied by analogy. It is hard to look for values or regulations inspiring different conclusions. There are also many strong arguments for this interpretation. Firstly, in Article 42 para. 2 second sentence Constitution, the legislator stipulated an absolute right to choose a defence counsel, which in the context of Article 8 para. 2 Constitution laying down an obligation to possibly broadest co-application of the Polish basic law,[47] undoubtedly builds the appropriateness of the proposed interpretation.[48] And although it is necessary to clearly admit that, determining the scope of the above-mentioned procedural guarantee, the legislator distinctly linked it to criminal liability, one cannot forget that "(…) the constitutional concept of 'criminal liability' is (…) understood autonomously and may concern various forms of liability not only connected with formal administration of a penalty but also repressive measures (…)",[49] which certainly includes measures of legal response to legal counsel's prohibited act subject to disciplinary proceedings. This is the classification of the legislator who, suggesting the application of CPC by analogy and not a civil law or administrative regulation, assumes that the formula subordinated to repressive aims constitutes more appropriate provisions referred to. Moreover, also Article 68 para. 3 ALC, which uses a term a "counsel for the defence" (and not a "representative") and suggests the penal nature of liability, supports such classification. Secondly, it should be taken into account that, in accordance with the assumptions of the legislator's rationality, the axiology of the Constitution seems to be the same as that in force based on statutory regulations. Thus, if in Article 42 para. 2 Constitution the legislator recognises the right to choose a defence counsel as the core of the right to have a counsel for the defence, it seems that other cases of declaring the right to have a defence counsel should also be recognised. Finding this declaration in Article 68 para. 3 ALC, one should assume that at its directive level supplemented by Article 83 CPC applied by analogy, the legislator certainly coded the right to choose a counsel for the defence because, in accordance with its

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46 Compare, W. Kozielewicz, *Odpowiedzialność dyscyplinarna…*, p. 320.

47 Compare, W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2013, p. 22.

48 See, M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warsaw 2017, p. 660 ff; P.K. Skowiński, *Uprawnienia składające się na prawo oskarżonego do obrony*, Rzeszów 2012, p. 19 ff.

49 Compare, the Constitutional Tribunal judgement of 8 January 2008, P 35/06, OTK-A 2008, No. 1, item 1.

axiology, it constitutes the essence of the discussed construct. The Supreme Court also inspires similar conclusions as it admits the participation of a suspected legal counsel's counsel for the defence in disciplinary proceedings.[50]

The lack of a suspected legal counsel's right to have a translator's assistance is also unquestionable.[51] Undoubtedly, the application of Article 72 CPC by analogy, due to a specific form of irrelevance, consists in refusal of its application. The analysis of ALC results in a conclusion that a legal counsel must know the Polish language. Otherwise no one can guarantee appropriate performance of this job. In accordance with Article 6 para. 1 in conjunction with Article 27 para. 1 ALC, the performance of the job of a legal counsel mainly consists in acting before the bodies of the Republic of Poland, which requires the legal counsel's linguistic proficiency. Also Article 22 para. 1(2) Act of 5 July 2002 on providing legal services by foreign lawyers in the Republic of Poland suggests such a requirement[52] as it requires that the foreign lawyers registered by the OIRP (Bar Association) have speaking and writing skills in the Polish language. Therefore, if the situation in which a legal counsel cannot use the Polish language fluently is legally inadmissible, the right to have a translator's assistance as a result of the application of Article 72 CPC by analogy cannot be considered.

The assessment of the right to have a defence counsel appointed within what is called the right of the poor in cases of obligatory representation by a counsel for the defence is not so unambiguous. The arguments derived from the legal system are relative here because the legislator, emphasising the discretion to shape this right in Article 42 para. 2 Constitution,[53] only indicates that one may exercise the right in accordance with the principles specified in statute. Thus, as ALC does not refer to this issue, it is possible to assume that this legislative omission was purposeful and was aimed at depriving a legal counsel of the right to have a counsel for the defence appointed. Indeed, the axiology of the discussed instrument, inspired by the will to ensure the equal arms,[54] loses its strong grounds in the discussed proceedings because in each case the accused is a legal counsel, "(…) i.e. a professional who knows his rights and obligations as well as the consequences of the infringement of procedural duties".[55]

Despite that, however, the unquestionable conclusion that there is a lack of the above right seems to be premature. There may be a different *ratio* for the participation of a defence counsel in proceedings. As R.A. Stefański rightly notes, although he

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[50] Compare, the Supreme Court judgement of 27 March 2008, SDI 3/08, LEX No. 1615356.

[51] It seems that P. Czarnecki argues differently and states that, due to reference to the application of CPC by analogy, the defendant has "(…) all the rights implementing his right to defence in the substantive meaning (the right aimed at annihilating or freeing one from the consequences of accusation) or in the formal one (the right to use assistance of a counsel for the defence)". (P. Czarnecki, *Status obwinionego w postępowaniach dyscyplinarnych w polskim systemie prawnym*, Przegląd Prawa Publicznego No. 4, 2017, p. 88).

[52] Journal of Laws [Dz.U.] 2016, item 1874, as amended.

[53] Compare, P. Wiliński, *Proces karny…*, p. 181.

[54] Compare, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 279; C. Kulesza, *Europejski standard efektywnej obrony z urzędu w orzecznictwie SN*, Państwo i Prawo No. 8, 2007, p. 62; ECtHR judgement of 31.05.2012 in case *Diriöz v. Turkey*, no. 38560/04.

[55] Ł. Chojniak, *Prawo do obrony…*, p. 97.

writes about criminal proceedings *sensu stricto*, "(…) the admissibility of participation of a counsel for the defence results from the following: professionalism – thanks to education and experience, a counsel for the defence defends better; a mental attitude – the defence counsel is involved in the defence of his legal interest, which enables him to choose appropriate defence tactics; the ability to act *in lieu of* others – the accused cannot always perform all procedural activities within the defence; psychical assistance – the counsel for the defence is a person trusted by the accused, who can have an impact on awakening activity in one's own defence".[56] Thus, the protection of equal arms requires not only professionalism of the parties to proceedings but also assumes the maintenance of an appropriate intellectual and mental relation. As a result, just the fact of ensuring adequate level of professional protection of the accused, connected with a professional's participation in proceedings, does not match all the elements of the grounds for the participation of a defence counsel in disciplinary proceedings and makes the issue of the right to have a counsel for the defence appointed open to discussion.

The construct of the right of the poor, resulting from Article 78 §1 CPC, in particular remains in this controversial scope. Assuming that the provision lays down a norm that, with a certain simplification, obliges given bodies to appoint a counsel for the defence in a situation when the accused has not chosen a defence counsel and demands that one is appointed because he cannot cover the cost of defence without harm to his and his family's livelihood, one needs to conduct a further interpretational analysis. Substituting "suspected" for "accused", we get the statement: "If the suspected who has not chosen a counsel for the defence demands that one should be appointed and properly proves that he cannot incur defence costs without harm to his and his family's livelihood, the competent bodies shall appoint a counsel for the defence". However, I have to point out that the interpretation of the construct should also cover the term "the competent bodies", which is omitted due to the limited scope of the article.

The linguistic interpretation of the above statement, explaining inter alia the scope of the phrases "without harm to his and his family's livelihood" or "chosen defence counsel", has no impact on the resolution of the analysed subject matter. The interpretation based on the legal system also seems not to change the adopted construct because there are no regulations in conflict with or opposite to the above formula. On the other hand, the functional interpretation emphasises a certain collision of values existing between the postulation concerning the speed of proceedings perceived as a condition for disciplinary proceeding reality and the axiological basis of the construct of the right to defence. Indeed, it may seem that the participation of an appointed counsel for the defence will only lengthen proceedings, which in the face of short periods of limitation will exclude the suspected legal counsel's liability. Nevertheless, this contradiction shocks with its seeming appearance. The participation in disciplinary proceedings of a professional, who is not emotionally involved directly, may only speed up the proceedings. Limiting the signs of excessive procedural activity, he will contribute to coherent

[56] R.A. Stefański, *Obrona obowiązkowa…*, p. 113 with the literature referred to therein.

and real presentation of the defendant's stand to a disciplinary court. Concurrently, the principles of professional ethics binding the defence counsel, forcing the maintenance of appropriate loyalty to procedural bodies, exclude his activity aimed at prolonging the proceedings. At the same time, the fact that the defence counsel substitutes for the defendant and excludes the necessity of the defendant's direct participation in the whole proceedings undoubtedly ensures appropriate protection of his interests and eliminates the effectiveness of a potential plea of breach of the right to defence. A professional's participation in the disciplinary proceedings also forces the clear formulation of grounds for an appeal; Article 427 §2 CPC applicable by analogy requires that professional entities articulate them. As a result, also the second instance proceedings are accelerated. All these conclusions illustrate the seeming appearance of the potential conflict of values.

In the face of the above arguments, admissibility of the suspected legal counsel's use of the benefits of the right of the poor should not raise doubts. Even if someone does not share the assumption of seeming appearance of the above-mentioned axiological conflict, it is necessary to notice that the legislator, taking a decision on the right to have an appointed defence counsel, encountered the same controversy. Thus, if the decision is in favour of the right to defence, acting in accordance with the assumption of the legislator's rationality, one should recognise that the legislator decided the same in case of the right to have an appointed counsel for the defence. Indeed, the legislator cannot create the shape of procedural standards depending on whether the defendant can afford to hire a counsel for the defence or does not have sufficient financial resources to do that.

The right to have an appointed counsel for the defence looks equally seeming in case of the obligatory participation of a defence counsel in proceedings. The discussed right, having grounds in Article 81 §1 in conjunction with Article 79 §1 CPC applied by analogy, is based on the same axiology as in case of the right of the poor. There are also other arguments for this interpretation. Indeed, one cannot forget that the construct of obligatory participation of a defence counsel "(…) is not established only in the interest of the accused but also in the interest of the administration of justice because it is in the interest of society to enable the accused to perform the role of the party defending against charges".[57] Thus, this social interest determines the protection of equal arms in a situation when a legal counsel is deaf, dumb, blind or insane at the moment of committing an act or the pronouncement of judgement. It is hard to speak about keeping any standards of the right to defence in situations when the suspected legal counsel, due to his physical or mental impairment, would not have real possibilities of exercising his procedural rights. There is no doubt that it would be absurd to ask questions to a deaf or dumb defendant and expect him to answer them. Thus, *argumentum ad absurdum* is also for the presented interpretation. At the same time, it should be indicated that the functioning of obligatory participation of a defence counsel in disciplinary proceedings against a legal counsel also seems to be connected with the need to establish guarantees for keeping the standard of the defendant's right

[57] R.A. Stefański, *Obrona obowiązkowa…*, p. 125.

to a fair trial. As the Constitutional Tribunal indicates, "(…) the implementation of the constitutional right to a fair trial, especially in its subjective aspect, is possible only when a court does not act arbitrarily and the parties to proceedings are not treated as objects".[58] Moreover, the construct of obligatory participation of a defence counsel interpreted as an obligation to have a defence counsel even against the will of the accused also suggests the above-presented conclusion.[59] If a defendant is obliged to have a defence counsel, the role of the proceeding bodies is to ensure its implementation. And the formula of appointing a counsel for the defence *ex officio* is the only form that can constitute a real mechanism of coercion to implement it. While one can raise a series of additional arguments or outline a full process of interpreting appropriate norms applied by analogy, it seems that the above consideration unambiguously indicates a defendant's right to have a counsel for the defence appointed *ex officio*.

The right to claim a refund of incurred defence costs also remains an indispensable element of the formal aspect of defence. As the Constitutional Tribunal noticed, "The right to defence is infringed when exercising it, even to the smallest extent of a single counsel for the defence, must be subject to economic calculation".[60] As far as this is concerned, however, it seems that the regulation of CPC applied by analogy will not be applicable because Article 70^6 ALC regulates the issue autonomously. As a result, the obligation to apply CPC by analogy expressed in Article 74^1 ALC will not be updated in the face of the lack of grounds for classifying the issue as "not regulated". However, it should be indicated that, in accordance with ALC, in case of acquittal, the defendant is only entitled to a lump sum as a refund of costs.

5. CONCLUSIONS

The presented considerations, illustrating the construct of the formal aspect of the suspected legal counsel's defence, emphasise the controversy over a series of issues. Despite that, there is no doubt that the application of CPC by analogy results in the occurrence of formulas providing a suspected legal counsel with rights, inter alia, to use the assistance of a counsel for the defence (either chosen or appointed *ex officio*) or to claim a refund of defence costs in the form of a lump sum. This way, the constitutional standard of the right to defence seems to be met. Indeed, the present regulation undoubtedly ensures appropriate maintenance of equal arms for all the parties to proceedings.

Nevertheless, somehow regardless of the above-mentioned relatively favourable assessment, it is hard to approve of the present shape of ALC. Placing a series of detailed issues of the right to defence in an imprecise mechanism of application by analogy, the legislator considerably limited the certainty of their application.

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[58] The Constitutional Tribunal judgement of 16 January 2006, SK 30/05, OTK-A 2006, No. 1, item 2.

[59] Compare, R.A. Stefański, *Obrona obowiązkowa…*, p. 123.

[60] The Constitutional Tribunal judgement of 26 June 2006, SK 21/04, OTK-A 2006, No. 7, item 88.

A complicated process of interpretation, requiring that a series of evaluative arguments should be taken into account, or the lack of uniform rules of interpreting the structure of reference may *in concreto* inspire the proceeding bodies to draw conclusions different from those indicated in the present article. That is why, approving of the fact that there are no grounds for the creation of a separate complex procedure regulation, one should assume that it is right to postulate *de lege ferenda* that the legislator clearly determine the basic procedural guarantees binding in disciplinary proceedings against a legal counsel. It can take the form of separate provisions, such as e.g. "A defendant has the right to use assistance of a counsel for the defence appointed *ex officio*", as well as consist in re-edition of the existing formulas. The interpretational doubts would be solved even thanks to such a simple step as an indication in Article 74[1] ALC that "the provisions of CPC, especially Articles 78 to 81 CPC, are applied by analogy" or, in case of the lack of the right to have an appointed counsel for the defence, an indication that "the provisions of CPC, except for Articles 78 to 81 CPC, are applied by analogy". At the same time, it seems right to postulate that the legislator, willing to amend the signalled legislative defects, should possibly avoid describing the fragments of reference with the use of classification terms, including those referring to a specific system of a legal act.[61] However, it seems that the use of such a legislative measure will still leave too broad decision-making freedom, undoubtedly hampering the appropriate exegesis of the complicated structure of provisions referring to other regulations.

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[61] Differently in K. Dudka, *Stosowanie przepisów kodeksu postępowania karnego w postępowaniach dyscyplinarnych uregulowanych w prawie o adwokaturze oraz ustawie o radcach prawnych,* Prawo w Działaniu No. 18, 2014, p. 59.

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FORMAL DEFENCE IN DISCIPLINARY PROCEEDINGS AGAINST LEGAL COUNSELS

Summary

The article discusses formal aspects of a suspected legal counsel's right to defence and pinpoints the great vagueness of this issue. That is why, the author begins his discussion with the analysis of the essence of formal aspects of the right to defence and accepted rules of interpretation of provisions referring to other regulations. Next, using theoretical instruments created earlier, the author describes a suspected legal counsel's basic rights, in particular, the right to have his own counsel for the defence, a translator's assistance, and the right to claim a refund of incurred costs of defence. As a result, the author proves that current regulations, although they meet the requirements of the Constitution, should be changed. In his opinion, describing the substantial elements of the basic procedural guarantees with the use of the phrase "should be applied by analogy" makes those guarantees doubtful.

Keywords: right to defence, disciplinary proceedings

OBRONA FORMALNA W POSTĘPOWANIU DYSCYPLINARNYM RADCÓW PRAWNYCH

Streszczenie

Niniejsza praca – poddając analizie formalne oblicze obrony obwinionego radcy prawnego – dostrzega szeroką niedookreśloność przedmiotowego zagadnienia. Z tego powodu zawarte w niej rozważania rozpoczyna przedstawienie istoty formalnego aspektu obrony oraz przyjętych zasad wykładni przepisów odsyłających. Korzystając z wytworzonych w ten sposób instrumentów teoretycznoprawnych, autor obejmuje dalszą refleksją kwestie uprawnień obwinionego do pomocy obrońcy, tłumacza czy żądania zwrotu kosztów obrony. Poczynione z tej perspektywy przemyślenia prowadzą go zaś do przekonania, iż – mimo zachowania przez obecną regulację wymogów konstytucyjnych – konieczne są określone zmiany legislacyjne. Zdaniem autora pozostawienie istotnych zagadnień kształtu podstawowych gwarancji procesowych nieostrej formule odpowiedniego stosowania wzbudza uzasadnione wątpliwości.

Słowa kluczowe: prawo do obrony, postępowanie dyscyplinarne

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PARTICIPATION OF THE MILITARY POLICE IN FISCAL PENAL PROCEEDINGS

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1. MILITARY POLICE TASKS AND *RATIONE MATERIAE* JURISDICTION

The Military Police, apart from the Border Guard, the Police, the Internal Security Agency and the Central Anticorruption Bureau (Article 53 §38 and Article 118 §1(4) to (6) and §2 Fiscal Penal Code[1]), are a non-financial preparatory proceeding body.

The Military Police constitute a selected and specialised service that is part of the Armed Forces of the Republic of Poland. Their position in the state system was defined this way in Article 1 para. 1 Act of 24 August 2001 on the Military Police and military order bodies[2] and in Article 3 para. 7 Act of 21 November 1967 on general obligation to defend the Republic of Poland[3].

The scope of the Military Police tasks was determined in the Act on the Military Police. They consist in (1) ensuring compliance with the military discipline; (2) protecting public order in the areas and facilities of military units and in public places; (3) protecting human life and health and military property against attempts to infringe those interests; (3a) conducting antiterrorist operations in accordance with the Act of 10 June 2016 on antiterrorist operations[4] in areas or in facilities belonging to organisational units of the Ministry of National Defence or supervised or administered by those organisational units; (4) detecting offences and misdemeanours, including fiscal ones, committed by persons referred to in Article 3

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1 Act of 10 September 1999: Fiscal Penal Code, uniform text, Journal of Laws [Dz.U.] of 2017, item 2226; hereinafter also: FPC.

2 Uniform text, Journal of Laws [Dz.U.] of 2016, item 1483, as amended; hereinafter: Act on the Military Police.

3 Uniform text, Journal of Laws [Dz.U.] of 2017, items 1430 and 2217.

4 Journal of Laws [Dz.U.] of 2016, items 904 and 1948.

para. 2, revealing and prosecuting perpetrators of them, revealing and protecting evidence of those offences and misdemeanours; (4a) carrying out analyses of professional soldiers' property declarations and providing the Minister of National Defence with conclusions concerning those issues; (5) preventing the commission of offences and misdemeanours by persons referred to in Article 3 para. 2 and other pathological phenomena, especially alcoholism and drug addiction in the Armed Forces; (6) cooperating with the Polish and foreign bodies and services responsible for security and public order and military police forces; (7) combating natural disasters, extraordinary threats to the environment and eliminating their consequences as well as active participation in search, rescue and humanitarian operations aimed at protecting life, health and property; (8) performing other tasks determined in other provisions (Article 4 para. 1 Act on the Military Police).

According to the doctrine, the Military Police tasks may be classified as three basic groups:

1) Investigative activities: (a) conducting criminal proceedings within the scope of and in accordance with the binding provisions of the Criminal Code,[5] the Criminal Procedure Code[6] and the Fiscal Penal Code; (b) conducting explanatory proceedings in cases of misdemeanours, including fiscal ones;
2) Surveillance operations: (a) detection of offences and misdemeanours, including fiscal ones, as well as their perpetrators and evidence of those offences and misdemeanours; (b) conducting searches for people, objects and classified documents;
3) Crime scene examination: (a) protecting venues and events; (b) protecting crime scenes and evidence of the commission of offences and misdemeanours, including fiscal ones, in order to use it in proceedings; (c) supervising the protection of military property, especially armament and weapons storage.[7]

The Military Police *ratione materiae* jurisdiction was established, unlike in case of other non-financial preparatory proceeding bodies, following the criterion concerning a perpetrator and not the type of committed act. The Military Police conduct preparatory proceedings in cases of fiscal offences and misdemeanours that are subject to military courts' jurisdiction, committed by persons referred to in Article 53 §36 FPC, i.e. by soldiers defined as persons actively serving in the armed forces, except homeland territorial defence service dispatched on demand and soldiers and civilian personnel of foreign armed forces staying in the territory of the Republic of Poland, provided their fiscal offences and misdemeanours are connected with the performance of their professional duties (Article 134 §1(4) FPC in conjunction with Article 53 §36 FPC).

It should be mentioned that the range of people who are under the Military Police jurisdiction in cases of fiscal offences and misdemeanours laid down in Act

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[5] Act of 6 June 1997: Criminal Code, uniform text, Journal of Laws [Dz.U.] of 2017, item 2204; hereinafter: CC.

[6] Act of 6 June 1997: Criminal Procedure Code, uniform text, Journal of Laws [Dz.U.] of 2017, item 1904; hereinafter: CPC.

[7] B. Pacek, *Żandarmeria Wojskowa*, Toruń 2016, p. 94; M. Rozmus (ed.), *Żandarmeria Wojskowa: informator*, Legionowo 2014, pp. 18, 23 and 31.

on the Military Police is much broader than that determined in Article 53 §36 FPC. Article 3 para. 2 Act on the Military Police stipulates that the Military Police have jurisdiction over: (1) soldiers actively serving in the armed forces; (2) soldiers who are not active but wear a uniform and military badges; (3) employees of military units; (4) people staying in the military units' areas and facilities; (5) people other than those referred to in subparas. (1) to (4) who are subject to military courts' adjudication or if other provisions stipulate so; (6) people who are not soldiers if they cooperate with people referred to in subparas. (1) to (5) in the commission of a prohibited act carrying a penalty or if they commit acts posing threat to military discipline or acts against life or health of a soldier or military property; (7) soldiers and civilian personnel of foreign armed forces staying in the territory of the Republic of Poland in connection with the performance of their professional duties, unless an international agreement to which the Republic of Poland is a party stipulates otherwise.

According to such a formulation of jurisdiction, in case a person referred to in Article 4 para. 1(4) and defined in Article 3 para. 2 Act on the Military Police commits whatever offence or misdemeanour, the Military Police are entitled to conduct proceedings, which excludes not only the jurisdiction of financial but also other non-financial preparatory proceeding bodies, regardless of the fact which body has revealed the commission of a given criminal act. As a result, any body detecting a punishable fiscal act committed by a person referred to in Article 53 §36 FPC should immediately refer the case to the Military Police.[8] T. Razowski draws attention to the fact that the exclusive jurisdiction of the Military Police in the discussed category of cases also results in admissibility of referring a case to the Military Police in a situation when another body (financial or non-financial preparatory proceeding one) just suspects a perpetrator but the suspicions are not sufficient to present charges. The author points out that in such a case, it should be remembered that too premature reference of a case may harm the dynamics of proceedings because the final determination that a perpetrator does not match the features laid down in Article 53 §36 FPC will cause the loss of the Military Police entitlements to conduct the case and an unavoidable necessity to refer it to another competent body.[9] In H. Skwarczyński's opinion, an interrogation of a person referred to in Article 53 §36 FPC by a body other than the Military Police or a prosecutor for military matters should be exceptionally admissible before the decision to present charges, provided that there are conditions for developing such a decision in accordance with Article 308 §2 CPC in conjunction with Article 312(1) CPC in conjunction with Article 113 §1 FPC. Admissibility of that step, although it concerns an entity that is under a military court's jurisdiction, results from the nature of the

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[8] M. Kołdys, *Rola i zadania niefinansowych organów postępowania przygotowawczego*, Prokuratura i Prawo 2017, No. 3, p. 113. Thus also: H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej w postępowaniu karnym skarbowym*, Wojskowy Przegląd Prawniczy No. 3–4, 2001, p. 34, and T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz*, Warsaw 2017, p. 1203.

[9] T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy...*, p. 1203; H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej...*, p. 35.

case requiring immediate response. In such a situation, a prosecutor for military matters should issue a decision to present charges within five days or, refusing to do so, discontinue proceedings against the person interrogated (Article 308 §3 CPC in conjunction with Article 657 §4 CPC in conjunction with Article 113 §1 FPC).[10]

2. MILITARY POLICE ENTITLEMENTS IN CASES OF FISCAL OFFENCES AND MISDEMEANOURS COMMITTED BY SOLDIERS

The Military Police entitlements in cases concerning soldiers are limited in nature because of the fact that the financial preparatory proceeding bodies specialise in fiscal offence and misdemeanour preparatory proceedings. The fact that the Military Police must notify a prosecutor for military matters, who has exclusive rights to file an indictment to a military court, about the initiation of preparatory proceedings (Article 134 §3 FPC), regardless of the category of a prohibited act (Article 121 §3 FPC), is an example of that limitation. A prosecutor for military matters has been granted the status of a public prosecutor in proceedings concerning fiscal offences and misdemeanours before a garrison military court or in cases concerning fiscal offences before a district military court. The analysis of Article 121 §3 FPC results in a conclusion that the development, filing and support of an indictment before a garrison or district military court is an exclusive prerogative of a prosecutor for military matters. Due to the fact that the discussed proceedings are conducted in a standard mode (Article 646 CPC in conjunction with Article 113 §1 FPC), the Military Police do not have the right to develop such an indictment. On the other hand, the Military Police conducting an investigation can develop an indictment in a fiscal misdemeanour case (Article 325a §1 CPC in conjunction with Article 312(1) CPC in conjunction with Article 113 §1 FPC); however, a prosecutor for military matters must approve of that indictment and file it to a military court (Article 331 §1 CPC in conjunction with Article 657 §4 CPC in conjunction with Article 113 §1 FPC). As a result, the Military Police cannot be a party before a court or appeal, while the Police and the Border Guard have been granted such rights in case of fiscal misdemeanours (Article 121 §2 FPC in conjunction with Article 134 §1(1) and (2) FPC).[11]

On the other hand, the Military Police are privileged in case of a jurisdiction dispute between them and financial preparatory proceeding bodies. Then, the Military Police conduct preparatory proceedings and the whole case should be referred to them because of the *ratione materiae* jurisdiction (Article 135 §3 FPC).[12]

It is worth mentioning that common courts or military courts adjudicate in cases of fiscal offences and misdemeanours. The regulation is laid down in Article 115 FPC and assumes separation of jurisdiction between common courts and military

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[10] H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej*..., p. 35.

[11] *Ibid*., p. 39.

[12] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz*, Warsaw 2014, p. 781.

courts. The latter adjudicate in cases concerning fiscal offences and misdemeanours committed by people referred to in Article 53 §36: (1) during or in connection with the performance of professional duties within the area of a military facility or the place of residence, for the detriment of the armed forces or with the infringement of an obligation resulting from their military service; (2) abroad, during the use or stay of the Armed Forces of the Republic of Poland abroad, in accordance with the Act of 17 December 1998 on the rules of use and stay of the Armed Forces of the Republic of Poland abroad[13] (Article 115 §1a FPC). A garrison military court is the first instance court in cases of fiscal offences and misdemeanours (Article 115 §3(1) FPC and Article 116 §1 FPC). On the other hand, in cases of fiscal offences committed by soldiers holding the rank of a major or higher, a district military court has jurisdiction (Article 115 §3(2) FPC in conjunction with Article 654 §1 CPC).[14] Thus, a garrison military court adjudicates misdemeanour cases, regardless of a perpetrator's rank (*argumentum ex* Article 115 §3(2) FPC *a contrario* in conjunction with Article 115 §3(1) FPC). A military court maintains its jurisdiction over a soldier who has finished military service (Article 116 §1 sentence 3 FPC).[15]

The provisions of the Fiscal Penal Code pay much attention to the issue of fiscal misdemeanours committed by soldiers. The linguistic interpretation of Article 116 §1 sentence 1 FPC suggests that criminal liability of persons referred to in Article 53 §36 FPC and their disciplinary liability for the same act may overlap. It is emphasised in literature that proceedings in such cases may be conducted one after another and are not an obstacle to one another. It reflects the principle of independence of criminal liability for fiscal misdemeanours from disciplinary liability.[16]

As J. Zagrodnik rightly states, in Article 116 §1 FPC, the legislator in general does not eliminate mutual influence, *sui generis* interaction between proceedings concerning criminal liability for a fiscal misdemeanour and disciplinary liability proceedings. In the author's opinion, the provisions of Article 116 §1 sentence 1 FPC support this stand because they constitute an obligation of immediate notification of a prosecutor for military matters or a garrison military court about the results of the disciplinary proceedings and disciplinary penalties imposed. The same can be said about the regulation under §4, which makes it possible to abandon criminal prosecution in case of a fiscal misdemeanour and refer to a competent superior to impose a penalty laid down in military disciplinary regulations if, in the opinion of a garrison military court, and before a prosecutor for military matters files an indictment, it is sufficient response to a fiscal misdemeanour.[17] As H. Skwarczyński

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[13] Uniform text, Journal of Laws [Dz.U.] of 2014, item 1510.

[14] T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy*..., pp. 1076–1077; T. Grzegorczyk, *Kodeks karny skarbowy. Komentarz*, Warsaw 2009, p. 486.

[15] H. Skwarczyński, *Problematyka postępowania w sprawach o wykroczenia i wykroczenia skarbowe popełniane przez żołnierzy*, Wojskowy Przegląd Prawniczy No. 3, 2002, p. 131.

[16] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz*, Warsaw 2016, p. 589; T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy*..., p. 1079; Z. Gostyński, *Komentarz do kodeksu karnego skarbowego*, Warsaw 2000, p. 32; H. Skwarczyński, *Problematyka postępowania w sprawach*..., p. 131.

[17] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy*…, 2016, p. 589.

emphasises, the Military Police conducting a fiscal investigation can suggest that a prosecutor for military matters could finish the proceedings this way.[18]

The regulation is connected with Article 17 para. 2(3) Act of 9 October 2009 on military discipline,[19] where a soldier's disciplinary liability, inter alia for a fiscal misdemeanour, is referred to, provided that a court or a prosecutor, or another body entitled to adjudicate in those cases, files a motion to a military unit commander or head of a civilian institution to impose a disciplinary penalty.[20]

The Military Police entitlements to conduct a fiscal investigation against a person under the jurisdiction of military courts (Article 53 §36 FPC) are marginalised in a situation when a perpetrator of a prohibited act applies for permission to voluntarily incur liability because then the case must be mandatorily referred to a financial preparatory proceeding body (Article 134 §4 FPC). A perpetrator has the right to apply for such permission, about which he should be informed before the first interrogation. The Fiscal Penal Code imposes an obligation on a financial preparatory proceeding body to provide this information (Article 142 §2 FPC). However, it is assumed in the doctrine[21] that also non-financial preparatory proceeding bodies, including the Military Police, have that duty. Still, it is not necessary to inform a perpetrator about this right in a situation when *in concreto* there are negative conditions for the application of such permission (Article 17 §2(1) and (2) FPC). In case the negotiation phase fails or if a court, although a financial preparatory proceeding body files a motion to give the permission, refuses it and refers the case to a financial preparatory proceeding body (Article 148 §6 FPC), the latter should refer the case back to the Military Police because the former reference of the case in which a perpetrator is a "military" person to a financial preparatory proceeding body has been extraordinary in nature.[22]

Analysing Article 116 §2 FPC, one can notice a similar limitation to the Military Police entitlements in a fiscal penal procedure. The content of this provision suggests that in proceedings concerning a fiscal misdemeanour, a penalty notice application mode is also possible. It can be applied to soldiers actively serving in the armed forces. The Military Police are not a body entitled to impose a fine in the form of a penalty notice. The Regulation of the Council of Ministers of 22 February 2017 amending the Regulation on imposing fines in the form of penalty notices[23] grants such entitlements only to financial preparatory proceeding bodies, i.e. employees of

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18 H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej*..., p. 38.

19 Uniform text, Journal of Laws [Dz.U.] of 2017, item 2024.

20 H. Skwarczyński, *Problematyka postępowania w sprawach*..., pp. 131–132; T. Grzegorczyk, *Kodeks karny skarbowy*..., p. 491.

21 Thus: M.R. Tużnik, *Postępowania szczególne w postępowaniu karnym skarbowym*, Warsaw 2013, p. 270; by this author, *Postępowanie w przedmiocie udzielenia zezwolenia na dobrowolne poddanie się odpowiedzialności w postępowaniu karnym skarbowym*, Ius Novum No. 1, 2012, p. 82; H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej*..., pp. 36–37; by this author, *Uprawnienia Straży Granicznej w postępowaniu o przestępstwa i wykroczenia skarbowe*, Wojskowy Przegląd Prawniczy No. 3, 2003, pp. 101–102; also by this author, *Udział Policji w postępowaniu karnym skarbowym*, Przegląd Policyjny No. 3, 2001, p. 115; I. Zgoliński, *Dobrowolne poddanie się odpowiedzialności w prawie karnym skarbowym*, Warsaw 2011, p. 130.

22 H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej*..., pp. 36–37.

23 Journal of Laws [Dz.U.] of 2017, item 401.

tax offices, employees and officers of the Customs-Revenue Service (Służba Celno-Skarbowa) performing their duties in customs-revenue offices and employees and officers of the Customs-Revenue Service performing the duties of the National Revenue Administration in organisational units of the office of the minister for public finance (§2 Regulation).

I support the opinion that the above-presented legislative solution is erroneous. Granting non-financial preparatory proceeding bodies, including the Military Police, the right to penalise fiscal misdemeanours would make the examination of cases in a penalty notice proceeding mode faster and more economical.

I propose *de lege ferenda* to introduce a provision granting the Military Police, the Police and the Border Guard such rights. An alternative solution would be to adopt the following wording of Article 136 §1 FPC: "A financial preparatory proceeding body or its authorised representative as well as a non-financial preparatory proceeding body shall conduct penalty notice proceedings; the former initiation of preparatory proceedings shall not constitute an obstacle thereto". Thus, the amendment to the provisions would consist in the repeal of the phrase "when a special provision stipulates so".[24]

Consequently, in a situation when a perpetrator of a fiscal misdemeanour turns out to be a soldier actively serving in the armed forces and the case qualifies for the penalty notice mode, a financial preparatory proceeding body may impose a penal notice (payable in cash or by bank transfer). However, when a soldier refuses to accept a penal notice or fails to pay the fine imposed in this mode, a financial preparatory proceeding body should notify a prosecutor for military matters about the fact that the soldier has committed a fiscal misdemeanour (Article 116 §3 FPC).

In case the Military Police detect a fiscal misdemeanour that can be punished with the application of the penalty notice mode, in H. Skwarczyński's right opinion, a perpetrator should be asked whether he accepts a penalty notice. If his answer is positive, the Military Police should refer the case to a competent financial preparatory proceeding body with a motion to impose a penal notice on the soldier being the perpetrator of a fiscal misdemeanour. Approving of the author's opinion, one cannot agree that the detection of a fiscal misdemeanour by a non-financial preparatory proceeding body should close the path to a fast solution within a penal notice mode and cause the need to conduct the whole proceedings.[25]

The detection of a fiscal misdemeanour committed by a soldier actively serving in the armed forces requires that a prosecutor for military matters should be notified (Article 116 §3 sentence 1 FPC). The situation connected with the application of a penal notice towards a perpetrator is the only exception, unless a perpetrator refuses to accept a penal notice or fails to pay it on time (Article 116 §3 sentence 2 FPC).

A financial preparatory proceeding body may notify a prosecutor for military matters about the commission of a fiscal misdemeanour by a soldier actively serving in the armed forces and also in the case referred to in Article 133 §2 FPC before, having protected the evidence, it refers the case to the Military Police.

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[24] See, M.R. Tużnik, *Postępowania szczególne*..., p. 330.

[25] H. Skwarczyński, *Uprawnienia Żandarmerii Wojskowej*..., p. 37.

