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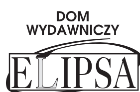

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LEGAL AND ECONOMIC ASPECTS OF HEALTHCARE SYSTEMS IN THE NETHERLANDS AND LUXEMBOURG

MIECZYSŁAW BŁOŃSKI*

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1. INTRODUCTION

Healthcare systems in the Netherlands and Luxembourg belong to the twelve most effective health systems in Europe. The other ones operate in Austria, Belgium, Denmark, Finland, France, Germany, Norway, Sweden, Switzerland and the United Kingdom. Scores being received by different criteria prove those countries' positions. Among the criteria, there are: patient rights and information (patient organizations involved in decision-making, the right to a second medical opinion, access to own medical record, registry of *bona fide* doctors, web or twenty-four-hour and seven-day telephone health consultant information, a possibility of seeking cross-border care, the catalogue of providers with quality ranking, e-accessible patient records, online booking of appointments and e-prescriptions, accessibility (family doctor same-day access, direct access to a specialist, major elective surgery in less than ninety days, cancer therapy in less than twenty-one days, CT scan in less than seven days, waiting time for paediatric psychiatry), outcomes (thirty-day case fatality for AMI, thirty-day case fatality for stroke, infant deaths, cancer survival, deaths before sixty-five years of age, MRSA infections, abortion rates, suicide rates, diabetes patients with HbA1c higher than seven), range and reach of services provided (equity of healthcare systems, cataract operations per one hundred thousand people sixty-five and more years old, kidney transplants per million population, dental care including in public healthcare, informal payments to doctors, long-term care for the elderly, percentage of dialysis done outside of a clinic, caesarean sections),

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prevention (infant eight-disease vaccination, blood pressure, smoking prevention, alcohol, physical activity, HPV vaccination, traffic deaths) and pharmaceuticals (Rx subsidy, novel cancer drugs deployment rate, access to new drugs, arthritis drugs, statin use, antibiotics per capita).[1]

The criteria include also access, health status, resilience, innovation, quality and other ones, where "Access is the extent to which medicines, treatments, diagnostics or other technologies can be accessed by the people who need them. Health Status evaluates the population's actual health status and outcomes. Resilience considers the ability of a health system to meet the population's needs in the future and the resources which ensure adaptability to innovation. Innovation assesses investments in developing new transformative medicines, treatments or technologies by both the responsible authorities and the private sector. Quality measures the strength of healthcare delivery, taking into consideration the methods of implementation of healthcare solutions."[2]

According to international comparisons, the healthcare system in the Netherlands is more effective than that in Luxembourg.[3] The outcomes of both systems distinguish the first one. The Netherlands, for example, has low antibiotic use, the small number of avoidable hospitalisations and low avoidable mortality.[4] Measuring by results, nearly year by year the Netherlands finds itself at the first position in the group of countries with the most effective healthcare systems in Europe, while Luxemburg is usually in the middle of the ranking.

2. LEGAL REGULATION OF HEALTHCARE IN THE NETHERLANDS

The most complex regulations of healthcare system in the Netherlands were introduced on 1 January 2006 by the Health Insurance Act (*Zorgverzekeringswet*).[5] According to the Act, the whole structure of the system and its regulatory mechanisms have been changed. The government resigned from substantial amount of its controlling role and its responsibilities were passed on to insurers, providers and patients. New agencies of a watchdog nature were established with their tasks to prevent improper healthcare market effects of the reform. The transfer of responsibilities to the municipalities resulted in diversified care arrangements. Self-regulation, always present in the Dutch healthcare system, increased. Professional organizations strengthened their involvement in periodic improvement and quality increase of the system.

The regulated market system does not mean central planning. Although institutions are licensed by the government, they make plans and investments

[1] A. Bjornberg, A. Yung Phang, *Euro Health Consumer Index 2018*, The Health Consumer Powerhouse, 2019.

[2] *The Sustainability Index 2018*, Future Proofing Healthcare, 2018, https://futureproofing healthcare.com/sustainability-index (accessed on 17/06/2019).

[3] *Ibid.*

[4] M. Kroneman et al., *Health Systems in Transition. Netherlands Health System Review 2016*, European Observatory on Health Systems and Policies Vol. 18, No. 2, 2016.

[5] *Ibid.*

decisions by themselves. The only area strictly controlled by the government is the number of persons working in the healthcare. It decides on the income of medical students and the volume of training of other medical specialists based on forecasts and plans. Municipalities with their public health departments supervise the health of their inhabitants at local level.[6]

In 2014 Public Health Status and Forecasts Act (*Volksgezondheid Toekomost Verkenning*, VTV) added four most important general challenges for the healthcare system in the Netherlands:

– keeping people healthy as long as possible and bring people who are ill to good health;
– supporting handicapped and vulnerable people and strengthening their social links;
– stimulating autonomy and freedom of decisions;
– maintaining affordable healthcare.

The government usually formulates in its health budget priorities for shorter time frames. In 2016 it expressed the following aims to be achieved:

– such modifications in the health sector which will be visible for the people (including responsive services and better information to enable citizens to make choices);
– such amendment in pharmaceutical policy which will restrain costs and improve quality, especially for new expensive drugs;
– better quality of service to patients in nursing homes (more day care, better prepared employees);
– stimulation of health insurers to provide a better offer for chronically ill and vulnerable people;
– less bureaucracy in the healthcare institutions and fewer regulations;
– reducing antibiotic resistance in the Netherlands and in whole Europe (by the national plan for the years 2015-2019 and by activities in the European Union);
– incentives for bigger information and research work on dementia (by the national plan for dementia);
– stimulation of electronic applications with reference to healthcare.[7]

The actual activity of the Dutch Ministry of Health, Welfare and Sport is limited to the following items:

– setting public health targets;
– preparing the country health budget;
– accepting the content of the basic health insurance package;
– deciding on the level of prices for services which are not freely negotiable;
– facilitating the healthcare market for its participants (for example with information);
– general supervision of the healthcare markets.[8]

[6] *Polska i Holandia – Zdrowe relacje. Ocena możliwości poprawy działania systemów ochrony zdrowia dzięki wzajemnej wymianie doświadczeń*, Netherlands-Polish Chamber of Commerce, 2017.

[7] M. Kroneman et al., *Health Systems in Transition…*, 2016.

[8] *Ibid*.

The Netherlands instead has a group of institutions which support and advice on healthcare policies and self-control the system in various dimensions. Some of them play an advisory role, other supervise the system and still others self-regulate it. The most important institution called the Health Council (*Gezondheidsraad*) has substantial influence on the evolution of health policy. It advises the Minister of Health, Welfare and Sport. Following its recommendations in 2013, the government, for example, introduced a national cancer screening programme. Among other authoritative advice in 2015 the Health Council formulated also its recommendations on healthy food.

The other main institutions in the Dutch healthcare system are the Council for Public Health and Society (RVS) and the Dutch Healthcare Authority (NZa). The first one advises the Minister on the societal aspects of healthcare and the other (among other functions) supervises the compliance of activities of insurers with the Health Insurance Act (ZVW) and the Healthcare Market Regulation Act (Wmg). It is worth mentioning also the substantial role of the Dutch National Healthcare Institute (*Zorginstituut Nederland*) and its part: the Quality Institute for Care (*Kwaliteitsininstituut voor de Zorg*). They conduct research and advise the Ministry of Health, Welfare and Sport on possible medical innovations and guard the quality, accessibility and affordability of the whole healthcare system.

In the Netherlands also various more specialised institutions operate advising, supervising and self-regulating the system. Among them there are the Capacity Body (*Capaciteitsorgaan*) which advises the Minster on workforce planning, the Medicines Evaluation Board (CBG), the National Institute for Public Health and the Environment (RIVM), the Healthcare Inspectorate (IGZ), the Netherlands Pharmacovigilance Centre Lareb (*Bijwerkingencentrum Lareb*), the Royal Dutch Medical Association (KNMG), the Federation of Medical Specialists (FMS), the Nurses and Carers Netherlands (V&VN), the Regional Vaccination Administration Bodies (*Entadministraties*) and the Regional Support Structures (*Regionale Ondersteuningsstructuren*, ROS). The main actors of the Dutch healthcare system and their roles in it are shown in Table 1.

Apart of the principal legal acts mentioned at the beginning of this part of the article, the health system in the Netherlands is regulated by a bunch of other acts referring to different aspects of healthcare. It is worth mentioning the Long-term Care Act (Wlz), the Healthcare Institutions Admission Act (*Wet Toelating Zorginstellinen*, WTZi), the Act on the Supervision of Insurance Companies (*Wet Toezicht Verzekeringsbedrijf*), the Screening Act (*Wet op het Bevolkingsonderzoek*, WBO), the Quality of Health Facilities Act (*Kwaliteitswet Zorginstellingen*, KZi), the Individual Healthcare Professions Act (*Wet Beroepen in de Individuele Gezondheidszorg*, BIG), the Medical Treatment Agreement Act (*Wet Geneeskundige Behandelovereenkomst*, WGBO), the Act on Quality, Complaints and Disputes in Care (*Wet Kwaliteit, Klachten en Geschillen Zorg*, Wkkgz), the Medical Research Involving Human Subjects Act (*Wet Medisch-Wetenschappelijk Onderzoek*, Wmo), the Organ Donation Act (*Wet Orgaandonatie*, WOD), the Personal Data Protection Act (*Wet Boscherming Persoonsgegevens*, Wbp) and the Dutch Standards (*Nederlandse Normen*, NEN).[9]

[9] M. Kroneman et al., *Health Systems in Transition…*, 2016.

Table 1. Main actors of the Dutch healthcare system and their roles

Category	Actor	Tasks
Government	Central government	Setting public health targets Setting the national healthcare budget Deciding the content of the basic health insurance package Setting tariffs for services that are not subject to free negotiation Deciding capacity in long-term care institutions Facilitating actors in the healthcare market (for example with information) General supervision of the healthcare markets
	Municipality	Supervising the health of local populations Setting local public health targets Setting the budget for social support and domestic care (under the Wmo) Purchasing Wmo care (including counselling, day care, respite care, domestic care and youth mental care)
Advisory	Health Council	Advising the Minister on preventive care and other health issues (scientific)
	Council for Public Health and Society (RVS)	Advising the Minister on the health policy agenda (societal)
	National Healthcare Institute (ZiNL)	Advising the Minister on the content of the basic benefit package Advising on the content of the medicine reimbursement system (GVS) Advising the Minister on the budget for long-term care (Wlz) (also supervision; see below)
	Capacity Body (*Capaciteitsorgaan*)	Advising the Minister on workforce planning for all specialised postgraduate training programmes
	Medicines Evaluation Board (CBG)	Evaluating the safety, efficacy and quality of pharmaceuticals
	Healthcare Inspectorate (IGZ)	Advising the Minister (also supervision; see below)
	Dutch Healthcare Authority (NZa)	Advising the Minister on the definition of negotiable care products and prices of non-negotiable care (also supervision; see below)

Table 1 – continued

Category	Actor	Tasks
Supervision	Dutch Healthcare Authority (NZa)	Overseeing and monitoring healthcare markets Promoting transparency among actors
	Healthcare Inspectorate (IGZ)	Inspecting safety and quality of individual and institutional providers Investigating complaints and accidents Supervising quality of care provided under the Health Insurance Act (Zvw) and Long-term Care Act (Wlz)
	National Healthcare Institute (ZinNL)	Supervising the quality, access and affordability of healthcare Regulating defaulters and uninsured people Administering the Health Insurance Fund, including risk adjustment Assessing pharmaceuticals before inclusion in the benefit package
Self-regulation (professional and other)	Royal Dutch Medical Association (KNMG)	Postgraduate medical education Accreditation of medical specialists (including GPs) Promoting professional quality
	Dutch College of GPs (NHG)	Developing clinical guidelines for GPs
	Federation of Medical Specialists (FMS)	Development of guidelines for medical specialists
	Nurses and Carers Netherlands (V&VN)	Keeping a voluntary quality register where nurses and care professionals can file their continuing education and monitor their performance Professional committee for objection and appeal
	Regional Support Structures (ROS)	Funded by the Ministry via capitation payments by health insurers Advising and supporting primary care organizations and professionals towards more integrated care arrangements

Source: M. Kroneman, W. Boerma, M. van den Berg, P. Groenewegen, J. de Jong, E. van Ginneken, *Health Systems in Transition. Netherlands Health System Review 2016*, European Observatory on Health Systems and Policies Vol. 18, No. 2, 2016

The social security systems in the European Union are generally left to the competence of member states. However, the EU can give recommendations to them. For instance, the Netherlands was advised to modernise its long-term care.

The European Union created also the "Together for Health" health strategy which complies with its general Europe 2020 strategy. It stresses that healthy citizens constitute a fundamental condition for sustainable economic growth and prosperity as a whole. The EU authorities maintain that spending additional money for healthcare may increase economic growth. "Health in all policies" is the main motto of the European Union health strategy.

The same principle has been a long distance priority of the World Health Organization. It recommends Whole Government System. According to it, the ministries of health in all member countries and elsewhere should inspire other ministries to promote health goodness and equity.

This is a part of healthcare stewardship activities formulated in 2008 in the Tallinn Charter aiming to strengthen health systems of different countries.[10]

3. ORGANIZATION AND ECONOMICS OF HEALTHCARE IN THE NETHERLANDS

In the last decades of the 20th century, the Netherlands had a non-effective and cost-consuming healthcare system which did not satisfy the country's citizens.

The governments decided to analyse deeply the problem and to solve it. The beginning of systematic research started with W. Dekker Commission which listed the greatest disadvantages of the existing healthcare system. Among them there were too strong interference of the state in the number of the cures paid by the government and their prices which brought lower efficiency, the separate financing of different healthcare sectors which brought difficulties in proper use of flexible treatment and lack of choice of the insurer by the patient (and similar cases). Having identified these weaknesses, the Health Insurance Act was introduced on 1 January 2006.[11] From that time, the Dutch healthcare has been ever better financed.

Now the Netherlands treats healthcare as investment. It maintains that citizens who are in good health produce more goods and higher income improves quality of their life and prosperity of the nation as a whole.[12] Such approach to the health issue (being in line with the EU recommendations) makes the country's health spending as a share of GDP among the highest in the European Union. It amounted to 10.5% in 2016[13] and, according to the other sources, reached even 13.3% in 2017 and was highest in the EU.[14] Consequently (what has been mentioned at the beginning of this article), for some time the Dutch healthcare system has been the most effective in the EU nearly every year.

All inhabitants of the Netherlands are entitled to the integrated complex package of basic treatment and cures, which is paid for and delivered by public or private insurers and suppliers. There is full competition among insurers and suppliers. Each

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[10] *Ibid*.

[11] *Polska i Holandia – Zdrowe relacje…*

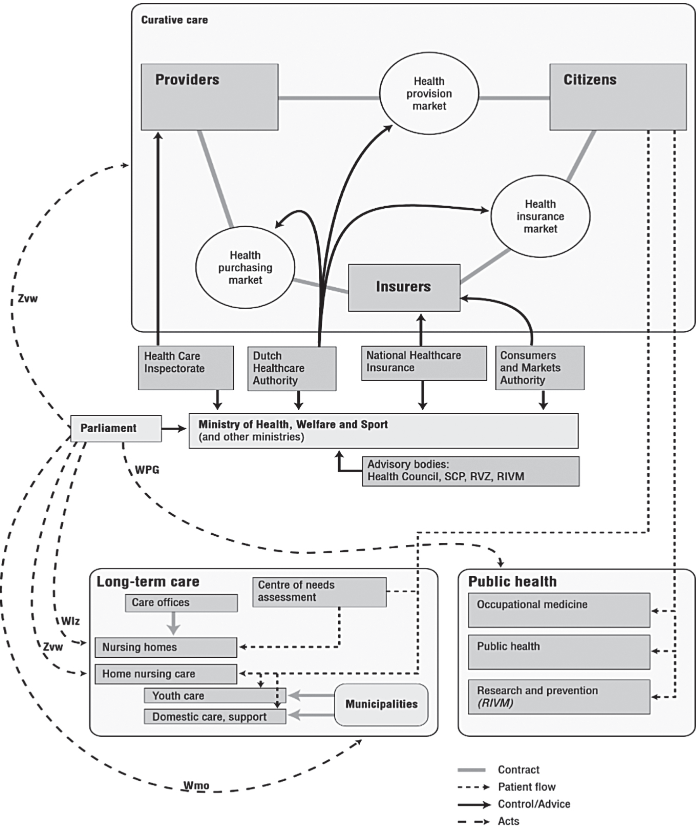
[12] *Ibid.*

[13] *OECD Health Statistics 2017 (2018)*, WHO Global Health Expenditure Database.

[14] https://*www*.statista.com/statistics/576000/total-health-expenditure-as-share-of-gdp-in-the-netherlands/.

citizen signs an insurance agreement with a freely chosen insurance entity, pays part of the subscription (ca. Euro 1,200) and another part of it is paid by the employer and the government. More than 90% of population have additional insurance. Figure 1 shows the organizational overview of the Dutch healthcare system.

Figure 1. Organizational overview of the Dutch healthcare system



Source: M. Kroneman, W. Boerma, M. van den Berg, P. Groenewegen, J. de Jong, E. van Ginneken, *Health Systems in Transition. Netherlands Health System Review 2016*, European Observatory on Health Systems and Policies Vol. 18, No. 2, 2016

4. LEGAL REGULATION OF HEALTHCARE IN LUXEMBOURG

The values and principles of the healthcare system in Luxembourg are contained in the Article Eleven of the Constitution of the Grand Duchy of Luxembourg issued in 1868 and in the Code of Health and the Code of Social Security. The most complex present regulations were in preparation since the middle of the last decade and introduced in 2008. The single national health fund called the National Health Insu-

rance (*Caisse Nationale de Santé*, CNS), merged nine healthcare funds. Its aim was to increase sustainable financing and transparency of the Luxembourg healthcare system and to cope with problems of non-residents, ageing society and increasing costs of services and treatment provided abroad. It was said that it should allocate better the resources and rationalise the purchases of medical services.

According to the next regulation, the Health Reform Law, introduced in 2010 with the aim of continued improvement of the quality and efficiency, the standardised accounting system for hospital services and new electronic health infrastructure were launched. It resulted in establishing of the National Agency for Shared Information in Health which adopted in 2015 the Shared Health Record (*Dossier de Soins Partagé*, DSP). According to it, patients and authorised suppliers of health services receive automatically the information on patients' health condition and treatment history.

Earlier, in 2011, the European Union introduced the Directive which allows patients to calculate different potential treatment options and costs in the country and abroad. Following this Directive, Luxembourg adopted in 2014 the law which guarantees patients access to all available information about their health status, examinations, diagnosis, treatment options and plans to help them make as informed decisions as possible. The institution of Health Mediator which helps in all this was also introduced. Both reforms have led to the personalised medicine which constitutes one of the most current topics.[15]

The most important institutions in the Luxembourg health system are the Ministry of Health and the Ministry of Social Security. The ministries cooperate, take decisions jointly and share responsibility for organization, legislation and financing of the healthcare system. The Ministry of Health (its Health Directorate) is responsible for planning health service provision in the whole country, conducting health studies, preparing surveys, advising public institutions on health issues and supervising health authorities in the country, public health suppliers and non-hospital sector. Another important institutions of the Luxembourg health system are the Luxembourg Institute for Health (LIH), National Health Laboratory (*Laboratoire national de santé*, LNS), the Social Security Medical Review (*Conrôle médical de la sécurité sociale*, CMSS), the Medical-Surgical Mutual Fund (*Caisse médico-chirurgicale mutualiste*, CMCM), the Nomenclature Commission (*Commission de nomenclature*, CN) and the Association of Medical and Dental Doctors (*Association des médecins et médecins-dentistes*, AMMD).[16]

5. ORGANIZATION AND ECONOMICS OF HEALTHCARE IN LUXEMBOURG

Luxembourg has the second highest per capita health spending with purchasing power parity (PPP) among European countries belonging to the World Health Organization. It keeps staying on such a high position for many years and amounted to

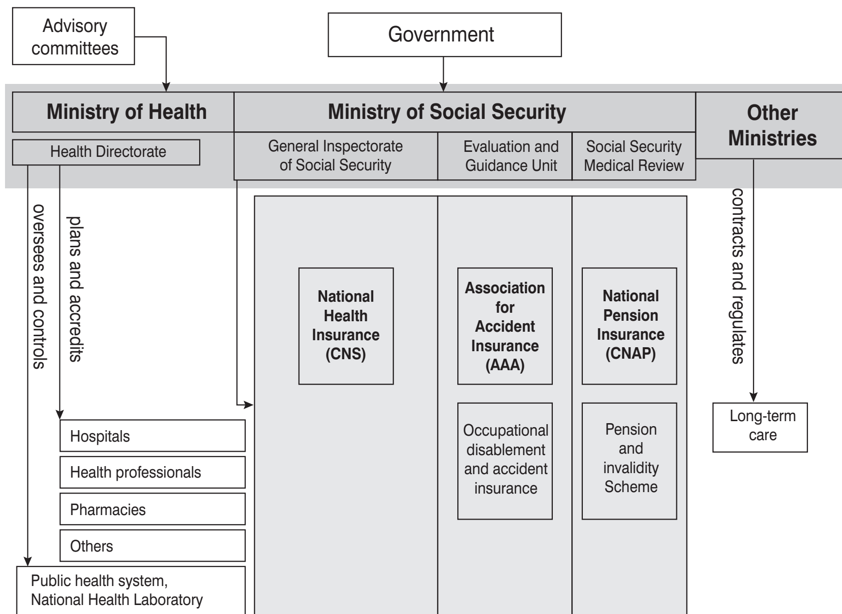
[15] F. Berthet et al., *Health Systems in Transition, HiT in Brief Luxembourg*, European Observatory on Health Systems and Policies, the Government of the Grand Duchy of Luxembourg, 2015.

[16] *Ibid*.

USD 6,475 in 2017.[17] However, compared to neighbouring countries, Luxembourg spends a significantly lower percent of its GDP on healthcare. It is because the country has the highest GDP per capita in Europe.

The main factor of so high per capita spending on healthcare is the limited number of inhabitants in Luxembourg (slightly more than half a million) and connected with it small number of specialised medical institutions. This makes citizens of this country go abroad to receive substantial part of necessary treatment, cures and services and Luxembourg insurers have to pay for it. The problem of increasing costs of services and treatment provided abroad was one of the major considerations that has led to establishing the country health fund: the National Health Insurance (CNS) in 2008 (what has been mentioned in the above section of this article).

Figure 2. Organizational overview of the Luxembourg healthcare system



Source: F. Berthet, A. Calteux, M. Wolter, L. Weber, E. van Ginneken, A. Spranger, *HiT in Brief Luxembourg, Health Systems in Transition*, European Observatory on Health Systems and Policies, the Government of the Grand Duchy of Luxembourg, 2015

The main principles of the health system in Luxembourg consist of the following:
- general access through obligatory social health insurance system (SHI) financed mainly by contributions;
- SHI consisting of three parts (healthcare, accident insurance and long-term care);

[17] *Health Spending Indicator*, OECD 2019 (accessed on 16/06/2019).

- open choice of service suppliers and direct availability of specialist treatment for patients;
- core role for self-employed physicians (authorised by the Ministry of Health and accredited at the CNS; reimbursed pursuant to price lists agreed with the CNS);
- whole country planning of hospital and pharmaceutical sectors by the Ministry of Health.[18]

The financing of the health insurance is done in 40% by the state and in 60% equally by insured persons and employers. The long-term care insurance is covered in 40% by the state, in around 1% by electricity consumers using more than 1 million kW a year and by the insured. The CNS negotiates annual budgets with hospitals (14 hospitals in Luxembourg in 2015) for operating costs and annual tariffs with professional groups, as the already mentioned Association of Medical and Dental Doctors in Luxembourg (AMMD) and with other suppliers of medical services and goods.[19] Figure 2 shows the organizational overview of the Luxembourg healthcare system.

6. CONCLUSIONS

The Netherlands and Luxembourg, two neighbouring countries, have similar but slightly different healthcare systems. In case of these two countries the most important is their size and the level of government intervention in them. The first country, with much bigger population and incomparably greater number of insurers and providers of medical services, relies mostly on home market and great competition among and between them. Additionally, the government does not interfere too much. The other country, due to the limited population, has a small number of hospitals and specialised medical centres, and has to send its citizens abroad to receive substantial amount of medical help. Moreover, it seems that Luxembourg authorities interfere in its health market more than the Dutch ones. As a result, the Dutch healthcare system with moderate expenses is considered to be the most effective (nearly in each consecutive year) in Europe and the Luxembourg one, with the considerably minor effectiveness, is the second most cost consuming (per capita) in Europe.

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[18] F. Berthet et al., *Health Systems in Transition…*

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LEGAL AND ECONOMIC ASPECTS OF HEALTHCARE SYSTEMS IN THE NETHERLANDS AND LUXEMBOURG

Summary

The article addresses issues related to legal regulations, organization and economics of healthcare systems in the Netherlands and Luxembourg. In order to provide the bird's eye view of these systems, the most important acts introducing them have been presented. Other significant regulations and principal institutions introducing, consulting and self-controlling them have been mentioned. The main economic conditions and organization of healthcare systems in the Netherlands and Luxembourg have been described. The organizational structures of both systems have also been included in the text. The whole analysis aims at delivering preliminary information on how the most effective (nearly in each consecutive year) healthcare system in Europe, the Dutch one, was established and is organized in comparison to one of the most expensive systems (per capita), the Luxembourg one, the effectiveness of which is considerably minor.

Keywords: legal aspects, economic aspects, healthcare system, the Netherlands, Luxembourg

PRAWNE I EKONOMICZNE ASPEKTY SYSTEMU OCHRONY ZDROWIA W HOLANDII I LUKSEMBURGU

Streszczenie

Artykuł porusza zagadnienia związane z regulacjami prawnymi, organizacją i uwarunkowaniami ekonomicznymi systemów ochrony zdrowia w Holandii i Luxemburgu. Aby dostarczyć widok z lotu ptaka na oba te systemy, zostały przedstawione najważniejsze akty prawne wprowadzające je. Zostały także wymienione inne odnoszące się do nich znaczące uregulowania prawne, jak również główne instytucje, tworzące, konsultujące i samokontrolujące je. Zostały ukazane podstawowe warunki ekonomiczne i organizacja obu systemów. W teście znalazły się również ich schematy organizacyjne. Artykuł ma na celu dostarczenie wstępnych informacji o tym, jak powstał i jest zorganizowany najbardziej efektywny w Europie (niemal w każdym kolejnym roku) holenderski system ochrony zdrowia w porównaniu do systemu luksemburskiego, jednego z najdroższych (na jednego mieszkańca), którego efektywność jest znacząco mniejsza.

Słowa kluczowe: prawne aspekty, ekonomiczne aspekty, system ochrony zdrowia, Holandia, Luksemburg

ASPECTOS LEGALES Y ECONÓMICOS DEL SISTEMA DE PROTECCIÓN DE SALUD EN HOLANDA Y LUXEMBURGO

Resumen

El artículo trata de cuestiones relacionadas con la regulación jurídica, organización y condiciones económicas del sistema de protección de salud en Holanda y Luxemburgo. Para tener una vista global de ambos sistemas, el articulo presenta los actos normativos principales, como

otras regulaciones importantes, instituciones principales que los crean, coadyuvan i autocontrolan. También trata de condiciones económicas básicas y organización de ambos sistemas. El texto contiene esquemas de organización. El articulo tiene por objetivo aportar información inicial sobre la constitución y organización del sistema holandés más efectivo en Europa de protección de salud (considerado así casi cada año) en comparación con el sistema luxemburgués, uno de los más caros (por un habitante), cuya efectividad es considerablemente menor.

Palabras claves: aspectos legales, aspectos económicos, sistema de protección de salud, Holanda, Luxemburgo

ПРАВОВЫЕ И ЭКОНОМИЧЕСКИЕ АСПЕКТЫ СИСТЕМЫ ЗДРАВООХРАНЕНИЯ В НИДЕРЛАНДАХ И ЛЮКСЕМБУРГЕ

Резюме

В статье обсуждаются вопросы, связанные с правовым регулированием, организацией и экономическими аспектами функционирования систем здравоохранения в Нидерландах и Люксембурге. Для получения общего представления об обеих системах здравоохранения рассмотрены важнейшие законодательные акты, лежащие в их основе. Также рассмотрены другие значимые нормы законодательства в этой области, основные составные части системы здравоохранения и институты, обеспечивающие контроль и самоконтроль за ее работой. Рассмотрены основные экономические и организационные аспекты обеих систем. В тексте содержатся также схемы организационной структуры рассматриваемых систем здравоохранения. Целью статьи является предоставление базовой информации о том, как создавалась голландская система здравоохранения, которая почти ежегодно признается самой эффективной в Европе, и как она организована. Для сравнения выбрана люксембургская система здравоохранения (одна из наиболее затратных в пересчете на одного жителя), являющаяся гораздо менее эффективной.

Ключевые слова: правовые аспекты, экономические аспекты, система здравоохранения, Нидерланды, Люксембург

RECHTLICHE UND WIRTSCHAFTLICHE ASPEKTE DES GESUNDHEITSSYSTEMS IN DEN NIEDERLANDEN UND LUXEMBURG

Zusammenfassung

Der Artikel befasst sich mit Fragen der gesetzlichen Vorschriften, Organisation und den wirtschaftlichen Gegebenheiten der Gesundheitssysteme in den Niederlanden und Luxemburg. Um einen Überblick über beide Systeme zu geben, werden die wichtigsten, diesen zugrunde liegenden Rechtsakte und die Durchführungsbestimmungen vorgestellt. Es werden auch die anderen, in diesem Bereich anwendbaren gesetzlichen Regelungen angeführt und die wichtigsten Institutionen benannt, von denen die Gesundheitssysteme ausarbeitet, konsultiert und selbstüberwacht werden. Dargestellt werden die wirtschaftlichen Rahmenbedingungen und die Gestaltung beider Systeme. In dem Text sind auch ihre Organisationsstrukturen dargestellt. Der Artikel soll erste Informationen darüber liefern, wie das holländische Gesundheitssystem, das (fast Jahr für Jahr) effizienteste Gesundheitssystem Europas, entstanden und organisiert ist

und einen Vergleich mit dem luxemburgischen Gesundheitswesen bieten, einem der teuersten Systeme (pro Einwohner), dessen Effizienz deutlich geringer ist.

Schlüsselwörter: rechtliche Aspekte, wirtschaftliche Aspekte, Gesundheitssystem, Niederlande, Luxemburg

ASPECTS JURIDIQUES ET ÉCONOMIQUES DU SYSTÈME DE SANTÉ AUX PAYS-BAS ET AU LUXEMBOURG

Résumé

L'article traite de questions liées à la réglementation, à l'organisation et à la situation économique des systèmes de santé aux Pays-Bas et au Luxembourg. Pour donner une vue d'ensemble des deux systèmes, les principaux actes juridiques les introduisant ont été présentés. D'autres réglementations juridiques importantes les concernant ainsi que les principales institutions qui les créent, consultent et contrôlent ont également été mentionnées. Les conditions économiques de base et l'organisation des deux systèmes ont été présentées. Le texte comprend également leurs organigrammes. Cet article vise à fournir des informations préliminaires sur la manière dont le système de santé néerlandais a été créé et organisé de la manière la plus efficace en Europe (presque chaque année suivante) par rapport au système luxembourgeois, l'un des plus coûteux (par habitant), dont l'efficacité est nettement inférieure.

Mots-clés: aspects juridiques, aspects économiques, système de santé, Pays-Bas, Luxembourg

ASPETTI GIURIDICI ED ECONOMICI DEL SISTEMA SANITARIO NEI PAESI BASSI E IN LUSSEMBURGO

Sintesi

L'articolo affronta le questioni legate alle regolamentazioni, all'organizzazione e alle condizioni economiche dei sistemi sanitari dei Paesi Bassi e del Lussemburgo. Per fornire una visione generale di entrambi i sistemi sono stati presentati i loro principali atti giuridici costitutivi. Sono state anche indicate altre significative regolamentazioni giuridiche che vi fanno riferimento, così come le principali istituzioni responsabili della loro creazione, consultazione e autocontrollo. Sono state mostrate le condizioni economiche fondamentali e le organizzazioni di entrambi i sistemi. Il testo contiene anche schemi organizzativi. L'articolo ha lo scopo di fornire informazioni preliminari su come è nato ed è organizzato il sistema sanitario dei Paesi Bassi, il più efficiente in Europa (quasi in ogni anno) confrontandolo con il sistema del Lussemburgo, uno dei più costosi pro capite, e con un'efficienza significativamente minore.

Parole chiave: aspetti giuridici, aspetti economici, sistema sanitario, Paesi Bassi, Lussemburgo

Cytuj jako:

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RIGHT TO A COURT IN A DEMOCRATIC STATE RULED BY LAW

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One of the fundamental assumptions of a democratic state ruled by law is the right to a court in order to ensure that citizens can protect their interests before an independent body adjudicating matters exclusively based on law that is in force in the state.[1] In the Polish legal tradition, the right to a court was close to the ideas of the Constitution of 3 May 1791, and the two Constitutions of the interwar period also stipulated that right.

The provision of Article 98 *in principio* of the March Constitution[2] laid down that: "No one may be deprived of the court to which he is subject by law. (…) No statute may deprive a citizen of access to the courts for the purpose of demanding reparation for injury or damage". According to Article 68(1) and (4) of the April Constitution,[3] "No law can bar a citizen from seeking redress in the courts of justice for his injury or damages. No one can be deprived of the court of justice to which he is subject by law (...)".

However, the right to a court is of particular importance based on the principles of a democratic state ruled by law, the supremacy of the Constitution, and separation of powers, which are its characteristics. In accordance with Article 10 para. 1 of the Constitution of the Republic of Poland,[4] "The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative,

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1 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warsaw 2012, p. 286 and the Constitutional Tribunal judgments referred to therein.

2 Act of 17 March 1921: Constitution of the Republic of Poland, Journal of Laws [Dz.U.] No. 44, item 267.

3 Constitution of the Republic of Poland of 23 April 1935, Journal of Laws [Dz.U.] No. 30, item 227.

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

executive and judicial powers". The legislative power is vested in the Sejm and the Senate, executive power is vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power is vested in courts and tribunals (*arg. ex* Article 10 para. 2 of the Constitution of the Republic of Poland).

The principle of separation of powers means that although they must be balanced and cooperate, they maintain their autonomy. Thus, it is rightly emphasised in the doctrine[5] of constitutional law that "the separation of powers is aimed, inter alia, at securing human rights by precluding the abuse of power by any of the bodies that exercise it".

In relation to the judicial power, the separation of powers only means the autonomy of each of them because the essence of justice administration requires that the judicial power should be exercised exclusively by courts, and other powers should not interfere in those activities or participate in them. Such a conclusion can be drawn based on the grammatical interpretation of the provision of Article 175 para. 1 of the Constitution of the Republic of Poland, in accordance with which "The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts".

Constitutional independence of the right to a court does not change the fact that the right is genetic and organisationally connected with the concept of a democratic state ruled by law. The provision of Article 2 of the Constitution of the Republic of Poland *expressis verbis* stipulates that: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

Ensuring that an individual is protected against the arbitrariness of public authorities is an important feature of a democratic state ruled by law. Thus, the right to a court constitutes a guarantee of judicial protection of human rights against their infringement by public authorities.[6] It plays two functions strictly connected with each another. Firstly, it protects an individual's rights and obliges all public authorities, within their actions, to conform to the Constitution. Secondly, it creates a characteristic system binding the distinct status of an individual with the objective legal order.[7] Due to that, it is treated at present as an element of a democratic state ruled by law, regardless of whether it is directly expressed in the Constitution or concluded from it.[8]

The constitutional approach to the right to a court, inspired by the opinions of the Polish doctrine and international norms, can be analysed following two interpretations: (1) as a principle of constitutional law and (2) as an individual's subjective right.

Within the first meaning, the principle constitutes a directive on law development and a directive on its interpretation. As a directive on law development, the principle bars the legislator from enacting legal norms that are in conflict with

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[5] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)*, Państwo i Prawo No. 11–12, 1997, p. 87 and the opinions of the doctrine referred to therein.

[6] *Ibid.*, p. 88.

[7] *Ibid.*

[8] *Ibid.*, p. 89.

the Constitution (a negative aspect) and, on the other hand, requires that legal norms should be enacted in compliance with the Constitution, which materialises the principle (a positive aspect). In both cases, it constitutes a benchmark used to examine whether the enacted law is in compliance with the Constitution. As far as the directive on interpretation is concerned, all public authorities must take the principle into account in the process of law application. In case of doubts, i.e. in situations in which the Constitution does not provide a clear exclusion, the constitutional presumption is for the existence of the right to a court. Within this meaning, it limits the legislator's discretion in the process of enacting law.[9]

Within the second meaning, the placement of Article 45 para. 1 of the Constitution of the Republic of Poland, regulating the right to a court, in Chapter II entitled "The freedoms, rights and obligations of persons and citizens" means that the right to a court was mainly shaped as a separate subjective right constituting a fundamental element of the constitutional status of an individual. It functions as one of personal rights, a person's right guaranteeing his dignity, liberty and the sense of security, and creating a specific sense of being protected by law safeguarded by courts.[10] Indeed, everyone who seeks justice and wants to have sanctions applied for law violation may turn to a court; a person may also turn to a court when he feels the need to definitely determine his legal status and to get confirmation that he is under the protection of law.[11]

The Constitution of the Republic of Poland, like the constitutions of other states that adopted a democratic legal order as the basis of their system, in Article 45 para. 1 stipulates a common right to a court in the substantive meaning. The provision stipulates that: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". The provision draws its normative basis from the content of two norms of ratified international conventions, namely from Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[12] and from Article 14 paras. 1 and 3c of the International Covenant on Civil and Political Rights[13], which were of key importance for the Polish regulation of the right to a court. Both above-mentioned norms of the treaties constitute part of the national legal order under Article 91 of the Constitution of the Republic of Poland.

It is worth noting that the Polish Constitution determines the right to a court in a broader way than the above-mentioned human rights treaties do. Both, basic as far as the issue is concerned, international legal acts, i.e. ICCPR and ECHR, stipulate that in the determination of their civil rights and obligations or of any criminal charge against them, everyone shall be entitled to a fair and public hearing within

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[9] *Ibid*.

[10] P. Sarnecki, *Komentarz do art. 45 Konstytucji RP*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warsaw 2003, p. 236.

[11] *Ibid*., p. 237 and the opinions of the doctrine referred to therein.