The Military Police are also subject to the obligation of notification referred to in Article 116 §3 FPC. Their notification is linked with the issue of a decision on the initiation of an investigation and sending the decision to a prosecutor for military matters (Article 134 §3 FPC). The notification can be made in the form of a separate letter informing a prosecutor for military matters about the detection of a fiscal misdemeanour committed by a soldier actively serving in the armed forces. However, the notification of a prosecutor for military matters in the form of a motion to punish a soldier developed by the Military Police sent to a prosecutor for military matters, who might approve of it and file it to court, is inadmissible.[26]

Proceedings in cases of fiscal misdemeanours committed by persons referred to in Article 53 §36 FPC are carried out following general rules laid down in the Fiscal Penal Code with the exceptions characteristic of military jurisdiction and those laid down in Article 116 §§1 to 4 FPC (Article 116 §5 FPC). As a result, proceedings in the discussed category of cases are subject to the provisions regulating fiscal penal proceedings before common courts with the exception of differences laid down in statute for cases under the jurisdiction of military courts, of which, first of all, in cases of fiscal misdemeanours, those that result from the content of Article 116 §§1 to 5 FPC should be taken into account and next those differences that are contained in the further part of the Fiscal Penal Code (Article 121 §3, Article 134 §1(4) and §3 and Article 135 §3 FPC).[27]

3. PROSECUTOR FOR MILITARY MATTERS' SUPERVISION OF PREPARATORY PROCEEDINGS CONDUCTED BY THE MILITARY POLICE IN CASES CONCERNING FISCAL OFFENCES AND MISDEMEANOURS

A prosecutor for military matters is a body superior to the Military Police in cases concerning fiscal offences and misdemeanours (Article 53 §39a FPC).

According to M. Kołdys, the supervision of fiscal penal proceedings undertaken by a prosecutor for military matters, who is superior to the Military Police, can be also inferred from other provisions of the Criminal Procedure Code and the Fiscal Penal Code, in particular Article 326 CPC and Article 113 §1 FPC. The former deals with a prosecutor's supervision of preparatory proceedings conducted by a procedural body in connection with criminal cases, and the latter concerns the application of the provisions of the Criminal Procedure Code by analogy in the course of an investigation or inquiry in cases of fiscal offences or misdemeanours. As far as this is concerned, only terminology is changed. The Criminal Procedure Code determines a prosecutor's supervision of preparatory proceedings and the Fiscal Penal Code uses a phrase: a body superior to a preparatory proceeding body. In addition, it should be emphasised that, as far as a prosecutor for military matters

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[26] *Ibid*., pp. 37–38.

[27] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy…*, 2016, p. 594; P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy...*, p. 1080.

is concerned, the legal grounds for the supervision of activities performed by the Military Police are found in Article 657 §4 CPC. The provision defines the concept of a military prosecutor as "a prosecutor of a common organisational unit of the prosecution office who performs activities in an organisational unit for military matters".

The analysis of the two codes draws attention to some other differences consisting in the fact that the Fiscal Penal Code uses a term "a prosecutor for military matters" (Article 53 §39a FPC) and the Criminal Procedure Code "a military prosecutor" (Article 657 §4 CPC). The terminology adopted in FPC and CPC concerns, in fact, a prosecutor for military matters' formal supervision of the procedural activities performed. As a body superior to a non-financial preparatory proceeding one, a prosecutor for military matters has a series of rights resulting directly from the FPC provisions. He can authorise a non-financial preparatory proceeding body to conduct preparatory proceedings or order the performance of specified, indicated procedural activities (Article 151b §2 FPC), as well as reserve the right to perform whatever procedural activity on his own, especially one that requires the issue of a decision, connected with presenting, changing or supplementing charges, claiming ancillary liability and changing the decision on this liability or closing the proceedings (Article 151b §3 FPC). Moreover, a prosecutor for military matters has the right to prolong preparatory proceedings supervised (Article 153 §§1 and 3 FPC) and can overtake preparatory proceedings and conduct them in person (Article 122 §1(2) FPC).[28]

The above facts indicate that by analogy to preparatory proceedings conducted in accordance with the CPC provisions, a prosecutor for military matters has all the entitlements to shape the directions of preparatory proceedings in cases of fiscal offences and misdemeanours by issuing orders, decisions and recommendations, and this way to perform real supervision of them.[29]

A prosecutor for military matters also deals with complaints about decisions issued in proceedings conducted by the Military Police (Article 167 §2 FPC). As J. Zagrodnik rightly notices, the jurisdiction of a prosecutor for military matters and, in cases stipulated in statute, of a military court to deal with complaints about decisions of the Military Police results from the application by analogy, in accordance with the Fiscal Penal Code, of Article 465 §3 CPC in conjunction with Article 646 CPC and Article 113 §1 FPC. As a result of that observation, it can be stated that the provision of Article 167 §2 FPC is a reflection of the statutory *superfluum*.[30]

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[28] M. Kołdys, *Rola i zadania niefinansowych...*, pp. 117–118; T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy...*, p. 608.

[29] M. Kołdys, *Rola i zadania niefinansowych...*, pp. 118–119.

[30] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy…*, 2014, p. 1008.

4. ENTITIES AUTHORISED TO PERFORM PROCEDURAL ACTIVITIES OF THE MILITARY POLICE

The issue of determining an entity performing procedural activities of non-financial preparatory proceeding bodies is closely connected with a prosecutor for military matters' supervision of preparatory proceedings in fiscal penal cases conducted by the Military Police. The wording of Article 118 §3 FPC clearly suggests that those bodies' authorised representatives perform their procedural activities. Approving of M. Kołdys' opinion, I believe that the above-mentioned wording indicates, at the same time, that the delegation to conduct preparatory proceedings is not the *ex lege* entitlement of all officers of the above-mentioned bodies but only those who have been granted special authorisation.[31] J. Zagrodnik presents a different opinion and states that Article 118 §3 FPC concerns a general authorisation to perform activities at the preparatory stage of fiscal penal proceedings resulting from the systemic provisions regulating non-financial preparatory proceeding organs' activities. At the same time, the author does not exclude a possibility of granting special authorisation to conduct preparatory proceedings in a particular case.[32]

The analysis of Article 118 §3 FPC leads to a conclusion that the discussed "authorisation" is a special delegation of authority for a body's particular representative. The Fiscal Penal Code and implementing regulations based on it do not cover the discussed authorisation. That is why, internal regulations and decisions of those bodies are applicable to the form, content and method of granting it.

It should be pointed out that the documents are not published and available to the public. Thus, it seems likely that they should contain, inter alia, an indication of a person entitled to issue/annul the authorisation, formal requirements for an officer/soldier who is to be authorised, the possible scope of the authorisation and its specimen.

In case of the Military Police, the Commander-in-Chief of the Military Police is the body that grants authorisation. On the other hand, in case of the Police, i.e. a much bigger formation than the Military Police, the Chief Commander of the Police is not the body that grants authorisation. The territorial body of the entity or a police officer authorised by it is one; but it is not every police officer.[33] It is hard to imagine a situation in which the Chief Commander of the Police issues personal authorisation for all police officers assigned by their superiors to conduct preparatory proceedings in cases concerning fiscal offences and misdemeanours. Thus, it should be assumed that heads of given organisational units, that is e.g. county, city, voivodeship forces, or in case of the Border Guard, commanders of branches, checkpoints and divisions of the Border Guard issue such authorisation.[34]

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[31] M. Kołdys, *Rola i zadania niefinansowych...*, p. 114.

[32] J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy…*, 2014, p. 595.

[33] See, the Supreme Court resolution of 27 March 2003, I KZP 3/03, OSNKW 2003, No. 3–4, item 29 with a critical gloss by Z. Świda, *Glosa do uchwały SN z dnia 27 marca 2003 r., sygn. I KZP 3/03*, Prokuratura i Prawo No. 10, 2003, p. 101 ff.

[34] M. Kołdys, *Rola i zadania niefinansowych...*, pp. 114–116.

As it has been indicated, in accordance with Article 151 §2 FPC, a prosecutor for military matters may authorise a non-financial preparatory proceeding body to conduct the whole or part of preparatory proceedings or to order the performance of specified, indicated procedural activities. Thus, this is a prosecutor who determines the scope of his authorisation for a given representative of a non-financial body and it is his decision, in fact, that constitutes the grounds for issuing the authorisation decision. At the same time, a prosecutor for military matters' decision determines the temporal scope of the authorisation; it is valid until the conclusion of preparatory proceedings in case it is granted to a non-financial body to conduct them as a whole, or until the indicated investigative activities are completed, e.g. protecting documents or interviewing witnesses, etc.[35]

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[35] *Ibid*., pp. 116–117.

Ustawa z dnia 17 grudnia 1998 r. o zasadach użycia lub pobytu Sił Zbrojnych Rzeczypospolitej Polskiej poza granicami państwa [Act of 17 December 1998 on the rules of use and stay of the Armed Forces of the Republic of Poland abroad], uniform text, Journal of Laws [Dz.U.] of 2014, item 1510.

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PARTICIPATION OF THE MILITARY POLICE IN FISCAL PENAL PROCEEDINGS

Summary

The article is an attempt to explain the participation of the Military Police as a non-financial preparatory proceeding body in fiscal penal proceedings, namely in cases concerning fiscal offences and misdemeanours detected within the scope of their *ratione materiae* jurisdiction. The article pays much attention to the Military Police entitlements in the fiscal penal procedure and the assessment of the scope of those rights in the currently binding legal state. The author also formulates *de lege ferenda* proposals probably constituting suggestions for the legislator to extend the jurisdiction of the Military Police. The article also discusses the issue connected with determining an entity performing procedural activities of the Military Police, i.e. the rights of their authorised representatives. In addition, the analysis covers the issue of a prosecutor for military matters' supervision of preparatory proceedings conducted by the Military Police in cases concerning fiscal offences and misdemeanours.

Keywords: Military Police, prosecutor for military matters, entitlements, soldiers, fiscal offences, fiscal misdemeanours

UDZIAŁ ŻANDARMERII WOJSKOWEJ W POSTĘPOWANIU KARNYM SKARBOWYM

Streszczenie

Niniejszy artykuł stanowi próbę przybliżenia udziału Żandarmerii Wojskowej jako niefinansowego organu postępowania przygotowawczego w postępowaniu karnym skarbowym, a ściślej w sprawach o przestępstwa i wykroczenia skarbowe ujawnione w zakresie jej właściwości rzeczowej. W publikacji sporo uwagi poświecono omówieniu uprawnień Żandarmerii Wojskowej w procesie karnym skarbowym wraz z oceną zakresu tych uprawnień w obecnie obowiązującym stanie prawnym. Sformułowano wnioski *de lege ferenda*, stanowiące być może wskazówkę dla ustawodawcy w kierunku rozszerzenia kompetencji Żandarmerii Wojskowej. Poruszono także zagadnienie związane z określeniem podmiotu wykonującego czynności procesowe Żandarmerii Wojskowej, czyli uprawnień jej upoważnionych przedstawicieli. Ponadto rozważaniami objęto problematykę nadzoru sprawowanego przez prokuratora do spraw wojskowych nad postępowaniem przygotowawczym, prowadzonym przez Żandarmerię Wojskową w sprawach o przestępstwa i wykroczenia skarbowe.

Słowa kluczowe: Żandarmeria Wojskowa, prokurator do spraw wojskowych, uprawnienia, żołnierze, przestępstwa skarbowe, wykroczenia skarbowe

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LEGAL ASPECTS OF PATENTING NANOTECHNOLOGICAL INVENTIONS

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1. INTRODUCTION

Innovations play a special role in the economic development nowadays. They are of key importance for the creation of better workplaces, development of environment-friendly society and the improvement of the quality of life as well as maintaining competitiveness on the global market. The European Commission identified technologies of strategic importance for the future development of the EU and called them Key Enabling Technologies (KETs). The Commission defines KETs as technologies that are "knowledge intensive and associated with high R&D intensity, rapid innovation cycles, high capital expenditure and highly-skilled employment".[1] They enable process, goods and service innovation throughout the economy. KETs are micro- and nano-electronics, advanced materials, industrial biotechnology, photonics, nanotechnology and advanced manufacturing technologies. Nanoscience is currently the most dynamically growing branch of science; it is involved in research into phenomena and manipulation of materials on a nuclear, molecular and macromolecular scale. The objective of nanotechnology is to design, characterise, manufacture and use structures, devices, tools and systems, the features of which can be controlled by means of shape and size on a nanometre scale (< 100 nm = 10^{-7} m).[2] Nanotechnology is commonly considered to be the key technology of the 21st century; its importance results from its interdisciplinary nature. Application of nano-

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "A European strategy for Key Enabling Technologies – A bridge to growth and jobs", COM/2012/341 of 26.06.2012.

[2] T. Dietl, *Nanotechnologie przyszłości*, Prace Komisji Zagrożeń Cywilizacyjnych Vol. 7, 2006, p. 3, http://www.ifpan.edu.pl/SL-2/articles/Dietl_PAU_KOM_ZAGR_06.pdf [accessed on 2/02/2017].

technology is very broad, inter alia, in medicine, IT, production and retention of energy, knowledge of materials based on nanotechnology and research into food, water and natural environment.[3] Since the 1990s, a consistent growth in patent applications connected with nanotechnology has been recorded. The United States has been a leader in the field of patenting nanotechnological solutions. In 2017 the United States Patent and Trademark Office (USPTO) published 20,187 patents in the field of nanotechnology and 4,019 nanotechnological patents.[4] Patent applications concern inventions in many sectors. However, it can be pointed out that the dominating nanotechnological inventions include computer technology and electronics, chemistry, biology, medicine, agriculture, materials, metrology and energy.[5]

The article aims to analyse the most important issues of patenting in the field of nanotechnology with special focus on the presentation of problems connected with matching patent requirements by nanotechnological inventions.

2. LEGAL ASPECTS OF NANOTECHNOLOGY DEVELOPMENT

Nanotechnology is currently a field that records an extremely dynamic development and creates opportunities to solve many civilizational problems. Particular states formulate strategies or programmes of nanotechnology development and increase the related investment. The United States is one of the most advanced countries in the field of regulating nanotechnology. Case law and jurisprudence have been occupied with the issues of patenting nanotechnological solutions for years. The European Union has also specified the objectives of legislation development in the field of nanotechnology. In accordance with Communication from the Commission "Regulatory aspects of nanomaterials", it is necessary to guarantee the community access to innovative nanotechnology applications and ensure the safety and protection of health and the environment.[6] Due to the fact that the field is relatively new, there may also be potential risks posed by nanotechnological products. Many countries' regulatory bodies have already started work aimed at regulating and recognising the exposure to potential risks connected with nanoparticles. Some of them, like France, Belgium or the Netherlands, have already enacted legislation concerning nanomaterials. The current European Union law concerning nanomaterials applies to products, chemicals, the protection of workers and the environment. Special regulations apply to cosmetics, food and bactericides. Non-binding acts in

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[3] O.G. Schmidt et al., *Nanotechnology – Bottom-up meets top-down*, Springer-Verlag Berlin Heidelberg 2002, p. 231, http://bazy.pb.edu.pl:2083/full_record.do?product= WOS&search_mode= GeneralSearch&qid =5&SID=C1SV4bGglKVnrMBepQq&page=1&doc=8 [accessed on 28/06/2018].

[4] *Top Ten Countries in Nanotechnology Patents in 2017*, Statnano.com: http://statnano.com/news/62082 [accessed on 27/06/2018].

[5] P. Ganguli, S. Jabade, *Nanotechnology, intellectual property rights, research, design, and commercialization*, Boca Raton, 2012, p. 15.

[6] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, "Regulatory aspects of nanomaterials", COM/2008/366 of 17.06.2008.

the form of recommendations and communications play an important role in regulating nanotechnology in the European Union. They specify, inter alia, the principles of doing research in nanosciences and nanotechnologies, and provide a definition of nanomaterials, which is important because of the already existing legislation. The European Commission recommends using this definition as a reference for determining whether a given material should be considered a nanomaterial for legislative purposes. It is important for all Member States to use a uniform definition. So far, there has been a big difference in the way states have used the term "nanomaterial" in individual cases in their legislation in order to identify particular substances.[7]

Due to the fact that the achievements of nanotechnology find applications in many fields of life, it is very probable that in the near future it will be necessary to regulate the solutions in this area that are subject to patent protection.

3. NANOTECHNOLOGY: TERMINOLOGY

Nanotechnology covers manufacturing elements of matter and/or forming their morphology on a scale range from 1 to 100 nanometres (nm). The range is conventional and not always applied in practice.[8] The terminology connected with nanotechnology is not uniform, which causes problems with applying for a patent. The definition of a nanomaterial and nanoscale is important in the examination whether an invention meets patent requirements, especially in the patent search. The International Organisation for Standardisation defined a nanomaterial as a material with any external dimension in the nanoscale or having internal structure or surface structure in the nanoscale. The term nanoscale was defined as a length range approximately from 1 nm to 100 nm. The number size distribution of particles makes it possible to take into account the fact that nanomaterials are usually composed of many particles in various sizes in a specific distribution. In case of no determination of the number size distribution of particles it would be difficult to recognise whether given material meets the requirements of the definition in a situation when some particles are smaller than 100 nm and others are not.[9] The Commission Recommendation of 2011 provides a definition of a nanomaterial as a natural, incidental or manufactured material containing particles, in an unbound state or as an aggregate or as an agglomerate and, where, for at least 50% or more of the particles in the number size distribution, one or more external dimensions is in the size range from 1 nm to 100 nm. In specific cases and where warranted by concerns for the environment or health, the number size distribution threshold of 50% may be replaced by a threshold between 1% and 50%. Interpretational problems result

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[7] Commission Recommendation of 18 October 2011 on the definition of nanomaterials, OJ L 275 of 10.10.2011, p. 38.

[8] A. Świderska-Środa, W. Łojkowski, M. Lewandowska, K.J. Kurzydłowski (ed.), *Świat nanocząstek*, PWN 2016, p. 18.

[9] Nanomaterials definition fact sheet, European Environmental Citizens Organisation for Standardisation, November 2014, http://ecostandard.org/wp-content/uploads/Nano_definition.pdf [accessed on 20/07/2016].

from imprecise concepts contained in patent applications, e.g. a nano-agglomerate or a nano-aggregate. In case of the European Union, the concepts were defined in the Commission Recommendation: "agglomerate" means a collection of weakly bound particles or aggregates where the resulting external surface area is similar to the sum of the surface areas of the individual components, and "aggregate" means a particle comprising of strongly bound or fused particles. The lack of a uniform definition makes the patent search difficult, which may cause duplication of solutions and, consequently, may lead to their nullification. Interdisciplinary solutions of nanotechnology may create difficulties in examination of patentability, which may result in granting unjustified protection to inventions. The most important patent offices, such as the European Patent Office or the United States Patent and Trademark Office, train their employees in the field of examining patentability of nanotechnological solutions.[10] At present, all patent offices throughout the world have started to classify nanotechnology in a uniform way within the International Patent Classification (IPC) and the Cooperative Patent Classification (CPC). A new symbol, B82Y, was introduced to IPC on 1 January 2011 to replace the formerly used Y01N.[11] The uniform marking of all nanotechnological solutions will facilitate patent search for solutions invented in the area and also will prevent doubling patents.

4. OBJECT OF PATENT PROTECTION

Patents are the key to the growth of economy based on modern technologies. Own technologies make it possible to develop competitive industry and benefit from licence agreements. At present, the patenting system is subject to assessment and a debate to what extent it really stimulates the development of new technologies. The system should be conducive to innovative entrepreneurs, and protect companies and their innovative solutions against appropriation and use of intangible goods. There is an opinion in literature that intellectual property rights may also have a negative impact on innovativeness; too broad scope of exclusive rights may lead to legal uncertainty as to what constitutes the existing state of patented technological solutions and whether a reported invention will not infringe somebody else's rights.[12] Interdisciplinary nature of nanotechnology and its application in many fields creates a possibility of formulating a broad scope of reservations and, thus, obtaining too broad patent protection. The phenomenon is quite common in case of new technologies when there is no complete knowledge in the given area. It may also cause low technological value of reported inventions and excessively limit competitiveness as well as discourage innovation.

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[10] A. Watal, T.A. Faunce, *Patenting nanotechnology: Exploring the challenges,* WIPO Magazine, 2 April 2011, p. 26, http://www.wipo.int/export/sites/www/ wipo_magazine/en/pdf/2011/ wipo_pub_121 _2011_02.pdf [accessed on 12/01/2017].

[11] European Patent Office, *Nanotechnology*, http://www.epo.org/news-issues/issues/ classification/ nanotechnology.html [accessed on 16/12/2016].

[12] D. Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej*, Wolters Kluwer, Warsaw 2012, p. 137.

A patent is an exclusive civil right that is property-related in nature, granted for an invention by the Patent Office by means of an administrative decision. Obtaining a patent, one is granted an exclusive right to use an invention in order to earn profits or in a professional way in the entire territory of the Republic of Poland. Patent claims contained in a patent description determine the scope of the patent object.[13] Patent claims constitute the main element of a patent application because they determine the scope of the patent monopoly. In accordance with Article 33 para. 3 Industrial Property Law (hereinafter: IPL),[14] the claims should briefly but clearly, by means of providing technical features of a solution, specify a reported invention and determine the scope of demanded patent protection.[15] The European Union patent offices' experience indicates that patent claims concerning nanotechnological inventions are formulated with regard to such a broad scope that they also cover the existing solutions in other fields of technology. The lack of a uniform approach to the nanoscale is also a problem, which causes frequent cases of claims concerning the solutions on a macro scale.[16] The patent protection term lasts 20 years from the day when an invention is reported to the Patent Office of the Republic of Poland. An entity applying for patent protection should take a decision concerning the territorial range of the protection because an invention protection covering only the country of the invention origin may turn out to be insufficient. That is why, it is necessary to take steps in order to obtain patent protection in other states; however, the choice should be based on the invention market potential.

In accordance with Article 24 IPL, an invention is an object of patent protection and patents are granted, regardless of the field of technology, for inventions that are new, involve an inventive step and can be applied industrially. There is no definition of an invention, which inter alia results from the fact that technologies are developing so fast and in such an unpredictable direction that it is not possible to formulate this definition. Therefore, most legal systems determine the requirements for granting invention protection. In case law, it is assumed that an invention is a solution to a problem with the use of nature in order to achieve a reasonably predictable result that is beyond the sphere of human intellectual influence. In the light of Polish law, an invention must be connected with the influence on matter by its new technical application and must result in a physical product of a new structure or composition or a new way of technical influence on matter.[17]

In order to obtain a patent, an invention must meet four basic requirements. It must be technical in nature, new, characterised by an inventive step and industrially

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[13] J. Sieńczyło-Chlabicz, *Prawo własności intelektualnej*, Wolters Kluwer, Warsaw 2018, p. 598.

[14] Act of 30 June 2000: Industrial Property Law, Journal of Laws [Dz.U.] of 2001, No. 49, item 508.

[15] K. Celińska-Grzegorczyk, *Postępowanie patentowe jako szczególne postępowanie administracyjne*, LexisNexis, Warsaw 2009, p. 210.

[16] M.G. Poza, V. Balmaseda, *Examination practice at the OEPM in the field of nanotechnology*, [in:] *Patenting procedures in the field of nanotechnology*, Madrid 27–28 October 2015, http://www.oepm.es/export/sites/oepm/comun/documentos_relacionados/Ponencias/94_00_PatentingProceduresInTheFieldOfNanotechnology.pdf [accessed on 28/06/2018].

[17] Judgement of the Voivodeship Administrative Court in Warsaw of 15 December 2009, VI SA/Wa 719/09, LEX No. 583588; the Supreme Administrative Court judgement of 16 March 2011, II GSK 374/10, Legalis No. 360713.

applicable. The technical requirement is laid down in Article 25 IPL which stipulates that patents are granted to inventions, regardless of the field of technology. This condition raises doubts because it is not defined in IPL in the same way as the conditions for novelty, innovativeness and industrial application. However, in accordance with §32 para. 1(1) Regulation concerning reporting and dealing with reports of inventions and utility designs[18] (hereinafter: RIUD), the Patent Office does not recognise a reported object as an invention if it establishes that it does not concern any physical object that can be used, specified with the use of technical features referring to its construction or composition or the way of technical influence on matter, or a new application of a substance constituting part of the existing patented technologies. Thus, an invention cannot be abstract in nature; it must be within the sphere of technical sciences. The condition of technical features has not been defined in the European Patent Convention (henceforth: EPC),[19] either. However, it results from the statement in Article 52 para. 1 EPC that patents must be granted for any inventions in all technical fields. Article 27 para. 1 Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter: TRIPS)[20] contains a similar formulation. The requirement of a technical nature of a solution also results from the provisions of implementing EPC regulations determining the rules of developing the European patent applications. According to them, a solution is technical in nature when it concerns a field of technique, a technical issue and is characterised by the use of technical means.[21] Examination of the condition of technical features becomes an element of practice in the majority of states that are parties to EPC. This approach is also applicable in the light of IPL, which is confirmed in administrative courts' case law.[22] Having recognised that an invention has a technical nature, the Patent Office examines whether the reported invention meets the three remaining requirements.

5. SCIENTIFIC DISCOVERY VERSUS PATENTING

Sciences such as biotechnology or nanotechnology, which are constantly growing very dynamically, provide great opportunities to find new solutions. This leads to impressive discoveries that have extraordinary importance for mankind or are significant from the point of view of economic development. In case of nanotechnological

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[18] Regulation of the President of the Council of Ministers of 17 September 2001 on reporting and dealing with reports of inventions and utility designs, Journal of Laws [Dz.U.], No. 102, item 1119.

[19] European Patent Convention of 5 October 1973, Poland became a party to the Convention on 1 March 2004, Journal of Laws [Dz.U.], No. 79, items 737 and 738.

[20] Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994, Journal of Laws [Dz.U.] of 1996, No. 32, item 143; Annex to the Agreement of 14 July 1967 Establishing the World Trade Organisation (WTO), Journal of Laws [Dz.U.] of 1975, No. 9, item 49.

[21] U. Promińska, *Prawo własności przemysłowej*, Difin, Warsaw 2005, p. 44.

[22] K. Szczepanowska-Kozłowska, A. Andrzejewski et al., *Własność intelektualna, wybrane zagadnienia praktyczne,* LexisNexis, Warsaw 2013, p. 49.

solutions, special focus must be on scientific discoveries and theories. Based on the Polish Industrial Property Law (Article 28 IPL) as well as in the systems of many states, scientific discoveries are excluded from patent protection. Article 52 para. 1 of the Munich Convention on the Grant of European Patents of 5 October 1973[23] stipulates that European patents are granted for any invention provided that they are new, involve an inventive step and are susceptible of industrial application. In accordance with para. 2 of the Contention, discoveries are not regarded as inventions. The concept of a discovery has not been defined so determining what is one and, thus, is not subject to patenting must be analysed in the context of a particular technology. In literature, there are statements that discoveries are physical phenomena occurring in nature but have not been noticed and proved yet, and inventions are technical solutions that men come up with. Scientific discoveries are determinations of formerly unknown features or phenomena occurring in nature.[24] A discovery does not result in practical application and, thus, does not provide a ready solution to a technical problem.[25] A discovery may contribute to an invention but, on its own, it cannot be identified with one. Patent protection may also concern a new technology that has contributed to a discovery. However, there have been attempts to patent discoveries by attributing the features of an invention to them; this is what happened in case of a discovery in the field of biotechnology, i.e. the sequencing of the human genome.[26] It raises considerable controversies and has become subject to numerous litigations. The recognition and description of the functions of a given gene should be treated as a discovery. A gene isolated from the natural environment, cleaned or modified in the way in which it does not exist in nature can be patented. Also a gene that is identical to a natural one but produced in a technical way can be patented.[27] The above explanation concerns biotechnology but similar problems can be observed in the field of discoveries in nanotechnology. It is extremely difficult to grant exclusive rights to a discovery in the field of nature. In nanotechnology, discoveries concerning new features of carbon materials the basic elements of which are a few or several nanometres in diameter, e.g. carbon nanotubes, led to a technological and civilizational revolution. Carbon nanotubes, discovered by Sumio Iijima several years ago, constitute a basis for work on new composite materials, which have extraordinary mechanical strength or electrical conductivity.[28] Graphene is also

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[23] Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as amended by the act revising Article 63 Convention of 17 December 1991 and by decisions of the Administrative Council of the European Patent Organisation of 21 December 1978, 13 December 1994, 20 October 1995, 5 December 1996 and 10 December 1998 and comprising the Protocols which constitute its integral part, Journal of Laws [Dz.U.] of 2004, No. 79, item 737.

[24] U. Promińska, *Prawo własności…*, p. 45.

[25] P. Kostański, *Prawo własności przemysłowej. Komentarz*, C.H. Beck, Warsaw 2014, citation after J. Sieńczyło-Chlabicz, *Prawo własności…*, p. 565.

[26] B. Fischer, *Ochrona patentowa produktów nanotechnologicznych*, Przegląd Prawa Handlowego No. 6, 2005, p. 50.

[27] G. Kawłatow, *Patentowanie ludzkich genów*, Diametros No. 32, 2012, p. 79, http://www.diametros.iphils.uj.edu.pl/index.php/diametros/article/download/478/568 [accessed on 2/02/2017].

[28] A. Świderska-Środa, W. Łojkowski, M. Lewandowska, K.J. Kurzydłowski (ed.), *Świat nanocząstek…*, p. 55.

a nanomaterial consisting of a single layer of carbon atoms, which is 100 times stronger than steel and has unique electrical properties. What can be patented is the production of graphene, which is a complicated technological process and which scientific centres all over the world try to improve. Both materials have an enormous potential in science and industry and, although their production is still difficult and expensive, patenting activity in the field of application of those two nanomaterials has increased especially since 2010.[29] Nano-scale production requires new complicated methods, which can meet the requirements of patentability. In most cases, solutions in nanotechnology are based on matter within which artificial interference has occurred, which has resulted in solutions unknown in nature and which can be patented, provided they meet the requirements of patentability.[30] In case of nanotechnological inventions, the problem results from the lack of regulations determining the object of protection. It is hindered, inter alia, by incoherent terminology (e.g. nanotechnology, nanoscale, nanomaterial) and incomplete knowledge of nanotechnology. In case of biotechnology, a regulation taking into account the specificity of patent protection of biotechnological inventions was included in the Industrial Property Law. Maybe, with the development of nanoscience, provisions determining conditions for patenting inventions in this field will be enacted. In the face of problems concerning the procedure of registering nanotechnological inventions, it seems that such a regulation is necessary.

6. NOVELTY AND INVENTIVE LEVEL REQUIREMENTS

In accordance with Article 25 IPL, an invention is recognised as a novelty if it is not part of the actual state of technology, i.e. everything that before the date determining the priority to obtaining a patent was disclosed to the public in the form of a written or oral description, by application, display or reveal in any other way. In literature, there is an opinion that the state of technology is a legal term and never reflects a particular person's actual knowledge. Thus, a novelty of an invention in an objective sense is required and not an inventor's subjective opinion on his solution.[31] The state of technology may be basic or extended. The basic state of technology concerns solutions that have been sufficiently revealed before the date of priority to obtaining a patent. The date of priority to a patent is a date of reporting an invention to the Patent Office of the Republic of Poland, the date of reporting in a patent office of another country or a priority date resulting from the disclosure of an invention at an official international exhibition or one officially recognised.

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[29] D. Jost, T. Cottler, *Broad concerns about nanotechnology patents: Symptoms and diagnosis*, Working Paper No. 2012/13, June 2012, p. 15, http://www.wti.org/media/filer_public/13/c5/13c527f4-019e-4172-9f0d-27bec3ca53d1/nccr_wp2012_13_nanopatentssymptomsdiagnostic_jost_cottier2012june.pdf [accessed on 11/01/2017].

[30] M. Balcerzak, *Zagadnienia nanotechnologii w prawie. Czy nanotechnologia może czerpać z doświadczeń biotechnologii?*, [in:] D.M. Trzmielak (ed.), *Innowacje i komercjalizacja w biotechnologii*, Poznań–Łódź 2013, p. 159, http://www.proakademia.eu/gfx/baza_wiedzy/455/ innowacje_i_komercjalizacja_ w_ biotechnologii_2.pdf [accessed on 20/06/2018].

[31] K. Celińska-Grzegorczyk, *Postępowanie patentowe…*, p. 26.

The extended state of technology concerns information contained in inventions or utility designs reports making use of a former priority, not disclosed to the public, provided they are revealed in the way determined in statute.[32] This means that if a report has not been formerly disclosed, the requirement of a novelty is not frustrated.[33] A new wording of Article 25 para. 4 IPL entered into force on 1 January 2015. It lays down that a patent can be granted for an invention of substances or mixtures constituting part of the state of technology applicable or that can be applied in a strictly specified way in treatment or diagnostic methods, provided that such an application does not constitute part of the state of technology. A new para. 5 was also added to Article 25 IPL, which determines that it will be possible to obtain a patent, regardless of an invention disclosure by third parties. However, there is a requirement that the invention should not be reported later than six months after the disclosure, which is an obvious abuse of the person reporting or his legal predecessor. The provision should facilitate obtaining patent protection, especially in a situation when one fails to protect oneself with former secrecy agreements against unauthorised use of knowledge about one's solution.

As far as the solutions in the field of nanotechnology are concerned, some problems with the global patent search arise in the course of the requirement of novelty examination. The problems result from the lack of complete knowledge about nanotechnology or no access to it. Apart from that, it is an interdisciplinary field linked to such sciences as biology, medicine, chemistry, electronics or mechanics. Thus, patents may be doubled. The same or a similar solution may be reported by different entities to different units in the Patent Office. The World Intellectual Property Organization (WIPO) observes such a phenomenon concerning nanotubes, nanofibres, nanocrystals or nanoemulsions.[34] A question is also asked whether the fact of reporting a solution on a scale exceeding 100 nm[35] does not annihilate a condition of a novelty for the same solution in a nanoscale reported later. The European Chemicals Agency believes that "nanomaterials may have different characteristics compared to the same materials without nanoscale features. Therefore, the physico-chemical properties of nanomaterials may differ from those of the bulk substances or particles of a larger size".[36] This statement indicates that the size has impact on the features of a material; however, it is the same material as one already patented. Still, there is no uniform approach to meeting the requirement of novelty because of the difference in size (dimensions and capacity) in comparison with the former inventions. Patent offices of the United States or Japan and the

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[32] A. Niewęgłowski, *Wynalazki, wzory użytkowe i wzory przemysłowe*, [in:] T. Demendecki et al., *Prawo własności przemysłowej*, Komentarz LEX, Wolters Kluwer Business, Warsaw 2015, pp. 116–117.

[33] M. du Vall, *Prawo patentowe*, Wolters Kluwer, Warsaw 2008, p. 186.

[34] A. Watal, T.A. Faunce, *Patenting nanotechnology…* [accessed on 8/02/2017].

[35] International Organization for Standardization (ISO) defined the term nanoscale as a length range approximately from 1 nm to 100 nm, and a nano-object as a material with one, two or three external dimensions in the nanoscale. Source: ISO/TS 80004-2:2015: "Nanotechnologies – Vocabulary – Part 2: Nano-object".

[36] European Chemical Agency, *Nanomaterials*, http://echa.europa.eu/pl/regulations/nanomaterials [accessed on 20/12/2016].

European Patent Office tried to introduce a uniform terminology in order to limit patent applications in which applicants defined different nanoscales for the reported solutions, which hindered patent search.[37] According to the European Patent Office, the change of scale to the nanosize does not have to be sufficient to treat a solution as a novelty.[38] The solutions can be patented, provided that an additional circumstance that has occurred as a result of the change of size is proved. "This circumstance may mean obtaining the same effect but at a surprisingly higher level or obtaining a completely different effect from expected as a result of miniaturisation".[39] Thus, one should approve of a statement that it is necessary to prove that a nanotechnological invention differs from its macro-scale "counterpart" as far as the set objectives or doubts about the obtained effects are concerned.[40]

After the recognition of technical features of a given solution, it is necessary to establish whether an expert in the given field, having to solve a technical problem, would be able to modify or adapt the closest patented solution and to obtain the effects of an invention in this way. If the solution to the problem is surprising in the light of the global state of technology, one can recognise that an invention involves an inventive step. However, the examination of the inventive level concerns only those solutions that have already been determined to be new. The examination of inventiveness requires that the object reported should be compared with the entire patented technology.[41] Article 26 IPL uses a category of "an expert", which in the face of the fast progress in technology may undergo changes, especially in the context of new technologies such as nanotechnology. The term "expert" may suggest it is a person who has extraordinary knowledge of the given field of technology. Case law indicates, however, that it is, inter alia, "a specialist who knows the closest patented solutions in the given field";[42] "an ordinary specialist having commonly available knowledge in the given field of technology"[43]. The practice of patent offices indicates that it is an average graduate working in the given research field.[44] However, it should be emphasised that the assumption of "ordinariness" of the level of knowledge in relation to new technologies such as biotechnology or nanotechnology may be wrong. The fields impose special requirements on experts to be employed in patent offices.[45] There is no uniform approach to the interpretation of the term "expert" in the context of nanotechnology. Since it is an interdisciplinary field, a question is asked in which fields an expert should have

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37 A. Watal, T.A. Faunce, *Patenting nanotechnology…* [accessed on 8/02/2017].