[12] Journal of Laws [Dz.U.] of 1993, No. 61, items 284–289; hereinafter ECHR.

[13] Journal of Laws [Dz.U.] of 1977, No. 38, item 167; of 1994, No. 23, item 80; hereinafter ICCPR.

a reasonable time by an independent and impartial tribunal established by law.[14] On the other hand, the Constitution of the Republic of Poland does not limit this right to civil and criminal matters. The right to a court is also applicable in other matters, which are neither civil nor criminal, i.e. also administrative ones.[15] A broader treatment of the right to a court in the Polish Constitution results not only from the fact that it does not limit itself to some categories of matters but also from the relationship the right has with the principle of the two-instance court proceedings laid down in Article 176 para. 1 of the Constitution of the Republic of Poland and the right to appeal against judgments at least to a court of second instance, to which not only a person facing criminal charges but all parties to a trial are entitled. It results *expressis verbis* from Article 78 of the Constitution of the Republic of Poland, which stipulates that: "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute".

Therefore, also persons who are aggrieved as a result of the commission of an offence have the right to appeal against judgments within the scope in which they can act as parties (Article 444 of the Criminal Procedure Code); this also concerns other entities which are granted the status of a party to a trial. It should be emphasised that the content of Article 45 para. 1 of the Constitution of the Republic of Poland clearly indicates the legislator wanted the right to a court to cover possibly the broadest scope of matters, and the principle of a democratic state ruled by law results in the directive on interpretation that bans the use of narrowing interpretation of the right to a court.[16]

When presenting the institution of the right to a court in a democratic state ruled by law, it is necessary to indicate that the idea of this right, in the form adopted in the Constitution of the Republic of Poland of 1997, is based on the combination of three sources of inspiration:[17]

1) former judgments of the Constitutional Tribunal,
2) international human rights standards laid down in Article 14 ICCPR and Article 6 para. 1 ECHR,
3) opinions of the doctrine.

On the other hand, there is no uniform stand on the issue concerning the elements constituting the right to a court.

In the judgment of 9 June 1998, K 28/97,[18] the Constitutional Tribunal reconstructed three basic elements of the right to a court and decided that it consists in particular of:

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[14] W. Daszkiewicz, *Konstytucyjne prawo do sądu a nowy Kodeks postępowania karnego (zagadnienia wybrane)*, [in:] E. Skrętowicz (ed.), *Nowy Kodeks postępowania karnego. Zagadnienia węzłowe*, Kraków 1998, p. 44.

[15] A. Kubat, *Prawo do sądu jako gwarancja ochrony praw człowieka w sprawach administracyjnych*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa kontrola*, Warsaw 1997, p. 221 ff.

[16] P. Tuleja, *Prawo do sądu i skarga konstytucyjna jako konstytucyjne środki ochrony praw człowieka*, [in:] E. Dynia, Cz.P. Kłak (eds), *Europejskie standardy ochrony praw człowieka a ustawodawstwo polskie*, Rzeszów 2005, p. 35.

[17] P. Wiliński, *Proces karny w świetle Konstytucji*, Warsaw 2011, p. 112.

[18] OTK-A 1998, No. 4, item 50.

1) the right to have access to a court, i.e. the right to start proceedings before a court, hence a body that has specific features (i.e. is autonomous, impartial and independent),
2) the right to the appropriately shaped court procedure in compliance with the requirements of justice and openness,
3) the right to a court judgment, i.e. the right to receive a binding adjudication of a given matter by a court.

In the above-quoted judgment, the Constitutional Tribunal *expressis verbis* emphasised the procedural nature of the right to a court and referred to it in its successive judgments.[19]

For years, the doctrine of constitutional law and the judgments of the Constitutional Tribunal have referred to the above-mentioned three-element structure of the right to a court making it possible to determine the criteria for "the right to have access to the system of justice administration" by the indication of features that the system should match.[20] The Tribunal alone did not exclude evolution in the area because it did not close the catalogue of the elements of the right to a court, which was indicated in one of its judgments by the use of a phrase "in particular". Thus, in a judgment of 20 July 2004, SK 19/02,[21] the Constitutional Tribunal indicated another element of the right to a court by concluding that, regardless of the procedural elements, the characteristics of the right to a court also includes systemic elements. In the judgment of 23 October 2006, SK 42/04,[22] the Constitutional Tribunal draws attention to the fact that the provision of Article 45 para. 1 of the Constitution stipulates that a court is the only body entitled to hear a case and determines the cumulative criteria a court should meet, i.e. that it should be:
1) competent,
2) autonomous,
3) impartial,
4) independent.

Thus, as a result, in the judgment of 20 October 2007, SK 7/06,[23] the Constitutional Tribunal unequivocally stated that the constitutional right to a court contains a fourth element, namely the right to the appropriate shape and position of bodies that hear cases.

Based on the opinions of the constitutional law doctrine and the judgments of the Constitutional Tribunal, it should be assumed that the constitutional right to a court contains the following elements:
1) the right to have access to a court,
2) the right to an appropriate shape of the court procedure,

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[19] See, inter alia, judgments of 16 March 1999, SK 19/98, OTK 1999, No. 3, item 36, and of 10 May 2000, K 21/99, OTK 2000, No. 4, item 109.

[20] See the Constitutional Tribunal judgment of 12 May 2003, SK 38/02, OTK-A 2003, No. 5, item 38.

[21] OTK-A 2004, No. 7, item 67.

[22] OTK-A 2006, No. 9, item 125.

[23] OTK-A 2007, No. 9, item 108; also see the Constitutional Tribunal judgment of 7 December 2010, SK 11/09, OTK-A 2010, No. 10, item 108.

3) the right to a court judgment (i.e. a binding adjudication),
4) the right to appropriately shaped system and position of bodies hearing cases, i.e. the right to a competent, autonomous, impartial and independent court,
5) the right to public hearing of a case without undue delay.

It should be emphasised that none of the indicated elements is self-standing or sufficient. Thus, in order to assess whether a normative regulation meets the requirements determined in Article 45 para. 1 of the Constitution of the Republic of Poland, it is necessary to assess all the elements cumulatively. The infringement of any of them implies that a constitutional standard is not met as far as the right to a court is concerned.[24]

Therefore, the first element of the right to a court consists in the right to start proceedings before a court, i.e. legal action. The term legal action should be interpreted as the possibility of seeking justice before any court of the Republic of Poland, not only a common court, in case rights and freedoms are infringed. It is the right of a person to initiate court proceedings in the course of which a matter is adjudicated.[25] The entitlement results not only from Article 45 para. 1 of the Constitution of the Republic of Poland, but also from Article 77 para. 2 of the Constitution, which stipulates that: "Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights". It is worth noticing that while the first of the listed provisions formulates the right to have access to a court in a positive form, the second one is its supplementation and formulates the right in a negative form, because it bans the legislator from enacting regulations that would bar legal action of claiming the infringed freedoms or rights.[26] "Any person's" right to a court means that "no one" can be deprived of the right to legal proceedings before a court.

Thus, a question is raised whether the provision of Article 77 para. 2 of the Constitution of the Republic of Poland takes into account only the constitutional right to a court (*sensu stricto*), or it also covers the rights granted based on other normative acts (*sensu largo*). In the doctrine[27] of constitutional law, it is assumed that while the provision of Article 45 para. 1 of the Constitution of the Republic of Poland encompasses broad interpretation of law, i.e. also the rights laid down in ordinary statutes, the provision of Article 77 para. 2 of the Constitution of the Republic of Poland limits itself to the constitutional rights. The legal nature of the provision of Article 77 para. 2 of the Constitution of the Republic of Poland is twofold. On the one hand, it expresses "the right to a court" constituting one of the constitutional subjective rights of an individual and within this meaning it may be perceived as the supplementation of the regulation contained in Article 45 para. 1 of the Constitution of the Republic of Poland and, on the other hand, the editorial form

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[24] P. Wiliński, *Proces karny w świetle Konstytucji…*, p. 117 and the opinions of the doctrine referred to therein.

[25] *Ibid.*

[26] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej…*, p. 91; J. Oniszczuk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI wieku*, Zakamycze 2004, p. 727 and literature referred to therein.

[27] *Ibid.*, p. 95.

of Article 77 para. 2 of the Constitution as well as its approach to an instance of the "infringement of freedoms or rights" suggest that the provision should be perceived as a guarantee of a substantive right to a court expressed in Article 45 para. 1 of the Constitution. Both elements coexist in Article 77 para. 2 of the Constitution of the Republic of Poland, and the right to a court alone may also be treated not only as a self-standing subjective right but an institutional guarantee that other freedoms are materialised.[28] This is also how the legal nature of the provision of Article 77 para. 2 of the Constitution is interpreted in the judgments of the Supreme Court, where it is highlighted that "the right to a court" is guaranteed in two complementary provisions of the Constitution of the Republic of Poland, i.e. Article 45 para. 1 and Article 77 para. 2.

The above suggests a close relation between the provisions of Article 45 para. 1 and Article 77 para. 2 of the Constitution of the Republic of Poland, which consists in the fact that: firstly, both provisions constitute the constitutional guarantees of the right to a court; secondly, the provision of Article 77 para. 2 should be interpreted as detailed specification of Article 45 para. 1; and thirdly, there is a genetic link between Article 45 para. 1 and Article 77 para. 2, and Article 77 para. 2 constitutes the supplementation of the constitutional right to a court.[29]

The second element of an individual's right to a court consists in the right to the appropriate shape of the court procedure. There is an established uniform stand in the judgments[30] of the Constitutional Tribunal that the fair court procedure is one that ensures that parties have procedural rights adequate to the subject matter of conducted proceedings. Therefore, in accordance with the requirements for a fair trial, the parties to the proceedings must have a real possibility of presenting their arguments and a court must consider them.

Another element of the right to a court consists in the right to the appropriate shape of the system and position of bodies hearing cases. It constitutes the systemic element.[31] A court, within the meaning of Article 45 para. 1 of the Constitution of the Republic of Poland and the corresponding Article 6 para. 1 ECHR, is such an adjudicating body that meets the following requirements. Firstly, it must be a state body established by statute in order to administer justice and, what has already been stated above, this function, in accordance with Article 175 of the Polish Constitution, is performed in the Republic of Poland by the Supreme Court, common courts, administrative courts and military courts. In general, common courts implement the

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[28] L. Garlicki, K. Wojtyczek [in:], L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 2, Art. 30–86, 2nd edn, revised and supplemented, Warsaw 2006, p. 858 and opinions of the doctrine and the Constitutional Tribunal judgments referred to therein.

[29] *Ibid.*, p. 859.

[30] See the Constitutional Tribunal judgment of 23 October 2006, SK 42/04, OTK-A 2006, No. 9, item 125; the Constitutional Tribunal judgment of 16 March 1999, SK 19/98, OTK 1999, No. 3, item 36; the Constitutional Tribunal judgment of 13 May 2002, SK 32/01, OTK-A 2002, No. 3, item 31; the Constitutional Tribunal judgment of 12 May 2003, SK 38/02, OTK-A 2003, No. 5, item 38.

[31] L. Garlicki, *Pojęcie i cechy "sądu" w świetle orzecznictwa Europejskiej Konwencji Praw Człowieka*, [in:] A. Szmyt (ed.), *Trzecia władza. Sądy i trybunały w Polsce. Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego. Gdynia, 24–25 kwietnia 2008 r.*, Gdańsk 2008, p. 146.

administration of justice concerning all matters save for those statutorily reserved to other courts (Article 177 of the Constitution of the Republic of Poland).

Secondly, it must be a "competent court". As far as competence is concerned, "establishment by statute" requires that a court's competence to hear a particular matter should have adequate legal grounds. This means that, on the one hand, there must be provisions determining a court's competence and, on the other hand, those provisions must be applied in a rational way free from arbitrariness. Reference to a court's competence is also laid down in Article 176 para. 2 of the Constitution of the Republic of Poland, where the legislator is obliged to specify the organisational structure and jurisdiction as well as procedure of the courts. The implementation of the right to a competent court is also in the public interest, which constitutes one of the elements of the value that, in the doctrine,[32] is referred to as "the interest of the administration of justice". The treatment of "the right to a hearing of a matter by a competent court" as one of a person's constitutional rights means that the competence of a court must be determined in a complete way with no loopholes whatsoever because one can turn to a court in any matter. Therefore, statute should contain a general competence clause indicating a specific type of court as a body that is always competent in case the competence of a particular court cannot be established without doubts.[33]

Thirdly, a court must be autonomous, independent and impartial. Within the meaning of Article 45 para. 1 of the Constitution of the Republic of Poland, it is a body separated from other state bodies. Article 173 of the Polish Constitution refers directly to independence as a feature of courts and stipulates that: "The courts and tribunals shall constitute a separate power and shall be independent of other branches of state power". The starting point for the assessment of "a court's independence" is the establishment whether an adjudicating body maintains independence from the legislative and the executive powers. A parliament and its bodies cannot act as a court in criminal matters, i.e. adjudicate on guilt and punishment, and members of parliament cannot hold any judicial posts.[34] In this context, the Constitutional Tribunal, interpreting the concept of "an autonomous court" decided that "courts' autonomy" first of all means that the judiciary is organisationally and functionally separated from other powers so that it is possible to ensure that courts have full discretion over planning, undertaking and implementing tasks, and there is no functional or organisational subordination that might directly or indirectly influence the implementation of a court's tasks or undermine the citizens' trust in it.[35]

A court's independence as the next element determining the position of a court is complex in nature. In the doctrine,[36] it is assumed that the concept of judicial independence includes: (1) a judge's impartiality towards the parties to

[32] P. Wiliński, *Proces karny w świetle Konstytucji…*, p. 121 and the opinions of the doctrine and the Constitutional Tribunal judgments referred to therein.

[33] P. Sarnecki, *Komentarz do art. 45 Konstytucji RP…*, p. 240.

[34] L. Garlicki, *Pojęcie i cechy "sądu" w świetle orzecznictwa…*, p. 150.

[35] See the Constitutional Tribunal judgment of 14 April 1999, K 8/99, OTK-A 1999, No. 3, item 111.

[36] P. Wiliński, *Proces karny w świetle Konstytucji…*, p. 124.

the proceedings; (2) a court's independence from non-judicial bodies; (3) a judge's discretion to adjudicate and his independence from authorities and other judicial bodies; (4) a judge's independence from social factors; and (5) a judge's personal independence. Judicial independence is also described as a judge's total freedom from the influence of whatsoever external factors on the adjudicated matter.[37] Independence is referred to within this meaning in Article 178 para. 1 of the Constitution of the Republic of Poland, which lays down its normative basis in accordance with which "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes", as well as links a court's independence with a judge's independence. Such interpretation of judicial independence as a feature constituting a guarantee of implementation of the right to a court is adopted in the Constitutional Tribunal judgments providing a uniform stand that "judicial independence consists in the fact that a judge adjudicates exclusively based on all evidence presented, assesses it freely while listening to the voice of conscience and personal conviction, taking into account knowledge and life experience as well as the provisions of law". Most often, however, judicial independence is understood as a directive ordering a judge to adjudicate based on the Constitution, statutes and his personal conviction, which means that nobody, except the legislator, can influence a judge in the area of his administration of justice.[38] Independent courts are composed of people whom the law has given the feature of independence and it does not only verbally declare its existence but also develops the system of conditions of judges' work in the way that really and efficiently ensures that this independence exists. Thus, judicial independence is an indispensable element of the independent court system and guarantees citizens' rights and freedoms. Therefore, it is rightly assumed in the judgments of the Constitutional Tribunal[39] that an independent court cannot be composed of people who are not independent.

Judicial independence remains in strict relation with a judge's impartiality. The former is the assumption of the latter. The term "an impartial judge" mainly refers to a judge's subjective attitude to the matter heard.[40] The Constitutional Tribunal also draws attention to this relation and concludes that: "the concept of judicial independence has an unequivocal and established content being a basic guarantee of impartial adjudication. Independence must mean a judge's independence from the parties to the proceedings as well as from the state bodies. A judge is under the obligation to be impartial, in accordance with the oath he takes, which is a correlate of the principle of independence (...). The obligation to be impartial sometimes goes beyond the scope of protection resulting from the principle of independence. While

[37] A. Murzynowski, A. Zieliński, *Ustrój wymiaru sprawiedliwości w przyszłej Konstytucji*, Państwo i Prawo No. 9, 2000, p. 5; D. Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie*, Lublin 1999, p. 195.

[38] K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice 2013, p. 72.

[39] P. Wiliński, *Proces karny w świetle Konstytucji…*, p. 126 and the Constitutional Tribunal judgments referred to therein.

[40] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej…*, p. 99 and opinions of the doctrine referred to therein.

the principle refers to the influence of external entities on a judge, the obligation to be impartial obliges a judge to oppose assessment resulting from experience, stereotypes and prejudice".[41] A judge's impartiality is the opposite of partiality or bias, which in case of a judge may consist in adjusting the content of judgments to suggestions or orders addressed to a judge from outside with a view to advantages resulting therefrom.[42] The infringement of the obligation to be impartial constitutes a particularly drastic form of betraying the principle of judicial independence and, as a result, it leads to the occurrence of the phenomenon of "a cooperative judge", which excludes the possibility of objective application of law and administration of justice.[43]

Normative standards of a court's acting in the area of hearing a case include three conditions: (1) fair hearing; (2) open hearing; and (3) hearing "without undue delay". Hearing a case means comprehensive examination of all aspects of the case, those concerning an act that is to be assessed or e.g. claims (in a civil lawsuit) as well as those concerning legal norms that may be applicable to the adjudicated matter. Therefore, the hearing must be fair, which correlates with the general role of courts, i.e. administration of justice.

Thus, fair hearing of a matter should be referred to the "procedural justice", which is most generally defined as fair and diligent proceedings, i.e. in line with fair play. Thus, procedural justice requires that persons who pursue their rights and obligations before a court should obtain a real possibility of presenting their arguments. A court hearing a particular matter is obliged to enable every person to present their stand, and this way it implements the guarantees included in the principle of fair proceedings.[44] Both terms also require that a court hearing a particular matter and issuing a judgment based on the provisions of law should act following the sense of social justice while applying them and take into account the educational aspect of a court's function, but should not automatically accept public opinion.[45]

Public hearing of a case, within the meaning of Article 45 paras. 1 and 2 of the Constitution of the Republic of Poland, is strictly connected with the principle of openness of proceedings, which in a democratic state ruled by law means that information about the activities of all the public authority bodies are available to the public and are subject to social control. The Constitution not only guarantees public hearing of a case to everyone but also exhaustively determines public hearing exclusion for reasons of morality, state security and public order, and due to the protection of private life of a party, or other important private interest (Article 45 para. 2 of the Constitution of the Republic of Poland). Openness of court proceedings is most often interpreted as "openness to the public", which is called "external

[41] *Ibid*. and the Constitutional Tribunal judgments referred to therein.

[42] See the Constitutional Tribunal judgment of 24 June 1998, K 3/98, OTK 1998, No. 4, item 552.

[43] *Ibid*.

[44] Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej…*, p. 102.

[45] P. Sarnecki, *Komentarz do art. 45 Konstytucji RP…*, p. 239.

openness". It plays an important role in establishing the rule of law and order. It makes social control over courts' actions possible, is conducive to issuing judgments in compliance with law and the sense of social justice. It constitutes a guarantee of a court's independence and impartiality because its actions are performed under social control. Openness of proceedings also strengthens the sense of public and legal order, has educational influence on the parties to proceedings and other persons, contributes to respecting law and prevents the parties to proceedings and other persons from infringing the established legal order.

Hearing of a case before a court without undue delay, i.e. in a relatively fast way, is an essential element of the constitutional right to a court. Such an approach to hearing a matter has its normative basis in Article 45 para. 1 of the Constitution of the Republic of Poland. It serves the implementation of substantive law because an efficiently issued judgment is connected with greater and preventive influence of substantive law and the fulfilment of the aims of proceedings, and at the same time it ensures that the rights of the parties concerned are protected.

Hearing of a case without undue delay also means there is no threat to the efficiency of proceedings resulting from their lengthiness. The legislator gave the parties the right to complain about the lengthiness of court proceedings[46] and authorised a court adjudicating on this matter to order the court hearing the case to undertake certain steps until a specified time. The right to a court loses its significance if proceedings are lengthy and do not meet any expectations but only result in the input of energy and financial resources.

Summing up the above-presented considerations, it is necessary to conclude that, firstly, the right to a court, which constitutes one of the most important means of the protection of human rights and freedoms, *de lege lata* laid down in Article 45 para. 1, Article 77 para. 2 and Article 78 of the Constitution of the Republic of Poland, meets the requirements of a democratic state ruled by law and international standards laid down in Article 6 para. 1 ECHR and Article 14 paras. 1 and 3c ICCPR. Secondly, the right to a court should be perceived as a principle based on an assumption that what is a correlate of every person's right are specific obligations of public authorities to: (1) safeguard this right in normative legal acts that should ban closing a judicial way of claiming the infringed rights and freedoms; shape court procedures in the way that would optimally ensure that every person has the right to have their case heard in accordance with the rules laid down in Article 45 para. 1 of the Constitution of the Republic of Poland; (2) oblige all public authority bodies applying law to comply with the right to have access to a court and, in the course of court proceedings, to create conditions for adjudicating the matter and active participation of the parties. Thirdly, the subjective right to a court, which constitutes the basis for requesting that a court should hear a case, is universal in nature, which results from the use of the word "everyone", i.e. anyone with no exception. Everyone within the meaning of the Constitution refers to a natural person as well as a legal person as defined

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[46] See Act of 17 June 2004 on the complaint about the infringement of the right to hearing of a case before a court without undue delay, Journal of Laws [Dz.U.] No. 179, item 1843.

in private law.[47] Fourthly, the right to a court within the topical sense referring to freedoms and rights may be limited only by the Constitution and in other terms by statute.

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[47] See the Constitutional Tribunal judgment of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50.

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RIGHT TO A COURT IN A DEMOCRATIC STATE RULED BY LAW

Summary

The article discusses the issue of the right to a court in a democratic state ruled by law, which constitutes a guarantee of judicial protection of a person's rights against their infringement by public authorities. It plays two functions: firstly, it protects a person's subjective right and binds all public authorities to act in compliance with the Constitution; secondly, it creates a characteristic system of relations between a person's individual status and an objective legal order, and thus it is at present treated as a component of a democratic state ruled by law.

The constitutional approach to the right to a court may be analysed within two meanings: (1) as a principle of constitutional law; (2) as a person's subjective right. Within the former, the principle constitutes a directive on enacting law and an interpretational directive, and within the latter, it means that the right to a court is shaped as an individual subjective right constituting an elementary component of the constitutional status of a person. It functions as one of personal rights, as a human right guaranteeing a person's dignity and free status, the sense of security and the typical feeling of being protected by law, which is safeguarded by courts.

The right to a court, within the substantive meaning, is regulated in Article 45 para. 1 of the Constitution of the Republic of Poland, in accordance with which "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". The quoted provision is supplemented by the content of Article 77 para. 2 of the Constitution, which is a guarantee stipulating that: "Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights".

The right to a court constituting one of the most important means of safeguarding human rights and freedoms, laid down *de lege lata* in Article 77 para. 2 and Article 78 of the Constitution of the Republic of Poland, meets the requirements for a democratic state ruled by law and international standards laid down in Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 14 paras. 1 and 3(c) of the International Covenant on Civil and Political Rights.

Keywords: Constitution, democratic state ruled by law, administration of justice, courts, autonomous, independent and impartial court

PRAWO DO SĄDU W DEMOKRATYCZNYM PAŃSTWIE PRAWNYM

Streszczenie

W artykule omówiono prawo do sądu w demokratycznym państwie prawnym, które stanowi gwarancję sądowej ochrony praw człowieka przed ich naruszeniem przez organy władzy publicznej. Spełnia ono dwie funkcje: po pierwsze, chroni podmiotowe prawo jednostki i wiąże wszystkie władze publiczne w zakresie ich działania w podporządkowaniu Konstytucji; po drugie, tworzy charakterystyczny system powiązania indywidualnego statusu jednostki i obiektywnego porządku prawnego, wobec tego jest współcześnie traktowane jako składnik demokratycznego państwa prawnego.

Konstytucyjne ujęcie prawa do sądu może być rozpatrywane w dwóch znaczeniach: 1) jako zasada prawa konstytucyjnego; 2) jako prawo podmiotowe jednostki. W pierwszym znaczeniu zasada ta stanowi dyrektywę tworzenia prawa i dyrektywę interpretacyjną, zaś w drugim znaczeniu oznacza, iż prawo do sądu zostało ukształtowane jako indywidualne prawo podmiotowe, stanowiące elementarny składnik konstytucyjnego statusu jednostki. Występuje jako jedno z praw osobistych, jako prawo człowieka, gwarantujące jego godność, wolnościowy status, poczucie bezpieczeństwa i stwarzające swoiste odczucie przebywania pod opieką prawa, na straży którego stoją sądy.

Prawo do sądu, w znaczeniu materialnym, jest uregulowane w art. 45 ust. 1 Konstytucji RP, według którego „Każdy ma prawo do sprawiedliwego i jawnego rozpatrzenia sprawy bez nieuzasadnionej zwłoki przez właściwy, niezależny, bezstronny i niezawisły sąd". Dopełnienie regulacji ujętej w cytowanym przepisie zawiera przepis art. 77 ust. 2 Konstytucji RP, mający charakter gwarancyjny, który stanowi, że: „Ustawa nie może nikomu zamykać drogi sądowej dochodzenia naruszonych wolności lub praw".

Prawo do sądu stanowiące jedno z najważniejszych środków ochrony praw i wolności człowieka, ujęte *de lege lata* w art. 45 ust. 1, art. 77 ust. 2 i art. 78 Konstytucji RP odpowiada wymogom demokratycznego państwa prawnego i standardom międzynarodowym, przewidzianym w art. 6 ust. 1 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz w art. 14 ust. 1 i 3c Międzynarodowego Paktu Praw Obywatelskich i Politycznych.

Słowa kluczowe: Konstytucja, demokratyczne państwo prawne, wymiar sprawiedliwości, sądy, niezawisły, niezależny i bezstronny sąd

DERECHO A LA JUSTICIA EN EL ESTADO DEMOCRÁTICO DE DERECHO

Resumen

El artículo analiza el derecho a la justicia en el estado democrático de derecho que constituye una garantía de tutela judicial de derechos humanos ante su infracción por los órganos del poder público. Cumple con dos funciones: primero, protege derecho individual subjetivo y obliga a todas autoridades públicas en el ámbito de su actuación a someterse a la Constitución; segundo, crea un sistema de vinculación entre estado particular de un individuo

y orden jurídico objetivo, por lo tanto en actualidad es considerado como elemento de estado democrático de derecho.
El aspecto constitucional del derecho a la justicia puede analizarse desde dos perspectivas: 1) como principio de derecho constitucional, 2) como derecho subjetivo de un individuo. En la primera, este principio es una directiva de creación de derecho y una directiva de interpretación; en la segunda el derecho a la justicia viene configurado como derecho individual subjetivo que forma parte de estado fundamental constitucional de un individuo. Aparece como uno de los derechos personales, como derecho humano que garantiza su dignidad, libertad, seguridad y sentimiento de tutela jurídica, ejercida por los tribunales.
El derecho a la justicia en el sentido sustancial queda regulado en el art. 45 ap. 1 de la Constitución de la República de Polonia, según el cual "Cada uno tiene derecho a la justicia equitativa y pública, sin retraso infundado, dictada por el tribunal competente, independiente, imparcial e inamovible". Esta regulación viene complementada con el art. 77 ap. 2 de la Constitución de la República de Polonia que posee carácter garantista y prescribe que "La ley no puede privar a nadie de la vía judicial de reclamar sus derechos o libertades infringidos".
El derecho a la justicia constituye una de las medidas más importantes de protección de derechos y libertades de ser humano, incluida, *de lege lata*, en el art. 45 ap. 1, art. 77 ap. 2 y art. 78 de la Constitución de la República de Polonia, que corresponde a los requisitos del estado democrático de derecho y a los estándares internacionales previstas en el art. 6 ap. 1 del Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales y en el art. 14 ap. 1 y 3 c del Pacto Internacional de Derechos Civiles y Políticos.

Palabras claves: Constitución, estado democrático de derecho, justicia, tribunales, el tribunal independiente, inamovible e imparcial

ПРАВО НА СУД В ДЕМОКРАТИЧЕСКОМ ПРАВОВОМ ГОСУДАРСТВЕ

Резюме

В статье рассматривается вопрос о праве на суд в демократическом правовом государстве, которое предполагает гарантию защиты человеческих прав в суде от их нарушения органами государственной власти. Упомянутое право выполняет две функции: во-первых, защищает субъектное право личности и обязывает все органы государственные власти в рамках своей деятельности подчиняться Конституции; во-вторых, образует специфическую систему взаимосвязи индивидуального статуса личности и объективного правового порядка, следовательно, в современном аспекте рассматривается как составляющая демократического правового государства.
Конституционная интерпретация права на суд может рассматриваться двояко: 1) в качестве принципа конституционного права, 2) в качестве субъектного права личности. В первом значении данный принцип носит характер законодательной и интерпретационной директивы, а во втором значении он сводится к тому, что право на суд было сформировано как индивидуальное субъектное право, представляющее собой элементарную составляющую конституционного статуса личности. Оно действует как одно из прав личности, как право человека, гарантирующее защиту его достоинства, статуса свободы, чувство безопасности, и создающее ощущение того, что человек охраняется законом, на страже которого находятся суды.
Право на суд в материальном смысле регулируется ст. 45 п. 1 Конституции Республики Польша, согласно которой «Каждый имеет право на справедливое и открытое разбирательство дела без необоснованного промедления в компетентном, независимом, беспристрастном суде». Дополнение

к регулированию, включённому в в цитируемое положение, содержится в ст. 77 п. 2 Конституции Республики Польша и имеет гарантированный характер, суть которого изложена в следующем: «Закон не может никому препятствовать в восстановлении в судебном порядке нарушенных свобод или прав». Право на суд, представляющее собой одно из важнейших средств защиты прав и свобод человека, предусмотренное в рамках действующего законодательства *de lege lata* в ст. 45 п. 1, ст. 77 п. 2 и ст. 78 Конституции Республики Польша, отвечает критериям демократического правового государства и международным стандартам, предусмотренным в ст. 6 п. 1 Европейской конвенции о защите прав человека и основных свобод, а также в ст. 14 п. 1 и 3c Международного пакта о гражданских и политических правах.

Ключевые слова: Конституция, демократические правовое государство, правосудие, суды, независимый и беспристрастный суд

DAS RECHT ZUR GERICHTSBARKEIT IM DEMOKRATISCHEN RECHTSSTAAT

Zusammenfassung

In diesem Artikel wurde das Recht zur Gerichtsbarkeit im demokratischen Rechtsstaat erörtert, welches die menschliche Garantie des Menschenrechtsschutzes vor dessen Verletzung seitens Organe der öffentlichen Gewalt darstellt. Es erfüllt zwei Funktionen: erstens schützt es das subjektbezogene Entitätsrecht und bindet alle öffentlichen Gewaltsteile hinsichtlich deren Tätigkeitsunterordnung dem Grundgesetz; zweitens bildet es ein besonderes Bezüglichkeitssystem des individuellen Entitätsstatus und der objektiven Rechtsordnung, demnach wird es gegenwartsnahe als ein Bestandteil des demokratischen
Rechtsstaates anerkannt. Die grundgesetzliche Fassung zur Gerichtsbarkeit kann in zweierlei Bedeutungen erörtert werden: 1) als grundgesetzliche Rechtsregel, 2) als subjektbezogenes Entitätsrecht. In der ersten Bedeutung setzt diese Regel die Richtlinie der Rechtsschaffung und die Auslegungsrichtlinie, dennoch beinhaltet es unter der zweiten Bedeutung, dass die Gerichtsbarkeit als individuelles subjektbezogenes Recht geschaffen wurde, indem es einen elementaren Bestandteil des grundgesetzlichen Entitätsstatus bildet. Es tritt als eines der persönlichen Rechte, als Menschenrecht auf, welches seine Würde, seinen freiheitlichen Status, sein Geborgenheitsgefühl vor Gerichten bewacht, indem es ein gewisses Empfinden einer Rechtsbeschirmung schafft. Gerichtsbarkeit in materieller Bedeutung ist nach Art. 45 Abschn. 1 des Grundgesetzes der Republik Polen geregelt, wonach jedermann „Das Recht zur gerechten und offenen Rechtsfallsachbearbeitung ohne unbegründete Zeitverzögerung seitens eines zuständigen, unabhängigen, unbefangenen und souveränen Gerichtes hat“. Diesbezügliche Ergänzung der Regelung unter zitierter Vorschrift beinhaltet Art. 77 Abschn. 2 des Grundgesetzes der Republik Polen, als Garantieeigenschaft bestimmt diese Vorschrift, dass „das Gesetz Niemandem den Zugang zum Rechtswege auf Vermittlung verletzter Freiheit oder Rechte schließen darf“.
Die Gerichtsbarkeit als eines der wichtigsten Mittel des Menschenrechts-, und Freiheitsschutzes, bestimmt *de lege lata* unter Art. 45 Abschn. 1, Art. 77 Abschn. 2 und Art. 78 des Grundgesetzes der Republik Polen, den demokratischen Aufforderungen eines Rechtsstaates und dem internationalen Standard entspricht, vorgesehen in Art. 6 Abschn. 1 der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, sowie im Art. 14 Abschn. 1 und 3c des Internationalen Paktes für bürgerliche und politische Rechte.

Schlüsselwörter: Grundgesetz, demokratischer Rechtsstaat, Gerichtsbarkeit, Gerichte, unabhängiges, souveränes und neutrales Gericht

DROIT À UN PROCÈS ÉQUITABLE DANS UN ÉTAT DE DROIT DÉMOCRATIQUE

Résumé

L'article traite du droit à un procès équitable dans un État de droit démocratique, qui constitue une garantie de la protection judiciaire des droits de l'homme contre leur violation par les autorités publiques. Il remplit deux fonctions: premièrement, il protège le droit subjectif de l'individu et oblige toutes les autorités publiques à agir en subordination à la Constitution; deuxièmement, il crée un système caractéristique de lien entre l'autonomie de l'individu et l'ordre juridique objectif, par conséquent, il est actuellement considéré comme un élément d'un État de droit démocratique.

L'approche constitutionnelle du droit à un procès équitable peut être envisagée de deux manières: 1) comme principe de droit constitutionnel, 2) comme droit subjectif de l'individu. Au premier sens, ce principe est une directive législative et une directive interprétative, et dans le second sens, cela signifie que le droit à un procès équitable a été conçu comme un droit subjectif individuel, constituant une composante élémentaire du statut constitutionnel de l'individu. Il fait partie de ses droits personnels en tant que droit de l'homme, garantissant sa dignité, son statut de liberté, son sentiment de sécurité et créant un sentiment spécifique d'être sous la protection de la loi, qui est sauvegardée par les tribunaux.

Le droit à un procès équitable, au sens matériel du terme, est régi par l'article 45 paragaraphe 1 de la Constitution de la République de Pologne, aux termes duquel «Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et sans retard excessif, par un tribunal compétent, impartial et indépendant, établi par la loi». La réglementation contenue dans la disposition citée est complétée par la disposition de l'article 77 paragraphe 2 de la Constitution de la République de Pologne, ayant un caractère de garantie, qui stipule que : «La loi ne peut clore à personne les moyens de poursuivre en justice des libertés ou des droits violés».

Le droit à un procès équitable, qui constitue l'une des mesures les plus importantes de protection des droits de l'homme et des libertés fondamentales, inclus *de lege lata* à l'article 45 paragraphe 1, l'article 77 paragraphe 2 et l'article 78 de la Constitution de la République de Pologne, répond aux exigences d'un État de droit démocratique et aux normes internationales prévues à l'article 6 paragraphe 1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et à l'article 14 paragraphes 1 et 3c du Pacte international relatif aux droits civils et politiques.

Mots-clés: la Constitution, État de droit démocratique, système de justice, tribunaux, tribunal indépendant et impartial

DIRITTO AL TRIBUNALE IN UNO STATO DEMOCRATICO DI DIRITTO

Sintesi

L'articolo discute il diritto al tribunale in uno stato democratico di diritto che costituisce una garanzia di tutela giudiziaria dei diritti umani contro la loro violazione da parte delle autorità pubbliche. Esso svolge due funzioni: in primo luogo, tutela il diritto soggettivo dell'individuo e vincola tutte le autorità pubbliche nell'ambito della loro azione nella subordinazione della Costituzione, in secondo luogo, crea un sistema caratteristico di collegamento tra lo status

personale dell'individuo e l'ordine giuridico oggettivo, quindi attualmente viene trattato come una componente di uno stato democratico di diritto.
L'inquadratura costituzionale del diritto al tribunale può essere considerata in due accezioni: 1) come principio di diritto costituzionale, 2) come diritto soggettivo dell'individuo. Nella prima, tale principio costituisce una direttiva per la creazione del diritto e una direttiva interpretativa, mentre nella seconda significa che il diritto al tribunale è stato formato come diritto soggettivo individuale che costituisce una componente elementare dello status costituzionale dell'individuo. Esiste come uno dei diritti della persona, come diritto umano che garantisce la dignità, lo status di libertà, il senso di sicurezza e crea una specifica sensazione di essere sotto la tutela della legge che è custodita dai tribunali.
Il diritto al tribunale, in senso materiale, è disciplinato dall'art. 45. paragrafo 1 della Costituzione della Repubblica di Polonia, secondo la quale "Ogni persona ha diritto che la sua causa sia esaminata equamente e pubblicamente senza indebiti ritardi da un tribunale competente, indipendente, imparziale e costituito per legge". Il completamento della regolazione inclusa nella disposizione citata è contenuto nella disposizione dell'art. 77. paragrafo 2 della Costituzione della Repubblica di Polonia che ha carattere di garanzia e afferma quanto segue: "La legge non può vietare a chiunque il procedimento giudiziario per la violazione delle libertà o dei diritti".
Il diritto al tribunale, che è uno dei mezzi più importanti per la protezione dei diritti umani e delle libertà, incluso *de lege lata* nell'articolo 45. paragrafo 1, nell'articolo 77. paragrafo 2 e nell'articolo 78 della Costituzione della Repubblica di Polonia, corrisponde ai requisiti di uno stato democratico di diritto e alle norme internazionali di cui all'articolo 6. paragrafo 1 della Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, nonché all'art. 14. paragrafi 1 e 3c del Patto internazionale sui diritti civili e politici.