38 European Patent Office, *Nanotechnology and patents*, http://documents.epo.org/projects/babylon/eponet.nsf/0/623ECBB1A0FC13E1C12575AD0035EFE6/$File/nanotech_brochure_en.pdf [accessed on 10/01/2017].

39 M. Balcerzak, *Zagadnienia nanotechnologii w prawie…*, p. 161.

40 B. Fischer, *Ochrona patentowa produktów…*, p. 51.

41 U. Promińska, *Prawo własności…*, p. 62.

42 Judgement of the Voivodeship Administrative Court in Warsaw of 12 March 2010, VI SA/Wa 2079/09, CBOSA.

43 The Supreme Administrative Court judgement of 19 April 2012, II GSK 1140/11, CBOSA.

44 M. Balcerzak, *Zagadnienia nanotechnologii w prawie…*, p. 161.

45 D. Kasprzycki, *Kontrowersje wokół zdolności patentowej wynalazków biotechnologicznych*, Repozytorium Uniwersytetu w Białymstoku 2015, p. 149, https://repozytorium.uwb.edu.pl/jspui/bitstream/.../ 1/ BSP%2019_D_Kasprzycki.pdf [accessed on 28/06/2018].

sufficient knowledge.[46] Thus, it is right to state that the level of knowledge of an expert who is involved in a narrow specialisation may be naturally high because it is the knowledge selected from a bigger whole, which specialists in other fields may know less. What is also important, imposing strict requirements of the level of average knowledge on experts may have impact on the examination of patentability criteria.[47] Thus, the assessment of an inventive step in case of a solution in the field of nanotechnology may cause a problem because of novelty and sophistication of such solutions for experts with general knowledge in the field.

Another problem concerns the requirement of disclosure of the basic knowledge about an invention in the patent description. One of the conditions for a patent grant is the disclosure of an invention in a patent application. The disclosure must be complete and should enable an average expert in the given field whose task is to solve a technical problem to copy the invention based on the description in the application. An inventor does not have to reveal detailed information about how the invention works or present a theoretical model. The only requirement is the disclosure of information in the manner sufficient for it to be carried out by a person skilled in the art (Article 83 EPC). In some cases, an applicant may be obliged to reveal the scientific theory based on which he has made the invention, e.g. if an invention contradicts general rules of physics and adopted theories, an inventor must prove that industrial application of his invention is possible and this is connected with a more detailed patent description.[48] The requirement of a more detailed description may occur in case of nanotechnological solutions because of the lack of complete knowledge about nanomaterials. That is why, a patent application must contain a representative number of examples in relation to the predictability of the field of science concerned.[49]

7. ETHICAL ASPECTS OF PATENTING NANOTECHNOLOGICAL INVENTIONS

In 2009, a report on regulatory aspects of nanomaterials was presented in the European Parliament.[50] It took into account the Commission Communication of 17 June 2008 "Regulatory aspects of nanomaterials". The report suggests that the European Commission notices the advantages of the growth in nanotechnology and, at the

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[46] M. Schellekens, *Patenting nanotechnology. Are we on the right track?*, [in:] M.E.A. Goodwin, B.J. Koops, R.E. Leenes (ed.), *Dimensions of technology regulation*, pp. 107–124, Wolf Legal Publishers, Nijmegen 2010, p. 6, https://pure.uvt.nl/ws/files/ 1225655/ Schellekens_Patenting_ nanotechnology_ 100526.pdf [accessed on 28/06/2018].

[47] A. Niewęgłowski, *Wynalazki, wzory użytkowe i wzory przemysłowe…*, p. 125.

[48] M. Cisneros, *Patentability requirements for nanotechnological inventions*, Munich Intellectual Property Law Center 2009, p. 19.

[49] B. Fischer, *Ochrona patentowa produktów…*, p. 54.

[50] Report on regulatory aspects of nanomaterials (2008/2208(INI)), the Committee on the Environment, Public Health and Food Safety, document adopted at the European Parliament session, PE418.270v02-00, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2009-0255+0+DOC+XML+V0//PL [accessed on 19/08/2016].

same time, is aware of hazards resulting from this development to people and the natural environment. The European Commission confirms the lack of complete knowledge of potential threats posed by nanomaterials, concerns raised over evidence that some nanomaterials carry a risk and a general shortage of methods of proper assessment of threats connected with nanomaterials.

Pursuant to EPC, patents should not be granted for inventions the exploitation of which would be contrary to *ordre public* or morality (Article 53(a) EPC). On the other hand, in accordance with TRIPS, "Members can exclude from patentability invention, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law" (Article 27 para. 2 TRIPS). Exclusion from patenting inventions that are in conflict with *ordre public* and morality is also possible in accordance with the Polish law, which results from Article 29 para. 1(1) IPL. However, such exclusion would be possible only in case there is information at the moment of taking such a decision that the given nanoproduct might cause damage to the environment or human health.[51] Today, the main fears concern artificially manufactured nanoparticles and control over them. They easily penetrate a living organism through the lungs, the digestive system and skin, and may even reach the brain.[52] The presence of nanoparticles in food, cosmetics or pharmaceuticals must be given appropriate attention. Consumers should be provided with an opportunity to learn that a given product contains nanoparticles in order to be able to make a conscious decision whether they want to buy it. The EU regulations determine the requirements in this area in relation to cosmetics, food, bactericides, plant protection products and pharmaceutical products. Regulations in this area contain definitions of nanomaterial and requirements for marking such products with information that a given product contains a nanomaterial.

Before patents were granted for biotechnological inventions, a ban on patenting inventions contrary to *ordre public* and morality had not been the subject of a lively debate. The ban was seldom applied then, e.g. to some types of ammunition, bombs sent in letters and anti-personnel mines.[53] With the dynamic growth of biotechnology and controversies over inventions in this area, the debate over this issue revived. It concerned, inter alia, patenting transgenic organisms the introduction of which to the environment might disturb ecological balance, and thus, pose a threat to the natural environment. The appeals boards of the Patent Office of the Republic of Poland and of the European Patent Office discussed the issue.[54] Therefore, it is possible that one day there will be a regulation excluding inventions in the field of nanotechnology

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[51] M. Cisneros, *Patentability requirements…*, p. 22.

[52] S. Bujak-Pietrek, *Narażenie na nanocząstki w środowisku pracy jako zagrożenie dla zdrowia*, Medycyna Pracy No. 61 (2), 2010, p. 186, http://lodz.pip.gov.pl/f/v/93622/07%20Nanoczasteczki% 20i%20 nanomaterialy%20charakterystyka.pdf [accessed on 2/02/2017].

[53] U. Promińska, *Prawo własności…*, p. 51.

[54] R. Witek, *Czy patentowanie może być niemoralne?*, http://wtspatent.pl/wp-content/uploads/ 2014/05/ pl4.pdf [accessed on 15/12/2015].

because of their non-compliance with *ordre public* and morality in a situation when harmfulness of a nanomaterial is identified. However, it is a complicated issue and, although legal norms concerning patents for biotechnological inventions were established, the assessment of ethical aspects of new technologies by the employees of patent offices remains controversial.

8. CONCLUSIONS

At present, we observe activities aimed at regulating nanotechnology. In the European Union, some states undertake steps to introduce legislation directly concerning nanomaterials. Due to the use of nanotechnology in many fields, this regulation does not constitute a separate branch of law. It is indicated that there is a need to adjust legislation to particular sectors with respect to untypical features of nanomaterials. In the field of patenting nanotechnological solutions, some problems occurred connected with meeting patentability requirements for this type of inventions. Due to the interdisciplinary nature of nanotechnology and incomplete knowledge of the field, there are difficulties with determining whether the reported solutions constitute a novelty. The differences in the size of the reported nanotechnological inventions also result in difficulties with the recognition of a novelty. The experience of patent offices indicates that different nanoscales are determined for reported solutions and this also hampers patent search. As far as the recognition of an inventive step is concerned, there are difficulties with ambiguity of the concept of an expert, especially in the context of nanotechnology. New technologies such as nanotechnology or biotechnology require that patent office experts should have more specialist knowledge, which cannot be described as average knowledge in a given field of technology. It seems that ethical issues connected with patenting nanotechnological inventions are also important. Although, at present, there is mainly a debate in literature over biotechnological inventions, attention should be also drawn to this issue in relation to nanotechnology. With learning the features of nanoproducts and possible confirmation of harmfulness of some of them, there may be a necessity of referring the provisions excluding the possibility of patenting inventions that are contradictory to *ordre public* and morality to this kind of solutions. It is possible that in the future the EU legislator will decide to regulate nanotechnology in the context of intellectual property rights, especially as the problem occurred when the uniform European patent was developed. The European Commission is of an opinion that the present conditions for the protection of the achievements of nanosciences and nanotechnology are less favourable than in other patent systems.[55]

[55] M. Balcerzak, *Zagadnienia nanotechnologii w prawie…*, p. 169.

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LEGAL ASPECTS OF PATENTING NANOTECHNOLOGICAL INVENTIONS

Summary

Nanotechnology uses a basic unit of measure called a "nanometre" (nm). It is one-billionth of a metre. Nanotechnology is a very vast field, which includes a range of nanoscale technologies, such as pharmaceutical sciences, biotechnology, genomics, neuroscience, robotics, information technologies, etc. In the 1990s there was a significant growth in the number of nanotechnological patents. Patenting nanotechnological inventions is not the same as that of other technologies as there are some problems with patent requirements. The difficulties concern fulfilling patentability criteria for novelty, inventiveness and industrial applications. The lack of a standardized definition of nanomaterials has implications for patent search and classification. The aim of this article is to analyse the main problems with patenting nanotechnological inventions.

Keywords: nanotechnology, nanomaterial, patent, patentability requirements, industrial property

PRAWNE ASPEKTY PATENTOWANIA WYNALAZKÓW NANOTECHNOLOGICZNYCH

Streszczenie

Nanotechnologia wykorzystuje podstawową jednostkę miary zwaną „nanometr" (nm). Jest to jedna miliardowa część metra. Nanotechnologia jest bardzo rozległą dziedziną, która dotyczy technologii w skali nano, takich jak farmaceutyka, genetyka, biotechnologia, neurologia, robotyka czy technologie informatyczne. W 1990 roku nastąpił znaczny wzrost liczby patentów w dziedzinie nanotechnologii. Patentowanie wynalazków nanotechnologicznych różni się jednak od patentowania innych technologii. Istnieje kilka problemów związanych ze spełnieniem wymagań patentowych. Trudności dotyczą przesłanek zdolności patentowej, nowości, nieoczywistości i zastosowań przemysłowych. Brak znormalizowanej definicji nanomateriałów ma wpływ na poszukiwania w stanie techniki i klasyfikację patentową. Celem artykułu jest analiza zagadnień problematycznych w zakresie patentowania wynalazków nanotechnologicznych.

Słowa kluczowe: nanotechnologia, nanomateriał, patent, przesłanki zdolności patentowej, własność przemysłowa

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ON (IN)ADMISSIBILITY OF UNILATERAL WITHDRAWAL FROM THE UNITED NATIONS

MARCIN PĄCZEK*

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1. INTRODUCTION

At the beginning of 2017, Mike Rogers, the US Representative for Alabama, a member of the Republican Party, called for the United States to withdraw from the United Nations[1] by introducing a bill to the House of Representatives entitled the American Sovereignty Restoration Act of 2017[2]. It requires that: "The President shall terminate all membership by the United States in the United Nations, and in any organ, specialised agency, commission, or other formally affiliated body of the United Nations". The termination of membership has to result in the withdrawal of the United Nations Headquarters from New York, termination of the United States' participation in the UN peacekeeping operations as well as the withdrawal of any privileges or immunities that the UN officers are entitled to in the United States.

Although the bill has little chances for being passed (at least in the form proposed by M. Rogers), it does not change the fact that the United Nations Organisation's activity has been recently criticised by American authorities and part of the public.[3]

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1 Eight other members of the Republican Party supported the Bill, including Andy Biggs (Arizona), John J. Duncan Jr. (Tennessee), Matt Gaetz (Florida), Walter B. Jones (North Carolina), Raul R. Labrador (Idaho), Thomas Massie (Kentucky), Alexander X. Mooney (West Virginia) and Jason Smith (Missouri). More information on the bill is available at: https://www.congress.gov/bill/115th-congress/house-bill/193.

2 A bill to end membership of the United States in the United Nations – American Sovereignty Restoration Act of 2017, 3 January 2017. Doc. H.R. 193 – 115th Congress (2017–2018). The full text of the bill is available on the US Congress website: https://www.congress.gov/bill/115th-congress/house-bill/193/text [accessed on 13/11/2017].

3 For more on the issue, see J. Czaja, *Świat ONZ – upadek czy nowe szanse?* Krakowskie Studia Międzynarodowe No. 1, 2005, p. 23 ff.

President Donald J. Trump has also expressed his critical view in one of the social media stating that: "The United Nations has such great potential but right now it is just a club for people to get together, talk and have a good time (…)".[4] However, President Trump presented his opinions in a more measured tone during the 72nd Session of the United Nations General Assembly in New York. He emphasised that, instead of striving to achieve the objectives laid down in the Charter of the United Nations, too often the focus of this organisation has been on bureaucracy and process. In his opinion, it is a source of embarrassment that some governments with egregious human rights records sit on the UN Human Rights Council. He reminded that the US is one of 193 countries in the UN, and yet it pays 22% of the entire budget of the Organisation. He stated that it was an unfair cost burden but he also admitted that if the UN could actually accomplish all of its goals, especially the goal of peace, this investment would easily be well worth it.[5]

At the same time, it is worth mentioning that also the Philippines' President, Rodrigo Duterte, who threatened to withdraw his country from the UN, was strongly critical of this organisation. One of the reasons was the 2016 criticism by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions used by Panama authorities in order to fight against illegal drug trafficking in the country.[6]

The above examples raise a very important question about the conformity of a member state's withdrawal from the UN with international law. Undoubtedly, this step would have to lead to the termination of the Charter of the United Nations as an act constituting the Organisation. Unlike in case of the Covenant of the League of Nations,[7] the provisions of the Charter do not include provisions concerning a possibility of a unilateral withdrawal but envisage only expulsion of a state or suspension of its membership. In such a situation, the resolution of the research problem requires reference to the principles of the Law of Treaties and identification of adequate customary norms applicable in the assessment of admissibility of withdrawal from the UN. Thus, using the contents of the Vienna Convention on the Law of Treaties of 1969, it is necessary to establish whether it is admissible to withdraw from an agreement constituting a membership alliance in a situation when the agreement alone does not lay down such a possibility.

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[4] https://twitter.com/realdonaldtrump/status/813500123053490176?lang=en [accessed on 13/11/2017].

[5] The White House, *Remarks by President Trump to the 72nd session of the United Nations General Assembly*, 19 September 2017. The full text of the address is available at: https://www.whitehouse.gov/the-press-office/2017/09/19/remarks-president-trump-72nd-session-united-nations-general-assembly [accessed on 13/11/2017].

[6] E. McKirdy, *Philippines President Rodrigo Duterte insults UN, threatens to leave over criticism*, CNN, 21 August 2016, http://edition.cnn.com/2016/08/21/asia/philippines-duterte-threatens-to-leave-un/ [accessed on 13/11/2017].

[7] The Covenant of the League of Nations stipulated that any Member of the League may, after two years' notice of its intention to do so, withdraw from the League, provided that all its obligations shall have been fulfilled at the time of its withdrawal. Compare, Article 1 para. 3 Covenant, [in:] K. Kocot, K. Wolfke, *Wybór dokumentów do nauki prawa międzynarodowego*, Wrocław–Warsaw 1976, p. 47.

2. WITHDRAWAL FROM THE UNITED NATIONS: AN UNPRECEDENTED SITUATION?

In order to indicate examples of countries illustrating the discussed issue, in general, only one case of Indonesia may provide material for the assessment. In 1965, the state decided to withdraw from the Organisation and substantiated the decision by its disapproval of the choice of Malaysia to be a non-permanent member of the Security Council. In the letter addressed to the Secretary General,[8] the Minister of Foreign Affairs of Indonesia informed that "(…) Indonesia has taken a decision to withdraw from the United Nations and also from specialised agencies such as FAO, UNICEF and UNESCO". He also assured that his country "still upholds the lofty principles of international co-operation enshrined in the United Nations Charter" emphasising that it can do this within as well as outside the UN organisational structure.

The Secretary General referred the letter to the Security Council and the General Assembly as the bodies with treaty authorisation to take decisions concerning membership. None of the bodies, however, decided to initiate formal proceedings. Having consulted Member States, the Secretary General informed Indonesian authorities that he acknowledges their decision and expressed a hope for resuming full participation in the nearest future. The real administrative activities undertaken in connection with the Indonesian motion consisted in the removal of the country's flag, badges and other symbols from the UN building and rooms. Indonesia stopped being listed as a Member State and the General Assembly did not take its contribution to the UN 1965–1967 budget into account.[9] The President of the 21st Session of the General Assembly assumed that since Indonesia declared its will to "resume" its membership in the Organisation, it means it treats its latest absence as temporary cessation of co-operation and not an official withdrawal from the Organisation. Thus, he did not see any reasons for initiating formal accession proceedings. As no Member opposed to such interpretation, the President of the General Assembly authorised the Secretary General to take administrative steps necessary to resume Indonesia's full membership in the UN. In addition, he stated that Indonesia should meet in full its budgetary obligations.[10]

Contrary to appearances, the issue of Indonesia's membership in the UN in the discussed period is not so unambiguous. The letter of 1965 suggested a real decision on withdrawal from the UN and not just the cessation of co-operation. As the Indonesian Minister of Foreign Affairs emphasised: "my government's decision is certainly revolutionary and unprecedented. It has been taken for the benefit of the United Nations, which, in our opinion, should be reprimanded from

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[8] See, Letter dated 20 January 1965 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia addressed to the United Nations Secretary General, [in:] International Legal Materials Vol. 4, No. 2, 1965, pp. 364–366.

[9] See, United Nations Juridical Yearbook 1966, part II, chapter VI: Selected legal opinions of the Secretariat of the United Nations and related inter-governmental organizations, pp. 222–223.

[10] Official Records of the General Assembly, Twenty-first Session, 1420th Plenary Meeting, 28 September 1966, UN Doc. A/PV.1420, p. 2.

time to time".[11] It is also worth reminding that as a result of the letter, Indonesia was deleted from the list of the UN Member States and administrative steps were taken in order to permanently conclude the co-operation with the country. Such measures are not applied in case a given Member State decides to temporarily cease its co-operation with the Organisation. Moreover, the governments of the United Kingdom[12] and Italy[13], which were the only ones that answered the letter of 1965, treated and assessed the situation in terms of withdrawal from the UN and not a temporary cessation of co-operation. Of course, this does not change the fact that the new Indonesian authorities spoke about the resumption of the membership and the UN accepted this classification. As a result, the question about admissibility of withdrawal from the UN has not been answered.

3. WITHDRAWAL FROM A TREATY THAT DOES NOT STIPULATE SUCH A POSSIBILITY

Due to the fact that the Indonesian case does not make it possible to confirm or deny that the unilateral termination of membership in the UN is in conformity with international law, it is necessary to consider the general rules of the Law of Treaties. Article 56 of the Vienna Convention on the Law of Treaties of 1969[14] stipulates that a treaty that contains no provision regarding termination of or withdrawal from it is not subject to termination or withdrawal. It may be otherwise only in two cases: if it is established that the parties intended to admit the possibility of termination or withdrawal, or if the possibility may be implied by the nature of the treaty.

The conclusion resulting from Article 56 VCLT that termination of a treaty that does not contain provisions regarding such a possibility is inadmissible is perceived as a permanent element of customary international law.[15] As a result, it is justified to apply the above-mentioned construction also when assessing the admissibility of the unilateral termination of the Charter of the United Nations and thus the withdrawal from the Organisation. Although the limited framework of the article does not make it possible to conduct a more thorough discussion whether the conclusion drawn from Article 56 VCLT is right, it should be mentioned that it finds support in the states' practice as well as *opinio iuris* of the period of negotiating the Vienna Convention on the Law of

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[11] Compare, footnote 6.

[12] See, Letter of 8 March 1965 from the United Kingdom, UN Doc. A/5919 (S/6229), Yearbook of the United Nations 1964, p. 191.

[13] See, Note verbale of 13 May 1965 from Italy, UN Doc. A/5914 (S/6356), Yearbook of the United Nations 1965, p. 237.

[14] The Convention was adopted in Vienna on 22 May 1969 and open for signing on 23 May 1969; it entered into force on 27 January 1980; hereinafter: VCLT. The text of the Convention in A. Przyborowska-Klimczak (selection and edition), *Prawo międzynarodowe publiczne. Wybór dokumentów*, Lublin 2008, pp. 43–65.

[15] Thus, e.g. see A. Wyrozumska, *Withdrawal from the Union*, [in:] H.J. Blanke, S. Mangiamelli (ed.), *The European Union after Lisbon: Constitutional basis, economic order and external action*, Heidelberg–Dordrecht–London–New York 2012, p. 345; L.R. Helfer, *Terminating treaties*, [in:] D.B. Hollis (ed.), *The Oxford guide to treaties*, Oxford 2012, p. 637 ff.

Treaties. Frankly, there were cases that might seem to illustrate a different opinion but when analysed in detail, they proved to confirm the above-mentioned conclusion. States taking a decision to terminate a treaty that does not have provisions clearly stipulating such a possibility in practice always referred to the *rebus sic stantibus* clause or serious violation of a treaty by the other party. They did not draw the admissibility of their action from the implied right to free themselves from treaty obligations, which must be *implicite* contained in every concluded international agreement.[16]

3.1. PARTIES' INTENTION REVEALED IN THE COURSE OF NEGOTIATING A TREATY

The presumption of inadmissibility of termination of a treaty that contains no denunciation clause is conditional in nature because, as it has already been mentioned, it may be challenged by indication that the parties intended to admit the possibility of termination of a treaty. The preparatory work on the Charter of the United Nations shows that the issue of establishing the UN membership was considered in the context of the universal nature of the Organisation to be created. The main arguments that finally played a decisive role in non-containing a provision stipulating termination in the Charter of the United Nations were the following: non-conformity of such a clause with the universal nature of the Organisation, fears that states will attempt to extort some activities from the Organisation under the threat of withdrawal from it and the fact that withdrawal might be a means of escape from obligations resulting from membership.[17] The final report by the Committee I/2, which worked on the development of Chapter II of the Charter of the United Nations, contained the following commentary: "If a Member State, because of extraordinary circumstances, feels obliged to withdraw and leave the burden of keeping international peace and security to other Members, it is not the intention of the Organisation to force such a Member State to continue co-operation. It is obvious that the possibility of withdrawal from the Organisation or other forms of termination of co-operation might seem to be unavoidable if the Organisation, against the expectations of mankind, proved to be unable to keep international peace or might do it at the expense of law and justice. It would also be hard to expect a Member State to remain in the Organisation if its rights and obligations were changed as a result of amendments to the Charter, which were passed without its participation or it disapproves of, or in case an amendment passed in a proper way and adopted by the required majority of the General Assembly or a Review Conference was not ratified by the necessary number of Members to enter into force".[18]

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[16] For more on the issue together with a review of states' practice, see Th. Christakis, *Article 56*, [in:] O. Coten, P. Klein (ed.), *The Vienna Conventions on the law of treaties: A commentary*, Vol. 1, Oxford 2011, pp. 1261–1266.

[17] A. Kleczkowska, *Karta Narodów Zjednoczonych jako światowa konstytucja – uwagi z perspektywy zakazu użycia siły*, Studia Prawnicze No. 3 (207), 2016, p. 14.

[18] Report of the Rapporteur of Committee I/2 on Chapter III, Membership, UNCIO Doc. 1178, 1/2/76 (2), p. 5.

The opinions of the doctrine on the legal nature of the cited commentary are varied. Some authors recognise it as authentic interpretation of states' stands concerning admissibility of withdrawal from the UN, while others reject such a perspective. However, there are no formal contraindications to classify the document as *travaux préparatoires* and refer to the conclusions of the Committee I/2 in order to get to know the real intentions of the authors of the Charter of the United Nations. Assessing the issue from this perspective, one sees that the parties considered, and even wanted to admit, a possibility of giving up membership in the Organisation, however, they decided it was justified only in three strictly determined situations.[19]

However, the circumstances that give grounds for admissibility of denouncing the Charter of the United Nations and, as a result, withdrawing from the Organisation were described in the way that may raise some objections. Performing a critical review of them, H. Kelsen drew attention to a few ambiguities in this context. Firstly, if termination of membership may be justified by the UN inability to keep international peace and security, there is a question what criteria should decide on the classification and who should perform evaluation. The treaty bodies will not take such a decision and letting a state interested in withdrawal from the Organisation to decide may be interpreted as encouragement to undertake unilateral activities. Secondly, withdrawal from the UN was to be justified by entry into force of amendments to the Charter of the United Nations that a given state does not approve of. This stand, however, is in flagrant conflict with the content of Articles 108 and 109 of the Charter of the United Nations, which stipulate that if an amendment or a review has been adopted by a vote of two-thirds of the Member States and ratified in accordance with their respective processes, they shall come into force for all Members.[20] Finally, the third circumstance results from the former. It concerns a situation when the passed amendment to or adopted review of the Charter will not enter into force because of insufficient number of ratifications. However, the problem is that the commentary of the Committee I/2 does not suggest that the possibility of withdrawal from membership is limited to the states that have accepted changes. Thus, theoretically, any other state would have the right

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[19] F. Livingstone, *Withdrawal from the United Nations: Indonesia*, American Journal of International Law Vol. 14, No. 2, 1965, pp. 640–641.

[20] Article 108 of the Charter stipulates that "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council". On the other hand, Article 109 para. 2 lays down that "Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all permanent members of the Security Council". For full text of the quoted provisions, see [in:] A. Przyborowska-Klimczak (ed.), *Prawo międzynarodowe…*, pp. 29–30. It is worth mentioning that foundation acts of some organisations admit withdrawal from membership in case amendments are made to their statutes, which a given country does not accept. Such a solution was adopted in the Pact of the League of the Arab States (Article 20) and the International Atomic Energy Agency Statute (Article 18).

to refer to the above-mentioned condition. It is also hard to determine how much time must pass in order to recognise that the ratification process has finished because the Charter of the United Nations does not determine any specific time limit.[21]

The emphasis put on the "extraordinary" nature of circumstances justifying a unilateral act of withdrawal from the UN demands that we consider whether it is possible to equalise between the situation described by the Committee I/2 and those that are contained in the *rebus sic stantibus* clause. A positive answer would mean that the Committee did not decide anything that would result from the already existing norms of the customary law of treaties. Despite the fact that the occurrence of circumstances listed in the commentary was envisaged by the parties at the moment of concluding the Treaty (which should eliminate grounds for discussing the application of the *rebus sic stantibus* clause), those circumstances do not seem to be so extraordinary that they should justify admissibility of termination of the Charter of the United Nations with the use of the above-mentioned clause. The UN turned out to be helpless in various cases of violation of or threat to the world peace and there is nothing extraordinary in it. The latest events in the Crimea and Eastern Ukraine are the best examples of that. Moreover, the process of negotiating the Charter of the United Nations does not let Member States make membership in the structure dependent on the Organisation's ability to keep international peace and security. The UN's helplessness in case of violation of the Charter of the United Nations by one party always gives an aggrieved state an opportunity to refer to this violation and cause the termination or cessation of the application of the Charter between all or some parties. The consideration of amendments to the Charter or its review is even more controversial from the point of view of the potential application of the *rebus sic stantibus* clause. If it is assumed that a change will not enter into force, the *status quo* is maintained. On the other hand, if the changes negotiated enter into force, it is nothing that the parties admit at the moment of concluding a treaty.

If the temporary absence of Indonesia from the UN is treated as an example of real loss of membership and the comments already made are used to assess the case, it will be obvious that there was none of the three conditions indicated by the Committee I/2. The election of a given state to be a non-permanent member of the Security Council is absolutely not such a condition.[22] In such circumstances, nobody should be surprised by the stand of the United Kingdom, which very clearly stated that "the election of a non-permanent member of the Security Council (…) does not constitute such an extraordinary circumstance that Indonesian authorities should be allowed to withdraw from the Organisation".[23]

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[21] H. Kelsen, *Withdrawal from the United Nations*, The Western Political Quarterly Vol. 1, No. 1, 1948, pp. 30–31.

[22] J.G. Kim, J.M. Howell, *Conflict of international obligations and state interests*, The Hague 1972, p. 99.

[23] Compare, Letter of 8 March 1965 from United Kingdom…, p. 191.

3.2. NATURE OF A TREATY AS JUSTIFICATION FOR ADMISSIBILITY OF ITS TERMINATION

In accordance with VCLT, the presumption of impossibility of terminating an international agreement that contains no denunciation clause may also be refuted by reference to the nature of a treaty. Some authors are of the opinion that just organisations' statutes, beside alliances and trade agreements, constitute examples of agreements the nature of which makes it possible to presume the right to terminate them. On the other hand, fixed-term agreements, agreements codifying international law and border treaties do not have such a status.[24]

However, there were some doubts raised in the doctrine about the customary nature of a norm allowing the use of the nature of a treaty as the only reason for terminating it.[25] Th. Christakis reminds that a relevant provision was added to Article 56 para. 1 VCLT just at the last moment thanks to the amendment proposed by the United Kingdom during the codification conference. The proposal was finally passed by a very slim majority of votes (26 countries voted for the change, 25 voted against and 37 abstained).[26] On the other hand, the project negotiated in 1966 by the International Law Commission assumed that only a diverse intention of the parties could constitute a reason for termination of a treaty. In its commentary to the then Article 53, the Commission noticed that the nature of a treaty is one of the elements that may prove to be useful for determining the parties' intention.[27]

Without prejudging the question of the customary nature of a norm prescribing the consideration of a nature of a treaty as a possible reason for its termination, it would be erroneous to completely dismiss such a possibility. Thus, if we assume that the Charter of the United Nations, due to its status and the content of its norms, constitutes a type of "global constitution" *de iure*, the nature of this document might be an obstacle to admissibility of its termination.[28] This hypothesis, however, should be subject to deepened consideration concerning international legal consequences of the constitutional nature of some agreements because, as C. Mik emphasises, the possibility of terminating an international agreement does not necessarily negate its constitutional dimension.[29] In this situation, a look at the legal nature of the Charter of the United Nations as any other foundation act of an international organisation

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[24] M. Frankowska, *Prawo traktatów,* Warsaw 1997, p. 164.

[25] Thus, e.g. see M. Akehurst, *Withdrawal from international organizations,* Current Legal Problems Vol. 32, 1979, p. 149.

[26] Th. Christakis, *Article 56…*, p. 1256.

[27] See, International Law Commission, *Draft Articles on the Law of Treaties with commentaries (1966)*; the text adopted by the International Law Commission at its eighteenth session, in 1966, and submitted to the General Assembly as a part of the Commission's report, [in:] Yearbook of the International Law Commission Vol. II, 1966, p. 251.

[28] See, A. Kleczkowska, *Karta Narodów…*, pp. 17–18.

[29] C. Mik, *Konwencja wiedeńska o prawie traktatów z 1969 r. wobec konstytucjonalizacji traktatów*, [in:] Z. Galicki, T. Kamiński, K. Myszona-Kostrzewa (ed.), *40 lat minęło – praktyka i perspektywy Konwencji wiedeńskiej o prawie traktatów,* Warsaw 2009, p. 107.

that does not contain any provisions regulating the issue of withdrawing from membership seems to be a much better solution.[30]

Most arguments justifying admissibility of withdrawal from an international organisation the foundation act of which does not stipulate such a possibility directly or indirectly refer to the idea of states' sovereignty.[31] L. Oppenheim stated that: "although the Charter does not directly mention the right to terminate it, in the face of the lack of a clear ban, the United Nations Member States maintain the possibility of breaking off what, in the light of law, constitutes a contractual relationship for unspecified period and imposing far-reaching limitations of sovereignty on the states".[32] According to the above-mentioned opinion, the nature of treaties constituting international organisations is against questioning admissibility of withdrawing from organisations created for unspecified time and regaining competences a state is entitled to. Thus, if a state joining such a structure voluntarily limits its sovereign rights, it can regain these rights at any time by deciding to give up its membership.

J. Menkes and A. Wasilkowski draw attention to a certain collision between a ban on presuming whatsoever limitation to a state's sovereignty (limitation to exercising it) and the *pacta sunt servanda* principle, which bans states' unilateral exemption from obligations of a treaty or the change of its provisions.[33] Of course, it is necessary to agree with the stand that no international organisation has the power to prevent a member state from withdrawing from it.[34] At the same time, it is not important whether the foundation act admits such a possibility, clearly bans it or, as it occurs in the discussed case, does not contain adequate provisions. One should not confuse a state's omnipotence in this area with the lawfulness of undertaken steps and their legal justification. A state's sovereignty will not make these activities legal if they are illegal without such justification. As H. Kelsen noticed in this context: "if sovereignty is interpreted as an indispensable right to withdraw from an organisation founded based on a treaty concluded between states, it means that a sovereign state will be bound by this treaty for as long as it recognises it as beneficial".[35] The way of understanding sovereignty indicated above marginalises the special rank of the *pacta sunt servanda* principle, which is fundamental for international law, and many others that constitute the foundations of stability and predictability of treaty relations. To some extent, it also depreciates many years of the International Law Commission's work on the codification of the Law of Treaties because not the norms of that law but an ordinary political interest would decide about admissibility of termination of a foundation act and withdrawal from an international organisation.

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[30] Similarly, N. Feinberg, *Unilateral withdrawal from an international organization,* British Yearbook of International Law Vol. 39, 1963, p. 189 ff.

[31] Thus, e.g. see L. Antonowicz, *Podręcznik prawa międzynarodowego,* Warsaw 2013, p. 195.

[32] L. Oppenheim, *International law*, London 1948, pp. 373–374, quotation after A. Wyrozumska, *Withdrawal*…, p. 346.

[33] J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne*, Warsaw 2006, p. 110.

[34] E. Schwelb, *Withdrawal from the United Nations: The Indonesian intermezzo*, American Journal of International Law Vol. 61, No. 3, 1967, p. 672.

[35] H. Kelsen, *The law of the United Nations: A critical analysis of its fundamental problems*, New Jersey 2000, p. 126.

4. CONCLUSIONS

The comments and observations presented in the article make it possible to state that a voluntary withdrawal from the United Nations does not seem possible at the moment, at least in the way that is in compliance with the norms of international law. Giving up membership in the Organisation may occur in some extraordinary cases, which, in the light of general rules of the Law of Treaties, in a way force a state to take such a decision. The change of circumstances existing at the time of concluding a treaty is an example. On the other hand, the principle stipulating that it is inadmissible if a treaty does not lay down a possibility of terminating it or withdrawing from it has established grounds in international law. A different statement requires a proof that parties really intended to admit a treaty termination or that the right to terminate is contained in the nature of the treaty concluded between states.

The Charter of the United Nations is an international agreement the authors of which did not decide to include a denunciation clause in its content. Undoubtedly, they were fully aware of the existence of such a clause in the Covenant of the League of Nations and the later consequences of that.[36] The Committee I/2, the work of which in a way illustrates the intentions of the parties to the Charter of the United Nations, in fact did not negate the possibility of withdrawing from the UN, but limited it to a few extraordinary situations. A question should be asked in this context whether these situations are really so extraordinary and whether the possible reference to them is in compliance with the wording, the subject matter and the aim of the Charter of the United Nations. Also the justification for admissibility of withdrawal from the Organisation by referring to the nature of the foundation act seems to be controversial. It is important that for the support of this hypothesis, it is not necessary to use arguments from the justification for the constitutional nature of the Charter and, as a result, prejudge the status it has.

Finally, it is worth emphasising that states that see withdrawal from the UN as a means of escape from any treaty obligations base their belief on too optimistic assumptions. Many norms of the Charter of the United Nations illustrate the binding customary law and have *erga omnes* consequences. Some even are *iuris cogentis* norms in nature.[37] Thus, it is not possible to act in a way that does not conform to their content without incurring international legal consequences. By means of withdrawing from the UN, a given state might really free itself only from formal legal membership links, including financial obligations (however, not necessarily those overdue). However, in the long term, such motivation, which is proved by termination of membership in other international organisations, generally turned out to be politically unprofitable.

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[36] For more on the issue, see K.D. Magliveras, *The withdrawal from the League of Nations revisited*, Dickinson Journal of International Law Vol. 10, No. 1, 1991, pp. 25–71.