Parole chiave: Costituzione, stato democratico di diritto, sistema giudiziario, tribunali, tribunale competente, indipendente, imparziale e costituito per legge

Cytuj jako:

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IMPLEMENTATION OF THE PRINCIPLE TREATING DEPRIVATION OF LIBERTY AS *ULTIMA RATIO* IN THE PRACTICE OF APPLYING CRIMINAL LAW

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A thesis that the legislator and justice implementation practice should treat a penalty of deprivation of liberty as *ultima ratio* is at present one of the principles of criminal policy recognised and expressed in the binding Criminal Code of 1997. It results from the recognition of the high value of human freedom, which beside life and health is one of the most precious rights of an individual.[1] Since deprivation of liberty, because of its content, is perceived as very painful and burdened with numerous drawbacks (inter alia, imprisonment, separation from relatives, deprivation of needs, low efficiency in reducing recidivist criminality),[2] it forces reduction of the application of a penalty of deprivation of liberty in favour of shortening its length and non-custodial penalties.

The process of ousting a penalty of deprivation of liberty by non-custodial penalties has been observed for years and results in systematic changes in the penal system.[3] The process has not been completed because, in spite of the fact that there is progress in reducing the application of a penalty of absolute deprivation of liberty,

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[1] See *Uzasadnienie rządowego projektu kodeksu karnego*, [in:] *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Wydawnictwo Prawnicze, Warsaw 1997, p. 141.

[2] See F. Ciepły, *Sprawiedliwościowa racjonalizacja wymiaru kary kryminalnej wobec współczesnych tendencji polityki karnej w Polsce*, Wydawnictwo KUL, Lublin 2017, pp. 247–259 and literature referred to therein; T. Szymanowski, *Recydywa w Polsce. Zagadnienia prawa karnego, kryminologii i polityki karnej*, Wolters Kluwer, Warsaw 2010, pp. 293–313.

[3] See M. Melezini, *Sankcje alternatywne wobec kary pozbawienia wolności w polskim prawie karnym na tle standardów międzynarodowych*, [in:] J. Kasprzak, W. Cieślak, I. Nowicka (eds),

there is still a high number of the imprisoned (about 74,000 in 2017), with a huge number of people sentenced to deprivation of liberty and waiting for their penalty execution because they cannot be admitted to prison due to overcrowding (over 44,000 in 2018).

In fact, already the Criminal Code of 1997,[4] in its original version, adopting a new penal philosophy appropriate to a democratic state ruled by law and modern development tendencies in the European criminal law, materialised the pursuit of less restrictive criminal law and more rational penalisation expressed in the doctrine for years. The authors of the Criminal Code decided that: "a penalty of deprivation of liberty is too expensive in every respect to apply it with no restrictions". They emphasised that the penalty of deprivation of liberty in the new version of the Criminal Code should, first of all, serve the protection of society against perpetrators dangerous for the legal order, which means giving up its domination in penal policy. On the other hand, in case of petty crime, the penalty is to be an alternative one applied when another penalty or penal measure cannot fulfil the aims of punishment.[5]

The treatment of an absolute penalty of deprivation of liberty as *ultima ratio* in relation to petty crime resulted directly from the constitutional principle of proportionality (adequacy) expressed in Article 31 para. 3 of the Constitution of the Republic of Poland. In accordance with this provision, "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of the freedoms and rights". In this context, a penalty of deprivation of liberty must be perceived as a necessary legal-penal interference in order to protect certain constitutional values (the protection of individuals' and universal rights). It can be imposed only when another less painful measure is not sufficient enough to achieve the aims of protection listed in Article 31 para. 3 of the Polish Constitution.[6]

The constitutional principle of proportionality has been given its statutory representation in the solutions of the Criminal Code concerning the catalogue of

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Meandry prawa karnego i kryminalistyki. Księga jubileuszowa prof. zw. dra hab. Stanisława Pikulskiego, Wyższa Szkoła Policji w Szczytnie, Szczytno 2015, pp. 187–208.

[4] Act of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] No. 88, item 553; hereinafter also CC.

[5] See A. Zoll, *Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności*, Państwo i Prawo No. 9–10, 1998, p. 47; A. Marek, *Nowy Kodeks karny – zasady odpowiedzialności, nowa polityka karna*, Monitor Prawniczy No. 12, 1997, p. 475.

[6] See W. Wróbel, *Zasady wymiaru kary i środków karnych*, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Vol. 1, Wolters Kluwer, Warsaw 2012, pp. 735–736 and 804; M. Królikowski, R. Zawłocki, *Aksjologiczne i normatywne uwarunkowania odpowiedzialności karnej*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz*, Vol. 1, C.H. Beck, Warsaw 2015, pp. 10–13; M. Melezini, *Założenia aksjologiczne systemu reakcji karnych na przestępstwo na tle kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy polskiego prawa karnego w perspektywie jego ewolucji*, Wydawnictwo Kujawsko-Pomorskiej Szkoły Wyższej w Bydgoszczy, Bydgoszcz 2017, pp. 121–122.

penalties and the construction of penal sanctions as well as the adopted principles and directives of penalty imposition.[7]

The new approach to the penalty of deprivation of liberty is reflected in particular in the content of Article 58 §1 CC, which laid down a directive prescribing the treatment of a penalty of absolute deprivation of liberty as *ultima ratio* in case of offences carrying alternative non-custodial penalties, i.e. a fine, a penalty of limitation of liberty and a penalty of deprivation of liberty. The directive was applicable to all types of offences carrying alternative sanctions, within which non-custodial penalties (a fine and a penalty of limitation of liberty) were prescribed beside the penalty of deprivation of liberty in general for a period from one to two years, and exceptionally up to three years as well as up to five years. In accordance with the original wording of Article 58 §1 CC, if statute prescribes a possibility of choosing the type of penalty, a court must rule on the penalty of deprivation of liberty without conditional suspension of its execution only when another penalty or penal measure cannot fulfil the aims of punishment. As a result, the priority of non-custodial penalties and penal measures over a penalty of absolute deprivation of liberty laid down in Article 58 §1 CC obliged a court to thoroughly justify a decision on the choice of a penalty of absolute deprivation of liberty and indicate the reasons for abandoning the adjudication of one of non-custodial penalties or a penal measure or a combination of those penal sanctions. The idea of the penalty of absolute deprivation of liberty as *ultima ratio* was also extended to cover other offences carrying only a penalty of deprivation of liberty for up to five years, which was laid down in Article 58 §3 CC. In such a case, there was a possibility of adjudicating a fine or a penalty of limitation of liberty instead of a penalty of deprivation of liberty if a court imposed a penal measure at the same time. It must be emphasised, however, that the directive on the imposition of punishment laid down in Article 58 §3 CC did not give the penalty of deprivation of liberty a special status (*ultima ratio*). As a result, the application of a non-custodial penalty required thorough justification. What constitutes the supplementation of the above solutions was the establishment of the possibility of abandoning imposition of punishment at all and adjudicating a penal measure in case of offences carrying a penalty of deprivation of liberty for up to three years or a more lenient penalty in case of an act with a lower level of social harmfulness and a penal measure sufficient enough to fulfil the aims of punishment (Article 59 CC).[8]

Successive amendments also confirm the change of the role of a penalty of deprivation of liberty in the prevention of petty crime. Namely, the catalogue of penalties (Article 32 CC) was compiled in accordance with an abstractive level of painfulness from the most lenient penalty (a fine) to the most severe one (a life sentence). In the new regulation, a penalty of deprivation of liberty, formerly holding the first position in the catalogue of penalties, was placed third, following

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[7] For more on the issue, see M. Melezini, *System środków reakcji prawnokarnej. Rys historyczny*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji prawnokarnej*, 2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2016, pp. 54–68; M. Melezini, *Środki karne jako instrument polityki kryminalnej*, Temida 2, Białystok 2013, pp. 94–99.

[8] See V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Wydawnictwo Uniwersytetu Mikołaja Kopernika w Toruniu, Toruń 2002, pp. 114–141.

a fine and a penalty of limitation of liberty. As it is emphasised in the justification for the Criminal Code Bill, such a sequence of penalties is to give a judge guidelines on statutory priorities concerning the choice of the type of punishment,[9] i.e. that non-custodial penalties should be given priority over the penalty of deprivation of liberty. At the same time, the pattern of sanctions in the Special Part of the Criminal Code was modified, which changed the sequence of alternative penalties starting the list with a fine and finishing it with the penalty of deprivation of liberty.

In the context of the length of a penalty of deprivation of liberty, lowering of the minimum threshold of this penalty from three months to one month (Article 37 CC) was an important change. It was decided that a too high minimum of this penalty contributed to its adjudication at a higher level.[10] It was also noticed that there were advantages of a short-term penalty of deprivation of liberty as a short shock penalty.[11]

Obviously, the authors of the Criminal Code did not limit themselves to changes reforming a penalty of deprivation of liberty. Striving to decrease the significance of the penalty of deprivation of liberty for the criminal policy was also connected with the modification of the entire penal system. Actually, the aim was to create a broad possibility of applying non-custodial penalties and penal measures that would provide courts with more discretion over the choice of penalties and penal measures for petty crimes.[12]

Unfortunately, expectations concerning rationalisation of criminal policy were not fulfilled in the practice of the administration of justice. The statistical data presented in Table 1 show that in the period 1999–2013, the penalty of deprivation of liberty continued to be a prevailing form of penal response. The share of imprisonment sentences in the total number of convictions was at the level of 64–78%. However, it should be noticed that there were significant differences in the application of the two different forms of the execution of the penalty of deprivation of liberty. While the share of a penalty of absolute deprivation of liberty was not very high as it accounted for 8.5–14% in the period 1999–2013, the share of a penalty of deprivation of liberty with the suspension of its execution constituted 54–64% of all convictions.

In general, the presented situation concerning the application of a penalty of deprivation of liberty should not raise major objections because the principle of *ultima ratio* referred exclusively to the absolute form of this penalty. However, the problem consisted in the fact that in practice a penalty of deprivation of liberty with the conditional suspension of its execution was overused. The statistical analysis shows that this form of penal response to offences was applied to over a half of all convictions, and this concerned a very high number of the convicted offenders (127,000–291,000 annually). Mass application of the penalty of deprivation of liberty with conditional

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[9] *Uzasadnienie rządowego projektu...*, p. 137.

[10] See A. Marek, *Prawo karne*, 10th edn, C.H. Beck, Warsaw 2011, p. 254; F. Ciepły, *Sprawiedliwościowa racjonalizacja...*, pp. 253–254.

[11] See M. Melezini, K. Kazmiruk, *Kara krótkoterminowego pozbawienia wolności a problem przeludnienia więzień*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Wolters Kluwer, Warsaw 2009, pp. 577–591.

[12] A. Zoll, *Założenia politycznokryminalne...*, pp. 48–50. Also see M. Melezini, *Założenia aksjologiczne...*, pp. 126–133.

suspension of its execution was accompanied by a seldom use of probation elements in the form of supervision and imposition of obligations. The lack of actual probation-related influence on a convicted offender resulted in his relapse into crime.[13]

Table 1. Penalty of deprivation of liberty in all convictions in the period 1999–2013

Year	All convictions	Penalty of deprivation of liberty					
		All types		Absolute type		Conditionally suspended execution	
		Total	%	Total	%	Total	%
1999	207,492	153,445	74.0	26,083	12.6	127,362	61.4
2000	222,785	174,162	78.2	30,680	13.8	143,482	64.4
2001	315,013	221,762	70.4	36,943	11.7	184,819	58.7
2002	365,326	250,275	68.5	35,790	9.8	214,485	58.7
2003	415,933	269,643	64.8	36,588	8.8	233,055	56.0
2004	513,410	327,331	63.7	48,993	9.5	278,338	54.2
2005	504,281	334,378	66.3	42,969	8.5	291,409	57.8
2006	462,937	315,074	68.1	42,421	9.2	272,653	58.9
2007	426,377	294,826	69.1	37,685	8.8	257,141	60.3
2008	420,729	289,269	68.7	38,495	9.1	250,774	59.6
2009	415,272	281,887	67.9	37,913	9.1	243,974	58.8
2010	432,891	290,669	67.1	39,582	9.1	251,087	58.0
2011	423,464	280,023	66.1	40,947	9.7	239,076	56.4
2012	408,107	265,876	65.1	41,691	10.2	224,185	54.9
2013	353,208	235,032	66.5	39,684	11.2	195,348	55.3

Source of total numbers: Management Statistical Information Department of the Ministry of Justice (https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie); author's own calculations

[13] See J. Skupiński, *Warunkowe zawieszenie wykonania kary pozbawienia wolności*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i środki karne. Poddanie sprawcy próbie*, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2010, p. 1062; T. Darkowski, *Warunkowe zawieszenie wykonania kary – próba oceny potencjalnego wpływu nowelizacji na politykę karną*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Wolters Kluwer, Warsaw 2016, pp. 50–51.

In literature, attention is drawn to the fact that the penalty of deprivation of liberty with conditional suspension of its execution was most often adjudicated in the so-called consensual mode, which made it possible to apply it regardless of the conditions laid down in Article 69 CC, i.e. regardless of whether a positive criminological forecast was made. Such practice led to multiple sentencing of the same offender to the penalty of deprivation of liberty with conditional suspension of its execution and increased the probability of ruling the execution of the penalty of deprivation of liberty. At the same time, it was emphasised that a court adjudicating the penalty of deprivation of liberty with conditional suspension of its execution often determines a penalty at a higher level, disproportionate to the gravity of an act, than when it adjudicates a penalty without suspension of its execution. As a result, in case of ruling the execution of the penalty of deprivation of liberty, a perpetrator of petty crime faced a penal repression disproportionate to the level of guilt and the gravity of the committed offence.[14]

The defective practice of applying the penalty of deprivation of liberty with conditional suspension of its execution led to very frequent ruling of its execution, increased the number of offenders deprived of liberty and did not allow decreasing the number of convicted offenders waiting for serving the penalty of deprivation of liberty.

Still in 1999, 41,656 offenders sentenced to a penalty of deprivation of liberty were kept in prisons and remand centres. In 2014, the number rose to 71,221. The imprisonment rate of 147 convicts per 100,000 inhabitants in 1999 increased to 221 convicts in 2013. Among the European Union countries, Poland ranked among the countries with the highest imprisonment rate (Poland – 217, Hungary – 186, England and Wales – 148, Italy – 106, France – 101, Germany – 79, and Sweden – 67). At the same time, the number of adjudicated and not executed penalties of deprivation of liberty increased (from 28,761 in 2001 to 52,846 in 2014) and so did the number of offenders involved (from 26,963 in 2001 to 42,709 in 2014).[15]

The diagnosis of problems connected with the results of that penal policy justified the need of amending the Criminal Code and reorganising the penal system so that non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, would become the basic means of penal response to petty crime and the possibility of applying a penalty of deprivation of liberty with conditional suspension of

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[14] See W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Znak, Kraków 2010, p. 483; J. Skupiński, *Warunkowe zawieszenie wykonania kary*..., p. 1123; T. Darkowski, *Warunkowe zawieszenie*..., pp. 53–54. Also see M. Melezini, G.B. Szczygieł, *Warunkowe zawieszenie wykonania kary pozbawienia wolności jako instrument polityki kryminalnej*, [in:] P. Góralski, A. Muszyńska (eds), *Współczesne przekształcenia sankcji karnych – zagadnienia teorii, wykładni i praktyki stosowania*, Instytut Wydawniczy EuroPrawo, Warsaw 2018, pp. 187–188; *Uzasadnienie projektu ustawy Kodeks karny Komisji Kodyfikacyjnej Prawa Karnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 4, 2013, pp. 45–47.

[15] See T. Szymanowski, *Skazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej*, Państwo i Prawo No. 4, 2014, pp. 87–89; A. Nawój-Śleszyński, *Problem przeludnienia więzień w Polsce w świetle rekomendacji R (99) 22 Rady Europy z 30 września 1999 r.*, Przegląd Więziennictwa Polskiego No. 81, 2013, pp. 5–32; G.B. Szczygieł, *Kara pozbawienia wolności*, [in:] *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji*..., pp. 292–295.

its execution would be also limited. The amendment to the Criminal Code of 20 February 2015 was to ensure the achievement of this goal.[16]

Among numerous changes introduced to the provisions of the Criminal Code, from the perspective of the practice of law application, the most important amendments were those consisting in radical limitation of the possibility of adjudicating the penalty of deprivation of liberty with conditional suspension of its execution with the simultaneous considerable extension of grounds for adjudicating non-custodial penalties as well as the new approach to the directive on *ultima ratio* of the penalty of deprivation of liberty.

In accordance with the new wording of Article 58 §1 CC laying down *ultima ratio* of a penalty of deprivation of liberty, if statute stipulates that there is a possibility of choosing the type of punishment and an offence carries a penalty of deprivation of liberty not exceeding five years, a court must adjudicate the penalty of deprivation of liberty only in case another penalty or a penal measure cannot fulfil the aims of punishment. The directive of this provision still prescribes the treatment of the penalty of deprivation of liberty as *ultima ratio* but the new approach concerns both penalties of deprivation of liberty, the absolute one and that with conditional suspension of its execution. It is a very important change strengthening the primacy of non-custodial penalties and penal measures in case of offences carrying alternative penalties of a fine or limitation of liberty and a penalty of deprivation of liberty for up to five years. The modification of the wording of Article 58 §1 CC obliges a court to thoroughly justify a decision on the choice of the penalty of deprivation of liberty adjudicated not only as an absolute one but also one with conditional suspension of its execution, and to indicate reasons why none of non-custodial penalties or penal measures cannot fulfil the aims of punishment.[17] It must be added that apart from the change of the wording of Article 58 §1 CC, Article 58 §2 was repealed as it limited the formal possibility of adjudicating a fine due to a perpetrator's financial situation, which justified a conviction that he would not pay a fine and its execution would be unfeasible. Thus, the derogation of Article 58 §2 CC aimed to constitute an additional incentive to adjudicate a fine instead of the penalty of absolute deprivation of liberty and the penalty of deprivation of liberty with conditional suspension of its execution.[18]

The legislator's striving to extend grounds for adjudicating non-custodial penalties was also reflected in the new solution adopted in Article 37a CC, which substituted the repealed Article 58 §3 CC. In accordance with the added Article 37a CC, if statute prescribes a penalty of deprivation of liberty that does not exceed eight years, a court may adjudicate a fine or a penalty of limitation of liberty

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[16] Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396. Also see *Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z projektami aktów wykonawczych z 15 V 2014 r.*, print no. 2393, pp. 1–5.

[17] See V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 4th edn, C.H. Beck, Warsaw 2018, pp. 448–449; J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Wolters Kluwer, Warsaw 2015, pp. 165–168.

[18] See J. Majewski, *Kodeks karny…*, pp. 168–171.

referred to in Article 34 §1a(1) or (4). There is no doubt that the solution aims to limit the application of the penalty of deprivation of liberty, both the absolute one and with conditional suspension of its execution.[19] It considerably extends the scope of cases in which it is possible to impose a fine or a penalty of limitation of liberty on an offender because Article 37a CC is applicable to statutory penal provisions as well as those not laid down in the Code. The condition that the offence must carry a penalty of deprivation of liberty not exceeding eight years is the only limitation to its application resulting from Article 37a CC.