[37] R.St.J. Macdonald, *The Charter of the United Nations as a World Constitution*, [in:] M.N. Schmitt (ed.), *International law across the spectrum of conflict. Essays in honour of Professor L.C. Green on the occasion of his eightieth birthday,* Newport 2000, p. 264.

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ON (IN)ADMISSIBILITY OF UNILATERAL WITHDRAWAL FROM THE UNITED NATIONS

Summary

This article aims to answer the question of the admissibility of withdrawal from the United Nations Organization. Since the Charter of the United Nations as a foundation act of the Organization does not contain any specific provisions in this regard, the author decides to refer to the general law of treaties and, based on it, to conduct a relevant analysis. Therefore, availing himself of the provisions of the Vienna Convention on the Law of Treaties, the author aims to demonstrate and characterize possible conditions which under customary international law allow the possibility of a unilateral withdrawal from a treaty. In the first place, the author refers to the intentions of the parties to the Charter of the United Nations at the time of its drafting and then to the nature of the treaty itself. As a result of the analysis, he comes to the conclusion that neither the intentions of the parties, nor the nature of the Charter of the United Nations can provide reasonable grounds for acknowledging the possibility of withdrawal from the UN as compliant with international law.

Keywords: withdrawal from the UN, Charter of the United Nations, Law of Treaties, Indonesia, preparatory work, nature of a treaty, *rebus sic stantibus* clause

PRAWNA (NIE)DOPUSZCZALNOŚĆ DOBROWOLNEGO WYSTĄPIENIA Z ORGANIZACJI NARODÓW ZJEDNOCZONYCH

Streszczenie

Przedmiotem niniejszego artykułu jest próba odpowiedzi na pytanie o legalność wystąpienia z Organizacji Narodów Zjednoczonych. W związku z tym, że Karta Narodów Zjednoczonych, jako akt założycielski Organizacji, nie zawiera odpowiednich postanowień w tym zakresie, autor postanawia odwołać się do ogólnych reguł prawa traktatów i na tej podstawie dokonać stosownej analizy. Posiłkując się regulacjami Konwencji wiedeńskiej o prawie traktatów, przybliża i charakteryzuje te przesłanki, które na gruncie prawa zwyczajowego pozwalają domniemywać istnienie możliwości jednostronnego wypowiedzenia umowy międzynarodowej. Autor odnosi się w pierwszej kolejności do intencji towarzyszących stronom Karty Narodów Zjednoczonych w momencie jej opracowywania, a następnie do natury wspomnianego traktatu. W następstwie poczynionych ustaleń dochodzi do wniosku, że ani zamiar stron wyrażony w trakcie prac przygotowawczych, ani natura Karty Narodów Zjednoczonych nie dają wystarczających podstaw do uznania, że akt wystąpienia z ONZ pozostaje w zgodzie z normami prawa międzynarodowego.

Słowa kluczowe: wystąpienie z ONZ, Karta Narodów Zjednoczonych, prawo traktatów, Indonezja, prace przygotowawcze, natura umowy międzynarodowej, klauzula *rebus sic stantibus*

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INFLUENCE OF THE EUROPEAN INTEGRATION ON THE SHAPE AND FUNCTIONS OF A CONTEMPORARY STATE

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1. INTRODUCTION

At present, European states undergo dynamic transformations connected with integration processes. Their basic laws *sensu stricto*, i.e. legal acts of the highest rank and superior in the hierarchy of domestic sources of law, constitute the foundation of their political systems and legal orders in force. Their stability, on the other hand, remains one of the fundamental constitutional values ensuring stability of political systems.[1] Nevertheless, we currently deal with continually changing political reality, which even in the strongest state organizations with established traditions triggers bigger or smaller changes. The European integration processes belong to the most important factors influencing the functioning of a state, its political system, the shape and scope of its functions, sovereignty and the content of the basic law as a fundamental legal act regulating the above-mentioned matters.[2] The relations

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[1] From the formal point of view, such a state of things can be obtained by more difficult, i.e. more complicated, mode of amendments (rigid constitution); from the substantive point of view, on the other hand, inter alia, by the "possibly narrow scope of the regulated matter, quite high level of its provisions' generality making various interpretation possible, active attitude of the bodies interpreting a constitution in the process of applying law". See, K. Kubuj, J. Wawrzyniak, *Wstęp*, [in:] K. Kubuj, J. Wawrzyniak (ed.), *Europeizacja konstytucji państw Unii Europejskiej*, Warsaw 2011, p. 12. For more, also see V. Serzhanova, *Europeizacja konstytucji na przykładzie ustaw zasadniczych Polski i Słowacji w kontekście ich członkostwa w Unii Europejskiej*, [in:] G. Dobrovičova, S. Sagan (ed.), *Implementacja prawa unijnego do systemów prawa krajowego w Polsce i na Słowacji po dziesięciu latach członkostwa w Unii Europejskiej*, Rzeszów 2015, p. 149 ff.

[2] From the point of view of constitutional law and the theory of a state, it is hard to overestimate these issues. A contemporary state's functions are often determined in basic

between those phenomena are obvious and do not raise any doubts at present; however, the scope of changes connected with those processes is subject to continuous verification, because it depends on the level of particular national states' involvement in them, which is not uniform.[3]

At present, we observe new phenomena the scale and dynamics of which have not been experienced in the history of the Old Continent before. On the one hand, a trend of regional economic, political and cultural integration is clearly seen and, on the other hand, we deal with processes of national states' disintegration.[4] The number and scope of changes in basic laws to some extent seem to depend on the level of formal and procedural difficulties in passing amendments to constitutions, the nature of this act alone, i.e. the scope and level of detailed regulation of matters therein,[5] as well as on the constitutional legalism understood as respect for its provisions in society in a given period.[6]

Integration processes on the European continent undoubtedly evoke a necessity to adjust constitutional systems and basic legal acts to the changing reality, put them in specific legal frameworks and organise them with respect to the principles of lawfulness and basic democracy canons.[7] The phenomenon of integration

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laws. And even if they are not determined in them directly, they undoubtedly result from their constitutional axiology, values and principles. The contemporary concept and scope of sovereignty also constitute a key issue. In my opinion, these are strictly related matters, in fact, they are aspects of the same matter if it is analysed from the perspective of constitutional law and the study of a state. That is why, their coherent analysis is necessary in order to draw reliable conclusions concerning contemporary states' functioning under the influence of regional integration processes as well as globalisation. For more on the influence of the processes of globalisation and the European integration on contemporary states, see: V. Serzhanova, S. Sagan, *Nauka o państwie współczesnym*, 3rd edition, Warsaw 2013, p. 230 ff; also, V. Serzhanova, S. Sagan, *Wpływ procesów integracji europejskiej na konstytucje narodowe*, [in:] D. Szpoper (ed.), *W kręgu historii doktryn politycznych i prawnych oraz konstytucjonalizmu, księga jubileuszowa Profesora Andrzeja Sylwestrzaka*, Gdańskie Studia Prawnicze Vol. XXVII, 2012, pp. 307–319; also in the English language: V. Serzhanova, *Modern state in the era of globalization and European integration*, Zborník príspevkov z 2. ročníka Jarnej Školy Doktorandov UPJŠ, Košice 2015, pp. 13–19; V. Serzhanova, S. Sagan, *The influence of the European integration and globalization processes on a contemporary state*, Annales Universitatis Apulensis, Series Jurisprudentia 14/2010, Alba Iulia 2011, pp. 219–229; V. Serzhanova, S. Sagan, *Changes in the constitutions of the European states in connection with the integration processes*, [in:] *Perspectives for the development of constitutional law in the conditions of integrating. Section of constitutional law. English part*, Collection of papers from the International Scholastic Conference "Law as a Unifying Factor of Europe – Jurisprudence and Practice, 21–23 October 2010", Bratislava 2011, pp. 259–264.

3 For more on the issue, see V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 307 ff.

4 *Ibid*.

5 See, M. Kruk-Jarosz, *Kształtowanie konstytucyjnych zasad członkostwa państwa w Unii Europejskiej (wybrane problemy)*, Przegląd Sejmowy No. 4(99), 2010, p. 43; also, K. Kubuj, J. Wawrzyniak, *Wstęp…*, p. 18; for more, also P. Chybalski, *Analiza porównawcza konstytucji państw członkowskich Unii Europejskiej w zakresie podstaw członkostwa tych państw w Unii*, Warsaw 2010, *passim*.

6 See, W. Sokolewicz, *O gradacji zmian konstytucji*, [in:] L. Garlicki (ed.), *Konstytucja. Wybory. Parlament. Studia ofiarowane Zdzisławowi Jaroszowi*, Warsaw 2000, p. 179; also, K. Kubuj, J. Wawrzyniak, *Wstęp…*, p. 13.

7 As far as the latest works are concerned, it is worth referring to J. Jaskiernia, K. Spryszak (ed.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017, in which one can find many valuable

processes' influence,[8] especially the EU law, on the constitutional law of particular European states, mainly including the EU Member States, is most often referred to as "Europeanization of constitutions".[9] Those processes also have considerable influence on interpretation of sovereignty and, in addition, on the objectives, scope and way of performing functions by a contemporary European state, which, as a result, has also impact on their shape, effectiveness and the way of functioning. This is why, the evolution of the texts of original constitutions is also unavoidable.[10]

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articles, inter alia, devoted to international democratic standards and their influence on the Polish basic law.

[8] Integration processes on the European continent of course are not limited to integration at the European Union level because they also cover the area of the Council of Europe and the Organisation for Security and Co-operation in Europe. In the context of the concept of Europeanization of constitutions (especially in its strict sense), however, the EU law undoubtedly influences the content and interpretation of basic laws to the greatest extent. It results from a rather obvious fact that there is an entire separate legal system that the EU, a supranational structure of still 28 states, managed to establish. The other above-mentioned international legal entities (the CE and the OSCE), although they constitute fully valuable international organisations and the level of integration of the states associated in them is not so advanced, do not resemble a treaty of states united in the EU neither from the point of view of their objectives, internal structure and common bodies, and organisational principles nor from the standpoint of the system of legal regulations in force. Integration in the area of binding law and its unification is so far-reaching only in the EU, which obviously has the strongest influence on Member States' national legal systems, including their constitutions. This cannot be said about the CE and the OSCE. That is why, the two organisations are not the subject of interest of the present article.

[9] The phenomenon of Europeanization of constitutions has been very thoroughly described in literature. Thus, my aim is not to analyse in detail the issue that has already been discussed in dozens of articles or to refer to all of them. It is not the aim of my article and does not have a scientific value. However, the approach to the issue presented in the introduction and the methodology of its analysis requires that some reference should be made to this concept for the needs of further considerations. Reflections on the Europeanization of constitutions in the context of the areas of the European integration in its strict sense (EU) undoubtedly justify this. In my opinion, it is worth referring to the most important works by Polish and foreign authors. The most useful in the light of those considerations are the works by constitutional experts who write about the issue very competently: W.J. Wołpiuk, *Semantyczne, prawne i konstytucyjnoprawne aspekty pojęcia europeizacji*, Zeszyty Naukowe Wyższej Szkoły Zarządzania i Prawa im. Heleny Chodkowskiej w Warszawie No. 2, 2008, p. 15 ff; also, M. Ziółkowski, *Europeizacja konstytucji – rekonstrukcja znaczenia*, [in:] K. Kubuj, J. Wawrzyniak (ed.), *Europeizacja konstytucji…*, p. 22. In English literature, it is worth reading: K. Featherstone, C.M. Radaelli (ed.), *The politics of Europeanization*, Oxford 2003, p. 6 ff. Also see, V. Serzhanova, *Europeizacja konstytucji…*, p. 151 ff. For the issue of Europeanization of law, compare, T. Biernat, *Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie*, [in:] T. Biernat (ed.), *Europeizacja prawa*, Kraków 2008, pp. 8 and 10; also, B.T. Bieńkowska, D. Szafrański (ed.), *Europeizacja prawa polskiego – wybrane aspekty*, Warsaw 2007, *passim*. One can often find more on the Europeanization of law in the context of constitutional law, also called "Europeanization of constitutions", "Europeanization of basic laws" or "Europeanization of constitutional law", which has become quite common recently, in the works of constitutional lawyers involved in studies of the matter: Z. Witkowski, V. Jirásková (ed.), *Aktualne problemy współczesnego konstytucjonalizmu. Europeizacja Konstytucji Republiki Czeskiej i Rzeczypospolitej Polskiej*, Toruń 2014, *passim*; D. Lis-Staranowicz, J. Galster, *O zjawisku europeizacji polskiego prawa konstytucyjnego*, Przegląd Sejmowy No. 2(97), 2010, p. 29 ff; J. Galster, *Konstytucja Rzeczypospolitej Polskiej wobec postępów integracji europejskiej. Diagnoza stanu europeizacji ustawy zasadniczej*, [in:] E. Gdulewicz, H. Zięba-Załucka (ed.), *Dziesięć lat Konstytucji Rzeczypospolitej Polskiej*, Rzeszów 2007, p. 55 ff; K. Wojtyczek, *Europeizacja konstytucji V Republiki Francuskiej*, Przegląd Sejmowy No. 6(89), 2008, pp. 139–155.

[10] It can take on various forms depending on a state's traditions and culture, but always leads either to the modification of the content of the basic law or to re-interpretation of this

The present article is devoted to the above-mentioned issues presented from the comparative perspective and exemplified by basic laws and political systems of contemporary European states. The article is, in particular, devoted to an analysis of forms and areas of the functioning of states, in which we observe clear signs of the phenomenon of Europeanization of constitutions and manifestation of influence of the European integration processes on the perception of sovereignty as well as the scope and way of performing functions by contemporary European states exemplified by the EU Member States.

2. ESSENCE OF THE PHENOMENON OF EUROPEANIZATION OF CONSTITUTIONS, ITS FORMS AND AREAS

The phenomenon of Europeanization of constitutions may be perceived narrowly (*sensu stricto*) and broadly (*sensu largo*). Simply speaking, the former approach consists in constitutionalising the matters that are in various ways connected with the European Union law, which takes place by means of amendments to a constitution and its re-interpretation in compliance with the principle of the EU law-friendly interpretation. In the latter approach, Europeanization is connected with the law enacted by the European international organisations.[11] In the broader sense, we can speak about the Europeanization of constitutions in the context of a broadly understood European integration and its influence on national constitutions. In the narrow sense, on the other hand, we analyse transformations taking place in the shape and content of basic laws in connection with membership in the European Union and resulting from the implementation and influence of the EU law on domestic legal systems.

In literature, the concept of Europeanization of constitutions is perceived not only in the context of normative changes but sometimes also as a manifestation of the phenomenon of globalisation. Due to dissemination of certain universal constitutional standards in the EU area, the phenomenon started to be interpreted as a certain legislator's obligation to refer to the EU issues in the basic law, which not always and not necessarily results from a state's belonging to the European culture but rather from stronger and stronger influence of the European law on the legal systems of Member States or those aspiring to the EU membership. In this context, J. Szymanek rightly formulates a concept of "Euro-amending constitutions", which means the processes of "interfering into the text of a constitution resulting from

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legal act. On the one hand, it can materialise by formal amendments to constitutions and, on the other hand, it may be reflected in a different interpretation of the existing provisions as a result of constitutional courts' case law. L. Garlicki writes about it competently in *Aksjologiczne podstawy reinterpretacji konstytucji*, [in:] M. Zubik (ed.), *Dwadzieścia lat transformacji ustrojowej w Polsce*, Warsaw 2010, p. 85; also, K. Kubuj, J. Wawrzyniak, *Wstęp*…, p. 12. Also see, V. Serzhanova, *Europeizacja konstytucji*…, p. 150 ff.

[11] J. Galster discusses it very thoroughly in *Konstytucja Rzeczypospolitej Polskiej*…, p. 55 ff; also, D. Lis-Staranowicz, J. Galster, *O zjawisku europeizacji*…, pp. 29 and 51; M. Ziółkowski, *Europeizacja konstytucji*…, p. 22; K. Kubuj, J. Wawrzyniak, *Wstęp*…, p. 15. For more, also see V. Serzhanova, *Europeizacja konstytucji*…, p. 150 ff.

a state's accession to the Union, some type of response to the need of re-organising the pattern of connections between authorities, which in the conditions of membership in the Union at least in some spheres of their activities begin to act in a different way or obtain new, so far unknown areas of their activity".[12]

The Europeanization of basic laws may concern various constitutional matters, inter alia, it may cause changes in interpretation of some constitutional principles (e.g. the principle of sovereignty), lead to modification of the scope of a state's functions, some state bodies' competence and even cause erosion of the constitutional matter.[13] The Europeanization of a constitution takes place with the use of two basic instruments: the change of a Member State's constitutional norms by means of amending the text of the basic law (called the category of formal changes) or re-interpretation of its existing provisions in force (called substantive changes performed without interference into the text of the basic law, in other words, "silent changes" or "breaking through"),[14] i.e. adopting new different interpretation in order to adjust to the EU legal regulations in force. The spheres in which the process of the European integration takes place, namely the economic, political, military and cultural ones, mainly determine the areas in which the changes in basic laws may occur.[15]

The changes resulting from the introduction of the European common currency (euro) on 1 January 1999 (which entered into common use at the beginning of 2002) is an example of the fastest changes in Member States' constitutions caused by integration in the economic sphere. This essential event for economic integration resulted in the necessity to regulate the matter in national constitutions of some states (e.g. the Basic Law of Germany)[16] that entered the euro area and also

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[12] J. Szymanek, *O potrzebie euro-nowelizacji Konstytucji RP*, Studia Prawnicze No. 1(183), 2010, p. 9. Such an opinion is also presented by M. Ziółkowski, *Europeizacja konstytucji*…, p. 24. Compare, A. Kustra, *„Euronowelizacja" w projektach ustaw o zmianie Konstytucji RP. Próba oceny*, Przegląd Sejmowy No. 3(104), 2011, pp. 31–55.

[13] For more, see K. Wojtyczek, *Wpływ Traktatu z Lizbony na ustrój Polski*, Przegląd Sejmowy No. 4(99), 2010, p. 24; also, D. Lis-Staranowicz, J. Galster, *O zjawisku europeizacji*…, p. 51; M. Ziółkowski, *Europeizacja konstytucji*…, p. 25. For more on sovereignty in the context of globalisation and European integration, see V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 244 ff; in addition, K. Działocha, *Poszukiwanie formuły suwerenności państwa-członka UE w polskiej nauce prawa*, [in:] J. Wawrzyniak, M. Laskowska (ed.), *Instytucje prawa konstytucyjnego w dobie integracji europejskiej. Księga jubileuszowa dedykowana Profesor Marii Kruk-Jarosz*, Warsaw 2009, pp. 46–62; also compare, J. Kranz (ed.), *Suwerenność i ponadnarodowość a integracja europejska*, Warsaw 2006, *passim*; K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym. Wybrane zagadnienia prawnokonstytucyjne*, Kraków 2007, p. 284 ff; by this author, *Przekazywanie kompetencji organów władzy sądowniczej podmiotom międzynarodowym*, [in:] J. Wawrzyniak, M. Laskowska (ed.), *Instytucje prawa konstytucyjnego*…, pp. 426–440.

[14] For more, see A. Kustra, *„Euronowelizacja" w projektach*…, p. 32; A Kustra, M. Laskowska, *Przyczyny i skutki zmian w Konstytucji Rzeczypospolitej Polskiej z 1997 roku a członkostwo w Unii Europejskiej*, [in:] K. Kubuj, J. Wawrzyniak (ed.), *Europeizacja konstytucji*…, p. 206.

[15] For more on the areas of the European integration and the influence of the phenomenon on the shape and functions of a contemporary state, see V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 230 ff.

[16] In 1992, Article 88 was introduced to the Basic Law of the Federal Republic of Germany. It stipulates a possibility of transferring the competences of the Federal Bank in the field of currency and its emission to the European Central Bank. See, the Basic Law of the Federal

those that committed themselves to joining the eurozone in the near future. This may concern the Constitution of the Republic of Poland.[17] The changes aimed at controlling national budgets by the European Union institutions are also more and more important. There are also ever more resolute calls for introducing personal income tax paid to the European Union, which of course would have to be reflected in national basic laws.[18]

The adoption of a constitutional act regulating the organisation and functioning of the EU bodies is of key importance for the Europeanization of national constitutions in the context of political integration. So far, the process has encountered far-reaching difficulties because the idea to call the document a constitution was rejected due to too strong and questioned connotations with a state, which might clearly suggest that the Union is going towards the development of a federal state.[19] The adoption of the Treaty

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Republic of Germany of 23 May 1949, [in:] *Konstytucja Niemiec*, translation by B. Banaszak, A. Malicka, introduction by B. Banaszak, Warsaw 2008, p. 79.

[17] The norms concerning the introduction of the euro currency do not, of course, have to be contained in the text of the basic law. Nevertheless, there was such an attempt made in Poland on 12 November 2010 when a bill amending the Constitution prepared by the President of the Republic of Poland was filed (Sejm paper no. 3598). It proposed, inter alia, introducing solutions making it possible to fully meet obligations resulting from the Accession Treaty with respect to membership in the Economic and Monetary Union and introduction of the euro, which would undoubtedly facilitate the introduction of the new currency to the national economic system. There were two readings of the bill but, in the face of no consensus in the Sejm, there was no third reading and voting and, as a result, the legislative procedure was discontinued with the end of the Sejm term. A. Szmyt discusses it competently in *Członkostwo i perspektywy jego rozwoju w UE a projekty zmian Konstytucji RP*, [in:] Z. Witkowski, V. Jirásková (ed.), *Aktualne problemy współczesnego…*, pp. 30–32. Due to successive postponing and delaying of the time limit of euro introduction in Poland in relation to the original plan, the government and the parliament does not treat the issue as urgent. However, one can expect or even be sure that sooner or later it will become subject to amendments to the Constitution. The issue has been thoroughly discussed in literature. See, inter alia, such works as: J. Jaskiernia, *Konstytucja a wejścia Polski do strefy euro*, Przegląd Socjalistyczny, http://przeglad-socjalistyczny.pl/opinie/aziemski/1092-jaskiernia [accessed on 30/11/2017]; by this author, *Członkostwo Polski w Unii Europejskiej a problem nowelizacji Konstytucji RP*, Warsaw 2004, *passim*; by the same author, *Wejście Polski do strefy euro a problem zmian w Konstytucji RP*, [in:] A. Piotrowska-Piątek, P. Ruczkowski (ed.), *Wyzwania w systemie bankowym w XXI wieku*, Kielce 2009, p. 203 ff; T. Knepka, *Przyjęcie przez Polskę waluty euro a zmiany w Konstytucji RP w zakresie polityki pieniężnej*, [in:] J. Gliniecka, E. Juchniewicz, T. Sowiński, M. Wróblewska (ed.), *System prawno-finansowy. Prawo finansowe wobec wyzwań XXI wieku*, Gdańsk–Nynnasham–Stockholm 2013, p. 282; J. Barcz, *Członkostwo Polski w Unii Europejskiej a Konstytucja z 1997 r.*, [in:] J. Barcz (ed.), *Czy zmieniać konstytucję? Ustrojowo-konstytucyjne aspekty przystąpienia Polski do Unii Europejskiej*, Warsaw 2002, p. 40.

[18] For more on the issue, compare V. Serzhanova, *Europeizacja konstytucji…*, pp. 153–154; also, V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 310.

[19] The opinion still dominates in literature on constitutional law. Compare, V. Serzhanova, S. Sagan, *Nauka o państwie…*, p. 233; also, V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 310. An interesting discussion of the issue can be found in K. Działocha, *Poszukiwanie formuły suwerenności…*, p. 45 ff. However, the issue is treated in a different way in contemporary international and European legal literature, where the term "constitution" stopped being inseparably connected with a national state. At present, it is used in order to describe internally related and non-contradictory set of rules, principles and their basic values that organise the exercise of authority in a given community or international organisation. To a great extent, this results from the Court of Justice of the European Union case law. For a competent discussion

of Lisbon[20] was an important step on the way to political integration; it extended the catalogue of human rights and freedoms (of course, mainly thanks to the Charter of Fundamental Rights that became directly legally binding and applicable), which must have had impact on the trends towards changes in particular national constitutions. Moreover, the reform of the European Union organisational structure and modification of the role of the European Parliament and national parliaments in the decision-making processes in the Union, especially enacting law but also the decision-making procedures which the Treaty of Lisbon introduced, may also result in the necessity to amend some national constitutions.[21] The process may cover the areas of competence of national parliaments, common courts, constitutional courts, prime ministers and government officials, etc. In addition, there is organisation of the European diplomacy, which aims to protect the citizens of the European Union regardless of their state citizenship. Former regulations were limited to the infringement of the judicial power monopoly and delegating it to supranational courts such as the European Court of Human Rights or the Court of Justice of the European Union.[22]

The EU membership and the more broadly understood European integration considerably influence the perception of national states' sovereignty.[23] This sometimes results in the desire and sometimes in the necessity to introduce amendments to the provisions of basic laws concerning renouncing or delegating part of a state's sovereignty to international or supranational bodies or organisations, especially to the bodies and institutions of the European Union.[24] Such provisions were introduced not only to the

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of that, see M. Ziółkowski, *Europeizacja konstytucji…*, p. 26 ff; also, A.V. Bogdandy, *Podstawowe zasady prawa UE – teoria i doktryna*, Part I, Europejski Przegląd Sądowy No. 8, 2009, p. 11.

[20] A consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union, OJ C115 of 9.05.2009.

[21] K. Kowalczyk-Bańczyk, M. Szwarc-Kuczer, *Traktat z Lizbony – reforma czy jej pozory?*, Studia Prawnicze No. 1(175), 2008, p. 5 ff.

[22] For more, see V. Serzhanova, *Europeizacja konstytucji…*, p. 154; V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 313.

[23] For more, see K. Działocha, *Poszukiwanie formuły suwerenności…*, pp. 45–62; J. Kranz (ed.), *Suwerenność i ponadnarodowość…*, *passim*; M. Ziółkowski, *Europeizacja konstytucji…*, p. 24; also, V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 311 ff. As far as the latest works on the issue of sovereignty in the context of membership in the EU are concerned, it is undoubtedly worth mentioning a collective work of P. Stawarz, T. Wallas, K. Wojtaszczyk (ed.), *Suwerenność państwa członkowskiego Unii Europejskiej*, Warsaw 2017, *passim*.

[24] For example, it is worth referring to a debate on the issue of amending the Constitution of the Republic of Poland connected with or resulting from Poland's membership in the EU, sometimes called an "integration clause" or a "European clause", conducted for several years and revived systematically with various intensity. The amendment proposed by some authors is in their opinion justified by the fact that the text of the basic law is seemingly insufficient taking into account all the consequences of Poland's membership in the Union. For more, see, inter alia J. Jaskiernia, *Projekt klauzuli integracyjnej do Konstytucji RP*, Państwo i Prawo No. 1, 2011, pp. 3–17 and the literature referred to therein. However, the scope of the changes proposed still remains debatable and no reasonable compromise has been reached. A detailed determination of the provisions of the basic law in this respect, on the one hand, seems to be necessary in order to avoid conflicts, at least competence-related ones (which of course constitutes only one aspect of the issue; see footnote no. 56) and, on the other hand, may lead to a not really desired tendency to regulate everything at the constitutional level, which is purposeless and, in fact, impossible. The main reason for the lack of consensus in this matter seems to be very prosaic and results from the stand of present political decision-makers. Frankly speaking, one should look for it in the fact that every successive governing

EU Member States' constitutions (in Austria, Croatia, Denmark, Finland, Greece, the Netherlands, Lithuania, Germany and Sweden) but also constitutions of the states aspiring to the EU membership (Macedonia, Albania) and of the states associated with the EU (Norway), and their scope is varied.[25] However, for constitutional law experts the establishment of changes in the scope of contemporary states' sovereignty as well as the level and way of reflecting that in the basic law texts have fundamental importance.

Family law remains a very sensitive and delicate issue. At present, there is a very dynamic trend towards legalisation of same gender partnerships in various forms.[26] Many states do not want, however, to give up the traditional way of perceiving marriage as a relationship between a man and a woman. Although the issue has a basic impact mainly on the transformation of the traditional institutions of family law developed for ages in Europe and does not directly constitute a constitutional matter, the will to confirm in the basic law that marriage is a relationship between a woman and a man may also cause the necessity to introduce amendments to a constitution (Slovakia and Croatia are examples of that), especially if there are no such a provisions therein. A diverse situation may occur, too. In constitutions in which such a norm is laid down (e.g. Article 18 of the Constitution of the Republic of Poland), in case of the legislator's strong will, a desire to modify or completely repeal such a provision may occur, which will cause permanent changes in family law.[27]

Military integration in the European Union, which encounters serious objections of the Member States, remains an equally important issue. The organisation of the European defence forces is implemented at present within the structure of the Common Security

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political party simply does not have the majority necessary to pass amendments to the Constitution that would be in conformity with its vision. At the same time, there is no will to solve the problem, regardless of political divisions and based on a compromise. By the way, many disputes might be avoided with a little more reasonable and pragmatic approach to the interpretation of the provisions of the Constitution in its present wording. In other words, it is not necessary to regulate everything in legal terms (including amending the Constitution); sometimes common sense, all-party political decision-makers' activities and, what is of fundamental importance, the treatment of a state as a common good by all the citizens are sufficient. The law must be simple and clear so that every citizen can understand it. It cannot cause problems with its interpretation. These values, which are carefully cultivated in countries with established democratic traditions and sophisticated political culture (e.g. Nordic countries), unfortunately not rooted in Poland, are worth copying.

[25] Compare, V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 311 ff.

[26] Various types of same-sex relationships (partnerships or marriages) have been legalised in 28 of 50 European states and seven of the nine dependent territories in Europe, including 22 European Union states. In 13 of them, homosexual marriages are allowed. These are Belgium, Denmark, Finland, France, Spain, the Netherlands, Ireland, Island, Luxemburg, Norway, Portugal, Sweden and the United Kingdom. 20 countries recognise partnerships or non-registered co-habitation. In six countries (the Netherlands, Belgium, Spain, Norway, Sweden and Island) it is also legally admissible to adopt children. Moreover, same-sex couples can legally adopt children in Andorra and the United Kingdom. In Denmark, Finland and Germany, parties to a partnership are permitted to adopt their partners' children. In a few states at present, there is a debate concerning the introduction of partnerships or same-sex marriages. The introduction of the latter may be obstructed by the fact that some constitutions define marriage as a relationship between a man and a woman. These are Belarus, Bulgaria, Croatia, Montenegro, Lithuania, Latvia, Moldova, Poland, Serbia, Slovakia, Ukraine and Hungary. Also, see V. Serzhanova, S. Sagan, *Wpływ procesów…*, p. 311. The issue of relationships is even more complicated when one of the partners changes his/her gender. It has far-reaching consequences for family law.

[27] For more, see V. Serzhanova, *Europeizacja konstytucji…*, pp. 155–156.

and Defence Policy (CSDP), as a component of the Common Foreign and Security Policy (CFSP). They substituted for the Western European Union (WEU), which was dissolved on 31 March 2010 by the Member States' decision due to the Treaty of Lisbon entry into force.[28] The lack of efficiency of activities aimed at organising the effective EU security structures results from asymmetry in acting in favour of the process of the European integration. This may require amendments to basic law provisions concerning defence of the homeland (one's own country), permission for service or secondment of part of national armed forces under supranational command as well as the use of armed forces abroad under the CSDP (such provisions are, inter alia, laid down in the constitutions of Austria, the Netherlands, Sweden and Slovakia). Such amendments may prove to be necessary in case of countries the basic laws of which stipulate the principle of neutrality as well as those that clearly ban participation in any military treaties (e.g. Malta).[29]

Cultural integration remains the most troublesome, sensitive and imprecise sphere of the EU Member States' integration,[30] because there is a lack of clear common opinions and prescriptions what it should be like. There are two reasons for that: the fears of small-population states and also those which have gained sovereignty recently that they will lose their identity, and the lack of precise and consistent policy of the European Union in this area. States with a small population potential, such as Denmark or Malta, and those that have gained their sovereignty recently, such as Slovakia and Slovenia, and also candidates to the EU membership, Bosnia and Herzegovina or Macedonia, are evidently afraid of losing their national identity. They attach importance to sovereignty and cultivate their statehood, which is their main objective. The concerns are strengthened by the lack of rules and, as a result, established political trends indicating the direction the European Union is taking: development of a "European nation" and disappearance of the identity of nations having their own national states or maintenance of cultural diversity of the European nations. At the present stage, the processes evoke a reflex action of strengthening decisions and extending legal regulations concerning the protection of national heritage, especially a language. This concerns mainly small states that have a relatively short history of their own statehood and are at the stage of consolidating their national identity (e.g. the Baltic states). Such regulations are found, inter alia, in the constitution of Slovakia. Moreover, more and more acts are passed in order to protect a national language and cultural heritage.[31] This is a proof of the Europeans' awareness of the importance of and the will to maintain their cultural diversity, which is perceived as the strength of Europe and its nations.

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[28] The organisation was officially declared defunct on 30 June 2011.

[29] For detailed information about military integration, see V. Serzhanova, *Europeizacja konstytucji*…, p. 156; also, V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 234 ff. For more on constitutional norms concerning defence of the country, the use of armed forced abroad, the principle of neutrality and a ban on entering military alliances in some constitutions of European states and possible amendments to them, see V. Serzhanova, S. Sagan, *Wpływ procesów*…, p. 313 ff.

[30] F. Gołembski, *Kulturowe aspekty integracji europejskiej*, Warsaw 2008, *passim*.

[31] Such an act has been in force in Slovakia since 1996 and in Poland since 2000. Those legal acts constitute a very important part of legislation in the Baltic states, where they play a very important role in the development of the reviving states and national identity. For more detailed information about cultural integration, compare V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 237 ff. For more on the regulations concerning the protection of national and cultural identity in the European constitutions, see V. Serzhanova, S. Sagan, *Wpływ procesów*…, pp. 315 and 317.

3. CONTEMPORARY STATES' OBJECTIVES AND FUNCTIONS VESRUS THE ISSUE OF SOVEREIGNTY

A state's functions are inseparably connected with the objectives that this omnipotent political structure pursues. A state's functions should be interpreted as basic directions of activities that are determined by aims that one wants to achieve. A state's objectives are understood as what a state organisation's political decision-making centre pursues.[32] With the evolution of states, their objectives and, as a result, their functions underwent transformations and differed as to the scope of their implementation in every historic epoch.[33] At present, a state's functions are developed under the influence of processes connected with the phenomena of the European integration and globalisation, which set objectives for contemporary states that were unknown in former periods, determined by the fact that national economy management escaped the control of particular states.

At present, states' objectives are determined by organised structures of society's political organisations and mainly by political parties as well as trade unions, pressure groups, churches, etc. International organisations, both the universal ones like the UN and regional ones like the European Union, or military ones like the NATO also play an important role. Contemporary states' leaders rarely determine their objectives. The states pursue the following aims: to achieve common good, to ensure an individual's freedom and an individual's and the community's security, to participate in the distribution of goods produced by the community, to ensure the defence of its territory and its integrity as well as co-operation under treaties on the international arena, and to combat terrorism. The latest is the aim pursued by the Euro-Atlantic world, which faces threats from Islamic extremism.

With the use of the most common classification most often applied in literature, based on the object-related criterion, i.e. the type of a state's activity resulting from the activities it undertakes in particular spheres of public life, a state's functions can be divided into external, internal, economic-organisational, cultural-educational and social ones.[34]

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[32] M. Manelli initiated studies of a state's functions in Polish literature, first in an article published in Państwo i Prawo (No. 1 of 1957): *Pojęcie funkcji państwa*, and next in a monograph *O funkcjach państwa*, published in Warsaw in 1963. It was written from the point of view of the Marxist-Leninist ideology but, paradoxically, is in many parts still up-to-date. I adopt the definition of a state's objectives proposed by S. Ehrlich, *Wstęp do nauki o państwie i prawie*, Warsaw 1977, p. 66. For more on the concepts of contemporary states' objectives and functions and their classifications, see V. Serzhanova, S. Sagan, *Nauka o państwie…*, p. 65 ff.

[33] "While in the 19th century, a state's functions can be limited to the protection of the legal system (referred to as external and internal functions), in the 1920s their catalogue is extended by economic, social and educational ones. This increase in a state's interference in an individual and community's life is justified by the theories of a state of well-being (*welfare state, sozialstaat, social state, service state*)", see L. Dubel, A. Korybski, Z. Markwart, *Wprowadzenie do nauki o państwie i polityce*, Kraków 2002, p. 42.

[34] There are generally two approaches to classifying a state's functions. The first one assumes a "classical" interpretation of a function as an object connected with the fact that contemporary states develop their structures based on the principle of separation of powers, which determines the scope of activity of particular public authority bodies. Such a division

The traditional external function consists in a state's participation in the international community. A state implements its foreign policy and maintains diplomatic relations with other states and international organisations.[35] Foreign policy covers economic relations, including trade exchange and scientific and cultural policy as well as information about the country and personal contacts. External security, i.e. military treaties, is a separate and extremely important element of every state's foreign policy.[36] A state's position on the international arena depends on many factors: national conditions, geographical location, the size of its territory and population, economic potential, military strength, cultural identity and a political system. Thus, a state has a specialised diplomatic service, including consular offices responsible for the protection of the state's diaspora abroad. On the other hand, international terrorism that occurred at the end of the 20th century is a new phenomenon. Combating it by individual states proved to be inefficient. It requires that political and military alliances are organised and attempts are made on a regional and global scale.[37] Therefore, the regional co-operation of states that strive together to solve problems connected with external security and economic development gains more and more importance in the contemporary world. The European Union plays a special role in this area.[38]

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of functions can be found, e.g. in the works by A. Mycielski or A. Peretiatkowicz. One can even have an impression that the authors identify the separation of powers with a state's functions. Compare, A. Mycielski, *Zarys nauki prawa państwowego. Część I ogólna*, Wrocław 1959, p. 85 ff; also, A. Peretiatkowicz, *Państwo współczesne. Wiadomości ogólne. Ustrój polityczny Anglii – Stanów Zjednoczonych – Związku Radzieckiego – Polski*, VIII edition, Poznań 1946, p. 56 ff. The second approach originates from the American school of systemic analysis and, that is why, it can be called a systemic one. It differentiates: a function of developing political behaviour patterns which, on the one hand, aim to maintain the existence of the system and regulate tensions occurring in it and, on the other hand, to implement those norms and values that result from general aims of the political system; an adaptation function; an instrumental and purpose-related function and an integration function. Both classifications are taken into account in Polish works on a state's functions. This is what can be found in E. Kustra, *Wstęp do nauk o państwie i prawie*, Toruń 1997, p. 58. On the other hand, P. Winczorek bases his study only on the school of systemic analysis and refers to the thoughts of an outstanding Polish sociologist and ethnographer, B. Malinowski (1884–1942). See, P. Winczorek, *Wstęp do nauki o państwie*, 2nd edition, Warsaw 1997, p. 29. The stand presented by the supporters of the systemic analysis method negates the point of view of constitutional lawyers who look at a state's functions through the prism of public authorities' activity in particular spheres of the separation of powers and its reflection in the regulations of the basic law. However, the concept is criticised because of its far-reaching abstraction and generality. Compare, T. Langer, *Amerykańska wersja analizy systemowej w nauce o polityce*, Warsaw 977, p. 77. Both approaches (objective and systemic) to the classification of a state's functions should be treated complementarily because they supplement each other and are not mutually exclusive. For more, also see V. Serzhanova, S. Sagan, *Nauka o państwie…*, pp. 65–74. For a still different approach to the concept and classification of a state's functions, see A. Korybski, *Funkcje państwa*, [in:] B. Szmulik, M. Żmigrodzki (ed.), *Wprowadzenie do nauki o państwie i polityce*, Lublin 2007, pp. 101–110.

35 M. Dobroczyński, J. Stefanowicz, *Polityka zagraniczna*, Warsaw 1984, p. 124 ff.

36 J. Kukułka, *Międzynarodowe stosunki polityczne*, Warsaw 1982, p. 240 ff.

37 B. Balcerowicz, *Siły zbrojne w państwie i stosunkach międzynarodowych*, Warsaw 2006, p. 82 ff.

38 See, V. Serzhanova, S. Sagan, *Nauka o państwie…*, p. 67. Compare, A. Korybski, *Funkcje państwa…*, pp. 107–108.

The internal function consists in the provision of order and security in a state and is implemented by public administration bodies, the police, secret service, justice administration bodies, prosecution offices and prison guards. More and more often, it also concerns information order and personal data protection. The issues of order and security are of public and all-party importance; not only governments but also the community are interested in them.[39] Thus, willing to efficiently counteract breaches of security and public order, a state tries to obtain support from various social organisations and local communities (community policing) to co-operate in the field of security and proper functioning of the whole social system.[40] Within that function, the protection of citizens' property and health is extremely important. A state enacts necessary regulations serving those purposes and also creates and equips various police forces, including municipal police.[41] Performing the internal function, a contemporary state uses electronic surveillance of its citizens to a wider extent. Every day, one can see some examples of it, i.e. CCTV cameras in public buildings, work places, hotels, residential areas, etc.[42] Under the pretext of protecting personal security and property, individuals become the object of interest of a state and non-governmental institutions protecting people and property. The process is unfavourable for the rights and freedoms. It is in flagrant collision with respect for dignity and privacy.[43] The tendency is strengthened by a very general slogan of "the fight against terrorism".[44] However, one cannot identify the necessity to ensure personal and community security and, at the same time, agree that the rights and freedoms, including people's dignity and privacy, would be limited.[45]

The movement of people and the issue of multiculturalism and tolerance towards aliens, on the one hand, and the protection of a state's territory against illegal migration, on the other hand, are some of the contemporary states' most important problems. Europe faced the necessity to establish the European Border and Coast Guard Agency (FRONTEX), an organisation co-ordinating the activities of national border guard services.[46] Organised crime remains another extremely

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[39] W.J. Wołpiuk, *Siły zbrojne w regulacjach konstytucyjnych RP*, Warsw 1998, p. 46 ff.

[40] Interesting considerations concerning security bodies and their role in society can be found in the work by J. Czapska and J. Wójcikiewicz, *Policja w społeczeństwie obywatelskim*, Kraków 1999, *passim*; especially on community policing, p. 129 ff.

[41] S. Pieprzny, *Ochrona bezpieczeństwa i porządku publicznego w prawie administracyjnym*, Rzeszów 2007, p. 73 ff.

[42] S. Fundowicz, *Utrwalanie obrazów w przestrzeni publicznej*, [in:] E. Ura, K. Rajchel, M. Pomykała, S. Pieprzny (ed.), *Bezpieczeństwo wewnętrzne we współczesnym państwie*, Rzeszów 2008, p. 78 ff; also, V. Serzhanova, S. Sagan, *Nauka o państwie…*, p. 69.

[43] An interesting study of the right to privacy was presented by J. Braciak, *Prawo do prywatności*, Warsaw 2004, *passim*; also, Z. Janku, *Prawo jednostki do bezpieczeństwa (teoria, prawo, praktyka)*, [in:] E. Ura, K. Rajchel, M. Pomykała, S. Pieprzny (ed.), *Bezpieczeństwo wewnętrzne…*, p. 13 ff; B. Jastrzębski, *O problemie prawa obywateli do bezpieczeństwa publicznego*, [in:] E. Ura, K. Rajchel, M. Pomykała, S. Pieprzny (ed.), *Bezpieczeństwo wewnętrzne…*, p. 16 ff.

[44] T. Białek, *Terroryzm, manipulacja strachem*, Warsaw 2005, p. 223 ff; J. Muszyński (ed.), *Terroryzm polityczny*, Warsaw 1981, *passim*.

[45] For more, see V. Serzhanova, S. Sagan, *Nauka o państwie…*, p. 69. Compare, A. Korybski, *Funkcje państwa…*, p. 107.

[46] The name FRONTEX originates from the French *frontières extérieures*, i.e. "external borders". FRONTEX was established on 26 October 2004 based on the Council Regulation (EC)

dangerous phenomenon. It implies close co-operation of law enforcement agencies on the regional scale (Europol) or the global scale (Interpol).[47]

The phenomena blur the distinction between external and internal functions and indicate that the two spheres of a state's activities infiltrate one another. "That is why, not only internal entities but also the external ones as well as non-governmental organisations usually participate in the implementation of a state's external function. The participation of those various entities contributes to representation of diverse interests and extension of the basis for the development of a stable social order in a state".[48]

The economic-organisational function at present consists in the creation of conditions and stimulation of economic activities. The scope and intensity of a state's interference into the economic sphere depends on the doctrines adopted by political circles. In places where liberal options dominate, a state limits its activity to the fiscal (low taxes are conducive to investments) and monetary policy (ensuring a stable exchange rate and maintaining a strong position of the national currency). On the other hand, in case of a state's strong interference into the economic sphere, the function will be considerably extended. A state, not allowing privatisation, manages the key areas of infrastructure, rail and road transport, energy system, etc. It implements the policy of supporting the private economic sector financially (use of intervention prices for agricultural products purchased and subsidising businesses) and sometimes regulates private companies' price policies. In general, the function consists in ensuring trade exchange and development of economic activities. A state fulfils these tasks mainly by creating appropriate legal norms and establishing institutions that look after certainty and security of trade exchange. Inter alia, it establishes commercial and arbitration courts, supervises notary offices and registers businesses. Moreover, it influences the market by establishing bodies and institutions of consumer protection and combating unfair competition. It also influences the economy by formulating a customs policy limiting import or export and an appropriate transport policy. However, contemporary states lose the ability of influencing their domestic economies that are following globalisation and regionalisation trends. Supranational institutions such as the World Bank or the International Trade Organisation and big corporations take over economy management on a global scale. However, on the Old Continent, the European Union

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No 2007/2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349/1, 25.11.2004). On 14 April 2005 a decision was made that the head office of FRONTEX would be in Warsaw. Formally, the Agency started working on 1 May 2005 and practically on 3 October 2005. At present, it operates as the European Border and Coast Guard established by the Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.09.2016). See, V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 69.

47 H. Kurta, *Interpol*, Warsaw 1976, *passim*; also, P. Wawrzak, *Współpraca policyjna a system informacyjny Schengen II*, Warsaw 2008, p. 21 ff. Also see, V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 70.

48 E. Zieliński, *Nauka o państwie i polityce*, Warsaw 1999, p. 141.

takes over the role. It managed to introduce a common currency, which resulted in the national countries' loss of influence on its exchange rate.[49] Thus, the economic function performed by contemporary states undergoes considerable transformations. A separation of a state and economy occurs as a result of regional integration and globalisation processes and the loss of control over domestic economies. The capital circulates on a global scale as quickly as the Internet connections and does not belong to a particular territory. This makes tax collection in national states difficult. Multinational corporations try to avoid paying taxes and use, inter alia, tax havens, i.e. states that exist mainly thanks to the principle of bank secrecy: Switzerland, Liechtenstein, Cyprus, the Cayman Islands, etc. Budget planning also undergoes transformations because it depends on external factors. In the European countries, the EU subsidies constitute part of their national budgets.[50]

The cultural-educational function consists at present in taking care of states' cultural heritage, and creating and maintaining the system of education. Sometimes, in extreme cases, especially in totalitarian states, society is subject to political indoctrination in the ideology adopted by the state. A state strives to maintain its nation's cultural heritage by creating legal and financial frameworks aimed at preserving its material and spiritual goods. Thus, inter alia, it supports the restoration of historic buildings, takes care of their substance by state bodies' supervision; it amasses collections and funds museums. As far as this is concerned, it co-operates with international organisations (UNESCO). A state also financially supports literature, which is extremely important for national culture, participates in film production, backs theatres and theatrical art. It gets financially involved in the maintenance of public mass media: radio, television and other modern technologies of providing access to cultural goods. A contemporary state also funds the public system of education at the elementary and secondary level, which apart from spreading knowledge shapes citizens' attitudes. Funding university studies, which in most European states are free of charge but in some others are to be paid for, is an open issue.[51]

The social function concerns social insurance, health protection, social support and creation of conditions for full employment as well as legal norms regulating labour (conditions for concluding and terminating employment contracts, health and safety, employees' holiday and healthcare rights). For welfare states, ensuring the social minimum benefit for the unemployed remains a very important issue. Co-operation with non-governmental organisations, trade unions and churches, which are involved in charity, aid for families, health and palliative care and aid for homeless people, plays an important role in fulfilling this function.[52]

The issue of a new way of perceiving sovereignty, which is one of the fundamental principles of most European national constitutions, is a key one in the context of

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[49] For more detailed information, see V. Serzhanova, S. Sagan, *Nauka o państwie*…, pp. 70–71.
[50] Also see, *ibid.*, p. 245 ff.
[51] See, *ibid.*, pp. 71–72.
[52] *Ibid.*, pp. 72–73.

functions performed by a contemporary state in the era of regional integration.[53] Evolution of sovereignty, in terms of its definition and practice, to a great extent influences the objectives and functions of contemporary states. A process of its considerable external and internal limitation can be observed.[54]

The monopoly on commonly binding legal norms and their enforcement as well as the administration of justice has always been one of the unquestionable aspects of sovereignty. At present, however, more and more norms in particular states are enacted outside them, by international organisations, which strive to unify law, or by regional associations of states, as it occurs in the European Union, which applies the principle of primacy of its law.[55] These norms become an integral part of national legal systems, which considerably influences the strict way in which classical external and internal functions of a state and the scope of foreign and domestic policy have been perceived in the doctrine so far. The re-interpretation of these concepts in the Polish basic law performed by means of the Constitutional Tribunal case law is an example in support of that.[56]

The administration of justice to a state's citizens has been another important manifestation of sovereignty not raising any doubts until recently. The obligation to submit to the jurisdiction of supranational bodies that adjudicate in cases of citizens who are not satisfied with the judgements of national courts is critical. Breaking the administration of justice, which is one of the most important attributes of sovereignty, has become a legal, political and psychological fact noticed by citizens who can now conduct litigation against their own states before justice administration bodies outside their own country.[57]

The establishment of the European Union citizenship is another issue in uniting Europe. Based on the doctrinal attitude, which undoubtedly suggests that citizenship is the relationship between an individual and a state, it is necessary to state that the European citizenship is mainly a political intention assuming that the EU will aim

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[53] See, K. Działocha, *Poszukiwanie formuły suwerenności*…, pp. 45–62; J. Kranz (ed.), *Suwerenność i ponadnarodowość*…, *passim*; M. Ziółkowski, *Europeizacja konstytucji*…, p. 24.

[54] V. Serzhanova, S. Sagan, *Wpływ procesów*…, p. 318; for the origins and evolution of the concept of sovereignty, see V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 44 ff. For expert literature on the issue, see J. Jaskiernia, *Istota i charakter prawny związania suwerennego państwa polskiego międzynarodowymi standardami demokratycznymi*, [in:] J. Jaskiernia, K. Spryszak (ed.), *Dwadzieścia lat*…, p. 398 ff.

[55] See, K. Wojtyczek, *Przekazywanie kompetencji organów władzy sądowniczej*…, p. 426 ff.

[56] The Constitutional Tribunal ruling of 20 May 2009, Kpt 2/08, OTK ZU 2009, No. 5A, item 78. The Tribunal stated that the relations between Poland and the European Union could not be unambiguously contained in the constitutional frameworks of foreign policy or domestic policy because the EU law constitutes at the same time part of the national legal order and is applied by state bodies. Thus, it is found in the area of "internal affairs and foreign policy of the Republic of Poland" (Article 146 para. 1 Constitution) as well as "the affairs of State" (Article 146 para. 2). On the other hand, it placed participation in meetings and decision-making groups and meetings with representatives of other states and international (supranational) organisations within the function of "conducting foreign policy". This means that in this case, the Tribunal also applied the interpretation of the Constitution in the way that is friendly to the European integration. For more, see M. Laskowska, *Przyczyny i skutki zmian*…, pp. 210–211; also, V. Serzhanova, *Europeizacja konstytucji*…, p. 160.

[57] For more, see V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 267 ff.

to apply some form of statehood. In accordance with the Treaty of the Functioning of the European Union, the EU citizenship is connected with the possibility of exercising some rights and Member States are obliged to guarantee human rights and fundamental freedoms because their aim is to strengthen the position of the EU citizen and create a basis for citizens' more intensive identification with legal, political, social, cultural and economic range of the EU activities.[58]

Integration and, more broadly, globalisation processes inter alia cause that contemporary states lose the possibility of managing their national economy which to a greater and greater extent depends on supranational corporations as well as banking and financial systems because there are not autarchies any more. This results in the loss of one of the most important attributes of sovereignty and dependence on the decisions made by economic organisations and financial systems functioning outside a national state. The flow of capital to a big extent remains outside national governments' control. Sustainable balance in particular states' economies that used to be an indispensable condition of the entire economic thought has become an illusion today.[59]

The loss of military and defence function by national states is another factor limiting sovereignty in favour of non-national political and military structures. A contemporary state has also lost the monopoly on possessing and disposing of armament and, as a result, organised armed forces intended for the protection of national borders. The lack of efficient control over a part or, sometimes, even most of their territory also causes a major problem for contemporary states. Such a situation occurs in dozens of states in the world.[60] The most evident examples are Somalia, Afghanistan and Georgia as well as Moldova, a part of the territory of which is under control of the authorities of an unrecognised state of the Pridnestrovian Moldavian Republic.[61]

Many regional movements are dangerous because they often lead to national states' destruction. The Taliban's movement that can be observed in Afghanistan or Pakistan or armed groups in Somalia, which was completely destroyed and became a pirates'

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[58] For thorough and deep analysis of the EU citizenship, see *ibid.*, p. 50 ff.

[59] *Ibid.*, p. 245.

[60] International practice allows the existence of a state without a territory but treats it as a temporary situation. There are many examples of such states at present: Palestine, Western Sahara, South Ossetia, Abkhazia, etc. The lack of efficient control over a state's own territory concerns mainly states where there was a secession, which resulted in the development of quasi-state organisms with indefinite status and which are not recognised by the majority of the international community.

[61] The latest history knows cases of over 30 states created after 1945 that were not recognised. At present, there are at least a dozen of states that are not recognised (it is difficult to determine their number definitely and undoubtedly). These are countries that have not been recognised by any member of the United Nations, e.g. Nagorno-Karabakh, Somaliland or the Islamic State, and those recognised by one or a few states, e.g. Abkhazia, South Ossetia (recognised by four states: Russia, Nicaragua, Venezuela and Nauru) or Northern Cyprus (recognised only by Turkey), or a few dozens of states, e.g. Kosovo or the Chinese Republic. It is not possible to mention them all; and it is so not just because of their number but mainly their ambiguous status. It is not the aim of the present article, either. It is only worth mentioning that they differ by the level of their internal organisation progress and they are at a different level of development and efficiency of functioning. What is most important, each of them meets the requirements of the definition of a state to a different extent.

base, are such examples. Moreover, due to a new type of conflicts that need joined allies' response, the use of armed forces escapes national states' control. Decisions on military involvement are taken outside a state, e.g. in the structures of the NATO, which is the biggest organisation of the Euro-Atlantic world and national armed forces are more and more often involved in conflicts outside their countries, e.g. in Iraq, Afghanistan, Chad, Sudan, Congo, etc. At present, there are many non-governmental organisations sometimes operating globally which have armed forces that can pose a threat to national states. It is true in case of Al-Qaeda or the Islamic State. After the intervention in the former Yugoslavia, the NATO formally promotes a new strategy that admits limitation of sovereignty in favour of the priority of human rights and democracy. The latter, however, are treated selectively and not always consistently. It can also be seen how imperfect the European Union military structures and policy are. In the face of the events in the countries of North Africa and Asia after 2011, especially in the light of escalated activity of the Islamic State since 2014, the necessity to establish European armed forces has been more and more clearly marked.[62]

A contemporary state also loses its monopoly on information in favour of global media. The networks of broadcasters, such as e.g. CNN or Al Jazeera, air globally. One cannot overestimate the role of the Internet which enables individual users to exchange information beyond a state's control. This results in the decrease in a state's possibilities of implementing its own information policy. The consequence is the lack of possibility of promoting national history and culture. A state's role is limited to the provision of transmission order by allocation of frequencies for broadcasting radio and television programmes, cellular phone communication and other forms of information transmission.[63]

Integration and globalisation tendencies clearly change the scope of functions of a contemporary state, which is deprived of influence on the national economy, taxes and defence. In the face of limitation to many functions, the role of a contemporary state consists in ensuring the security of trade exchange and investment in the territory of its jurisdiction. In addition, states limit their area of activity to ensuring internal order in given territories. Globalisation and integration causing migration on an unprecedented scale have also impact on the disappearance of citizens' identification with a national state.[64] In such circumstances, there is a clear increase in the role of civil society which takes over many state's competences in the process of decentralisation and considerably shapes political decisions.

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[62] It seems to be justified mainly because the military aims determined by the NATO, as the only efficient alternative to the operations of national armed forces in the field of a state's own defence, are more and more distant from military aims set in the European states. The strengthening tendencies to involve Member States' armies (of course, it concerns European states) in conflicts taking place far away from the European continent prove that. Thus, the establishment of the European armed forces with coherent military aims, protecting the defence interests of the European states seems to be a reasonable step. For more details, see V. Serzhanova, *Europeizacja konstytucji*…, p. 164 ff; also, V. Serzhanova, S. Sagan, *Wpływ procesów*…, p. 318.

[63] For more, compare V. Serzhanova, S. Sagan, *Nauka o państwie*…, p. 245 ff; also, V. Serzhanova, S. Sagan, *The influence*…, pp. 226–227.

[64] An interesting study of an individual in globalisation processes can be found in J. Staniszkis, *Antropologia władzy. Między Traktatem lizbońskim a kryzysem*, Warsaw 2009, p. 149 ff.

4. CONCLUSIONS

Contemporary European states undergo dynamic transformations connected with integration processes, which can sometimes be perceived as a manifestation of globalisation. As a result, national constitutions to a greater extent not only register but also open to such processes. The European integration influences them in a particularly strong way. Thus, the phenomenon called "Europeanization of constitutions" in literature becomes more and more common. On the other hand, we observe attempts to introduce regulations that aim to protect and preserve states' national heritage, culture and languages.[65]

A state's membership in the European Union causes far-reaching political consequences. It poses new challenges to Member States in the process of adjusting their legal systems, including the content of their basic laws, to the continually changing political and legal reality.[66] The implementation of the EU law into national legal orders sometimes also necessitates amendments to basic laws. This is reflected in all constitutions of the EU Member States.

The processes of limiting states' sovereignty and voluntary transfer of its part to international and supranational organisations, including military alliances, are not without influence on constitutional regulations. Similar attempts to introduce detailed regulations concerning limitation of sovereignty and precise determination of matters concerning the relations between a state and the European Union, although inefficient so far, have also been undertaken in connection with the Polish basic law. However, in the face of the fact that such an amendment has not eventually been made, it is not out of the question that in more favourable political circumstances, such norms will be also introduced to the Polish Constitution.[67]

Integration processes in the European space clearly change the scope and way in which a contemporary state performs its functions. What happens is not only the limitation of states' influence on their fulfilment but also the fact that the so far clear borderlines between them are blurred, which is exemplified by external and internal functions. Integration and globalisation to a great extent limit individual states' ability to manage national economies. The introduction of the common supranational currency in Europe may be a step on the way to take over control of the procedures of the national budget development.

Globalisation and integration processes contribute to increased migration of people and related greater and greater challenges. This considerably influences national states' internal functions, because it triggers the necessity to introduce

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[65] See, V. Serzhanova, *Europeizacja konstytucji*…, p. 165; also, V. Serzhanova, S. Sagan, *Wpływ procesów*…, p. 318.

[66] For expert comments, see K. Kubuj, J. Wawrzyniak, *Wstęp*…, p. 14 ff.

[67] An attempt to introduce the broadest amendment to the Constitution of the Republic of Poland took place in 2010 within joined legislative work on two bills at the same time: the above-mentioned President's bill and one proposed by MPs. Both bills proposed to repeal Article 90 and add Chapter Xa instead, which would more precisely and thoroughly regulate matters connected with Poland's membership in the European Union. Due to the lack of political consensus, the work on the bills stopped after the second reading and was discontinued. Also see, footnote no. 24.

specified legal solutions, breaks down civilization barriers and ensures economic, cultural and educational integration.

As a result, national constitutions, especially new and small states' ones, also at the legislative level, try to protect their national cultural identity. In the era of the European integration, a contemporary state on the one hand is characterised by the weakening of a national state, including its sovereignty, influence on economy and disposal of armed forces, and on the other hand, by the transmission of the central government's competences to local, autonomous or self-government authorities, which strengthens the regionalisation trend, often by the revival of historic regions and even disintegration of national states. The phenomenon has also been observed in many European countries.

Thus, at present, we observe two phenomena that are contradictory in nature. On the one hand, it is the erosion of national states resulting mainly from globalisation processes driven by supranational powers, which causes increased integration aimed at uniting in local (regional) supranational structures. On the other hand, there is a phenomenon of regionalisation consisting in strengthening the influence of territorial division units, including autonomous regions, at the expense of central authorities' territorial jurisdiction of national states. Those, however, still seem to be indispensable as a factor of maintaining international balance between political blocks.

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INFLUENCE OF THE EUROPEAN INTEGRATION ON THE SHAPE AND FUNCTIONS OF A CONTEMPORARY STATE

Summary

Nowadays, contemporary European states are undergoing dynamic transformations connected with the integration processes. Thus, national basic laws not only register to a wider extent, but also become open to integration processes, which is commonly called "Europeanization of constitutions". Regional integration causes far-reaching constitutional consequences for the European states. It poses new challenges to the EU Member States in the process of adjusting their legal systems, including the contents of their basic laws, to the permanently changing political and legal reality. Objectives and functions performed by the contemporary European states, particularly their scope and ways of fulfilment, are also undergoing transformation. The key issue is also new understanding of the concept of sovereignty.

Keywords: European integration processes, national basic laws, Europeanization of constitutions, regional integration, the European Union Member States, functions and objectives of contemporary European states, sovereignty

ODDZIAŁYWANIE INTEGRACJI EUROPEJSKIEJ NA KSZTAŁT I FUNKCJE WSPÓŁCZESNEGO PAŃSTWA

Streszczenie

Współczesne państwa europejskie ulegają dynamicznym przemianom związanym z procesami integracyjnymi. Stąd narodowe ustawy zasadnicze w coraz szerszym zakresie nie tylko rejestrują, ale także otwierają się na procesy integracji europejskiej, co powszechnie określa się mianem „europeizacji konstytucji". Integracja regionalna powoduje daleko idące konsekwencje ustrojowe dla państw europejskich. Przed państwami członkowskimi UE stawia nowe wyzwania w procesie dostosowywania ich porządków prawnych, w tym treści ich ustaw zasadniczych, do wciąż zmieniającej się rzeczywistości politycznej i prawnej. Przemianom podlegają również cele i funkcje realizowane przez współczesne państwa europejskie, a w szczególności ich zakres i sposób wykonywania. Kluczowym pozostaje także problem nowego pojmowania suwerenności.

Słowa kluczowe: procesy integracji europejskiej, narodowe ustawy zasadnicze, europeizacja konstytucji, integracja regionalna, państwa członkowskie Unii Europejskiej, funkcje i cele współczesnych państw europejskich, suwerenność

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COMMUNISATION OF STATE PROPERTY AND PKP PROPERTY ENFRANCHISEMENT: COMMENTS ON THE SUPREME ADMINISTRATIVE COURT RULING OF 27 FEBRUARY 2017, I OPS 2/16

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The transformation of the political system in Poland after 1989 concerned a series of aspects of the state functioning. Among them, territorial self-governments were revived and communes became municipal legal entities independent of the state.[1] In addition, state legal entities, including state-owned enterprises, were "empowered" and became legal entities independent of the state, could represent their own financial interests and set them against the financial interests of the state (the State Treasury). The change took place, inter alia, as a result of the abolition of the principle of the uniform fund of state property expressed in Article 128 Civil Code, which was later repealed. The provision was amended by the Act of 31 January 1989.[2] In accordance with Article 128 Civil Code, state legal entities could acquire property rights, including the ownership right to real estate.

The above-mentioned political system transformations also required far-reaching changes with respect to former ownership relations. What caused the need was the fact that the entire public and state property constituted the object of ownership of the State Treasury (in accordance with Article 128 Civil Code). Thus, there was a need to organise and allocate the property, including the right to real estate. Under

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1 Act of 8 March 1990 on territorial self-governments, Journal of Laws [Dz.U.] of 1990, No. 16, item 95, as amended.

2 Act of 31 January 1989 amending the Act: Civil Code, Journal of Laws [Dz.U.] of 1989, No. 3, item 11.

the denationalisation process of the 1990s, the state property was communised and state and municipal legal entities were enfranchised.

The communisation of the state property took place in accordance with the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees[3] (hereinafter: Communisation Act) or the Act of 13 October 1998: Provisions implementing the Acts reforming public administration[4] concerning public roads. The Acts gave communes the ownership right to real estate successively on 27 May 1990 and 1 January 1999. The acquisition of the right of ownership by territorial self-government units took place *ex lege* based on the above-mentioned provisions.

In accordance with Article 5 para. 1(1) to (3) Communisation Act, if other provisions do not stipulate otherwise, national (state) property belonging to the National Councils and territorial bodies of state administration of the basic level as well as state enterprises for which the above-mentioned bodies play the role of founding entities, or plants or other organisational units subordinate to those entities became the property of the communes concerned *ex lege* on the day of Communisation Act's entry into force (27 May 1990).

The Communisation Act indicates negative conditions for the acquisition of land by communes, in accordance with which the discussed property did not belong to the National Councils or territorial state administration bodies of the basic level or was excluded from the process of communisation based on special provisions. The issues were regulated in Article 11 Communisation Act, under which, inter alia, the property that serves to perform public tasks of the state administration bodies, courts and divisions of state authorities as well as that belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks may not be subject to communisation. The above-mentioned enterprises were listed in the Regulation of the Council of Ministers concerning the determination of the list of state enterprises and organisational units the property of which is not subject to communisation[5] (hereinafter: Regulation CM of 1990).

As a result of the abandonment of the principle of the unity of the state property, state legal entities were given, also *ex lege*, property rights to real estate. It was called enfranchisement of the state legal entities performed in accordance with Article 2 of the Act of 29 September 1990 amending the Act on land management and expropriation of real estate.[6] In accordance with this provision, on 5 May 1990, legal entities, including state enterprises, like PKP (Polish state railways), acquired

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[3] Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees, Journal of Laws [Dz.U.], No. 32, item 191, as amended.

[4] Act of 13 October 1998: Provisions implementing the Acts reforming public administration, Journal of Laws [Dz.U.] of 1998, No. 133, item 872.

[5] Regulation of the Council of Ministers of 9 July 1990 concerning the determination of the list of state enterprises and organisational units the property of which is not subject to communisation, Journal of Laws [Dz.U.] of 1990, No. 51, item 301.

[6] Act of 29 September 1990 amending the Act on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1990, No. 79, item 464.

perpetual usufruct over land and the ownership right to buildings erected on it.[7] It is believed that the above-mentioned regulation was of fundamental importance for the transformation of property relations in Poland.[8]

Eventually, the Act on privatisation of state enterprises was passed.[9]

Getting down to the matter of regulating the rights to railway real property, it is necessary to indicate that, in general, Article 2 Act of 29 September 1990 amending the Act on land management and expropriation of real estate constituted grounds for PKP enfranchisement. The mode of proceeding in order to recognise the acquisition of land in accordance with the above-mentioned Act is at present regulated in Article 200 Act of 21 August 1997 on real property management,[10] provided an entity proves it possessed the right of management on 5 December 1990. In practice, the provisions turned out to be insufficient to implement PKP enfranchisement. The basic problem with the regulation of the legal status of railway real property consisted in the fact that the railway enterprise did not possess documents that could evidence of acquisition of perpetual usufruct over land, i.e. the company did not have documents confirming it was granted the right of management of this real property. Due to the legislator's awareness of the problems with enfranchisement, Article 34 para. 1 Act on commercialisation and restructuring of the Polskie Koleje Państwowe state enterprise[11] (hereinafter: PKP Commercialisation Act) made the enfranchisement of the company possible on the land being the property of the State Treasury that was in possession of PKP on 5 December 1990, for which PKP did not have documents confirming the transfer in the form required by law and could not prove its identity until the date of deleting of state enterprises from the registry. On the day the PKP Commercialisation Act entered into force, the real property became subject to PKP perpetual usufruct.

5 December 1990, i.e. a few months after communes acquired real property under the provisions of the Communisation Act, was the date when former state enterprises or those that were subject to the provisions concerning the acquisition of permanent usufruct, as in case of the above-mentioned Article 34 PKP Commercialisation Act, were enfranchised.

It is worth pointing out that, enfranchising communes and state legal entities, the legislator was not consistent in the application of the time of acquisition of rights by those entities: 27 May 1990 and 5 December 1990. Thus, communes were enfranchised first and state legal entities were enfranchised later. State legal entities acquired the right to real property of the state resources, which was already reduced by formerly communised real property. Thus, theoretically, there should not be any

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[7] K.H. Łaszkiewicz, *Zmiany stosunków własnościowych w Polsce po roku 1989*, Ruch Prawniczy, Ekonomiczny i Socjologiczny Vol. LXXVI, issue 2, 2014, p. 65.

[8] J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin, *Ustawa o gospodarce nieruchomościami. Komentarz*, 2nd edition, C.H. Beck, Warsaw 2011, p. 1427.

[9] Act of 13 July 1990 on privatisation of state enterprises, Journal of Laws [Dz.U.] of 1990, No. 51, item 298.

[10] Act of 21 August 1997 on real property management, Journal of Laws [Dz.U.] of 2016, No. 0, item 2147.

[11] Act of 8 September 2000 on commercialisation and restructuring of the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 2017, item 680.

disputes concerning communisation and enfranchisement between communes and state legal entities. Nevertheless, the difference in terms, especially that occurring in 1990, caused different interpretation of the provisions and case law, which, as a result, more and more often prevents the implementation of the legislator's intention expressed, e.g. in the PKP Commercialisation Act.

In accordance with the administrative procedure, decision-making bodies treat communisation proceedings as preliminary issues in relation to enfranchisement proceedings. Pursuant to it, the land owned by the State Treasury belonging to the National Councils and territorial state administration bodies of the basic level on 27 May 1990, i.e. the day when the Communisation Act entered into force, became the property of the communes concerned. In accordance with case law, the land that was not subject to the right of management, usufruct or permanent usufruct was recognised as land owned by the above-mentioned entities. Administrative bodies and administrative courts derive this approach from Article 6 para. 1 Act on land management and expropriation of real estate that was then in force,[12] pursuant to which territorial state administration bodies managed that land. At the same time, it was assumed, which was groundless in my opinion, that the concept of management should be interpreted as belonging to that body, regardless of the fact which entity really managed the property. The phrase "belonging to the National Councils and territorial state administration bodies of the basic level" means belonging of the state property to those entities in a legal sense (understood as possession of a specific legal title) and not only in factual sense.[13] Real property that was recognised as "not belonging" to the state administration bodies of the basic level was only one that an organisational unit was granted the right of management or usufruct to, in accordance with Article 38 para. 2 Act on land management and expropriation of real estate, which was then in force. The lack of such a decision means, according to case law, that the real property absolutely belonged to a territorial state administration body.[14] The fact that the right of management resulted directly from the provisions on the establishment and operation of PKP, which entered into force much earlier than the provisions of the Act on land management and expropriation of real estate, was not in general taken into account. It was also ignored that decisions on management were not mainly issued for PKP at that time. A question should be asked whether, adopting such interpretation after the above-mentioned Article 38 para. 2 laying down the ways of documenting the fact of being granted the right of management or perpetual usufruct over property entered into force, one should regulate the right to thousands of hectares of real property, which the PKP state enterprise used and which have been occupied for railway infrastructure for dozens of years. The adoption of such interpretation of the provisions of law deprives PKP of evidence required in communisation proceedings, which can stop the process. At the same time, the exclusion of the property of the enterprise from the process was

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[12] Act of 29 April 1985 amending the Act on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1985, No. 22, item 99.

[13] The Supreme Administrative Court judgement of 4 November 2015, I OSK 3106/14, CBOSA.

[14] *Ibid*.

not guaranteed in the Regulation CM of 1990, which is emphasised in case law.[15] As a result of the above, pursuant to Article 5 paras. 1 and 2 Communisation Act, in accordance with the adopted case law policy, real property being at the disposal of PKP S.A. became *ex lege* the property of communes concerned on 27 May 1990.

Pursuant to the above interpretation, a uniform case law policy started to consolidate many years ago in accordance with which, although the property was at PKP's real disposal before 1990 and later but the right to its management was not confirmed in the legal form, it belonged to the National Councils and territorial public administration bodies. As a result, it is subject to communisation pursuant to the Communisation Act of 10 May 1990. Case law totally ignores the fact that communes have never possessed this real property and did not have any rights whatsoever to it, either.