It must be highlighted that there are divergent views on the application of Article 37a CC presented in the doctrine. According to some scholars, Article 37a CC is applicable exclusively to a simple sanction in the form of a penalty of deprivation of liberty for up to eight years.[20] Others admit a possibility of applying Article 37a CC to a complex, cumulative sanction[21] where apart from a penalty of deprivation of liberty for up to eight years, a cumulative fine can be applied as well as to an alternative sanction where the penalty of deprivation of liberty for up to eight years is an alternative to a penalty of military detention, a penalty of limitation of liberty, a fine and a penalty of limitation of liberty and military detention.[22] There is also an opinion presented in literature that the scope of application of Article 37a CC covers all types of prohibited acts carrying the penalty of deprivation of liberty for up to eight years, regardless of whether a given type of offence carries another type of punishment.[23] The divergence of opinions also concerns the issue of the legal nature of Article 37a CC. In literature, there is a stand that Article 37a CC constitutes a modification of the statutory penalty prescribed for the commission of prohibited acts. It co-determines statutory punishment in cases where provisions prescribe a penalty of deprivation of liberty not exceeding eight years. In accordance with this opinion, Article 37a CC transforms simple sanctions, including the penalty of deprivation of liberty, into alternative sanctions including a fine and a penalty of limitation of liberty.[24] According to the adverse opinion, Article 37a CC constitutes a special directive on judicial administration of a penalty enabling adjudicating

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[19] See A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, 5th edn, C.H. Beck, Warsaw 2018, pp. 340–341; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 4th edn, Warsaw 2018, p. 340.

[20] See A. Grześkowiak, [in:] *Kodeks karny. Komentarz…*, p. 342; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Praktyczny komentarz*, Kantor Wydawniczy Zakamycze, Kraków 2014, p. 122; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, 2nd edn, Wolters Kluwer, Warsaw 2018, p. 234; M. Królikowski, R. Zawłocki, *Prawo karne*, 3rd edn, C.H. Beck, Warsaw 2018, p. 320.

[21] See V. Konarska-Wrzosek, *Kodeks karny. Komentarz…*, p. 235.

[22] See J. Majewski, *Kodeks karny…*, pp. 89–90; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz…*, pp. 343–344.

23 See M. Małecki, *Stosowanie art. 37a k.k. Glosa do postanowienia Sądu Najwyższego z 31.03.2016 r. (II KK 361/15)*, Przegląd Sądowy No. 3, 2017, pp. 121–123; J. Majewski, *Kodeks karny…*, p. 85.

[24] See J. Majewski, *Kodeks karny…*, pp. 85–94; M. Małecki, *Ustawowe zagrożenie karą i sądowy wymiar kary*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Krakowski Instytut Prawa Karnego Fundacja, Kraków 2015, pp. 284–289; J. Giezek, *O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzonej kary*, Palestra No. 7–8, 2015, pp. 25–36; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, 4th edn,

courts to apply a non-custodial penalty (a fine or a penalty of limitation of liberty) instead of a penalty of deprivation of liberty prescribed in statute, i.e. a sanction.[25] Regardless of doctrinal differences concerning the legal nature of Article 37a CC, the undoubted penal policy aim of the regulation is to considerably extend the possibility of adjudicating a fine or a penalty of limitation of liberty and to limit the application of a penalty of absolute deprivation of liberty or one with conditional suspension of its execution.

The far-reaching modification of the institution of conditional suspension of the execution of a penalty of deprivation of liberty with the simultaneous abandonment of the possibility of conditional suspension of the execution of a fine or a penalty of limitation of liberty became a key change correlated with the aims of the criminal law reform. Indeed, the possibility of applying conditional suspension of the penalty execution was considerably limited by lowering the maximum limit for a penalty of deprivation of liberty that may be suspended from two years to one year and by adding a new condition excluding the application of conditional suspension of the execution of a penalty of deprivation of liberty towards a perpetrator who, at the moment of crime commission, was subject to a penalty of deprivation of liberty (an absolute or suspended one). Apart from those conditions, it is necessary to match a requirement that the application of conditional suspension of the penalty execution will be sufficient to achieve the aims of punishment, i.e. in particular prevent relapse into crime (Article 69 §1 CC).[26] If the modification of Article 58 §1 CC treating a penalty of deprivation of liberty (the absolute one and with suspension of its execution) as *ultima ratio* is taken into account, it turns out that, in case of statutory penalties that make it possible to choose between a penalty of deprivation of liberty for up to five years and non-custodial penalties, the possibility of applying conditional suspension of the execution of the penalty of deprivation of liberty was limited only to those cases where a court decides that "another penalty or a penal measure will not fulfil the aims of punishment".

It should be added that the mitigation of criminal liability resulting from what is called a consensual mode was also eliminated. It is connected with the possibility of conditionally suspending the execution of a penalty of deprivation of liberty for

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C.H. Beck, Warsaw 2017, pp. 640–641; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz…*, pp. 342–343.

[25] See V. Konarska-Wrzosek, *Szczególne dyrektywy sądowego wymiaru kary*, [in:] T. Kaczmarek (ed.), *System Prawa Karnego*, Vol. 5: *Nauka o karze. Sądowy wymiar kary*, 2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2017, pp. 302–304; A. Grześkowiak, [in:] *Kodeks karny. Komentarz…*, pp. 343–344; M. Mozgawa, [in:] *Kodeks karny. Praktyczny komentarz…*, p. 120; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warsaw 2016, p. 165; M. Królikowski, R. Zawłocki, *Prawo karne…*, p. 320; B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warsaw 2016, pp. 209–210.

[26] For more on the issue of conditional suspension of the execution of the penalty of deprivation of liberty, see A. Zoll, *Środki związane z poddaniem sprawcy próbie i zamiana kary*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015…*, pp. 436–438; J. Majewski, *Kodeks karny…*, pp. 223–224 and 237–282; J. Skupiński, *Warunkowe zawieszenie wykonania kary*, [in:] M. Melezini (ed.), *System Prawa Karnego…*, Vol. 6, 2016, pp. 1124–1136. Also see articles in A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Wolters Kluwer, Warsaw 2016, p. 272.

up to five years, while the maximum determined in Article 69 §1 CC in the original version was two years. This legislative step resulted from an accurate diagnosis that the overuse of this form of penal response was a significant, if not the main, obstacle to implement one of the basic penal policy objectives of the binding Criminal Code, which was (and still is) the achievement of a state in which a fine and a penalty of limitation of liberty becomes a basic (from the statistical point of view) means of penal response to crime of "petty" and "medium" significance.[27]

The drastic limitation of the possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty resulting from the amended Article 69 §1 CC faced numerous objections expressed by the representatives of jurisprudence. On 20 May 2014, the Commission for Criminal Law Codification issued a statement[28] in which it presented its opinions about the solutions proposed in the Bill amending the Act: Criminal Code and some other acts adopted by the government on 8 May 2014. It drew attention to the view that implementation of such a drastic proposal to limit the use of conditional suspension of the execution of a penalty of deprivation of liberty "poses a risk that the prison population will increase and additional financial and social costs will have to be incurred".

The solutions adopted next were assessed as too drastic, although the aim and direction of change were approved of. Criticism concerned, in particular, the reduction of the maximum threshold for the adjudicated penalty of deprivation of liberty the execution of which may be conditionally suspended from two years to one year due to high probability of increasing the number of absolute deprivation of liberty sentences as well as because of the abandonment of the use of a court probation officer's direct influence on a convicted offender in the long-term and "misunderstanding of the role of well-implemented probation".[29] Also subjective limitations of conditional suspension of the execution of the penalty of deprivation of liberty excluding the application of this measure to a perpetrator who was already sentenced to deprivation of liberty at the moment of crime commission is considered too far-reaching as a general preventive restriction considerably limiting

27 *Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, print no. 2393, sub-section II. 4; J. Majewski, *Kodeks karny…*, pp. 203–204; J. Skupiński, J. Mierzwińska-Lorencka, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz…*, pp. 524–527.

28 Statement of the Commission for Criminal Law Codification of 22 May 2014 (copied print).

29 See A. Zoll, *Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław 2015, p. 412; V. Konarska-Wrzosek, *Ustawowe przesłanki warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, pp. 168 and 180; J. Lachowski, *Ocena wybranych zmian w zakresie instytucji warunkowego zawieszenia wykonania kary w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (eds), *Problemy współczesnego prawa karnego…*, pp. 250–255; T. Szymanowski, *Nowelizacja kodeksu karnego z 2015 r.*, Przegląd Więziennictwa Polskiego No. 87, 2015, p. 19; P. Burzyński, *Zmiany normatywne w zakresie instytucji warunkowego zawieszenia wykonania kary pozbawienia wolności – uwagi praktyczne*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, pp. 60–63.

the possibility of individual imposition of the penalty and covering a great number of cases at the same time.[30]

Striving to limit the application of the penalty of deprivation of liberty (the absolute one and with suspension of its execution) was also reflected in a series of other amendments to the Criminal Code, in particular in the introduced possibility of exchanging the suspended penalty of deprivation of liberty into a fine or a penalty of limitation of liberty (Article 75a CC), in the reform of a penalty of limitation of liberty (Articles 34–35 CC), which is to become a real alternative to a penalty of deprivation of liberty (also that with conditional suspension of its execution), in the introduction of the possibility of imposing on a perpetrator the so-called mixed penalty, i.e. a short-term penalty of deprivation of liberty and a penalty of limitation of liberty (Article 37b CC), which "should be especially attractive in case of more serious offences",[31] or in the extension of the possibility of applying conditional discontinuation of proceedings concerning all offences carrying a penalty of deprivation of liberty not exceeding five years (Article 66 CC).

It is worth considering whether the expectations connected with the reform of criminal law were met in the practice of justice administration and influenced the change in the position of the penalty of deprivation of liberty within the structure of adjudicated penalties.

Table 2. Penalty of deprivation of liberty among all convictions in the period 2014–2017

Year	All convictions	Penalty of deprivation of liberty					
		All types		Absolute type		Conditionally suspended execution	
		Total	%	Total	%	Total	%
2014	295,353	199,167	67.4	35,633	12.1	163,534	55.4
2015	260,034	167,028	64.2	33,952	13.1	133,076	51.2
2016	289,512	125,368	43.3	43,695	15.1	81,673	28.2
2017	241,436	99,346	41.1	44,527	18.4	54,818	22.7

Source of data: Management Statistical Information Department of the Ministry of Justice (https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie); author's own calculations.

[30] J. Skupiński, *Zalety i wady instytucji warunkowego zawieszenia wykonania kary w założeniach nowej polityki karnej*, [in:] A. Adamski, M. Biernat, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, p. 190; V. Konarska-Wrzosek, *Ustawowe przesłanki stosowania…*, p. 180; A. Zoll, *Regulacja warunkowego zawieszenia…*, pp. 412–413; J. Lachowski, *Ocena wybranych zmian…*, pp. 253–254.

[31] Justification for the government bill, p. 12.

The statistical data in Table 2 show that there are evident changes in the picture of the application of the penalty of deprivation of liberty after the criminal law reform of 2015 but the direction of those changes does not always meet the expectations.

First of all, in accordance with the expectations, the share of the penalty of deprivation of liberty in the total number of convictions clearly decreased from 67.4% in 2014 to 41.1% in 2017, i.e. by 26.3%. In the period 2016–2017, the share of the penalty of deprivation of liberty within the structure of all convictions fell below 50% for the first time from 1999. This does not mean, however, it can be claimed that the penalty of deprivation of liberty is treated in terms of *ultima ratio* in the practice of justice administration. In fact, the analysis of the structure of convictions indicates that the penalty of deprivation of liberty was still a basic means of penal response as in 2017, when the share of a fine accounted for 35.1% and of a penalty of limitation of liberty for 22.3%.[32]

It is worth emphasising that the importance of non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, in the penal policy increased. In 2017 the share of the total number of those penalties accounted for 57.4% and outnumbered the share of the penalty of deprivation of liberty (41.1%). Thus, a conclusion can be drawn that the criminal law reform of 2015 contributed to the increase in the importance of non-custodial penalties in practice, and those penalties became a dominating form of penal response to crime.

On the other hand, an alarming tendency has appeared in the picture of the application of a penalty of absolute deprivation of liberty. Indeed, an increase in the frequency of the application of the penalty of absolute deprivation of liberty is observed every year. While in 2014 the share of the penalty of absolute deprivation of liberty accounted for 12.1%, in 2017 it rose to 18.4%. Such a big share of the penalty of absolute deprivation of liberty in all convictions was recorded for the first time after the Criminal Code of 1997 entered into force. At the same time, the number of adjudicated penalties of absolute deprivation of liberty rose considerably (from 35,633 in 2014 to 44,527 in 2017). Undoubtedly, it is a negative phenomenon, which results especially from the substantial limitation of the possibility of applying a penalty of deprivation of liberty with conditional suspension of its execution. It will result in an increased number of adjudicated penalties of deprivation of liberty without execution, which is reflected in the prison population.

It must be taken into account that, in the currently binding legal environment, the penalty of absolute deprivation of liberty is not only a self-standing penalty but it also constitutes an element of a mixed penalty (a penalty of absolute deprivation of liberty and a penalty of limitation of liberty). In 2017, there were 2,029 offenders sentenced to the mixed penalty, however, the penalty of deprivation of liberty with conditional suspension of its execution was adjudicated in 20 cases. Thus, if 2,009 cases of the mixed penalty sentences are taken into account, it turns out that the number of adjudicated deprivation of liberty penalties grew to 46,536, which accounts for 19.3% of all convictions.

[32] The author's own calculations based on statistical data of Management Statistical Information Department of the Ministry of Justice.

In accordance with the assumptions of the criminal law reform, the share of the penalty of deprivation of liberty with conditional suspension of its execution decreased considerably. Still in 2014 the number of adjudicated penalties of deprivation of liberty with conditional suspension of their execution accounted for 163,534 and the share of this means of penal response in all convictions was at the level of 55.4%. In 2017 the number of the adjudicated penalties of deprivation of liberty with conditional suspension of their execution fell to 54,818, i.e. by 108,716, and its share in the structure of adjudicated sentences decreased to 22.7%, i.e. by 32.7%. As a result, the penalty of deprivation of liberty with conditional suspension of its execution lost its leading position among applied penal response measures.

The phenomenon might be positively assessed, in terms of treating the penalty of deprivation of liberty with conditional suspension of its execution as *ultima ratio* in the practice of justice administration, if the recognition of the penalty of absolute deprivation of liberty as *ultima ratio* were practically not ceased at the same time. This state was undoubtedly affected by drastic limitation of statutory possibilities of applying the penalty of deprivation of liberty with conditional suspension of its execution. It led to a situation in which, on the one hand, in accordance with the assumptions of the criminal law reform, non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, partially substituted for the penalty of deprivation of liberty with conditional suspension of its execution; and, on the other hand, against the legislator's expectations, the penalty of absolute deprivation of liberty to some extent substituted for the penalty of deprivation of liberty with conditional suspension of its execution.

A question is raised whether the observed changes in the structure of the application of the penalty of deprivation of liberty are reflected in the size of prison population.

Table 3. Offenders temporarily arrested and serving a sentence

Deprivation of liberty	**2014**		**2017**		**30 September 2018**	
	Total	%	**Total**	%	**Total**	%
Total	77,371	100	73,822	100	73,035	100
Temporarily arrested	6,238	8.1	7,239	9.8	7,476	10.2
Convicted and serving a sentence	70,125	90.6	65,769	89.1	64,526	88.3
Punished	1,008	1.3	814	1.1	1,033	1.4

Source: Ministry of Justice, Central Board of Prison Service, *Roczna informacja statystyczna za rok 2017* and *Miesięczna informacja statystyczna – listopad 2018.*

The analysis of the data presented in Table 3 shows that in the period 2017–2018 (as of 30 November) the number of offenders deprived of liberty decreased in comparison to 2014. While in 2014 it accounted for 77,371, the figure was 73,035

in 2018. The number of offenders convicted and serving the penalty of deprivation of liberty went down (from 70,125 to 64,526), which should be positively assessed. However, at the same time, the number of adjudicated and not executed penalties of deprivation of liberty and the number of offenders concerned rose. Thus, the number of adjudicated and not executed penalties of deprivation of liberty increased from 52,846 in 2014 to 54,989 on 30 November 2018. The number of offenders concerned rose from 42,709 in 2014 to 44,292 on 30 November 2018.[33]

Attention should also be drawn to an alarming tendency in the application of temporary detention. Indeed, the number of the temporarily arrested clearly increased. Still in 2014, the number of the temporarily arrested accounted for 6,238 but in 2017 it rose to 7,239, and to 7,476 in 2018 (as of 30 November). The share of temporarily arrested persons in the prison population increased from 8.1% to 10.2%. In this context, it should be noticed that temporary detention influences the adjudication of the penalty of deprivation of liberty. Thus, the increase in the temporarily arrested population may next translate into the increase in the adjudicated penalties of deprivation of liberty and their length.

Summing up, it should be stated that the penalty of deprivation of liberty is still not treated in terms of *ultima ratio*, although at the same time the role of non-custodial penalties is becoming more important in the penal policy. It seems that a proposal, expressed in literature many times, to extend grounds for the application of the penalty of deprivation of liberty with conditional suspension of its execution should be considered. It is a probation measure, which is very important in the penal policy; and the introduced limitation of the possibility of applying it is too restrictive, which results, inter alia, in the growing share of the penalty of absolute deprivation of liberty in the total number of convictions as well as the growing number of adjudicated but not executed penalties of absolute deprivation of liberty.

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[33] The data are based on 2018 statistics provided by the Central Board of Prison Service (www.sw.gov.pl/dział/statystyka).

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IMPLEMENTATION OF THE PRINCIPLE TREATING DEPRIVATION OF LIBERTY AS *ULTIMA RATIO* IN THE PRACTICE OF APPLYING CRIMINAL LAW

Summary

The article discusses the issue concerning the implementation of the principle of treating a penalty of deprivation of liberty as *ultima ratio* in the practice of justice administration. The statutory solutions adopted in the original version of the Criminal Code of 1997 are the starting point of the analysis. It shows a new approach to the penalty of deprivation of liberty, which – as it was assumed – was to become a subsidiary penalty applied to petty crime. In practice, it turned out that an attempt to minimise the role of the penalty of deprivation of liberty in the penal policy was a failure, which resulted in a considerable size of prison population and a big number of offenders convicted and waiting for the penalty execution. A penalty of deprivation of liberty with conditional suspension of its execution adjudicated on a massive scale remained the basic means of penal response to petty crime. The diagnosis of the reasons for the actual situation became the basis for the criminal law reform of 2015. The article discusses the most important amendments to the provisions of the Criminal Code, which are to contribute to the increase in the importance of non-custodial penalties (a fine and a penalty of deprivation of liberty) and to limit the scope of application of the penalty of deprivation of liberty (its absolute type and with conditional suspension of its execution). The statistical overview of the penalty of absolute deprivation of liberty and the penalty of deprivation of liberty with conditional suspension of its execution presented in the article makes the author draw a conclusion that the penalty of deprivation of liberty is still treated as *ultima ratio* in the practice of justice administration. Despite a considerable decrease in the importance of the penalty of deprivation of liberty with conditional suspension of its execution in the penal policy and a growing share of non-custodial penalties in the structure of adjudicated penalties, the share of the penalty of absolute deprivation of liberty in all convictions is growing and the number of adjudicated and not executed penalties of absolute deprivation of liberty is also higher. That is why, the author expresses an opinion that failure in the implementation of the penal policy assumptions of the 2015 criminal law reform results from too drastic limitation of a possibility of applying the penalty of deprivation of liberty with conditional suspension of its execution. Therefore, she supports the proposals expressed in literature to extend grounds for adjudicating the penalty of deprivation of liberty with conditional suspension of its execution.