It is also worth mentioning what possibilities exist that PKP might regulate the legal status of land that has already been communised. In the present situation, the enterprise cannot apply Article 34 PKP Commercialisation Act, which was especially dedicated to it and took its specific legal situation into account, because its application requires that land should be the property of the State Treasury. As it has already been mentioned above, the mode of confirming the existence of perpetual usufruct over land being the property of communes was laid down in Article 200 Act on real property management. In this situation, filing a motion to enfranchise the commune land, an enterprise should provide documents confirming the right of management. The catalogue of evidence is much broader than the one applied in case of exclusion of land from the process of communisation. It is necessary to refer to the content of the regulation implementing Article 200 Act on real property management, in accordance with which a competent body confirms the right of management, inter alia, based on a decision on the calculation or updating fees for the right of management or usufruct over real property.[16] However, the majority of communes do not recognise documents indicating the establishment of annual fees for management as evidence of the right of management, regardless of the fact that law directly indicates them as grounds for recognition of that right. The negative stand concerning non-recognition of the above-mentioned documents is based on administrative courts' case law, in accordance with which decisions on the calculation or updating fees may constitute documents in enfranchisement proceedings only if their content refers to a lost or damaged decision on the establishment of the right.[17] In practice, at that time, a series of decisions on calculation or updating fees did not meet the criterion, which resulted from clerks' negligence or directly from the fact that decisions on management were not issued at all because the right

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[15] The Supreme Administrative Court judgements of 6 July 2011, I OSK 1269/10 and of 9 November 2011, I OSK 2014/10, CBOSA.

[16] Section 4 para. 1(6) and (7) Regulation of the Council of Ministers of 10 February 1998 on implementation provisions concerning enfranchisement of legal entities and granting them the right to real property to which they had the right of management or usufruct before, Journal of Laws [Dz.U.] of 1998, No. 23, item 120.

[17] Judgement of the Voivodeship Administrative Court in Gliwice of 30 September 2016, II SA/Gl 637/16, CBOSA.

resulted directly from legal provisions. The argument is generally not recognised and a document concerning fees is treated as, e.g. confirmation of settlement of charges for non-contractual use of real property, which in case of railway land is absurd. Inter alia, the Supreme Administrative Court challenged such an approach and indicated that, due to imprecise decisions issued at that time, including decisions on the calculation of fees, most decisions, although this should be treated as blameworthy, did not refer to specific documents in accordance with which an enterprise was granted the right of management or usufruct over a given area. As a result of a linguistic interpretation, in case there is no contrary evidence, it should be assumed that decisions on the calculation or updating of fees document that the right of management existed. The adoption of a different interpretation would lead to a situation in which an act on enfranchisement would become an act on expropriation.[18]

With regard to the above comments, ending of the proceedings and final establishment of perpetual usufruct by the PKP enterprise, the statutory aim of which is to regulate the right to land, encounter considerable difficulties resulting from the lack of possibility of providing required documents in order to confirm the right to real property being at the disposal and management of PKP and which, as a result of communisation, belongs to communes. At this stage the application of Article 34 PKP Commercialisation Act is not possible because the land does not belong to the State Treasury since, as a result of communisation, it became communes' property. On the other hand, the lack of documents confirming PKP's right of management constitutes an obstacle to grant PKP S.A. perpetual usufruct in accordance with Article 200 Act on real property management.

Nevertheless, adjudications contrary to the discussed case law policy have also occurred in administrative courts' case law. The stand was presented in five judgements. According to them, the claim that land for which PKP does not have documents confirming the right of management was managed by territorial public administration bodies of the basic level is erroneous. The reasoning, apart from detailed legal justification, is also based on an obvious statement that "it is hard to assume that the land where there is a platform or a locomotive shed, which were built dozens of years ago, was not managed by PKP then".[19] The courts present an argument that the land was given to this enterprise for management[20] and the Regulation of 1926 on the establishment of the Polskie Koleje Państwowe enterprise[21] (hereinafter also: Regulation of 1926 on PKP) constitutes the evidence of the existence of its right of management. The legal act established Polskie Koleje Państwowe as a separate legal entity and granted it first the right of management,

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[18] The Supreme Administrative Court judgement of 19 January 2017, I OSK 1977/16, CBOSA.

[19] The Supreme Administrative Court judgement of 15 July 2016, I OSK 3398/15, CBOSA.

[20] *Ibid*.

[21] Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568.

then trust and finally usufruct over that land[22] in order to enable it to conduct its operations.

The establishment of a railway enterprise and rules of its operation, due to its importance for the state, were regulated in statutory provisions or the provisions of similar rank. Legal acts regulating the enterprise's establishment, competences and rules of operation concerned also the issue of the possessed property. As the Supreme Administrative Court indicated in one of its judgements, the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise[23] uses the identical terminology as the provisions issued in the period 1944–1989 in relation to the way of allocation of the state property possessed by other state enterprises. According to the Court, as a rule, it is justified to assume that it is admissible to refer to the legal act regulating the establishment of a given entity and indicate that pursuant to this regulation, the entire, even not determined property was given to this enterprise for management. At the same time, the Court did not notice any arguments confirming that the legal acts concerned did not regulate the legal status of the given real property. It was also indicated that in legislation, the conditions from which legal consequences are derived in relation to particular entities are often defined in an abstract way; of course, it concerns provisions in the field of enfranchisement.[24]

Case law that is favourable to former state enterprises also indicates that it is not justified to create an exhaustive catalogue of documents based on Article 38 para. 2 Act on land management and expropriation of real property, from which a legal title to particular real property may be derived. The provision, as an adjudicating bench decided in its judgement, concerns giving real property for management based on a particular legal act, which results from the wording of Article 40, indicating elements that a decision or an agreement on giving land for management must contain. The court emphasises that one cannot exclude a situation in which a particular state unit's legal title to land might have occurred before the Act on land management and expropriation of real property entered into force. In such a situation, determination of a legal title to the given real property cannot be limited to determination whether a document referred to in Article 38 para. 2 exists. Speaking about PKP, it is necessary to refer to general rules of using national (state) property by state enterprises and provisions regulating the creation and operation of a given enterprise.[25]

Management that an enterprise was entitled to may be also derived from general provisions concerning real property management, i.e. Article 87 (after the amendment: Article 80) of the Act on land management and expropriation of

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[22] Article 1 para. 6 Regulation of the President of the Republic of Poland of 29 November 1930 amending and supplementing the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1930, No. 82, item 641.

[23] Uniform text, Journal of Laws [Dz.U.] of 1948, No. 43, item 312.

[24] The Supreme Administrative Court judgement of 3 March 2016, I OSK 3397/15, CBOSA.

[25] The Supreme Administrative Court judgement of 6 September 2010, I OSK 1430/09, CBOSA.

real estate. In accordance with this provision, state-owned land used by the state organisational units on the day when the Act entered into force must be treated as managed by those units. It is necessary to remind that on the day when the Act entered into force, PKP was the holder of usufruct over railway land, which resulted from the provisions constituting the basis for the establishment and operation of this enterprise.[26] Therefore, on the day when the Act on land management and expropriation of real estate entered into force, the land started to be managed by PKP. Thus, regardless of whether the enterprise possesses documents confirming it was given particular land, it may use various means to prove that the given real property constituted land used to conduct railway activities and operate, and thus was managed by PKP. This fact is at the same time the reason for exclusion from communisation.[27]

The successive opinions, different from those of the majority, occurred in case law in connection with the issue of non-exclusion of the railway enterprise from the process of communisation. The fact that Regulation CM of 1990 does not indicate the enterprise PKP in its list does not mean that real estate belonging to PKP must be subject to communisation. The Regulation was issued as a result of Article 11 Communisation Act, which indicates what components of the state property are not subject to communisation and refers directly to Article 5. Such formulation excludes from communisation property that directly matches the conditions of Article 5 paras. 1 to 3 Communisation Act. In addition, Regulation CM of 1990 laid down that the list contains state enterprises and organisational units subordinate to or supervised by the former National Councils and territorial state administration bodies of the basic level. The PKP enterprise has never been this type of enterprise. At the same time, the list indicates small enterprises, local in nature. The character, functions and importance of PKP clearly indicate that it is a state enterprise performing national tasks (Article 11 para. 1(2) Communisation Act). Since railway property in general is not subject to communisation, the provision of Article 11 Communisation Act and Regulation CM of 1990 do not apply to it, either.[28]

The case law negating the process of acquisition of railway land by communes also emphasises the essence and significance of the provisions regulating the legal status of the PKP enterprise that were in force on the day when the provisions of the Communisation Act entered into force. In accordance with Article 16 para. 2 Act on the PKP state enterprise of 1989,[29] "resources at PKP's disposal on the day when the Act entered into force (i.e. 9 December 1989) and resources acquired by PKP in the course of its operations constitute its property". At the same time, it is indicated that the legislator was aware that PKP possessed land of the State Treasury

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[26] Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568, as amended.

[27] The Supreme Administrative Court judgement of 6 September 2010, I OSK 1401/09, CBOSA.

[28] The Supreme Administrative Court judgements of 6 September 2010, I OSK 1401/09 and I OSK 1430/09 and of 8 November 2011, I OSK 1956/10, CBOSA.

[29] Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 1989, No. 26, item 138; hereinafter also: Act of 1989 on PKP.

and did not have documents confirming it was transferred to the enterprise in the form required by law, which results from the provision of Article 34 para. 1 PKP Commercialisation Act. Moreover, attention is drawn to the legislator's aim laid down in Article 34a of the above-mentioned Act, which stipulates that "land referred to in Article 34 shall not be subject to communisation from 1 June 2003 in accordance with the provisions of the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees". In order to leave no doubts concerning these provisions, the Constitutional Tribunal stated that: "the aim of the provision in question was to exclude specified land from communisation and to ensure a stable legal situation for PKP (…) with respect to real property referred to in Article 34 PKP Commercialisation Act".[30] Assuming the legislator's rationality, one should draw a conclusion that the land directly managed by PKP without a legal title was excluded from the process of communisation. Otherwise, it would lead to the statement that the provisions of Articles 34 and 34a PKP Commercialisation Act are subjectless because there is no land matching the criteria laid down in them.[31]

The legal issue of land communisation directly connected with the enfranchisement of land being in the possession of a state enterprise, including inter alia Polskie Koleje Państwowe, was the subject matter of many analyses conducted by administrative courts. As it has been stated above, the dominating courts' stand is to support communisation of property that formerly, for dozens of years, constituted the property of state enterprises. The administrative courts' opinion results mainly from the fact that those enterprises do not possess documents confirming they were granted the right of management of the given real property. The lack of the document granting the right of management became the key argument in administrative proceedings and the proceedings before administrative courts for recognition that in this situation the given real property belonged to territorial state administration bodies of the basic level on the day when the Communisation Act entered into force, and thus is subject to communisation. Only five judgements are in contradiction to this stand. Three of them were issued in the period 2010–2011. This adjudication policy occurred again in 2016, when two successive similar judgements were issued on this matter. One can guess that they constituted grounds for the President of the Supreme Administrative Court to file a motion to a bench of seven judges to adopt a resolution concerning the interpretation of the provisions on communisation of land.

The President of the Supreme Administrative Court in Warsaw asked the bench of seven judges of the Supreme Administrative Court to adopt a resolution in order to explain the debatable issue: "Does the fact that real property was at the PKP enterprise's disposal without the right documented in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate (Journal of Laws [Dz.U.] No. 22, item 99, as amended) mean that on 27 May

[30] The Constitutional Tribunal judgement of 12 April 2005, K 30/03, OTK-A 2005, No. 4, item 35.

[31] The Supreme Administrative Court judgement of 6 September 2010, I OSK 1401/09.

1990 the real property did not belong to the National Councils and territorial state administration bodies of the basic level in accordance with Article 5 para. 1 Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz.U.] No. 32, item 191, as amended)?"[32]

On 27 February 2017, the Supreme Administrative Court answered the above question and the bench of seven judges adopted a resolution,[33] in which it confirmed that the fact that the real property was at the PKP enterprise's disposal without the possession of a document granting the right concerned in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate means that on 27 May 1990 the real property belonged to the National Councils or territorial state administration bodies of the basic level, in accordance with Article 5 para. 1 Communisation Act. Thus, the Court confirmed the dominating opinion that land that was at the PKP enterprise's disposal without the possession of documents confirming the right of management became *ex lege* the property of the communes concerned on 27 May 1990.

In the justification for the resolution, the Supreme Administrative Court indicated a series of arguments mainly connected with the analysis of legal acts developing the rules of functioning of the PKP enterprise starting with the Regulation of 1926 on the establishment of the PKP enterprise up to the establishment of a limited company called PKP S.A. based on the PKP Commercialisation Act.

Despite the fact that the Court indicated the land that was at a particular entity's disposal, the content of the resolution also shapes a general opinion concerning the regulation of the rights to land possessed by other successors of state enterprises. Although it does not formally bind the public administration bodies,[34] it may constitute a tip for them on adjudicating on property rights.

The bench of seven judges starts the analysis of the issue presented by the President of the Supreme Administrative Court discussing the controversial phrase "belong to" used in Article 5 Communisation Act. Using the term "belong to", the Supreme Administrative Court refers to Article 6 para. 1 Act on land management and expropriation of real estate in the wording binding since 1 January 1988,[35] which stipulated that territorial state administration bodies managed land that was not subject to the right of management, usufruct or perpetual usufruct. From this provision, courts derive a general principle that land that was not allocated in the form laid down in law belongs to the National Councils and territorial state administration bodies of the basic level and, at the same time, treat the phrase as a legal term and not a factual one. The rules of giving enterprises property for management were then laid down in Article 38 para. 2 Act on land management

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[32] Motion of 27 October 2016 to the Supreme Administrative Court bench of seven judges to adopt a resolution, BO-4660-28/16, www.nsa.gov.pl.

[33] I OPS 2/16, CBOSA.

[34] R. Hauser, A. Skoczylas (ed.), *Postępowanie administracyjne i sądowoadministracyjne z kazusami*, Wolters Kluwer, Warsaw 2016, p. 386.

[35] Article 6 in the wording of the Act of 16 July 1987 amending the Act: Housing law, Journal of Laws [Dz.U.], No. 21, item 124, which entered into force on 1 January 1988.

and expropriation of real estate, in accordance with which the acquisition of the right of management takes place in the form of a decision issued by a territorial state administration body, an agreement on property transfer between state organisational units or an agreement on acquisition of real property. Examining the provisions, the Supreme Administrative Court drew a conclusion that land, although in fact possessed and managed (in the sense of operations performed) by a state enterprise, could not be recognised as given to it for management if an enterprise did not possess the above-mentioned documents. Thus, the opinion of the Supreme Administrative Court means that in a legal sense the land did not belong to a state enterprise. Thus, it was subject to communisation.

With regard to the issue of methods and possibilities of transferring real property for management, the Supreme Administrative Court commented on the issue of deriving this right from general provisions determining the status of the PKP enterprise. The former dominating adjudications of administrative courts indicated that only a decision or another document referring to the given land confirms the recognition of management. There was no question of the right being recognised based on an abstract document, i.e. for example, statute if it did not specify the property concerned. However, the Supreme Court bench of seven judges adopted a resolution on 16 November 1990, III AZP 10/90, concerning public roads and stated that management of land occupied for public roads may be performed mainly based on general legitimisation laid down in statute concerning public roads. The Supreme Administrative Court drew similar conclusions with regard to railway land and in the resolution discussed confirmed that the establishment of the right of management could have taken place *ex lege*, and in such a situation it was not necessary for any administrative body to issue a decision, which should be assessed as a positive aspect of the resolution.

In the opinion of the Supreme Administrative Court, however, the problem is different in case of PKP. According to the Court's assessment, it results from the provisions of the Act of 1960 on railways[36] repealing the Regulation of 1926 on the establishment of the Polskie Koleje Państwowe enterprise, in accordance with which the enterprise was granted the right of management and usufruct over real property being at its disposal. Here, the Supreme Administrative Court notices, which was not stated in the Act on railways *expressis verbis*, the moment when the state enterprise lost its right to railway land. The Court decided that since the existence and maintenance of the right of management was not mentioned in the Act of 1960 on railways, the legislator's aim was to deprive the enterprise of this right. At the same time, in the Supreme Administrative Court's opinion, successive provisions concerning the railway enterprise did not grant the enterprise this right until 2000, i.e. until the PKP Commercialisation Act entered into force.

In its resolution, the Supreme Administrative Court also discussed the issue of negative conditions for communisation laid down in Article 11 Communisation Act and indicated that the exclusions could not be applied to railway land. It

[36] Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] of 1960, No. 54, item 311, as amended.

decided that the PKP enterprise at that time did not perform public tasks within the competence of the government administration bodies and state administration bodies, and this property could not be recognised as belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks, because the enterprise was not contained in the Regulation CM of 1990.

The opinion expressed in the Supreme Administrative Court resolution is important from the point of view of confirming PKP rights to real property under the PKP Commercialisation Act. It is necessary to realise the fact that at the time when the principle of state property unity was in force, decisions concerning the right of management were not issued and in case of such enterprises like PKP using enormous real property resources, grounds for operations were mainly based on statutory provisions (regulations), which comprehensively regulated the enterprise's legal status. Such a situation was envisaged in the Bill on PKP commercialisation. That is why, the main provisions (Article 34) were based on the possibility of enfranchisement of PKP S.A. on the possessed land being the property of the State Treasury on 5 December 1990, even if the enterprise did not have documents confirming that it was granted the right of management, as it submitted a wide range of other types of evidence making it possible to prove the right to land. Thus, in case of communisation of land on 27 May 1990, the application of the enfranchisement provisions to PKP S.A. became impossible.

The above arguments constitute the main grounds for adjudication presented in the resolution of seven judges of the Supreme Administrative Court.

Up to now, the resolution of seven judges of the Supreme Administrative Court of 27 February 2017 has been only subject to a gloss of approval,[37] which has inspired a broader analysis of the issue. Undoubtedly, the analysis below will present an absolutely different assessment of the Supreme Administrative Court adjudication, which is decidedly critical.

The analysis of the resolution with respect to its adjudication, mainly the motives for conclusions, raise a question whether the adjudication is based on a complete analysis of the issue and whether it is in conformity with the legislator's intention expressed in the provisions of law. It is also worth assessing the method of interpreting provisions from the legal and systemic perspective. It is worth indicating the issues that were not analysed by the Court or were discussed in a cursory way, including, inter alia:

– the nature and legal grounds for enfranchisement of railway real property that constituted the property of the former PKP state enterprise, including especially inappropriate statements contained in the resolution with regard to the loss of property rights by PKP as a result of entry into force of the Act on railways of 1960;
– marginalisation of the importance of the Act of 1989 on PKP referring directly to the range of property that PKP possessed on the day when the Communisation Act entered into force;

[37] P. Nowakowski-Węgrzynowski, *Możliwość komunalizacji nieruchomości pozostających we władaniu PKP S.A. – glosa do uchwały składu 7 sędziów NSA z 27.02.2017 r., I OPS 2/16*, Finanse Komunalne No. 7–8, 2017.

– the legislator's activities after 1990 aimed at PKP enfranchisement;
– principles of state property management: the range of property and legal grounds for developing inventory of property that was subject to communisation (Article 17 Communisation Act) and grounds for initiating proceedings (Article 17a Communisation Act);
– reasons for excluding real property from the communisation process.

Starting the analysis of the above-mentioned issues, it is necessary to decidedly negate the statement of the Supreme Administrative Court concerning the seeming loss of the right to land by PKP due to entry into force of the Act of 1960 on railways and, as a result, repealing of the Regulation of 1926 on PKP. The statement is wrong and its justification insufficient. The adjudication ignores documents and legal principles that directly indicate that it is not true that the legislator's intention in 1960 was to deprive PKP of its right to railway real property.

Discussing legal acts in accordance with which Polskie Koleje Państwowe S.A. manages its property, it is necessary to start with the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise. The following legal acts were: the Act of 2 December 1960 on railways and the Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise. The above-mentioned legal acts clearly indicate that the legislator's intention was to make the railway property a separate part of the state property. The PKP enterprise was established in 1926 and was granted the right of management of all railway (movable and immovable) property.[38] The right of management was next changed into trust and usufruct based on the Regulation of the President of the Republic of Poland of 29 November 1930[39] introducing amendments to the Regulation of 1926. The Regulation of 1930 on PKP emphasises separateness of railway property by indication that PKP's property transferred to this enterprise in trust and usufruct is separated from the property of the State Treasury. Trust was then changed into management due to the deletion of the term "trust" on 3 August 1948.[40] The aim of the Regulation of 1930 should be emphasised here, namely the separation of the railway property from the entire state property in order to ensure proper operation of the enterprise because of the importance of rail transport for the state economy and defence.

The Regulation of 1926 constituting grounds for the establishment of the Polskie Koleje Państwowe enterprise was in force, as it was rightly indicated in the justification for the resolution, till 1960, when the provisions of the Act on

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[38] Article 3 Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568.

[39] Regulation of the President of the Republic of Poland of 29 November 1930 amending and supplementing the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1930, No. 82, item 641.

[40] Article 1 para. 19 in conjunction with Article 4 Decree of 28 July 1948 amending the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] No. 36, item 255.

railways entered into force.[41] Analysing the act, however, it is necessary to indicate its completely different nature in comparison with the legal act of 1926. First of all, at the moment when the Act on railways entered into force, the PKP enterprise operated, managed and used movable and immovable property it had been given in 1926. The Act of 1960 did not change the legal status of the Polskie Koleje Państwowe state enterprise, assumed continuity of its operations, did not interfere into property rights granted to this enterprise and, what is most important in the context of the Supreme Administrative Court resolution of 27 February 2017, did not stipulate expiration of the rights acquired by the enterprise. The repealing of Regulation of 1926 on PKP did not result in the loss of the possessed rights by the enterprise. The confirmation of that can be additionally found in the wording of the Statute of the Polskie Koleje Państwowe enterprise adopted by means of the Resolution No. 189 of the Council of Ministers of 26 May 1961,[42] the existence of which the Supreme Administrative Court ignored and which indicates that in order to perform its statutory operations, including transport, maintenance of buildings used for the purpose of rail transport, and protection of railway areas, PKP must possess immovable property allocated by the state. The content of the Statute directly indicates that the Act on railways did not interfere in the possession of property by PKP and assumed its continuity. Moreover, PKP may rent or lease fixed assets in accordance with the general rules obligatory for state enterprises. That is why, it is hard to accept the arguments presented in the justification for the resolution of the Supreme Administrative Court that the legislator's intention in 1960 during the introduction of the Act on railways was to deprive the PKP state enterprise of the right to railway land. In such a situation, in order to fulfil the provisions of the PKP Statute, it was necessary to establish a new range of rights to be granted to the enterprise, which did not happen; and as the Statute resulting from the directive contained in the Act of 1960 on railways states directly, the enterprise had already possessed fixed assets. Also the assumption that with the repeal of the Regulation of 1926 on PKP all the enterprise's property rights effectively acquired expired is groundless, especially in a situation when, at the same time, continuous operation of PKP was assumed and there are the provisions of the PKP Statute of 1961 mentioned above. The adoption of such interpretation by the Supreme Administrative Court is in direct contradiction to the principle of the protection of acquired rights.

The statement in the justification for the resolution of the Supreme Administrative Court that the 1960 repeal of the Regulation of 1926 on PKP caused that PKP lost its rights to the possessed property is, in my opinion, groundless and, first of all, unjustified and should be treated in a decidedly critical way. Similar conclusions concerning the statements in the resolution were indicated in the Supreme Administrative Court ruling of 21 June 2017, I OSK 2148/15[43]. In this particular case, the bench referred a legal issue concerning communisation of railway real

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41 Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] of 1960, No. 54, item 311.

42 Resolution No. 189 of the Council of Ministers of 26 May 1961 on the adoption of the Statute of the Polskie Koleje Państwowe enterprise, Monitor Polski 1961, No. 47, item 210.

43 Announcement of the Supreme Administrative Court's Adjudication Office No. 32/17 of 27 June 2017, www.nsa.gov.pl.

property for adjudication. Asking the question about the rights established in the Regulation of 1926 on PKP, the adjudicating bench indicates that these "rights were not terminated by any clear statutory provision (including especially on 8 December 1960 by whatever provision of the Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] No. 54, item 311)".

Indicating the legislator's activities concerning granting the PKP enterprise property rights, it is necessary to refer to the content of Article 16 paras. 1 and 2 Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise in the wording that was in force also on the day when Communisation Act entered into force. It directly states that the property of PKP constitutes a separated part of the national property and contains resources at its disposal on the day of the Act's entry into force and resources acquired by PKP in the course of its operations. Next, in para. 4, the legislator emphasised that PKP exercises all rights to property at its disposal. It is emphasised again that on the day of the Communisation Act's entry into force, PKP possessed property in the form of real estate. Similarly to the Regulation of 1926 on PKP, the legislator highlights independent nature of railway property as separated from the national property.

Taking into consideration such PKP's entitlements to manage property and emphasis on the fact that PKP's property is a separated part of the national property, one cannot accept the approach presented in the Supreme Administrative Court resolution concerned, in accordance with which the provisions of the Act of 1989 on PKP were of no importance for the exclusion of this property from the process of communisation.

It is also hard to agree that the property that was really managed by the PKP state enterprise ever constituted property allocated to communes or that it was intended. It is also not possible to approve of the interpretation that, seemingly in accordance with Article 6 Act on land management and expropriation of real estate, there was a presumption of the existence of the right of management of railway real property granted to territorial state administration bodies. Article 6 stipulates that those bodies manage state-owned land that has not become subject to the right of management, usufruct or perpetual usufruct. It should be indicated that the term "manage" cannot be interpreted as granting the right of management, but the performance of management activities, i.e. maintenance, use or lease. The Polskie Koleje Państwowe state enterprise performed all these activities in relation to railway land. The provisions of the Act of 1989 on PKP directly indicate that PKP was legally obliged to maintain order and ensure security in railway areas. The railway enterprise managed residential estates that were at its disposal and was a party to apartment rent contracts. As it has been mentioned above, what was really important was the content of Article 16 Act on PKP that was in force on the day when the Communisation Act entered into force. It indicated that PKP's property constitutes a separated part of the national property. This property constitutes resources being at PKP's disposal on the day of the Act's entry into force and resources acquired in the course of its operations. At the same time, PKP was obliged to ensure the protection of the possessed property and authorised to exercise any rights to property being at its disposal. This indicates that PKP could, just within the possessed rights, apply

the provisions of the Civil Code in order to protect its possessions. All these facts indicate that the PKP enterprise really managed railway real property and exercised all the rights in the way typical of an entity possessing the right to real property. Taking into account the above-mentioned provisions, which were not thoroughly analysed in the Supreme Administrative Court resolution, one should assume that the case law policy in accordance with which on 27 May 1990 railway property was managed by territorial state administration bodies of the basic level is not right.

Taking into account the fact that the Supreme Administrative Court bench of seven judges adopted the resolution after 27 years of the Communisation Act being in force, it is also necessary to indicate the activities of the legislator, who developed legal regulations at the time in the way enabling the PKP enterprise, after the political transformation in Poland and the abolition of the principle of unity of the state property, as a result of commercialisation and restructuring, to acquire usufruct over the possessed land. The activities, although they undoubtedly have considerable significance for the issue, were very briefly discussed in the resolution. First of all, the resolution ignored the intention and aim of amendments to legal provisions concerning PKP enfranchisement, which were directly expressed in justification for the bills.

Restructuring of the railway property started on 5 December 1990 when the Act of 29 September 1990 amending the Act on land management and expropriation of real estate entered into force. In accordance with Article 2 of the Act, land constituting the property of the State Treasury or communes that on 5 December 1990 was subject to management of state legal entities other than the State Treasury became on that day *ex lege* subject to perpetual usufruct over that property. The legislator also decided on the method of acquisition of buildings raised on that land. It is necessary to indicate Article 42 of the Act of 6 July 1995 on the Polskie Koleje Państwowe state enterprise,[44] which supplemented the provisions and stipulated that the acquisition of buildings by PKP should be free of charge.

The introduction of the provisions of the Act on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise was another step towards railway land enfranchisement.[45] The issue was regulated in Chapter 5 of this Act. Willing to present the legislator's intention, one should refer to the content of the justification for the Bill on PKP commercialisation, which although very brief, clearly indicates circumstances and the aim of its establishment. It reads: "Chapter 5 contains solutions that make it possible to regulate the legal status of land being the property of the State Treasury, which on 5 December 1990 was possessed by PKP, for which PKP does not have documents confirming its transfer in the form required by law".[46] The legislator was fully aware in 1999 that there are considerable shortages

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[44] Act of 6 July 1995 on the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 1995, No. 95, item 474.

[45] Act of 8 September 2000 on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 2000, No. 84, item 948, as amended.

[46] Sejm paper no. 1368 of 22 September 1999 presenting bills on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise and on amendments to some acts with justification for them.

in archival documents concerning the right to real property and predicted that such documents might not exist at all, and the aim of the Act was the enfranchisement on the land that on 5 December 1990 was at PKP's disposal. It should be emphasised that such decisions were not issued in relation to most real property in that period, regardless of the fact that state enterprises managed that property before 1990. At that time, decisions on granting the right of management were not issued because, firstly, the rights of the PKP state enterprise were acquired *ex lege* and, secondly, such proceedings were often practiced because of the principle of the uniform fund of the state property. In the justification, the legislator did not indicate who the owner of railway land was on 5 December 1990, although in the text of the proposed provision of Article 32, it is stated that it is the State Treasury. It should be presumed that the legislator did not envisage then that communes might become owners of whichever railway property on 5 December 1990 and that there might occur a conflict with the Communisation Act. If there had been such an assumption, a rational legislator would have predicted it in the content of a provision.

The PKP Commercialisation Act with respect to enfranchisement eventually stipulates in Article 34 that "the land that is the property of the State Treasury that on 5 December was possessed by PKP, which did not have documents confirming that the land was transferred to the enterprise in the form required by law, and did not have them till the date when it was deleted from the register of state enterprises, shall become *ex lege* subject to PKP usufruct on the day of the Act's entry into force". The legislator also decided in what way the possession of land by PKP should be confirmed, which was laid down in the Regulation of the Council of Ministers[47]. The act contains enumerative list of types of evidence indicating the possession of land, regardless of the lack of decisions granting the right of management.

The enfranchisement provisions of the PKP Commercialisation Act were amended in 2003.[48] The justification for the bill indicates that it is aimed, inter alia, at "accelerating the procedure of regulating the legal status of the land being part of railways in order to allocate it as a non-cash contribution to PKL S.A., by means of new legal instruments of organisation of property relations concerning this land analogous to regulations for real property occupied for public roads". Implementing the above, the legislator introduced Article 37a to the PKP Commercialisation Act, which concerns the acquisition of the land occupied by railways and constituting the property of entities other than the State Treasury, units of territorial self-government and PKP S.A., and Article 34a concerning railway property. The content of Article 34a PKP Commercialisation Act indicates that the legislator tried to intervene in communisation of railway property by stipulating that: "The land referred to in Article 34 is not subject to communisation on 1 June 2003, in accordance with the

[47] Regulation of the Council of Ministers of 3 January 2001 concerning the method of confirming that the Polskie Koleje Państwowe state enterprise possesses the land that is the property of the State Treasury, including documents constituting evidence in such cases, Journal of Laws [Dz.U.] of 2001, No. 4, item 29.

[48] Act of 28 March 2003 amending the Act on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise and amending the Act on real property management, Journal of Laws [Dz.U.] of 2003, No. 80, item 720.

provisions of the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz.U.] No. 32, item 191, as amended)". In addition, the provision of Article 5 of the Act implementing Article 34a laid down that cases concerning communisation of real property that were pending but did not finish before the Act entered into force were to be discontinued. However, the introduction of Article 34a was ineffective because of the interpretation presented by the Constitutional Tribunal in 2003,[49] which indicates that the provision is applicable to communisation performed on the motion of a commune filed in the mode of Article 5 paras. 3 or 4 Communisation Act and cannot be applied to proceedings concerning the acquisition *ex lege*, i.e. in the mode of Article 5 paras. 1 and 2 of the Act.[50] It should be emphasised, however, that the Constitutional Tribunal did not recognise Article 34a PKP Commercialisation Act to be in conflict with the Constitution of the Republic of Poland.[51]

Analysing the process of communisation of real property, which resulted from the establishment of commune self-governments and granting them legal status, inter alia, in accordance with the Act of 1990 on commune self-governments,[52] it is necessary to indicate the provisions regulating the process as far as the substantial and procedural aspects are concerned, which was dealt with too briefly in the Supreme Administrative Court resolution. The substantive grounds for the acquisition of property *ex lege* by communes were thoroughly regulated in Article 5 paras. 1 and 2 Communisation Act. The principles of classification of property that should be subject to acquisition and detailed rules connected with the administrative procedure in this area were laid down in Articles 17, 18 and 20 of this Act.

In accordance with Article 5 paras. 1(1) to (3) Communisation Act, if other provisions do not stipulate otherwise, national (state) property belonging to the National Councils and territorial state administration bodies of the basic level and state enterprises for which those bodies are the founding ones or plants and other organisational units subordinate to those bodies, on the day of he Communisation Act's entry into force (27 May 1990), becomes *ex lege* the property of the communes concerned. Article 5 para. 2 concerns real property for public use belonging to the National Councils of Warsaw, Kraków and Łódź. The land that matched the criterion laid down in Article 5 para. 1, i.e. "belonging" to the National Councils and territorial state administration bodies of the basic level included one that was not transferred to other entities and subject to the right of management, usufruct or perpetual usufruct.[53] Pursuant to the directive laid down in Article 17 para. 1

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[49] The Constitutional Tribunal judgement of 12 April 2005, K 30/03, OTK-A 2005, No. 4, item 35.

[50] M. Bednarek, a gloss on the Constitutional Tribunal judgement of 12 April 2005, K 30/03, Monitor Prawniczy No. 5, 2006, p. 264.

[51] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.], No. 78, item 483, as amended. A different opinion can be found in P. Nowakowski-Węgrzynowski, *Możliwość komunalizacji…*

[52] Act of 8 March 1990 on commune self-governments, Journal of Laws [Dz.U.] of 1990, No. 16, item 95, as amended.

[53] Article 6 Act of 29 September 1990 on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1987, No. 21, item 124.

Communisation Act, communes have been obliged to develop inventories of property that is subject to communisation. Inventory committees appointed by commune councils were to fulfil this aim. The inventories were to be available for 30 days to entities that might have legal interest in the established facts and could challenge them. The inventory committees were authorised to deal with potential complaints. Moreover, Article 17 para. 7 indicates the directive for the Council of Ministers on determining the method of taking inventories. The provisions of Articles 18 and 20 Communisation Act, on the other hand, lay down the competence of bodies conducting administrative proceedings concerning recognition of the acquisition of rights by communes and determine the nature and force of decisions concerning the acquisition of commune property.

For the needs of the present article, attention should be drawn to the significance and role of the inventories, which constituted the first step in the acquisition of property rights to real property by communes, the existence of which was practically ignored in the resolution. Detailed rules of taking them as well as instructions what type of property should be considered in the inventories were laid down in the "Instruction in methods of taking inventories of property that is subject to communisation", which was an annex to the Resolution No. 104 of the Council of Ministers of 9 July 1990[54] (repealed on 30 March 2001[55]).

The Instruction thoroughly determined what type of property should be subject to communisation and what is excluded from the process. It also contained rules and methods of inventory committees' work and provided specimens of inventory documents and annexes. In case of real property, it was a copy of a cadastre map with a marked area subject to communisation. An inventory form should contain data of real estate, information about buildings, constructions and facilities situated there, information whether and who was granted the right of management, usufruct or perpetual usufruct over it as well as the value by land and buildings. In addition, the Instruction provided the specimen of a competent voivode's decision stating the acquisition *ex lege* of real property by a given commune free of charge. The justification for the decision should contain details concerning the inventory taken, including complaints and claims to the property filed during the former stage. Speaking about the inventories, one should not ignore their important role played in the entire process. As the Supreme Administrative Court indicated, "the provisions of Article 17 paras. 1 and 4 to 6 Communisation Act do not admit arbitrariness of the inventory proceeding mode and they do not envisage a possibility of abandoning the regulated proceeding mode. Before issuing a communisation decision, a competent voivode is obliged to check whether the proceeding inventory mode laid down in statute has been applied".[56]

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[54] Resolution No. 104 of the Council of Ministers of 9 July 1990 concerning the methods of taking inventories of public property, Monitor Polski 1990, No. 30, item 235.

[55] In accordance with Article 75 para. 2 of the Act of 22 December 2000 amending some types of statutory authorisations to issue normative acts and amending some acts, Journal of Laws [Dz.U.] of 2000, No. 120, item 1268.

[56] The Supreme Administrative Court judgement of 30 July 1998, I SA 125/98, LEX No. 45039.

Analysing the Instruction, although the legal act is no longer in force, which was applied in the period of taking the inventories and thoroughly determined what type of property was subject to communisation, one cannot agree with the opinion that property belonging to the PKP state enterprise should have been subject to inventory.

It is necessary to quote and analyse directives laid down in the Instruction, Part III, item 2(1), which obviously, due to their content, cannot be recognised as ones concerning railway property. Pursuant to the above-mentioned directives, the inventories of the state property subject to communisation *ex lege* (Article 5 para. 1(1) Communisation Act) should list the state land, i.e. the land referred to in Article 6 and Article 13n Act on land management and expropriation of real estate. Article 13 indicates land resources intended for building towns and villages, especially residential buildings. On the other hand, Article 6 indicates the state land that was not subject to the right of management or perpetual usufruct and, thus, was managed by territorial state administration bodies. As everybody knows, railway land was not intended for the purpose of building houses and the land was transferred to the PKP enterprise for management, which resulted directly from the legal acts regulating its establishment and operation.

It should be emphasised that, in accordance with the above-mentioned Instruction, the property of PKP was not subject to inventory and the enterprise was not obliged to produce a balance sheet of its property as in case of enterprises the property of which was subject to communisation. The state enterprises' obligation to produce a balance sheet of property subject to communisation was laid down in §2 Resolution No. 104.

The above analysis clearly shows that the legislator's intention was different from the one the Supreme Administrative Court assumed with respect to railway land communisation. The fact that the Court totally ignored this issue means that it adopted a selective approach to the problem of land communisation.

The provisions of the Communisation Act in the area of taking inventories and stating the acquisition of property by communes *ex lege* were aimed at fast and full regulation of the rights to real property. However, the process has not been in fact completed up to now. The problem was noticed, inter alia, in 2003, when legislative work was undertaken in order to discipline communes in the field of taking the inventories. The justification for the amendments indicated that the situation when there is no decision concerning the owner of land (a commune or the State Treasury) constitutes a considerable obstacle to property management and managerial decision-taking. It was indicated that the reason for that could be found in communisation provisions, which require that an inventory should be taken and submitted before a voivode's decision is issued. Thus, a deadline for the process was proposed: at first it was to be 31 December 2004, and eventually the date 31 December 2005 was set. In case inventories were not taken to that deadline, voivodes were to have a possibility of initiating communisation proceedings without inventories. It should be emphasised that the author of the proposal indicated that the provision was to provide a possibility of initiating proceedings and not to create an obligation to initiate them.[57]

[57] Sejm paper no. 1421 of 12 March 2003 presenting the Bill amending the Act on real property management and some other acts.

The amendment to the provisions presented above took place on 22 September 2004, when the provision of Article 17a added by means of Article 3 Act of 28 November 2003 amending the Act on land management and some other acts entered into force.[58] In accordance with Article 17a, in case of real property that was not contained in the inventories taken by communes concerned and submitted to voivodes until 31 December 2005 but became communes' property pursuant to Article 5 paras. 1 and 2 Communisation Act, a voivode initiates proceedings *ex officio* to confirm the acquisition of the right to real property by a commune, as it was laid down in the provision introduced eventually. The amendment caused initiation of a series of communisation proceedings, inter alia, concerning railway land that communes have never possessed and, moreover, which has never met the criteria laid down for the inventories taken for the purpose of communisation.

As it was pointed out above, originally, property listed in the inventories, the taking of which was thoroughly regulated by the legislator, was to be subject to communisation. The rules of taking them enabled entities involved to take active part in the administrative proceedings from this very stage. Despite that, as a result of amendments to the Communisation Act, since 2006 the range of real property that is subject to communisation proceedings initiation has been extended, for which there is no justification whatsoever. Since then, some voivodeship authorities have been initiating communisation proceedings concerning most real property that is claimed by entitled enterprises filing enfranchisement motions. These activities result from the wrong interpretation of Article 17a para. 3 Communisation Act, pursuant to which a voivode initiates communisation proceedings *ex lege* in every case when it is probable that the land of the State Treasury became commune land *ex lege* on 27 May 1990. In practice, some authorities do not examine in the course of the proceedings whether such a probability occurs. The interpretation does not take into consideration the aspect of the purpose of the provision at all. As it was rightly indicated in the Supreme Administrative Court judgement, the aim of the introduction of the provision of Article 17a Communisation Act was to accelerate the process of communisation of property being at communes' disposal but communes failed to undertake activities connected with its acquisition.[59] The presented opinion is totally the same as the justification for the bill introducing the discussed provision. In practice, however, the provision is also applied to the land that has never been at the disposal of territorial state administration bodies of the basic level and next at communes' disposal.

The issue of railway land communisation before the above-described amendment to the provisions of the Communisation Act in 2004, when Article 17a was introduced, was considerably less important. It resulted from the fact that communes did not list this property in inventories taken for the purpose of communisation because they did not possess it and, with some exceptions, did not claim the right to its acquisition. Groundless claims to land within the communisation process since 1 January 2006

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[58] Journal of Laws [Dz.U.] of 2004, No. 141, item 1492.

[59] Judgement of the Voivodeship Administrative Court in Warsaw of 11 September 2006, I SA/Wa 797/06, CBOSA.

(initiation of proceedings *ex officio* pursuant to Article 17a Communisation Act) have caused serious obstacles to the implementation of the process of state enterprises' land enfranchisement.

Summing up, the provision of Article 17a Communisation Act caused initiation of communisation proceedings concerning land not listed in the inventories and the range of this land has not been limited in any way. As a result of this inappropriate approach, communisation is initiated, regardless of whether given real property has ever been at a commune's disposal (managed by it) and whether the property should be listed in the inventories of property that is subject to communisation. The above conclusion indicates that today's interpretation and application of the provisions of the Act are far from matching the legislator's intention.

The above-mentioned provisions directly concerning determination of the type of property that was subject to communisation were not analysed by the bench of seven judges of the Supreme Administrative Court, although this is of great importance for the discussed issue.

Indicating the interpretation of the provisions of Article 17a Communisation Act in the context of railway real property, it is necessary to point out a wide range of real property that was subject to this process. We deal with communisation of land where there are railway stations and apartment buildings as well as railways that are important for the state. It leads to the regulation of rights to the railway real property in a way that is different from one that the legislator originally assumed, and this makes particular parts of railways become the property of independent entities, which should be recognised as absurd.

It is also worth mentioning the negative conditions for communisation laid down by the legislator. It is necessary to point out Article 11 para. 2 Communisation Act, in accordance with which the property belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks are not to be subject to communisation. The provision also contains a directive for the Council of Ministers on issuing a relevant regulation determining enterprises concerned. As the Supreme Administrative Court stated in its resolution, the exclusion of the railway enterprise's property from the communisation process was not ensured in the Regulation of the Council of Ministers of 1990, which is not an unintentional solution, though. It should be emphasised that the provision of Article 11 para. 1(2) directly concerns property components referred to in Article 5 para. 1(2). This provision stipulates exclusion of property belonging to state enterprises for which the National Councils or territorial state administration bodies play the function of their founding bodies or organisational units performing national or higher than voivodeship-level tasks. This means that the list of enterprises contained in the Regulation CM of 1990 does not concern national enterprises subordinate to central administration bodies, and the PKP state enterprise was one. The above fact indicates that since PKP was an enterprise for which the Minister of Transport, Shipping and Communications, a central administration body, was a founding entity, PKP's property did not match any of the criteria under Article 5 paras. 1 to 3 Communisation Act. Thus, also Article 11 para. 1(2) could not refer to it so, rightly, it could not be listed in the Regulation CM of 1990. In addition, railway property,

as a rule, was not intended to be subject to communisation and, that is why, it was not listed in the Regulation.

It is also hard to approve of the opinion expressed in the Supreme Administrative Court resolution that the railway property did not serve the purpose of performing public tasks within the competence of state administration or state authority bodies and was not excluded from the process pursuant to Article 11 para. 1 Communisation Act, even if one recognised, although inappropriately, that it could be subject to communisation. Providing arguments for inappropriateness of the stand presented in the Supreme Administrative Court resolution, it is necessary to indicate that rail transport unquestionably constitutes the implementation of public objectives and the Polskie Koleje Państwowe enterprise undoubtedly was a state enterprise covering the whole country, i.e. was an enterprise operating at the nationwide level. A competent minister, i.e. a central authority, was PKP founding body, which results directly from the legal acts that established the enterprise. The fact that, as Article 11 para. 1 Communisation Act stipulates, the performance of rail transport tasks was within the competence of the Minister of Transport and Maritime Economy is then confirmed in the provisions based on which the office of the Minister of Transport and Maritime Economy was founded.[60]

Providing arguments for the above, it is also necessary to refer to the provisions concerning PKP that were binding on the day when the Communisation Act entered into force. The Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise laid down obligations and rights of PKP, including, inter alia, the domestic and international transport of people and cargo by rail of public use in order to meet the needs of the public and national economy as well as the state defence and security (Article 1), and tasks resulting from the provisions on the common obligation to defend the Polish People's Republic (PRL), including military transport and preparation of the railways for the needs of the state defence (Article 7). Moreover, PKP organisational units were entitled to use the emblem of PRL and official stamps with the image of the eagle from the emblem and the enterprise title in the ring (Article 4). It is also important that the Act contained the list of tasks of the state administration that PKP was obliged to perform (Article 8). At that time, the Minister of Transport, Shipping and Communications supervised PKP's operations.

Adjudication on the issue indicated in the question asked by the President of the Supreme Administrative Court may constitute a crucial comment on communisation of the property, which, as it has been described above, for almost 90 years has been railway property possessed by the state enterprise. The activity may result in depriving the State Treasury of its rights and, with regard to the arguments presented above, it is hard to assume that the legislator intended that when developing the structures of commune self-governments. Groundless communisation of the property that is possessed by PKP totally negates the adopted statutory solutions connected with the implementation of the process of commercialisation of the enterprise and is against the adopted solutions within the state transport policy.

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[60] Article 3 para. 3 of the Act of 1 December 1989 on the establishment of the office of the Minister of Transport and Maritime Economy, Journal of Laws [Dz.U.] of 1989, No. 67, item 407.

In this situation, one can risk a statement that the adopted resolution is in conflict with the interest of the State Treasury and inconsistent with the systemic and logical interpretation of provisions. Recognition that the Polskie Koleje Państwowe state enterprise's management, despite the lack of documents referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate, is equivalent to the fact that the real property belonged to the National Councils and territorial state administration bodies of the basic level constitutes the negation of the legislator's intention adopted when the provisions determining PKP operations were introduced in order to change property relations in 1990.

The way of drawing inferences ignores a series of important legal acts that directly prove that the statements about the legislator's intentions to deprive the PKP enterprise of the right to land in 1990 are not true. The legislator was aware that there were problems with archival documents concerning PKP and undertook a number of steps aimed at regulating the situation. As it has been pointed out in the present article, this results directly from the provisions concerning PKP as well as the content of the justification for their introduction. Therefore, the resolution directly negates the principle of the rational legislator who wanted PKP to possess property rights to railway property, which results from the provisions on enfranchisement of the property of the former state enterprise. With such an assumption, the provision of Article 34 PKP Commercialisation Act, because of the lack of the basic condition for the State Treasury property, becomes a subjectless regulation. The Court completely forgets about the principle of the rational legislator in its resolution.

It is also hard to approve of the statement that the legislator has ever intended to communise this property and this is what the Supreme Administrative Court resolution indirectly suggests. The provisions concerning PKP operations as well as the Communisation Act's implementation provisions concerning taking inventories are the proof of that.

The Supreme Administrative Court resolution is abstract in nature, which causes that it is binding on adjudicating benches of administrative courts, however, not absolutely. This means that in case of a lack of approval of the opinion, there is a possibility of referring a prejudicial question to a competent bench of the Supreme Administrative Court,[61] which creates a possibility of "overruling the binding resolution".[62]

Finally, it is worth referring to loud comments that have been made since the resolution was adopted. It is argued that self-governments were given opportunities connected with communisation of land to acquire additional financial resources from fees for perpetual usufruct over railway land. However, what is forgotten are the provisions of the Act on rail transport,[63] which directly stipulates that railway land is exempt from those fees.

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[61] Article 269 §1 of the Act of 30 August 2002: Law on the proceedings before administrative courts, Journal of Laws [Dz.U.] of 2017, item 1369.

[62] R. Hauser, A. Skoczylas (ed.), *Postępowanie administracyjne…*, p. 387.

[63] Article 8 of the Act of 28 March 2003 on rail transport, Journal of Laws [Dz.U.] of 2016, item 1727.

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COMMUNISATION OF STATE PROPERTY AND PKP PROPERTY ENFRANCHISEMENT: COMMENTS ON THE SUPREME ADMINISTRATIVE COURT RULING OF 27 FEBRUARY 2017, I OPS 2/16

Summary

The article deals with the legal issue concerning the acquisition of public property by communes and the enfranchisement of the Polskie Koleje Państwowe state enterprise, which resulted from the transformation of property relations in Poland after 1989. The differences in administrative courts case law concerning the issue led to a solution provided by the Supreme Administrative Court bench of seven judges, which adopted a resolution of 27 February 2017, I OPS 2/16, and pointed out that possessing real property by the PKP state enterprise without the right documented in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate (Journal of Laws [Dz.U.] No. 22, item 99, as amended) means that on 27 May 1990 the real property belonged to the National Councils and territorial state administration bodies of the basic level, in accordance with Article 5 para. 1 Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz. U.] No. 32, item 191, as amended). The content of the resolution, first of all the motives for drawing conclusions, inspired the author to ask a question whether the adopted resolution is based on a complete analysis of the issue and whether it is in conformity with the legislator's intention expressed in the provisions of law. The author presents a short

outline of the history of property relation transformations in Poland connected with the abolition of the principle of the uniform fund of state property and the separation of property, especially with regard to the provisions concerning the acquisition of property rights by PKP. He presents two case law approaches that made the President of the Supreme Administrative Court ask a legal question. Next, the author presents the Supreme Administrative Court stand contained in its resolution and issues that, in his opinion, raise doubts. He analyses them, inter alia, based on the content of legal acts, justification to bills and case law. The conducted analysis indicates that, in the author's opinion, the adopted resolution is based on a cursory analysis of the examined issue and does not take into account the aspect of the purpose of the enfranchisement provisions. As a result, the article has the form of a critical gloss.

Keywords: enfranchisement, communisation, PKP, perpetual usufruct, transformations of property relations

KOMUNALIZACJA MIENIA PAŃSTWOWEGO ORAZ UWŁASZCZENIE PKP – UWAGI NA KANWIE UCHWAŁY NACZELNEGO SĄDU ADMINISTRACYJNEGO Z DNIA 27 LUTEGO 2017 R., SYGN. AKT I OPS 2/16

Streszczenie

Prezentowany artykuł odnosi się do zagadnienia prawnego związanego z nabywaniem mienia komunalnego przez gminy i uwłaszczeniem przedsiębiorstwa państwowego Polskie Koleje Państwowe, co było następstwem przekształceń własnościowych w Polsce po 1989 r. Rozbieżności w orzecznictwie sądów administracyjnych w powyższym zakresie stały się asumptem do podjęcia rozstrzygnięcia przez skład siedmiu sędziów Naczelnego Sądu Administracyjnego, który w uchwale z dnia 27 lutego 2017 r. (sygn. akt I OPS 2/16) wskazał, że pozostawanie nieruchomości we władaniu przedsiębiorstwa państwowego PKP bez udokumentowanego prawa w sposób określony w art. 38 ust. 2 ustawy z dnia 29 kwietnia 1985 r. o gospodarce gruntami i wywłaszczaniu nieruchomości (Dz.U. Nr 22, poz. 99 ze zm.) oznacza, że nieruchomość ta należała w dniu 27 maja 1990 r. do rad narodowych i terenowych organów administracji państwowej stopnia podstawowego w rozumieniu art. 5 ust. 1 ustawy z dnia 10 maja 1990 r. Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych (Dz.U. Nr 32, poz. 191, ze zm.). Treść uchwały, a przede wszystkim motywy wnioskowania, skłoniły autora do postawienia pytania, czy podjęte rozstrzygnięcie oparte jest na pełnej analizie zagadnienia oraz czy jest ono zgodne z intencją ustawodawcy wyrażoną w przepisach prawa. Autor w swoim opracowaniu przedstawił krótki rys historyczny przemian własnościowych w Polsce, związanych ze zniesieniem zasady jednolitego funduszu własności państwowej i rozdziału majątku, ze szczególnym uwzględnieniem przepisów dotyczących nabywania praw majątkowych przez PKP. Wskazał dwie linie orzecznicze, które skłoniły Prezesa NSA do postawienia pytania prawnego. W dalszej części autor zaprezentował stanowisko Naczelnego Sądu Administracyjnego zawartego w uchwale oraz zagadnienia budzące jego wątpliwości, które następnie zostały szczegółowo przeanalizowane m.in. w oparciu o treść aktów prawnych, uzasadnienia do projektów ustaw oraz orzecznictwo. Przeprowadzona analiza wskazuje zdaniem autora, że podjęta uchwała oparta jest na pobieżnej analizie badanego zagadnienia oraz nie uwzględnia aspektu celowościowego przepisów uwłaszczeniowych. Powyższe skutkowało tym, że artykuł przybrał formę glosy krytycznej.

Słowa kluczowe: uwłaszczenie, komunalizacja, PKP, użytkowanie wieczyste, przemiany własnościowe

Cytuj jako:

Chabior B., *Communisation of state property and PKP property enfranchisement: comments on the Supreme Administrative Court ruling of 27 February 2017, I OPS 2/16 [Komunalizacja mienia państwowego oraz uwłaszczenie PKP – uwagi na kanwie uchwały Naczelnego Sądu Administracyjnego z dnia 27 lutego 2017 r., sygn. akt I OPS 2/16]*, "Ius Novum" 2018 (12) nr 3, s. 153–181. DOI: 10.26399/iusnovum.v12.3.2018.29/b.chabior

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RIGHT TO PRIVACY IN THE MARCH CONSTITUTION OF POLAND OF 1921 AND ITS BILLS

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1. INTRODUCTION

The national legislator for the first time noticed the need for legal protection of the matter that *in spe* would change into the concept of "the right to privacy" in the period of the Second Polish Republic. On the one hand, it resulted from the circumstance that at the earlier stage of history the matter remained outside the scope of the legislator's interest (the period of the First Polish Republic). Then the legislator did not have an opportunity to issue legal acts (the period of the Partitions of Poland). On the other hand, the increase in the importance of human rights dictated it. However, what is characteristic, the noticed need was expressed in the content of the proposed and adopted basic laws. In the above-presented context, attention should be paid to the fact that the legal materialisation of the discussed issue took place simultaneously with the process of restoring the structures of the state. Thus, it deserves appreciation that the legislator, being aware of the need to develop legal acts necessary for the functioning of administration, did not lose sight of the issue of developing the text of the Constitution. Although the Legislative Sejm's ordinance of 20 February 1919 entrusting Józef Piłsudski with the further execution of the office of Chief of State,[1] also called the Small Constitution, was the first act of constitutional nature adopted in the period of the Second Polish Republic, it was temporary, focused on organisational issues and ignored the matters concerning human rights. Due to that, its content is not the subject matter of further discussion. However, the Act of 17 March 1921: the Constitution

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[1] Journal of Laws of the Polish State [Dz.Pr.P.P.] of 1919, No. 19, item 226.

of the Republic of Poland[2] contained regulations determining the scope of human rights and obligations. These types of provisions were also included in the bills preceding its adoption.

2. SCOPE OF THE RIGHT TO PRIVACY

Further discussion requires that "privacy" and "the right to privacy" should be defined. Omission of this process would result in depriving the reasoning of whatever limits and thus, would have no scientific value. Thus, it must be pointed out that defining "privacy", the interwar doctrine postulated that it was the rights "constituting a tiltyard for the state authorities; by formulating them an individual is given a sphere of existence and acting that is free from the state interference. They determine the scope of a citizen's liberty, i.e. those factors of interests that are recognised as those belonging to the sphere of autonomous individual acting, i.e. left to an individual's free determination, excluding any coercion by the state authorities as well as private one originating from other entities".[3] "Privacy" is at present explained in a similar way. For example, K. Motyka understands "privacy" as the right to be left in peace, the right to control information about oneself, to control access to a person and as an individual's autonomy.[4] On the other hand, J. Braciak highlights that everything that is found in the sphere commonly defined as private is totally subjective, depending on the particular person's psyche.[5] In literature, it is unquestionably indicated that while it is not possible to formulate a uniform definition of "privacy", it is purposeful to refer to the spheres creating it.[6] In this context, in the justification for its judgement of 24 June 1997 concerning the case K 21/96, the Constitutional Tribunal stated that privacy is composed of the principles and rules concerning various spheres of an individual's life and their common feature consists in granting an individual the right "to live his own life organised following his own will and with whatever external interference limited to absolutely necessary minimum".[7] The similarity of the opinions presented in the period of the Second Polish Republic and at present undoubtedly results from the fact that the comprehension of the scope of "privacy" is universal and timeless in nature. From this perspective, "privacy" does not transform. Thus, potential changes may concern, e.g. not whether the secrecy of correspondence is within the scope of "privacy" but in what type of situations it can be limited. As a result, it should be assumed that the evolution of "privacy", inter alia dictated by the specificity of

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[2] Journal of Laws [Dz.U.] of 1921, No. 44, item 267; hereinafter: the March Constitution.

[3] W. Komarnicki, *Polskie prawo polityczne (geneza i system)*, reprint of 1922 edition, Wydawnictwo Sejmowe, Warsaw 2008, p. 561.

[4] M. Jagielski quotes K. Motyka's opinions. See, M. Jagielski, *Konstytucjonalizacja ochrony prywatności*, [in:] R. Małajny (ed.), *Konstytucjonalizm a doktryny polityczno-prawne. Najnowsze kierunku badań*, Katowice 2008, p. 265.

[5] J. Braciak, *Prawo do prywatności*, Warsaw 2004, p. 22.

[6] J. Sieńczyło-Chlabicz, *Naruszenie prywatności osób publicznych przez prasę*, Warsaw 2006, p. 75.

[7] The Constitutional Tribunal judgement of 24 June 1997, K 21/96, Legalis No. 10365.

the period and the level of development, does not concern its grounds but only its limits. Approving of the above-presented stands, I would like to supply my own analysis. Thus, I would like to point out that I perceive privacy as such forming of legal norms that ensure an individual's functioning based on internal and external stimuli that make it possible to shape one's own personality and opinions without the state apparatus' control, provided that the personality shaped this way does not infringe the rights protected by law, as well as in the way free from third parties' interference; moreover, with a possibility of building a personality based on non-material values and material objects. Thus, privacy covers possessing one's own secrets, beliefs and opinions (internal stimuli), a possibility of expressing them in public or only to particular addressees (external stimuli, e.g. the secrecy of correspondence), as well as identifying with a particular worldview and developing one's own personality in conformity with this opinion (non-material values) and the sense of ownership of specified material objects. I believe it is obvious that the wealth collected, understood as every individual's property, creates a component of his privacy limits. Even understood intuitively, the privacy of a person living an affluent life is different from the privacy of a person struggling with financial problems. Disregarding the above, I would also like to indicate that the concept of "privacy" is not the same as the concept of "the right to privacy". The latter means an individual's right to make use of "privacy", on the one hand, and providing an individual with the means of legal protection, which he/she may use in a situation when his/her privacy is or has been infringed, on the other hand. The analysis of the position of "privacy" in basic law bills as well as the text of the March Constitution is carried out based on the opinion expressed above.

3. RIGHT TO PRIVACY IN THE CONSTITUTIONAL BUREAU'S BILLS AND THE PROJECT OF THE QUESTIONNAIRE

The Cabinet of Prime Minister Jędrzej Moraczewski started a discussion about the shape of the political system of the restored Polish State on 29 November 1918, when the Minister of Internal Affairs, Stanisław Thugutt, presented a programme of work on the text of a constitution and proposed establishing a section or department for constitutional bills.[8] The conditions of the political scene of the time excluded the possibility of working on the basic law in the form proposed by Minister Thugutt. Thus, instead of the proposed "section" or "department", the Constitutional Bureau affiliated to Prime Minister was founded in January 1919 and in its two months' activity, it developed two and published three constitutional bills.[9]

The first bill was entitled "Constitution of the Republic of Poland Bill developed by Józef Buzek, PhD" and was commonly called the "American bill" by Józef

[8] S. Krukowski, *Geneza konstytucji z 17 marca 1921 r.*, Warsaw 1977, p. 13.

[9] The "American" bill was published by the Constitutional Bureau, however, the bill was developed already before the Bureau was established. Compare, J. Buzek, *Projekt Konstytucji Rzeczypospolitej Polskiej oraz uzasadnienie i porównanie tego projektu z konstytucją szwajcarską, amerykańską i francuską*, Warsaw 1919, p. 2.

Buzek. The author referred to the text of the American Constitution. The next bill was developed by Mieczysław Niedziałkowski and was formally proposed as "Constitution of the Polish People's Republic Bill". It was called "people's bill" because of the author's political party membership and an assumption in the text that "the Polish State shall be free and independent People's Republic". The third bill, presented under the title "Constitution of the Republic of Poland Bill" referred to the content of the French basic law and, thus, it was called the "French bill". The authorship of this bill raises doubts.[10]

The American bill,[11] stipulated the right to free choice of the place of residence called "the right of free movement and abode" and the right to property (Article 7). Moreover, it ensured personal liberty (Article 10) referring to the Polish legislature of 1430. It also guaranteed home inviolability (Article 11) and the secrecy of correspondence (Article 12). The above-mentioned regulations were contained in Chapter I entitled "Nation and lands". The people's bill shaped the scope of citizens' rights in Chapter II entitled "Citizens' rights". The bill guaranteed the freedom of speech and conscience (Article 13), a ban on a body search (Article 14), the freedom to select the place of residence and to transfer property (Article 17). Moreover, it confirmed the right to home inviolability (Article 19) and the secrecy of correspondence (Article 20). Passing to the French bill, it is necessary to notice that it regulated the issues connected with the status of a citizen in Chapter V, while the American and the people's bills did it straight at the beginning. The French bill ensured personal liberty (Article 72), guaranteed private property inviolability (Article 74) and home inviolability (Article 75). Moreover, it guaranteed freedom to select the place of residence and to transfer property (Article 76), the freedom to express thoughts (Article 79), the secrecy of correspondence (Article 80) and the freedom of religion (Article 83).

The comparison of the bills shows that the matter of privacy was regulated in the broadest manner, at the level of basic law, by the French bill. It should be highlighted, however, that none of the presented bills obtained the official government support and the approaching session of the Legislative Sejm required the government's decision on that issue. The solution to the problem became the task for the next government led by Prime Minister Ignacy Paderewski, who on 25 January 1919 appointed a team composed of "men of science and persons taking prominent part in public life in order to assess the bills prepared for the Sejm from scientific and political point of view".[12] The team working from 19 February 1919 till 12 March 1919 was called "Questionnaire concerning the Constitution of the Republic of Poland Bill" and Michał Bobrzyński, a law historian, was appointed its chairman. The Questionnaire continued the work on and reviewed the bills

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[10] S. Krukowski argues that Władysław Wróblewski was the author of the "French" bill. Compare, S. Krukowski, *Geneza…*, pp. 16–17.

[11] The complete texts of the American, French and people's bills can be found in: M. Jabłonowski, W. Jakubowski, K. Jajecznik, *Ku Rzeczypospolitej demokratycznej. Polska debata ustrojowa 1917–1921*, series: *O niepodległą i granice*, Vol. 8, Pułtusk–Warsaw 2014, pp. 327–348 and pp. 360–378.

[12] W. Komarnicki, *Polskie prawo…*, p. 149.

of the Constitutional Bureau, which initially were a starting point for the work of the Questionnaire. However, during the second session of the Questionnaire, a unanimous decision was taken that further work would be based on the French bill.[13] The final result of the team's work was a constitutional bill submitted to the government in March 1919. It was entitled "Constitution of the Republic of Poland Bill developed by Professors Michał Bobrzyński, Stanisław Bukowiecki, Zygmunt Chrzanowski, Zygmunt Cybichowski, Stanisław Horwatt, Bolesław Koskowski, Władysław Maliniak, Konrad Niedziałkowski, Feliks Ochimowski, Michał Rostworowski, Stanisław Starzyński, Aleksander Świętochowski, Józef Świeżyński and Stanisław Wrólewski".[14] The Questionnaire's bill devoted the whole Chapter V entitled "Citizens' rights and duties" to issues connected with human rights. The bill guaranteed personal liberty (Article 85), property inviolability (Article 87), home inviolability (Article 88), the right to express thoughts (Article 92), the secrecy of correspondence (Article 93) and the freedom of religion (Article 97) with an indication that the complete freedom concerns only those religions that are legally recognised (Article 108 *a contrario*). The authors of the bill envisaged a possibility of temporary suspension of the above-mentioned rights, with the exception of the freedom of religion, for the time of war as well as in the face of a threat of war, possibly in case of internal disturbances and, in addition, in case of conduct that bears the character of high treason, when the constitution of the state is threatened, and finally, when personal security of citizens is at risk (Article 113).

4. RIGHT TO PRIVACY IN GOVERNMENTAL BILLS

When the Questionnaire presented its bill, the Legislative Sejm had already started work and appointed the Constitutional Commission. On 12 March 1919, the Commission requested that the government transfer the Legislative Bureau to the Commission and present the governmental constitutional bill.[15] The Cabinet did not decide to support the Questionnaire's bill and on 29 March 1919 resolved that the basic law bill would not be submitted to the Legislative Sejm as a governmental bill but as a result of the Questionnaire's work.[16] The decision had two effects. On the one hand, the Constitutional Commission decided it would not take into account the Questionnaire's bill because it did not gain the support of the Council of Ministers. On the other hand, the government represented by the Minister of Internal Affairs, Stanisław Wojciechowski, started working on the next basic law bill. Its author was Włodzimierz Wakar. He adopted a systematic method based not on chapters but on titles and included guarantees concerning personal inviolability, the inviolability of the hearth and home, and family relationships, the protection of religion and the secrecy of correspondence in Title II: "Citizens' relations". The bill entitled "Basis of the Order of the Republic of Poland" did not win Minister Wojciechowski's

[13] S. Krukowski, *Geneza…*, p. 29.
[14] Legislative Sejm of the Republic of Poland, paper no. 443B.
[15] S. Krukowski, *Geneza…*, p. 70.
[16] *Ibid.*, pp. 58–59.

approval. However, it served him as a basis for developing a governmental bill called "Constitutional Declaration Bill" adopted by the Council of Ministers on 3 May 1919 and submitted to the Legislative Sejm on 6 May 1919.[17] The Declaration was composed of 12 parts and the second one was entitled "Citizens' rights and duties", and included the following guarantees: inviolability of a person, the hearth and home, and family relationships, the protection of religion and the secrecy of correspondence. Thus, this part of the bill is the same as Włodzimierz Wakar's one. However, the Declaration also guaranteed the freedom of speech, press and image creation, and the freedom to acquire and sell property. This way, the author expressed the necessity of protecting the area that unavoidably shapes privacy in man's life.

There was also another governmental bill entitled "Constitution of the Republic of Poland Bill" adopted by the Council of Ministers in the form of a resolution on 1 November 1919 and submitted to the Sejm two days later.[18] This time, the bill acquired the form of a constitutional act, not a declaration. The matter of citizens' rights and duties was incorporated in Chapter V. The author guaranteed personal liberty (Article 75), property inviolability (Article 77), home inviolability (Article 78), the freedom to select the place of residence and stay on the territory of the state (Article 79), the freedom to express ideas in speech, press and image (Article 80), the secrecy of correspondence (Article 81) and the freedom of religion (Article 85). The rights were of course subject to limitation resulting from their purpose and the content of statutes based on which they were developed. Moreover, the author of the bill admitted a possibility of temporary suspension of the rights, with the exception of property inviolability, in accordance with the decree of Chief of State issued on the Council of Ministers' motion, provided the suspension of the rights should be necessary for the maintenance of public security. The bill also determined that the suspension could take place only during a war or when an outbreak of a war threatens as well as in case of internal disturbances or widespread conspiracies that threaten the state (Article 96).

5. RIGHT TO PRIVACY IN PARLIAMENTARY BILLS

At the same time as the governmental Constitutional Declaration was proposed, MPs' bills started to be submitted to the Legislative Sejm, too. It should be pointed out that on 6 May 1919, the bill of the "Wyzwolenie" Polish People's Party was submitted to the Sejm.[19] Next, on 27 May 1919, the Parliamentary Union of Polish Socialists[20] submitted their bill. On 30 May 1919, Stanisław Głąbiński, MP, and other MPs of the Popular National Union filed "an urgent motion to enact Constitution of the Republic of Poland Bill".[21] The next bill was one by Józef Buzek "concerning

[17] Legislative Sejm of the Republic of Poland, paper no. 443A.
[18] Legislative Sejm of the Republic of Poland, paper no. 443F.
[19] Legislative Sejm of the Republic of Poland, paper no. 443.
[20] Legislative Sejm of the Republic of Poland, paper no. 443C.
[21] Legislative Sejm of the Republic of Poland, paper no. 443D.

the Constitution of the Republic of Poland".[22] The bill, like the one of the Popular National Union, was submitted on 30 May 1919.

The analysis of the content of the above-mentioned bills should be started with the bill of the "Wyzwolenie" Polish People's Party. In Title II: "Citizens' union", it was, inter alia, laid down that the nation by means of law ensures inviolability of a person, family relationships and the hearth, the protection of religion and the secrecy of letters. The interpretation of the language and the purpose makes us assume that the authors, emphasising the importance of personal inviolability, the protection of family life, religion and secrecy of correspondence, outlined the constitutional comprehension of privacy with respect to the specificity of the time. Thus, privacy covered the internal sphere (family relations, religion and its protection) as well as the external one (body inviolability, secrecy of correspondence). It is indicated in literature that Włodzimierz Wakar was the author of the bill.[23]

The bill of the Parliamentary Union of Polish Socialists was similar to the people's one. The similarity consists in the fact that Mieczysław Niedziałkowski was its author. In Chapter II: "Citizens' rights", he guaranteed the freedom of conscience, speech and press (Article 12), personal inviolability (Article 13), the freedom to change the place of residence and stay (Article 14), home inviolability (Article 16), and the secrecy of correspondence (Article 17).

On the other hand, the bill by Stanisław Głąbiński, and other MPs of the Popular National Union contained the citizens' rights and duties in Chapter I of the basic law, which shows how important the issues concerning an individual's rights were for the authors. As far as this bill is concerned, it is also necessary to assume that, although the title of the Chapter is "Citizens' rights and duties", it essentially concerns the issue of human rights. The bill guaranteed private property inviolability (Article 6), home inviolability (Article 7), the freedom to select the place of residence (Article 8), the secrecy of correspondence (Article 11), and the freedom of religion (Articles 15 and 16). It should be pointed out, however, that the author admitted the possibility of a temporary suspension of the right to home inviolability and the secrecy of correspondence due to public security (Article 28).

Józef Buzek's bill does not have a chapter dealing only with the rights and duties and the legal norms of that nature are gathered in Chapter I entitled "Nation and lands". Like other above-presented bills, this one also guaranteed, as a rule, home inviolability and the secrecy of correspondence (Articles 11 and 12, respectively) as well as the freedom of religion and conscience inviolability (Article 29). What deserves attention is the circumstance that this time the author did not decide to construct a norm entitling *expressis verbis* to temporary suspension of all or some of the rights in strictly determined situations. The above-mentioned bills, i.e. the Questionnaire's one, the governmental Constitutional Declaration Bill and MPs' bills were submitted to the Constitutional Commission of the Legislative Sejm. The first reading of the Constitutional Declaration Bill strengthened the Commission's conviction that it should undertake the task of developing a constitutional act, not

[22] Legislative Sejm of the Republic of Poland, paper no. 443E.
[23] S. Krukowski, *Geneza…*, p. 83.

a declaration. However, the Commission did not manage to work out an internal consensus about the choice of a particular bill and its adoption as a basis for their work. As a result, the Commission started working on their own bill. In the meantime, another governmental bill, already mentioned above, was submitted on 1 November 1919.