Keywords: penalty of deprivation of liberty, penalty of deprivation of liberty with conditional suspension of its execution, criminal law reform, practice of justice administration, penal policy, non-custodial penalties, prison population

REALIZACJA ZASADY TRAKTOWANIA KARY POZBAWIENIA WOLNOŚCI JAKO *ULTIMA RATIO* NA PŁASZCZYŹNIE STOSOWANIA PRAWA KARNEGO

Streszczenie

Przedmiotem rozważań jest realizacja zasady traktowania kary pozbawienia wolności jako *ultima ratio* w praktyce wymiaru sprawiedliwości. Punktem wyjścia analizy są rozwiązania ustawowe przyjęte w pierwotnym brzmieniu kodeksu karnego z 1997 r., ukazujące nowe podejście do kary pozbawienia wolności, która w założeniu miała stać się karą subsydiarną w odniesieniu do drobnej i średniej przestępczości. W praktyce okazało się, że próba zminimalizowania roli kary pozbawie-

nia wolności w polityce karnej nie powiodła się, czego rezultatem był wysoki poziom populacji więziennej oraz duża liczba osób skazanych na karę pozbawienia wolności i oczekujących na jej wykonanie. Podstawowym środkiem reakcji karnej na przestępstwa drobne i średniej wagi pozostawała niezmiennie kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania, orzekana na masową skalę. Diagnoza przyczyn zaistniałych niepowodzeń stała się podłożem reformy prawa karnego z 2015 r. W opracowaniu omówiono najważniejsze zmiany w przepisach kodeksu karnego, które mają przyczynić się do zwiększenia roli kar nieizolacyjnych (grzywny i kary ograniczenia wolności) i ograniczenia zakresu stosowania kary pozbawienia wolności (bezwzględnej i z warunkowym zawieszeniem jej wykonania). Prezentowany w opracowaniu statystyczny obraz bezwzględnej kary pozbawienia wolności oraz kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania skłonił autorkę do wniosku, że kara pozbawienia wolności nadal nie jest traktowana w praktyce wymiaru sprawiedliwości jako *ultima ratio*. Pomimo wydatnego ograniczenia znaczenia kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania w polityce karnej i rosnącego udziału kar nieizolacyjnych w strukturze kar orzeczonych, powiększa się udział bezwzględnej kary pozbawienia wolności wśród skazań ogółem oraz wzrasta liczba orzeczonych i niewykonywanych bezwzględnych kar pozbawienia wolności. Autorka wyraża pogląd, że na niepowodzenia w zakresie realizacji założeń politycznokryminalnych reformy prawa karnego z 2015 r. rzutują nazbyt drastyczne ograniczenia możliwości zastosowania kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania. W związku z tym przyłącza się do zgłaszanych w piśmiennictwie postulatów rozszerzenia podstaw orzekania kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania.

Słowa kluczowe: kara pozbawienia wolności, kara pozbawienia wolności z warunkowym zawieszeniem wykonania, reforma prawa karnego, praktyka wymiaru sprawiedliwości, polityka karna, kary nieizolacyjne, populacja więzienna

EJECUCIÓN DEL PRINCIPIO DE TRATAR LA PENA DE PRIVACIÓN DE LIBERTAD COMO *ULTIMA RATIO* DESDE LA PERSPECTIVA DE APLICACIÓN DE DERECHO PENAL

Resumen

Se analiza la ejecución del principio de tratar la pena de privación de libertad como *ultima ratio* en la práctica. Se parte de análisis de regulaciones legales adoptadas en la primera versión del código penal de 1997 que demuestra nueva aproximación a la pena de privación de libertad que debería ser una pena subsidiara en la delincuencia pequeña y mediana. En la práctica, resulta que el intento de minimizar el papel de la pena de privación de libertad en la política penal fracasó, cuyo resultado fue un nivel alto de la populación prisionera y elevado número de personas condenadas a la pena de privación de libertad y que esperaban su ejecución. La medida de reacción penal básica para los delitos de pequeña y mediana gravedad era la pena de privación de libertad con la suspensión condicional de su ejecución que se dictaba en escala masiva. El análisis de fracaso ocurrido fue objeto de reforma de derecho penal en 2015. El artículo analiza las modificaciones más importantes del código penal que han de incrementar el papel de penas no privativas de libertad (multa y pena de restricción de libertad) y reducir el ámbito de aplicación de la pena de privación de libertad (sin suspensión y con suspensión condicional de su ejecución). Las estadísticas presentadas en el artículo de la pena de privación de libertad sin la suspensión condicional de su ejecución y de la pena de privación de libertad con la suspensión condicional de su ejecución le llevan a la autora a la conclusión que la pena de privación de

libertad sigue siendo sin tratarla en la práctica como la *ultima ratio*. A pesar de limitar de forma sustancial la importancia de la pena de privación de libertad con la suspensión condicional de su ejecución en la política penal y aumentar la participación de penas no privativas de libertad, dentro de las penas impuestas, se aumenta la participación de la pena de privación de libertad sin la suspensión condicional de su ejecución en las condenas totales y se aumenta el número de penas de privación de libertad sin la suspensión condicional de su ejecución que son impuestas y no ejecutadas. La autora sostenta que al fracaso en el ámbito de ejecución de principios de política criminal de la reforma de derecho penal en 2015 contribuyen limitaciones demasiado drásticas para poder aplicar la pena de privación de libertad con la suspensión condicional de su ejecución. Por lo tanto, se junta a los postulados de la doctrina de ampliar requisitos para aplicar la pena de privación de libertad con la suspensión condicional de su ejecución.

Palabras claves: pena de privación de libertad, pena de privación de libertad con la suspensión condicional de su ejecución, reforma de derecho penal, práctica judicial, política penal, penas no privativas de libertad, populación prisionera

РЕАЛИЗАЦИЯ ПРИНЦИПА ИНТЕРПРЕТАЦИИ НАКАЗАНИЯ В ВИДЕ ЛИШЕНИЯ СВОБОДЫ КАК ПОСЛЕДНЕГО ДОВОДА – *ULTIMA RATIO* – В РАМКАХ СОБЛЮДЕНИЯ УГОЛОВНОГО ПРАВА

Резюме

Предмет исследования – реализация принципа интерпретации наказания в виде лишения свободы как последнего довода – *ultima ratio* – в судебной практике. Точкой отсчёта для анализа служат законодательные решения, принятые в первоначальном варианте Уголовного кодекса от 1997 года, указывающие на новый подход к наказанию в виде лишения свободы, которое концептуально должно было выступать в качестве субсидиарной ответственности в отношении преступлений малой и средней тяжести. Как показала практика, попытка минимизировать роль наказания в виде лишения свободы оказалась безуспешной, результатом чего были перегруженность мест лишения свободы, большое количество приговорённых к наказанию в виде лишения свободы и ожидающих приведения в исполнение данного приговора. В качестве основного средства уголовного преследования за преступления малой и средней тяжести всегда выступало наказание в виде лишения свободы с условным приостановлением его исполнения, определяемое на массовом уровне. Диагностика причин упомянутых сложностей стала основанием для реформы уголовного права 2015 года. В статье рассматриваются наиболее важные изменения в положениях Уголовного кодекса, целью которых является повышение актуальности роли наказаний, не связанных с лишением свободы (штрафы и наказания в виде ограничения свободы), и ограничение объёма применения наказания в виде лишения свободы (до абсолютного наказания и с условным приостановлением его исполнения). Представленный в исследовании статистический вывод об абсолютном наказании в виде лишения свободы, а также наказания в виде лишения свободы с условным приостановленнием его исполнения позволил Автору прийти к заключению, что наказание в виде лишения свободы по-прежнему не воспринимается в практике правосудия как *ultima ratio*. Несмотря на существенное ограничение значимости наказания в виде лишения свободы с условным приостановлением его исполнения в уголовной политике и возрастающего количества наказаний, не связанных с лишением свободы, среди определяемых наказаний растёт коэффициент безусловных наказаний в виде лишения свободы среди общего количества наказаний, а также увеличивается количество определенных судом и не приведенных в исполнение безусловных наказаний в виде лишения свободы. Автор высказывает мнение, что трудности и недостатки

реализации политико-криминалистических принципов реформы уголовного законодательства 2015 года являются следствием чрезвычайно радикальных ограничений возможностей применения наказания в виде лишения свободы с условным приостановлением его исполнения. В связи с этим автор присоединяется к предлагаемым в предметной литературе постулатам, связанным с расширением оснований для определения наказания в виде лишения свободы с условным приостановлением его исполнения.

Ключевые слова: наказание в виде лишения свободы, наказание в виде лишения свободы с условным приостановлением его исполнения, реформа уголовного права, практика правосудия, уголовная политика, наказание, не связанное с лишением свободы, тюремное население

DIE BEHANDLUNGSREGELVOLLSTRECKUNG DER FREIHEITSSTRAFE ALS *ULTIMA RATIO* AUF EBENE DER STRAFRECHTSANWENDUNG

Zusammenfassung

Der Erörterungsgegenstand ist die Behandlungsregel der Freiheitsstrafe als *ultima ratio* in der Gerichtsbarkeitspraxis. Als Ausgangspunkt der Analyse dienen gesetzliche Lösungen angenommen im primären Wortlaut des Strafgesetzes von 1997, welcher eine neue Herangehensweise zur Freiheitsstrafe bietet, welche voraussetzend eine subsidiäre Strafe in Bezug auf minderwertiges oder durchschnittliches Verbrechen werden sollte. Die Praxis hat jedoch bewiesen, dass die Minimalisierungsprobe der Rolle der Freiheitsstrafe in der strafrechtlichen Politik misslungen ist, was mit einer hohen Gefängnispopulation resultierte und auch eine hohe Anzahl von zur Freiheitsstrafe Verurteilten erwartete deren Vollstreckung. Das Hauptmittel der Strafreaktion minderwertige oder durchschnittliche Verbrechen blieb unveränderlich die Freiheitsstrafe auf konditioneller Bewährung deren Vollstreckung, erkannt im großen Ausmaß. Die Ursachendiagnose der aufgetretenen Misserfolge lag zugrunde eine Strafrechtsreform im Jahre 2015. In dieser Bearbeitung wurden die wichtigsten Änderungen in den Regelungen des Strafgesetzbuches beschrieben, welche zur Rollenverstärkung von nicht Freiheit entziehenden Strafen (Bußen und Freiheitsstrafen) und zur Beschränkung des Anwendungsgebietes der Freiheitsstrafe in Form von bedingungsloser gegeben falls auf bedingter Bewährung deren Vollstreckung beitragen sollen. Die in dieser Bearbeitung dargestellte statistische Illustration der bedingungslosen Freiheitstrafe und der Freiheitsstrafe auf bedingte Vollstreckungsbewährung hat die Autorin zur Folgerung geneigt, dass die Freiheitsstrafe weiterhin nicht als *ultima ratio* in der Gerichtsbarkeitspraxis betrachtet wird. Trotz wesentlicher Beschränkung der Bedeutung der Freiheitstrafe auf bedingter Vollstreckungsbewährung in der Strafpönalisierung und trotz wachsenden Anteils der nicht Freiheit entziehenden Strafen in der Struktur von erkannten Strafen vergrößert sich der Anteil von bedingungslosen Freiheitsstrafen unter der allgemeinen Verurteilungsanzahl, und es wächst diejenige von erkannten und nicht vollstreckten bedingungslosen Freiheitsstrafen. Die Autorin vertritt die Meinung, dass die Misserfolge in Bezug auf Abwicklung politisch-krimineller der Voraussetzungen der Strafrechtsreform von 2015 allzu einschneidende Einschränkungen der Freiheitsstrafenanwendung auf bedingter Vollstreckungsbewährung beeinflusst haben. Demnach schließt sich die Autorin zu den eingehenden Postulaten im Schrifttum einer Regelausbreitung der Freiheitsstrafenerkennung auf bedingter Vollstreckungsbewährung.

Schlüsselwörter: Freiheitsstrafe, Freiheitstrafe auf bedingter Vollstreckungsbewährung, Strafrechtsreform, Gerichtsbarkeitspraxis, Strafpolitik, nicht Freiheit entziehende Strafen, Gefängnispopulation

MISE EN ŒUVRE DU PRINCIPE DU TRAITEMENT DE L'EMPRISONNEMENT EN TANT QU'*ULTIMA RATIO* SUR LE NIVEAU D'APPLICATION DU DROIT PÉNAL

Résumé

Le sujet à examiner est la mise en œuvre du principe du traitement de l'emprisonnement en tant qu'*ultima ratio* dans l'exercice de la justice. Le point de départ de l'analyse est constitué par les solutions législatives adoptées dans le libellé initial du Code pénal de 1997, montrant une nouvelle approche de la peine d'emprisonnement, censée être une peine de substitution pour les crimes de petite et moyenne gravité. En pratique, il s'est avéré que la tentative visant à minimiser le rôle de la peine d'emprisonnement dans la politique pénale a échoué, ce qui a entraîné une forte population carcérale et un grand nombre de personnes condamnées à l'emprisonnement et en attente de son exécution. Le moyen fondamental de réaction pénale aux crimes de petite et moyenne gravité consistait invariablement en une peine d'emprisonnement assortie d'une suspension conditionnelle de son exécution, prononcée à grande échelle. Le diagnostic des causes d'échec est devenu la base de la réforme du droit pénal de 2015. L'étude examine les modifications les plus importantes apportées aux dispositions du code pénal, qui doivent contribuer à renforcer le rôle des peines non privatives de liberté (une amende et la peine de limitation de la liberté) et à limiter la portée de l'emprisonnement (absolue et avec suspension conditionnelle de son exécution). Le tableau statistique de l'emprisonnement absolu et de l'emprisonnement avec suspension conditionnelle de son exécution présenté dans l'étude a amené l'auteur à conclure que la peine de privation de liberté n'est toujours pas traitée dans la pratique de la justice comme un *ultima ratio*. Malgré l'importante limitation du sens de l'emprisonnement avec suspension conditionnelle de son exécution dans la politique pénale et la part croissante des peines non privatives de liberté dans la structure des peines prononcées, la part de l'emprisonnement absolu dans le total des condamnations augmente, de même que le nombre de peines d'emprisonnement absolues prononcées et non exécutées. L'auteur exprime l'opinion que les limitations trop sévères de la possibilité d'appliquer une peine d'emprisonnement avec suspension conditionnelle de son exécution affectent l'échec de la mise en œuvre des principes politiques et pénaux de la réforme du droit pénal de 2015. À cet égard, elle rejoint les postulats proposés dans la littérature d'étendre les motifs pour prononcer la peine d'emprisonnement avec suspension conditionnelle de son execution.

Mots-clés: peine d'emprisonnement, peine d'emprisonnement avec suspension conditionnelle de son execution, réforme du droit pénal, exercice de la justice, politique pénale, peines non privatives de liberté, population carcérale

ATTUAZIONE DEL PRINCIPIO DEL TRATTAMENTO DELLA PENA DI RECLUSIONE COME *ULTIMA RATIO* A LIVELLO DI APPLICAZIONE DEL DIRITTO PENALE

Sintesi

L'argomento in discussione è l'attuazione del principio del trattamento della pena di reclusione come *ultima ratio* nella prassi del sistema giudiziario. Il punto di partenza dell'analisi sono le soluzioni legislative adottate nella versione originale del codice penale del 1997, che

mostrano un nuovo approccio alla pena di reclusione, con la supposizione che essa doveva diventare una punizione sussidiaria per i reati di piccola e media criminalità. Nella prassi si è rivelato che il tentativo di minimizzare il ruolo della pena di reclusione nella politica penale è fallito, il che ha portato a un alto livello di popolazione carceraria e a un gran numero di persone condannate a una pena detentiva e in attesa della sua esecuzione. La pena di reclusione con sospensione condizionale (inflitta su larga scala) rimaneva sempre la misura di base della reazione penale ai reati minori e di media gravità. La diagnosi delle cause del fallimento è stata la base per la riforma del diritto penale del 2015. L'articolo discute le modifiche più importanti delle disposizioni del codice penale, che contribuiranno all'aumento del ruolo delle sanzioni non detentive (multe e sanzioni per restrizione della libertà) e alla limitazione dell'ambito di applicazione della pena di reclusione (quella senza sospensione e con sospensione condizionale). Il quadro statistico della pena di reclusione senza sospensione e quella con sospensione condizionale, presentato nello studio ha portato l'Autrice alla conclusione che la pena di reclusione non viene ancora trattata come *ultima ratio* nella prassi del sistema giudiziario. Nonostante la significativa limitazione dell'importanza della pena di reclusione con sospensione condizionale nell'ambito della politica penale e della crescente partecipazione delle pene non detentive nella struttura delle pene inflitte, la totale delle pene di reclusione senza sospensione sul numero totale delle pene è in aumento (lo stesso per quanto riguarda il numero di pene di reclusione senza sospensione inflitte e non eseguite). L'Autrice ritiene che il fallimento nell'ambito dell'attuazione dei presupposti politici e penali della riforma del diritto penale del 2015 viene causato da restrizioni troppo drastiche alla possibilità di applicare la pena di reclusione con sospensione condizionale. A questo proposito, l'Autrice si unisce ai postulati riportati nella letteratura per estendere le basi dell'infliggere la pena di reclusione con sospensione condizionale.

Parole chiave: pena detentiva, pena detentiva con sospensione condizionale dell'esecuzione, riforma del diritto penale, prassi del sistema giudiziario, politica penale, pene non detentive, popolazione carceraria

Cytuj jako:

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CRIMINAL-LAW PROTECTION OF DOMESTIC PEACE IN THE TERRITORY OF POLAND

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1. POLAND IN THE PAST[1]

The concept of the domestic peace (*mir domowy*) is part of a broader concept of the king's peace that was called "the ruler's hand" in the first centuries of the Polish statehood. In the Polish language, the word *mir* is most often defined as: respect, esteem, regard, peace, concord, good relations. It consisted in the system of ensuring order and internal security by rulers and was divided into the peace of a person (e.g. special protection of clergymen, women, Jews and court ushers), the peace of land (e.g. a special status of the ruler's court, churches, public and even private roads, markets, fields and land borders) and mixed peace (concerning, e.g. archbishops, persons going to or coming back from a court). In the course of time, the concept of the king's peace was extended to cover, e.g. beehives, and in the fourteenth century villages, farm land, agricultural products, cattle and some forests. The domestic peace was part of the peace of land. Its most important values include peace, quiet and respect of the home.[2]

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1 The term is commonly used in literature on the history of law in relation to the history of the Polish political system and law until 1795.