6. RIGHT TO PRIVACY IN THE MARCH CONSTITUTION

The work of the constitutional commission finished in June 1920. On 12 June, the Commission submitted the basic law bill it developed to the Legislative Sejm. The bill was composed of six chapters, among which Chapter V concerned "Citizens' rights and citizens' duties". This part of the basic law bill contained guarantees concerning full protection of life and liberties to all citizens (Article 99), personal liberty (Article 100), the right of ownership (Article 102), home inviolability (Article 104), the freedom to select the place of residence and stay in the territory of the state (Article 105), the freedom to express ideas and beliefs (Article 107), the secrecy of correspondence (Article 109) and the freedom of conscience and religion (Article 114). The authors admitted a possibility of temporary suspension of some rights, i.e. personal liberty, home inviolability and the secrecy of correspondence for the reason of public security. The suspension could be implemented on a local and national scale (Article 130). Finally, the Legislative Sejm adopted the text of the first basic law after Poland regained independence on 17 March 1921. The Constitution, called the March Constitution because of the month of its adoption, regulated the matter of privacy, following the Constitutional Commission's bill, in Chapter V. However, it was entitled "General duties and rights of citizens". The legislator shaped the sphere of an individual's autonomous activities by covering with the constitutional guarantees the protection of liberty and property (Article 95). It guaranteed personal liberty admitting its limitation, especially in the form of search of a person and arrest, only in cases prescribed by law (Article 97), ensured the inviolability of home and hearth (Article 100) and the liberty of selecting his/her place of residence on the territory of the state (Article 101). Moreover, the Constitution guaranteed the right to express freely one's ideas and convictions in so far as a citizen does not thereby violate legal provisions (Article 104), the secrecy of correspondence (Article 106) and the freedom of conscience and religion (Article 111). The Constitution admitted a possibility of temporary suspension of citizens' rights: of personal liberty, of inviolability of home and the secrecy of correspondence for the whole territory of the state or for localities in which it may prove necessary for the reason of public safety (Article 124). Based on the presented norms of the March Constitution, it should be assumed that the legislator noticed privacy in the matters connected with the internal sphere of an individual's existence (freedom of conscience, the right to express ideas and beliefs) as well as the external sphere (the right to property, the protection of this right, liberty of selecting the place of residence, the secrecy of correspondence and, finally, home inviolability). Thus, it is a catalogue of such rights that enable an individual to acquire his own identity

and, based on that identity, build his own social and financial position, and develop his own worldview. Moreover, the indicated rights and guarantees mutually supplement each other and result from each other. It is so because constitutional protection of liberty and property is connected with the inviolability of home, and this right corresponds to personal liberty, which in turn is connected with the right to express ideas and convictions, the secrecy of correspondence and the freedom of conscience and religion.

It is necessary to draw attention to the fact that the above-presented rights are not absolute in nature and as such they are subject to limitations applied by the legislator in various forms. As far as this aspect is concerned, there are three methodologies used in the March Constitution: a limitation that is strictly constitutional in nature, a limitation by reference to general legislation and a mixed limitation precisely laid down in the Constitution with additional reference to general legislation. Article 95 may be an example of a strictly constitutional limitation as it *in principio* stipulated: "The Republic of Poland guarantees on its territory, to all, without distinction of extraction, nationality, language, race or religion, full protection of life, liberty and property". Although there is a reference to statutes in the further fragment of the norm, it is made in the scope concerning the protection enjoyed by foreigners. As far as the second method is concerned, it is necessary to point out Article 106, i.e. the secrecy of correspondence. The provision stipulated that "the secrecy of letters and other correspondence may be infringed upon only in cases provided by law". Thus, the legislator left every single regulation of the situation to general legislation in a situation when the infringement of constitutional guarantees of the secrecy of correspondence is not sanctioned. On the other hand, the guarantee placed in Article 97 is an example of the mixed limitation. On the one hand, the norm constitutes the right of "personal liberty" and, on the other hand, indicates an exemplary catalogue of admissible ways of violating it with the use of the phrase concerning admissibility of "search of a person and arrest" and, at the same time, determination that limitation of personal liberty is admissible "only in cases prescribed by law, and in the manner defined by statutes, by virtue of an order from judicial authorities". However, the legislator was not satisfied with such determination of the right to personal liberty and decided that it was purposeful to specify that in a situation when "a judicial order cannot be issued immediately, it should be served, at the latest, within forty-eight hours with a written statement of the cause of search or arrest. Arrested persons who have not been served within forty-eight hours with a written statement of the cause of arrest regain their freedom immediately". Finally, the legislator once again referred to general legislation and indicated that "The means of compulsory service by which the administrative authorities may enforce their orders are determined in statutes". The presented catalogue of the methods used to build the norms shaping the right to privacy indicates difficulties connected with the discussed matter as well as the legislator's will to determine those rights in the way meeting the expectations of the sovereign.

7. CONCLUSIONS

Summing up this discussion, it is necessary to emphasise the similarity of the passed basic law to its bills with regard to the way in which the legislator and the authors of the bills shaped the scope of an individual's rights that can be described as privacy and the right to it. Every text of the bills regulated the issues connected with the right to property, body inviolability, inviolability of the home, the freedom of conscience and the secrecy of correspondence. The doctrine of the times noticed the value and importance of the above-listed rights and called them "basic constitutional rights".[24] Thus, the above-presented bills tried to materialise the constitutional protection of the right to privacy, although they did not do it *expressis verbis*.

It should also be indicated that it was decided to describe the part concerning "the rights", thus also "privacy" and "the right to privacy", with the use of the word "citizen" in the title of the respective chapter of both the basic law and the bills. However, it should be highlighted that the nature of the legal regulations in them referring to "privacy" suggests that, in fact, they concern "human" rights and not only "citizen's" ones. Not only systemic interpretation but also the provisions in the bills and the text of the March Constitution confirm this. For example, Article 99 of the Constitutional Commission's bill laid down that "Foreigners exercise the rights laid down in statutes and international agreements", and Article 22 of the bill of the Parliamentary Union of Polish Socialists provided that "A foreigner staying within the territory of the Republic of Poland is subject to the statute and shall exercise all personal rights which it guarantees to the state's citizens". The March Constitution stipulated that "Foreigners enjoy, on condition of reciprocity, rights equal to those of citizens of the Polish State, and have duties equal to those of such citizens, unless statutes expressly require Polish citizenship" (Article 95 *in fine* March Constitution). The above unanimously indicates that the legislator made the possibility of exercising some rights dependent on the Polish citizenship. However, in case of "the right to privacy", it was not necessary. That is why, those rights should be classified as human rights and not citizens' rights.[25]

To conclude, it should be pointed out that the above-presented regulations make it possible to state that the right to privacy was defined in a constitutional and not colloquial form already at the stage of work on the basic law, which was later called the March Constitution, as well as in the text of its final version. The fact that it was not done *expressis verbis* results from the legislator's conviction that such a solution was not necessary for ensuring appropriate constitutional guarantees. In accordance with the March Constitution, the right to privacy was not absolute in nature and was addressed to every individual who was within the territory of the Polish state.

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[24] Thus, W. Komarnicki, *Polskie prawo…*, p. 561.

[25] Similarly, based on the March Constitution, the scope of regulations shaping the "rights to privacy" are classified as human rights, inter alia, by A. Młynarska-Sobaczewska, J. Hołda and Z. Hołda. See, A. Młynarska-Sobaczewska, *Wolności i prawa człowieka i obywatela*, [in:] D. Górecki (ed.), *Polskie prawo konstytucyjne*, Warsaw 2012, pp. 82–83; J. Hołda, Z. Hołda, *Prawa człowieka w wewnętrznym porządku prawnym*, [in:] J. Hołda, Z. Hołda, D. Ostrowska (ed.), J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Warsaw 2014, pp. 29–30.

The scope of the regulation undoubtedly met social expectations in the restored state. Moreover, this scope was encouragement to develop other regulations and norms concerning an individual's right to enjoy the sphere free from interference and activities of the state apparatus and third parties.

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RIGHT TO PRIVACY IN THE MARCH CONSTITUTION OF POLAND OF 1921 AND ITS BILLS

Summary

At present, the right to privacy is one of fundamental human rights. In the Polish legal system, its value is emphasised by the circumstance that it was laid down *expressis verbis* in the Constitution that is currently in force. This situation is a unique novelty since the right to privacy was not directly expressed in the previous Polish basic laws. However, this does not mean that the legislator did not envisage any regulations related to the matter of privacy. Indeed, this norm can be derived from the guarantees indicated in the content of the March Constitution. The article presents the development of the right to privacy in the March Constitution and its bills.

Keywords: right to privacy, civil law, March Constitution, personality rights, human rights

PRAWO DO PRYWATNOŚCI W KONSTYTUCJI MARCOWEJ I JEJ PROJEKTACH

Streszczenie

Współcześnie prawo do prywatności jest jednym z podstawowych praw człowieka. W systemie prawa polskiego jego znaczenie podkreśla okoliczność, iż zostało wyrażone *expressis verbis* w obowiązującej Konstytucji. Sytuacja ta stanowi swoiste *novum*, gdyż w poprzednio obowiązujących w Polsce ustawach zasadniczych prawo do prywatności nie było wyrażane w sposób bezpośredni. Nie oznacza to jednak, iż ustrojodawca nie przewidywał regulacji odnoszących się do materii prywatności. Przedmiotową normę można bowiem wywodzić już z gwarancji wskazanych w treści Konstytucji marcowej. Niniejszy artykuł prezentuje ukształtowanie prawa do prywatności w Konsytuacji marcowej i jej projektach.

Słowa kluczowe: prawo do prywatności, prawo cywilne, Konsytuacja marcowa, dobra osobiste, prawa człowieka

Cytuj jako:

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GLOSS
on the Supreme Court ruling of 14 September 2017, I KZP 7/17[1]

The phrase "threat referred to in Article 190" contained in Article 115 §12 CC concerns only a perpetrator's conduct and does not cover a result in the form of eliciting a threatened person's justified fear that the threat can be carried out.

The Supreme Court ruling that is the subject of the present gloss discussed a very interesting issue concerning the phrase "threat referred to in Article 190" contained in Article 115 §12 Criminal Code (henceforth: CC). The Supreme Court ruling was issued after the examination of the case of K.H. accused under Article 245 CC and others, which a District Court referred to the Supreme Court, in accordance with Article 441 §1 Criminal Procedure Code (henceforth: CPC) in connection with a legal question requiring interpretation of statute: "Is it necessary for the needs of criminal liability for an offence under Article 245 CC to establish whether a threat elicits justified fear that it can be carried out, in case a perpetrator uses a punishable threat in the meaning of Article 115 §12 CC (referred to in Article 190 CC) to exert pressure on a witness, and does the fear of the aggrieved that the threat can be carried out constitute a statutory feature of a prohibited act under Article 245 CC?"

The Supreme Court refused to adopt a resolution concerning the issue indicating that it does not meet the requirements for a prejudicial question and, in addition, referred to the Supreme Court ruling of 27 March 2014[2] issued in connection with an almost identical formulation of a legal question,[3] in the justification of which (in the Supreme Court's opinion) the answer to the question can be found in this case.

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1 LEX No. 2352165.

2 I KZP 2/14, OSNKW 2014, No. 7, item 53.

3 "Is it necessary for liability under Article 245 CC, in a situation in which a perpetrator in order to exert pressure on a witness uses an unlawful threat in the form of a punishable threat determined in Article 190 §1 CC, to establish whether the threat raises a justified fear that it can be carried out?"

Refusing to adopt a resolution concerning the issue, the Supreme Court emphasised in the justification for its decision that "Article 115 §12 CC defines three forms of an unlawful threat: (1) of committing an offence; (2) of causing criminal proceedings; (3) of publicising an insulting message. It is not possible to derive an opinion that eliciting a threatened person's justified fear is an element of threats under subparas. (2) and (3) without usurping the legislative rights by a court". Moreover, refusing to answer the prejudicial question in the further part of the justification, the Supreme Court referred to it stating that: "the legislator 'built' this element (eliciting fear that a threat can be carried out) in many types of offences characteristic also of those forms of threats, although did not incorporate it in the set of features. It concerns substantive offences determined in the Criminal Code in Articles: 124 §1, 128 §3, 153 §1, 197 §1, 224 §1, 232 §1, 249, 250 and 260.[4] Causing an effect that is a feature of those acts by means of a threat, e.g. in the form of exerting pressure (Articles 128, 224 §1, 232 §1, 250), already contains the occurrence of an element of subjective fear that the threat will be carried out (as a result, the lack of such determination in the description of an act will not make the features of an offence incomplete)".

In the light of the conclusions formulated by the Supreme Court in the justification for its decision, it is necessary to discuss two issues. Firstly, how should the phrase used in the definition of a punishable threat "threat referred to in Article 190 §1 CC" be interpreted (does it apply only to a perpetrator's conduct and does not cover the result in the form of eliciting justified fear that the threat can be carried out)? Secondly, is the assumption that it covers the effect referred to in Article 190 §1 CC important for the comprehension of the whole definition of an unlawful threat, i.e. does eliciting fear that a threat can be carried out also constitute an element of a threat of causing criminal proceedings and publicising an insulting message? In the light of the lack of uniformity of the opinions on the matter of the criminal law doctrine representatives and of case law, the issue needs a deepened analysis.

At the beginning, it should be assumed that the concept of a punishable threat is determined in the binding Criminal Code in the same way as in Article 120 §10 CC of 1969 and in a similar way as in Article 91 §4 CC of 1932. The difference between the approach to an unlawful threat in the Criminal Code of 1969 and the former one consisted in the fact that Article 91 §4 CC of 1932 did not contain a clause stipulating that "the announcement of causing criminal proceedings does not constitute a threat if it is only aimed at protecting the right infringed by an offence".

A punishable threat is especially important among unlawful threats. It is laid down in Article 115 §12 CC as the most serious among all the other forms and constitutes a self-standing offence against liberty determined in Chapter XXIII CC (Article 190 §1 CC). The remaining forms of an unlawful threat (a threat of causing criminal proceedings and a threat of publicising a message insulting a threatened person or his/her close relation) occur as a means of a perpetrator's modus operandi aimed at obtaining a particular aim. According to K. Daszkiewicz-Paluszyńska, an argument for this approach was undoubtedly the fact that the intensification of the

[4] There is no information why the Supreme Court listed only a few types of offences and ignored others in which an unlawful threat occurs as a method of a perpetrator's conduct.

will of a perpetrator who threatens to commit an offence is greater than of the one who threatens to cause criminal proceedings or publicise an insulting message.[5]

Analysing the first issue (constituting the thesis of the discussed ruling), it is necessary to notice that the legislator, using the phrase "threat referred to in Article 190 CC" in Article 115 §12 CC, refers to the directive of Article 190 §1 CC, the features of which consist of two elements that must occur jointly. It is an executor act, i.e. threatening another person that an offence will be committed to the detriment of him/her or his/her close relation, and the effect in the form of eliciting a threatened person's justified fear that the threat will be carried out. The provision of Article 115 §12 CC does not limit the scope of that reference so it should be assumed that it is a reference in a complete scope. Thus, the phrase "threat referred to in Article 190 CC" should be interpreted as a threat of committing an offence to the detriment of the threatened person or his/her close relation and eliciting a threatened person's justified fear that it will be carried out.[6] From the logical point of view, there is no justification for making the description of the features incomplete, limited to an executor act and ignoring the effect. Such a stand was already presented earlier based on the Criminal Code of 1969 in case law and the doctrine. According to A. Spotowski, "since Article 120 §10 CC of 1969 [Article 115 §12 CC of 1997 – note by K.N.] stipulated that an unlawful threat is a threat referred to in Article 166 CC of 1969 [Article 190 CC of 1997 – K.N.], this phrase should be interpreted as concerning a threat having all the features determined in Article 166 CC. A threat of committing an offence that does not elicit a threatened person's justified fear is not a threat referred to in Article 166 CC [of 1969 – K.N.]".[7] In addition, it should be emphasised that if the legislator's intention had been to limit the interpretation of this phrase, he would not have referred to Article 190 CC but would have directly determined that an unlawful threat was, inter alia, a threat of committing an offence, regardless of the effect referred to in Article 190 §1 CC. It is worth highlighting that the Criminal Code Bill of 1956 laid down in Article 96 that: "A threat in accordance with the provisions of the Criminal Code is a threat of committing an offence against life, health, freedom or property", and then indicated a threat of causing criminal proceedings and a threat of publicising a message insulting a threatened person or his/her close relation.[8] A similar solution to the problem of defining an unlawful threat was proposed in the Criminal Code Bill of 1963, where Article 433 §4 laid down that "a threat includes (…) an announcement that an offence will be committed".[9] The application of such a legislative technique would not raise doubts as to whether a punishable threat like one of the forms of unlawful threats concerns only a perpetrator's conduct and not the effect.

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[5] K. Daszkiewicz-Paluszyńska, *Groźba w polskim prawie karnym*, Warsaw 1958, p. 105.

[6] Similarly, P. Daniluk, *Wzbudzenie w zagrożonym uzasadnionej obawy spełnienia groźby w konstrukcji groźby bezprawnej*, Prokuratura i Prawo No. 1, 2018, p. 7.

[7] See, A. Spotowski, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part 2, Ossolineum, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1989, pp. 43–44. Also see, the judgement of the Appellate Court in Poznań of 8 November 1994, II Akr 252/94, OSA 1995, No. 1, item 1.

[8] *Projekt kodeksu karnego Polskiej Rzeczypospolitej Ludowej i przepisy wprowadzające*, Wydawnictwo Prawnicze, Warsaw 1956, p. 27.

[9] *Projekt kodeksu karnego*, Wydawnictwo Prawnicze, Warsaw 1963, p. 88.

Therefore, assuming that a "threat referred to in Article 190 CC" concerns a perpetrator's conduct as well as the effect in the form of eliciting fear that the threat will be carried out, it is worth discussing doubts occurring when it is assessed whether the existence of a threatened person's justified fear that the threat will be carried out constitutes an element of the essence of an action in case of the whole punishable threat.

The opinions of the representatives of the doctrine about the matter have been varied. M. Surkont drew attention to this problem making comments on an offence of coercion. The author considered whether only a person using a threat that elicited a threatened person's justified fear can be liable for coercion committed by means of a threat of causing criminal proceedings or publicising an insulting message, or whether it is sufficient to use a threat in order to coerce somebody into something to be liable for coercion. He pointed out two stands. According to one of them, an unlawful threat differs from a threat of committing an offence only in the scope of the content of the hazard and the negative consequences presented to the threatened person, while the essence of a threat remains unchanged. Thus, all the conditions for a threat of committing a crime concern an unlawful threat. According to the other, which he approved of, in relation to the two other forms of an unlawful threat, the statute does not require that they should elicit a threatened person's fear that they will be carried out, and the introduction of this condition by means of interpretation is inadmissible. In his opinion, Article 120 §10 CC of 1969 [Article 115 §12 CC of 1997] explains, unlike Article 166 CC of 1969 [Article 190 CC of 1997], the concept of the entire unlawful threat. There is a lack of whatever mention of the necessity of such fear occurring there.[10] The author presented two examples: when a perpetrator threatens another person with causing criminal proceedings but does not elicit a threatened person's fear that the threat will be carried out because he knows he has not committed any offence, and when a blackmailer threatens a woman that he will publicise a message about her immoral conduct but her husband trusts her and she is not afraid of rumours, i.e. is not afraid of the threat.[11] M. Siewierski presented a similar opinion based on the Criminal Code of 1969. According to him, "the criminality condition (eliciting a threatened person's fear) laid down in Article 166 CC does not belong to the features of an offence determined in Article 167 CC; however, what is a criminality condition for coercion by means of an unlawful threat referred to in Article 167 CC is the potential of that threat, conditioned by external circumstances of a given act, to exert pressure on the threatened person's will in order to induce action, endurance or omission".[12] Also case law was not uniform as far as this issue is concerned. The Supreme Court judgement of 2 December 1948 states that: "the difference between an unlawful threat and a punishable one does not consist in the quality, i.e. does not concern the essence of a threat alone, but in the quantity, because it extends the scope of methods of an unlawful threat, in which a perpetrator expresses his threat (apart from a threat of committing a crime, also a threat of causing

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[10] M. Surkont, *Przestępstwo zmuszania w polskim prawie karnym*, Gdańsk 1991, p. 83.

[11] *Ibid*., p. 84.

[12] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1977, p. 428; also see, judgement of the Appellate Court in Łódź of 20 July 1994, II AKR 175/94, Prok. i Pr. 1995, No. 3, item 18, p. 14.

criminal proceedings or publicising an insulting message). An unlawful threat laid down in Article 251 CC [Article 167 CC of 1969 and Article 191 CC of 1997 – K.N.] must also have the same quality features that characterise a punishable threat, thus, must be capable of eliciting a threatened person's fear. When a threat under Article 251 CC does not meet the condition, the essence of the act under this Article does not exist".[13] The Supreme Court presented a different opinion in its judgement of 19 December 1949, where it emphasised that "the existence of a threatened person's fear that the threat will be carried out is a statutory condition for liability for a punishable threat but is not a statutory condition of an unlawful threat laid down in Article 251, provided that this threat is not expressed in the form of the above-mentioned punishable threat but in other forms, i.e. in the form of a threat of causing criminal proceedings or publicising a message insulting a threatened person or his/her close relations".[14] It is also necessary to indicate the resolution of the Supreme Court Criminal Chamber bench of seven judges of 18 October 1949,[15] where attention was drawn to the fact that the nature of coercion being different from a threat is against the reception of the conditions for a threat of committing an offence in relation to an act consisting in coercion. An offence of a punishable threat is special in nature. Its direct object of protection is freedom from concern, fear. The mode of operation consists in a threat of committing an offence of special features, which are determined in the provision. The conditions belong to the essence of the object of an offence, they are object-related in nature, and a lack of any of them causes that a threat is no longer an offence. In case of an offence of coercion, a threat is not only one of the components of this act. However, the Act does not make a reservation concerning any object-related conditions as in case of a punishable threat.[16] A threat used by a perpetrator of coercion does not have to be intended to be serious; carrying it out does not have to be intended or possible. However, it should seem to be serious so that it could have impact on the will of the threatened person. A person threatening must be aware of that feature of the threat.[17] In another judgement of 4 November 1963, the Supreme Court stated that the ability to elicit justified fear is not an indispensable element of every unlawful threat but only a condition for the existence of a particular offence determined in Article 250 CC of 1932.[18]

The above-presented doubts can also be found in literature and case law based on Article 115 §12 of 1997. Some authors believe that other forms of a threat, apart from a punishable one, do not have to elicit a threatened person's feeling of hazard.[19] Others, on the other hand, believe that *mutatis mutandis* it should be assumed that the condition of reality of carrying out an announced threat also concerns an unlawful

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[13] The Supreme Court judgement of 2 December 1948, K 1668/48, PiP 1949, No. 4, p. 145.

[14] The Supreme Court judgement of 19 December 1949, WaK 605/49, PiP 1950, No. 7, p. 140.

[15] The Supreme Court resolution of 18 October 1949, K 1228/49, PiP 1950, No. 1, p. 133.

[16] Justification for the Supreme Court resolution of 18 October 1949, K 1228/49, PiP 1950, No. 1, pp. 133–135.

[17] *Ibid*., p. 135

[18] See, the Supreme Court judgement of 4 November 1963, III K 72/63, OSNKW 1964, No. 5, item 76.

[19] Thus, T. Oczkowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 588; O. Górniok, [in:] O. Górniok (ed.), *Kodeks karny. Komentarz*, Warsaw 2006, p. 430; J. Bojarski, O. Górniok, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 815.

threat in the remaining scope,[20] i.e. the occurrence of a state of justified fear that the threat will be carried out in the threatened person's psyche should be assumed also in relation to a threat of causing criminal proceedings or publicising an insulting message.[21] A. Zoll objectifies and presents it flexibly as "the existence of grounds for treating this threat seriously by an addressee".[22] On the other hand, according to J. Majewski, although the condition of eliciting justified fear was expressed *expressis verbis* only in case of a punishable threat, due to functional reasons, it should be referred to two other forms of an unlawful threat. The author believes that "in fact, this means narrowed interpretation of the provision discussed but departure from linguistic interpretational directives does not act to a perpetrator's disadvantage (i.e. is not an absolutely inadmissible solution) and, at the same time, it is necessary in order to save the presumption of the legislator's axiological rationality, because the result of the linguistic interpretation challenges this assumption".[23] Presenting his own opinion, he asks a question how it can be rationally justified that, on the one hand, every threat of causing criminal proceedings or publicising an insulting message and, on the other hand, not every threat of committing an offence, but only one that is serious, should be treated as an unlawful threat if this form of unlawful threat is of the greatest gravity.[24] That is why, according to J. Majewski, it should be assumed that a threat of causing criminal proceedings or publicising a message insulting a threatened person or his/her close relation constitutes an unlawful threat in the meaning of Article 115 §12 CC only when it is so serious that it is capable of eliciting a threatened person's justified fear that it will be carried out.[25] Such an interpretational approach dominates the doctrine of criminal law,[26] but case law still differs in this area. Sometimes this limitation is applied,[27] sometimes not.[28]

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[20] A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I: *Art. 1–116*, Gdańsk 2005, p. 843.

[21] Similarly, A. Michalska-Warias, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, pp. 310–311; and also, as it seems, M. Filar, *Przestępstwa przeciwko wolności*, [in:] Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze, issue 18, Warsaw 1998, p. 83, and J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2012, p. 707.

[22] A. Zoll, [in:] K. Buchała, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116 Kodeksu karnego*, Kraków 1998, p. 636.

[23] See, J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Vol. I: *Komentarz do art. 53–116*, Warsaw 2016, p. 1007.

[24] *Ibid*., pp. 1007–1008, and also M. Bielski, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*, Vol. II: *Komentarz do art. 117–277 k.k*., Warsaw 2008, p. 592.

[25] J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny*…, p. 1008.

[26] Thus also, A. Michalska-Warias, [in:] *Kodeks karny*…, p. 310, and S. Hypś, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 747.

[27] The Supreme Court judgement of 7 December 1999, WA 38/99, OSNKW 2000, No. 3–4, item 32; the Supreme Court judgement of 26 September 2006, WA 27/06, OSNwSK 2006, No. 1, item 1809; judgement of the Appellate Court in Poznań of 14 July 2005, II AKa 155/05, OSA 2006, No. 1, item 1; judgement of the Appellate Court in Lublin of 13 October 2008, II AKa 236/08, LEX No. 477863; judgement of the Appellate Court in Wrocław of 23 August 2012, II AKa 227/12, LEX No. 1220370.

[28] The Supreme Court ruling of 6 June 2011, V KK 128/11, LEX No. 897778; the Supreme Court ruling of 27 March 2014, I KZP 2/14, OSNKW 2014, No. 7, item 53; judgement of the Appellate Court in Lublin of 6 September 2012, II AKa 189/12, LEX No. 1217723.

As it is seen, the problem has triggered considerable differences in the doctrine and case law. The difficulties would not occur if the legislator had clearly determined whether the condition of "eliciting a threatened person's fear" should be applied to the entire concept of an unlawful threat. While a threat determined in Article 190 CC is a self-standing offence and its essence consists in eliciting a threatened person's fear, the Criminal Code uses the concept of an unlawful threat also to describe the statutory set of features of other types of offences. In such a situation, a threat and its direct consequence constitute only a certain stage in the implementation of a perpetrator's other criminal intention. Eliciting fear is not a final objective of his action but constitutes a means planned to obtain another objective.[29] Thus, it seems that a threat should be so serious that a threatened person, objectively speaking, would be convinced that he/she is in danger of the announced wrong. Regardless of the fact that the discussed provision of Article 115 §12 CC, in literal terms, does not speak about the effect in the form of eliciting fear of causing criminal proceedings and publicising a message insulting a threatened person or his/her close relation, it should be assumed that such a threat (in accordance with grammatical interpretation) may but does not have to lead to eliciting fear, however, due to the purpose, this effect must occur. A different interpretation would first of all negate the essence of a threat and, in addition, would lead to absurd situations. It is hard to imagine that an unlawful threat as a means of a perpetrator's influence on the aggrieved, intended to produce a result belonging to the features of a particular offence (e.g. in case of rape, leading to sexual intercourse), will not elicit fear that it will be carried out. If a threat did not elicit fear that it will be carried out, one could not speak about matching the features of an offence under Article 197 §1 CC. However, it can happen that sexual intercourse takes place, although a threat does not elicit fear, but then the sexual intercourse should be recognised as voluntary.

Summing up, it should be recognised that a result in the form of eliciting a threatened person's fear, constituting a feature of a punishable threat (Article 190 §1 CC) is also an element of other forms of a threat (laid down in Article 115 §12 CC), which may constitute an effective method of influencing another person's motivational processes, but (as it has been stated above) only when they can really have impact on the threatened person's psyche and persuade him/her to give in to a perpetrator's will.

Thus, one cannot approve of the thesis of the Supreme Court ruling that "a threat referred to in Article 190 CC" concerns only a perpetrator's conduct and does not cover an effect in the form of eliciting a threatened person's fear that the threat will be carried out. It concerns a perpetrator's conduct as well as eliciting justified fear that the threat will be carried out. This result, in accordance with purpose-related interpretation, should be also referred to other forms of threats.[30] A belief that a perpetrator using unlawful threats must elicit a threatened person's fear that the threat will be carried out if it is a punishable threat and does not have to elicit

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[29] Z. Czerwiński, *Groźba użycia przemocy jako forma popełnienia przestępstwa z art. 208 k.k.*, Problemy Praworządności No. 11, 1984, p. 43.

[30] Compare, P. Daniluk, *Wzbudzenie w zagrożonym…*, pp. 14–15.

such fear in case of the use of another type of threats leads to a differentiation of a perpetrator's legal situation, depending on the type of a threat he uses, and it cannot be defended from the point of view of logical interpretation. A perpetrator using a punishable threat that does not elicit justified fear that it will be carried out would be liable for an attempt to commit, and in case of using other types of threats, he would be liable for the commission of this offence, regardless of the failure to elicit a threatened person's fear.

The presented comments induce one to formulate respective *de lege ferenda* proposals. The definition of an unlawful threat should be formulated in the way that would not raise any doubts concerning its interpretation. This means it is necessary to give up reference to Article 190 §1 CC and to state that an unlawful threat is "a threat of committing an offence to the detriment of a threatened person or his/her close relation" and clearly indicate that the effect in the form of eliciting justified fear that the threat will be carried out concerns also other types of threats. The wording of Article 115 §2 CC might be as follows: "An unlawful threat is a threat of committing an offence to the detriment of a person threatened or his/her close relation as well as a threat of causing criminal proceedings or publicising a message insulting a threatened person or his/her close relation, provided it elicits justified fear that it will be carried out".

Finally, it is necessary to comment on the prejudicial question, which the Supreme Court refused to answer stating at the same time that "(…) the legislator 'built' this element (eliciting fear that a threat will be carried out) into many other types of offences also characteristic of these forms of threats, although he did not contain it in the set of features (…). Producing, by means of a threat, a result being the feature of those acts, e.g. in the form of exerting impact (Articles 128, 224 §1, 232 §1, 250), contains the implementation of an element of subjective occurrence of fear that the threat will be carried out (as a result, the lack of such determination in the description of an act will not make the features of the given offence incomplete)".

It should be analysed whether the effect in the form of eliciting fear is important for matching the features of an offence, in case of which a threat was a perpetrator's method of acting. In this case, controversies do not concern only Article 245 CC,[31]

[31] One can point out two stands that give different answers to the question whether eliciting a fear is a condition for criminal liability under Article 245 CC. First, that eliciting a threat, an addressee's fear is a condition for liability under Article 245 CC. See, judgement of the District Court in Wrocław of 29 May 2017, III K 343/16, LEX No. 2306082; judgement of the Appellate Court in Lublin of 3 October 2013, II AKa 152/13, LEX No. 1388873; judgement of the Appellate Court in Wrocław of 23 August 2012, II AKa 227/12, LEX No. 1220370; judgement of the Appellate Court in Lublin of 13 October 2008, II AKa 236/08, LEX No. 477863; the Supreme Court judgement of 7 December 1999, WA 38/99, LEX No. 39910. And second, that eliciting fear is not a condition for liability under Article 245 CC. See, judgement of the District Court in Gliwice of 31 July 2015, VI Ka 358/15, LEX No. 1831043; judgement of the District Court in Warszawa-Praga of 23 June 2015, VI Ka 227/15, LEX No. 1841829; judgement of the District Court in Lublin of 14 May 2015, XI Ka 81/15, LEX No. 1933779; judgement of the Appellate Court in Białystok of 9 October 2014, II AKa 202/14, LEX No. 1532570; judgement of the Appellate Court in Katowice of 24 March 2014, II AKa 20/14, LEX No. 1646974; the Supreme Court ruling of 14 February 2013, II KK 120/12, LEX No. 1405555; judgement of the Appellate Court in Lublin

which was the basis for the prejudicial question asked in the case analysed, but also apply to other types of offences in which the feature of an unlawful threat occurs.

Assuming that in case of any form of threat eliciting a threatened person's fear is important for the commission of an offence the features of which include the use of a threat, it is necessary to highlight that this effect does not belong to those features. Eliciting fear is not an effect of a given prohibited act. This is an effect of a threat that, in order to be efficient, must be serious enough to persuade its addressee to give in to a perpetrator's will. Regardless of whether an offence is formal and aims, e.g. at exerting influence (Article 245 CC), or substantive, where the effect is, e.g. leading to sexual intercourse (Article 197 §1 CC), eliciting fear is the element that should occur. Thus, it is important for matching the features of an offence, although it does not belong to its features.

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of 6 September 2012, II AKa 189/12, LEX No. 1217723. One can also indicate a halfway stand presented in the Supreme Court ruling of 27 March 2014, I KZP 2/14, LEX No. 1441244.

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Supreme Court ruling of 14 September 2017, I KZP 7/17, LEX No. 2352165.

GLOSS ON THE SUPREME COURT RULING OF 14 SEPTEMBER 2017, I KZP 7/17

Summary

The gloss presents comments on the ruling (issued by the Supreme Court on 14 September 2017, I KZP 7/17, LEX No. 2352165) concerning the issue of interpretation of the phrase "threat referred to in Article 190" contained in Article 115 §12 CC. The author tries to prove that eliciting a threatened person's justified fear that the threat will be carried out constitutes an element of

a punishable threat as a from of an unlawful one. Presenting her critical attitude to the thesis of the discussed ruling, she expresses her opinion that the phrase "threat referred to in Article 190" covers a perpetrator's conduct as well as a result in the form of eliciting justified fear that the threat will be carried out. The effect, in accordance with the purpose-related interpretation, should be also referred to other types of threats (a threat of causing criminal proceedings and a threat of publicising a message insulting a threatened person or his/her close relation), which may constitute an efficient method of influencing another person's motivational processes only in case they can really influence a threatened person's psyche and persuade him/her to give in to the perpetrator's will. In the face of different opinions of the representatives of the doctrine and case law concerning the issue, the author formulates respective *de lege ferenda* proposals.

Keywords: unlawful threat, punishable threat, justified fear, eliciting fear

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 14 WRZEŚNIA 2017 R., I KZP 7/17

Streszczenie

Przedmiotem glosowanego postanowienia (wydanego przez Sąd Najwyższy 14 września 2017 r., sygn. I KZP 7/17, LEX nr 2352165) jest problematyka dotycząca rozumienia zwrotu „groźba, o której mowa w art. 190", zawartego w art. 115 §12 k.k. Autorka podjęła próbę wykazania, że wzbudzenie w zagrożonym uzasadnionej obawy spełnienia groźby stanowi element groźby karalnej jako postaci groźby bezprawnej. Krytycznie odnosząc się do tezy glosowanego postanowienia, wyraziła pogląd, że zwrot „groźba, o której mowa w art. 190", obejmuje zarówno zachowanie sprawcy, jak i skutek w postaci wzbudzenia uzasadnionej obawy spełnienia groźby. Skutek ten, zgodnie z wykładnią celowościową, należy odnosić także do pozostałych postaci gróźb (groźby spowodowania postępowania karnego i groźby rozgłoszenia wiadomości uwłaczającej czci zagrożonego lub jego osoby najbliższej), które mogą stanowić skuteczny sposób oddziaływania na procesy motywacyjne drugiej osoby tylko wtedy, gdy są w stanie realnie wpłynąć na psychikę zagrożonego i skłonić go do poddania się woli sprawcy. Wobec niejednolitości poglądów przedstawicieli doktryny i orzecznictwa sądowego, dotyczących przedmiotowego zagadnienia, sformułowano stosowne postulaty *de lege ferenda*.

Słowa kluczowe: groźba bezprawna, groźba karalna, uzasadniona obawa, wzbudzenie obawy

Cytuj jako:

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