2 S. Kutrzeba, *Dawne polskie prawo sądowe w zarysie (I. Prawo karne. II. Postępek sądowy)*, Lwów–Warsaw–Kraków 1921, pp. 4–5; J. Bardach, *Historia państwa i prawa Polski*, Vol. 1: *Do połowy*

The first historical information about the legal protection of the peace in the Polish common law comes from the thirteenth century. It can be found in the provisions of the oldest Polish law (usually, although imprecisely, called the Book of Elbląg), which was probably written at the turn of the fourteenth century. I have not found direct reference to the domestic peace in the Book of Elbląg but there are provisions concerning other categories of the peace of land (roads and fields).[3] As far as Jewish population is concerned, it is worth mentioning punishment for trespass to the peace of Jews' home laid down in the rights given by Bolesław, the Prince of Kalisz, in 1264. In case of a Christian perpetrator, "as a destroyer of our treasury, he should be severely punished".[4]

In the Statutes of Casimir the Great, there is a provision penalising an attack on a noble's home. In the literature on the history of law, there is a controversy over the question whether the act should be treated as an autonomous offence or a circumstance incriminating a perpetrator.[5] "An intrusion into a house, which was called the violation of the home and indirectly dishonouring (*dehonestatio*) the one who was its owner or was attacked in it, carried a penalty of fifteen units and another fifteen units for the court. When a person in the house was injured or captured, a court ruled the perpetrator should pay another fifteen units".[6] When a noble was killed during the invasion, all participants of the intrusion were punished on a par.[7]

Penalisation of the violation of the domestic peace was also laid down in the provisions of the Mazovian law. Based on the Statute of Prince Konrad III of 1496, the offence of intrusion into a house was punished by deprivation of honour and the whole property (after the settlement of compensation, the rest of the property was to be transferred to the princely treasury). The issue of alternative classification of the act also occurs in this case. It was treated as a transition from offences against persons to those against property. On the one hand, the Mazovian princes provided houses with special protection and reserved the right to judge on the trespass to the domestic peace (later, it was under the jurisdiction of *starostas*, i.e. district administrators). On the other hand, it was recognised as an incriminating circumstance in case of a killing committed or injury caused in the course of a house intrusion. It is worth emphasising the differentiation of punishment: a perpetrator

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XV wieku, Warsaw 1965, pp. 321–322; T. Bojarski, *Karnoprawna ochrona nietykalności mieszkania jednostki*, Lublin 1992, pp. 21–22.

3 J. Matuszewski, *Najstarszy zwód prawa polskiego* (translation, edition and introduction by J. Matuszewski), Warsaw 1959, pp. 9–12, 186; J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju i prawa polskiego*, Warsaw 2005, p. 28; W. Witkowski, *Wybór tekstów źródłowych z historii prawa (epoka feudalizmu i kapitalizmu)*, Lublin 1978, pp. 23–24; R. Hube, *Prawo polskie w wieku trzynastym*, Warsaw 1874, p. 146.

4 S. Godek, M. Wilczek-Karczewska, *Historia ustroju i prawa w Polsce do 1772/1795. Wybór źródeł*, Warsaw 2006, *Przywilej generalny dla Żydów w Wielkopolsce z 1264 r.*, p. 299 (29); R. Hube, *Prawo polskie w wieku trzynastym…*, p. 179; T. Bojarski, *Karnoprawna ochrona…*, p. 31.

5 S. Godek, M. Wilczek-Karczewska, *Historia ustroju…*, *Suma statutów małopolskich króla Kazimierza Wielkiego według Kodeksu dzikowskiego*, p. 337 [26]; T. Bojarski, *Karnoprawna ochrona…*, pp. 31–32.

6 R. Hube, *Prawo polskie w 14 wieku*, Warsaw 1886, p. 269.

7 J. Bardach, *Historia państwa…*, p. 516.

had to pay damages to the injured or wergild to the victim's family and a separate compensation to "the landlord for his house intrusion".[8]

In the course of the process of strengthening political hegemony of gentry in the Polish state system, we can observe the development of a special status of gentry's homes. It can be noted in the field of private law: a Roman-Catholic wedding ceremony could be conducted at home (of course, in the presence of a priest), while townsmen and peasants could get married only in church. In practice, increased legal protection was even more important. It must be emphasized that a noble's house was treated as an asylum, it could not be searched and from 1588 even an outlaw could seek refuge there; however, it must be emphasized that in case a landlord refused to surrender an outlaw, he was criminally liable. Apart from that, it was not punishable to kill a trespasser. Mikołaj Zalaszowski, a Polish lawyer of the seventeenth century, included this special case in several most important gentry's rights, which gave this social group dominance over other social groups.[9]

However, it is necessary to draw attention to extraordinary provisions protecting gentry's homes against external attacks. At that time, it was called "an attack on a noble's home" and was classified under the "four municipal legal articles" (*Quatuor articuli iudicii castrensis*) among such acts as robbery on highways, arson and rape. In case of an offence classified under "municipal legal articles", a sedentary noble was liable in accordance with the provisions of the Statute of Warta before a municipal court, which was under the jurisdiction of a *starost.* All the other cases concerning gentry were tried by circuit courts (*sądy ziemskie*).[10]

In the nobles' Republic of Poland, an invasion of a house was classified as an offence against peace and public order. In case of a killing or a serious injury caused in the course of trespass to the home, an investigation (*skrutynium*) was conducted to establish whether the guilt was intentional or unintentional and a perpetrator was punished by death penalty. In case he was not apprehended, he was sentenced to infamy *in absentia*. The capital punishment for this offence was laid down in the legislation of the Sejm of Piotrków of 1493 and 1496, which was very important for the development of the catalogue of public penalties.[11]

The issue of the trespass to the domestic peace was also included in the draft legislation of land material law of 1532 that is known in literature on the history of law as *Correctura Iurium* or *Taszycki's Correctura*. Unfortunately, the Sejm of

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[8] K. Dunin, *Dawne mazowieckie prawo*, Warsaw 1880, p. 192; T. Bojarski, *Karnoprawna ochrona…*, pp. 32–33.

[9] J. Bardach, *Historia państwa…*, p. 492; W. Uruszczak, *Historia państwa i prawa polskiego*, Warsaw 2013, pp. 192–193; Z. Kaczmarczyk, B. Leśnodorski, *Historia państwa i prawa Polski*, Vol. 2: *Od połowy XV wieku do r. 1795*, Warsaw 1966, pp. 78, 332; T. Maciejewski, *Historia prawa karnego w dawnej Polsce (do 1795 r.)*, [in:] T. Bojarski (ed.), *System Prawa Karnego*, Vol. 2: *Źródła prawa karnego*, Warsaw 2011, p. 84.

[10] S. Godek, M. Wilczek-Karczewska, *Historia ustroju…*, *Statut warcki z 1423 r. w układzie 31 artykułów według Kodeksu dzikowskiego*, p. 344 [17]; Z. Góralski, *Urzędy i godności w dawnej Polsce*, Warsaw 1983, p. 198; M. Borucki, *Temida staropolska. Szkice z dziejów sądownictwa Polski szlacheckiej*, Warsaw 1979, p. 20; J. Bardach, *Historia państwa…*, p. 478.

[11] Sejm of Piotrków of 1493, *Volumina Constitutionum*, Vol. I, *Volumen 1*, prepared for print by S. Grodziski, I. Dwornicka, W. Uruszczak, Warsaw 1996, p. 49 (hereinafter VC); Sejm of Piotrków of 1496, *ibid.*, p. 79; Z. Kaczmarczyk, B. Leśnodorski, *Historia państwa…*, pp. 336–337, 339.

1534 did not pass the code.[12] In accordance with it, invasion of a noble's house might be classified as an offence against public security. The invasion could be classified as light (without bloodshed) or severe in the course of which a landlord, his guests, wife, son or servants were killed or injured. The former case was under the jurisdiction of a circuit court, a perpetrator had to pay 60 units and redress all financial and personal damage. The severe invasion, as one of the four municipal articles, was under the jurisdiction of a *starost* and the sanction was death penalty. There was a proposal to extend the concept of the home invasion and cover the invasion of a rented house, a *folwark* and an inn. In case of an offence committed by a servant, the master was obliged to punish his servant. Otherwise, he would be personally liable.[13]

The offence of house invasion was the subject of numerous detailed constitutions passed by the General Sejm of the First Polish Republic. T. Bojarski, following J. Makarewicz, mentions six constitutions of the Sejm in which the act was referred to (of 1493, 1496, 1598, 1601, 1613, 1768).[14] I have not succeeded in verifying all these examples[15] but based on the latest (extraordinarily thorough and reliable) publications, I can state that the trespass to the domestic peace was an extremely frequently discussed issue in the Polish parliament in the past (I refer to the successive volumes of *Volumina Constitutionum* prepared for publication by S. Grodziski, I. Dwornicka, W. Uruszczak, M. Kwiecień, A. Karabowicz, K. Fokt). Some examples are just brief mentions.[16] However, it is possible to refer to broader regulations having a more complex impact on the punishment for the trespass to the domestic peace in Poland in the past. In my opinion, the nature of the provisions laid down in 1611 was important as they introduced an orderly classification of offences under the jurisdiction of municipal courts. They were divided into two groups: criminal (*criminales*) and simple or civil (*civiles*) ones. The offence of trespass to the domestic peace was called "home invasion or house robbery, i.e. *pro spolio*". It was included in

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[12] T. Maciejewski, *Historia ustroju i prawa sądowego Polski*, Warsaw 2011, p. 106; J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju…*, p. 188.

[13] W. Uruszczak, *Korektura praw z 1532 roku. Studium historycznoprawne*, Vol. 2, Warsaw–Kraków 1991, pp. 86–87.

[14] T. Bojarski, *Karnoprawna ochrona…*, pp. 33–34.

[15] For instance, I have not found any reference to the trespass to the domestic peace made in the legislation of the General Sejm of 1598 and 1613. It seems that it results from a different interpretation of the word "invasion", which in my opinion, is the same as the terms "assault" or "home intrusion". At the Sejm of 1598, violent invasions by Courland were discussed (*Volumina legum. Prawa konstytucye i przywileje Królestwa Polskiego, Wielkiego Xięstwa Litewskiego y wszystkich prowincyi należących, Volumen secundum*, Petersburg 1859, p. 371). The Sejm of 1613 focused on regulations to fight with the invasions by Cossacks, *ibid.*, Vol. 3, p. 122.

[16] For instance, the General Sejm of Kraków of 1531–1532, VC Vol. I, *Volumen 2*, prepared for publication by W. Uruszczak, S. Grodziski, I. Dwornicka, Warsaw 2000, pp. 95, 97; the General Sejm of Piotrków of 1534, *ibid.*, p. 129; the General Sejm of Kraków of 1553, VC Vol. II, *Volumen 1*, prepared for publication by S. Grodziski, I. Dwornicka, W. Uruszczak, Warsaw 2005, p. 55; the Convocation Sejm of Warsaw of 1587, VC Vol. II, *Volumen 2*, prepared for publication by S. Grodziski, Warsaw 2008, p. 23; *ibid.*, the General Crown Sejm in Warsaw in 1601, p. 293; the Extraordinary Sejm of Warsaw of 1662, VC Vol. IV, *Volumen 2*, prepared for publication by S. Grodziski, M. Kwiecień, K. Fokt, Warsaw 2017, pp. 227, 236; the Extraordinary Sejm of Warsaw of 1667, *ibid.*, p. 269.

the first group, i.e. *criminales*, with ten other acts: rape, robbery on highways, arson, any offences committed by non-sedentary gentry, theft, manslaughter (in case of perpetrators caught red-handed), any types of offences committed by outlaws and their accomplices, fraud, failure to execute the penalty of imprisonment of killers in a tower, and special investigations *ex officio* in criminal cases (*skrutynia*).[17]

The Sejm of 1576 passed regulations penalising invasion or intrusion of a noble's house. In case a noble invaded or intruded a house with the use of force or violence and in the course of it caused battery, injury or appropriation of property, he was punished by dishonour and property seizure. The property seized was used to redress damage incurred by the aggrieved and the rest was transferred to the royal treasury. The same rules of liability (as for invasion or intrusion of a noble's house) were introduced for intrusion of a church, a cemetery, an inn and a serf's house committed with the use of violence and resulting in manslaughter, battery or injury.[18]

A special mode of the procedure in case of invasion of a noble's house or plundering it in an interregnum period was regulated in 1587.[19] It is also worth drawing attention to the provisions making it possible to postpone trials by *dilatio propter negotia publica.* On the one hand, the concept of public service was extended, and on the other hand, there was a ban on this form of postponement in case of some offences, including a house invasion. It concerned e.g. soldiers during war campaigns.[20]

In the period of Stanisław August Poniatowski's reforms, there was a tendency to extend the catalogue of public crimes. It also concerned a house invasion. It seems that the reason for that was the wish to protect nobles' houses against many invasions organised at the time by aristocrats' guests (the excesses of brawlers connected with Prince Karol Stanisław Radziwiłł "My Dear Sir" were especially famous).[21] The codification drafted in the late 1770s stipulated penalisation of the trespass to the domestic peace (*Zbiór praw sądowych* by Andrzej Zamoyski). The offence was called invasion of a house and included in the catalogue of public offences.[22]

It is worth referring to the provisions of the codified Lithuanian law because it was in force not only in the Grand Duchy of Lithuania but also in Wołyń, Bracław and Kiev Voivodeships (Second Statute of 1566). Apart from that, due to clarity, precise language and high legal values, the Third Statute of Lithuania of 1588 was used in the Polish Crown as auxiliary law.[23] In accordance with the Statutes of Lithuania,

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[17] The Extraordinary Sejm of Warsaw of 1611, VC Vol. III, *Volumen 1*, prepared for publication by S. Grodziski, M. Kwiecień, A. Karabowicz, Warsaw 2010, p. 60.

[18] The General Sejm of Toruń of 1576, VC Vol. II, *Volumen 1*, pp. 387–388.

[19] The Convocational Sejm of Warsaw of 1587, VC Vol. II, *Volumen 2*, pp. 19–20, 28.

[20] The General Sejm of Piotrków of 1567, VC Vol. II, *Volumen 1*, p. 205; the General Sejm of Warsaw of 1579–1580, *ibid.*, pp. 441–442; the General Sejm of Warsaw of 1581, *ibid.*, p. 453; Z. Kaczmarczyk, B. Leśnodorski, *Historia państwa…*, p. 386.

[21] Z. Kaczmarczyk, B. Leśnodorski, *Historia państwa…*, p. 573.

[22] E. Borkowska-Bagieńska, "*Zbiór Praw* Sądowych" Andrzeja Zamoyskiego, Poznań 1986, p. 254.

[23] J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju…*, p. 190.

prosecution of invasion of a noble's house or premises was under the jurisdiction of a municipal court subordinate to a *starost* or a voivode performing the function of a *starost*.[24] The First Statute of Lithuania of 1529 stipulated capital punishment for that act in case it was connected with injury caused to another person. In the Second Statute, the provisions were repeated and determined the penalty more precisely: in case of no injury, a fine of 12 rubles (i.e. 418 zlotys and 22 groszes) was imposed. A perpetrator was also obliged to redress the damage. A penalty of 12 weeks' imprisonment in a tower was added in the Third Statute of Lithuania. In addition, liability of co-perpetrators (accomplices) of invasion in conjunction with injury was regulated. It carried a penalty of imprisonment in a tower for one year and six weeks. However, it did not concern persons subordinate to a noble (servants).[25] Like in Poland, the domestic peace of a noble was highly valued. A perpetrator of a house invasion and his accomplices could be killed with impunity and the damage as well as a fine for the act was covered from the invader's property.[26] On the other hand, the domestic peace was connected with the house owner's special liability for injuries incurred by his guests. It was precisely stipulated in the Second Statute that when a host "belonged in the harming of his guest", he should redress all damage and could hunt for "invaders or wreckers". The Third Statute stipulated that in case of an insult, battery or injury committed by a host, apart from sanctions for the acts, he was punished for the violation of the domestic peace. A special status of a noble's house also results from the fact that the provisions protecting his peace were treated as a kind of model: perpetrators of invasion of a church, a cemetery, a school as well as a Roman-Catholic or Orthodox Church priest or a preacher's house were to be punished in the same way as "invaders of a noble's house".[27]

Besides Polish lands common law, also German law was in force in the territory of former Poland. It started to be introduced at the beginning of the thirteenth century in conjunction with the foundation of towns in accordance with German town law (Lübeck law, Magdeburg law and its variations: Chełmno law and Środa-Śląska law). The term of Polish municipal law is used in literature on the history of law in relation to the next centuries. It regulated the protection of the domestic peace.

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[24] T. Czacki, *O litewskich i polskich prawach, o ich duchu, źródłach, związku i o rzeczach zawartych w pierwszym Statucie dla Litwy 1529 roku wydanem*, Vol. 2, Warsaw 1801 (offset reprint by Poznańskie Zakłady Graficzne im. Marcina Kasprzaka of the volume provided by the National Library of Poland, Warsaw 1987), pp. 92–98.

[25] *Statut Wielkiego Księstwa Litewskiego z dołączeniem treści konstytucji przyzwoitych*, Part II, Chapters seven to the end, Saint Petersburg 1811, pp. 140–141, Chapter eleven, Article III; T. Czacki, *O litewskich…*, Vol. 2, pp. 112–121.

[26] The Second and the Third Statutes of Lithuania lay down detailed provisions concerning evidence that an invader's killing or injury took place in the course of the invasion. T. Czacki, *O litewskich…*, Vol. 2, p. 127. The table containing Polish and Lithuanian coins that were used over the period of more than 450 years (from 1300 till 1786) is available in T. Czacki, *O litewskich i polskich prawach, o ich duchu, źródłach, związku i o rzeczach zawartych w pierwszym Statucie dla Litwy 1529 roku wydanem*, Vol. 1, Warsaw 1800, p. 179. It provides data concerning coins mentioned in the text: groszes, zlotys and Lithuanian rubles.

[27] *Statut Wielkiego Księstwa Litewskiego*, Vilnius 1786, p. 271, Chapter eleven, Article III; T. Czacki, *O litewskich…*, Vol. 2, pp. 129–130, 135.

Municipal law classified invasion of a house as one of the most serious offences. The fact that such acts were excluded from lay-judge courts' jurisdiction in Kraków confirms that. The jurisdiction over such cases in the thirteenth century was reserved for a prince.[28] The trespass to the domestic peace by breaking into a house, battery, injury, killing the inhabitants, and damage to household equipment was called an assault on a house and carried a death penalty by decapitation.[29] In case of a perpetrator who was a servant, his master was obliged to impose the penalty. Otherwise, he became liable. In case of a servant's escape, his master and two other men had to swear an oath that this had happened without his knowledge and will. A lodger had the same right to protect the domestic peace as the owner of a house.[30] The only exception concerned the trespass to the domestic peace in case of a threat of fire. A neighbour could break into the house of another in order to save his property from burning. Civil liability for such an act was regulated in a primitive way. It depended not on the existence of a threat but on the result that actually occurred. When the fire reached that house, the perpetrator was not liable. However, when the fire did not reach the house, the neighbour had to redress damage, unless he trespassed the domestic peace as a result of the authorities' order.[31]

It is worth referring to the research done by Polish historians of law based on archival sources of the judicial practice in Polish towns: W. Maisel (Poznań) and M. Mikołajczyk (towns of Małopolska region).[32] According to them, the offence of invasion of a house was not always punished by death. A penalty of imprisonment was also applied. M. Mikołajczyk quotes a sentence of imprisonment for "a house intrusion" of 1718. A. Maisel presents a similar example.[33] Co-perpetrators of a house intrusion were punished in the same way.[34] Attention should be drawn to the fact that the scene was examined in the course of the proceedings concerning the trespass to the domestic peace (equipment thrown through the windows, doors and window shutters broken, shot or cut with swords, wounds of the injured persons). W. Maisel found that the perpetrators in Poznań were most often the representatives of gentry.[35]

It is worth highlighting the special role of Chełmno law in Royal Prussia (without Warmia and Braniewo, Elbląg and Frombork, which were founded based on Lübeck law). From 1476 Chełmno law was treated as classless and nationwide. Intrusion of a house was classified as an offence against the public peace. It consisted in an armed attack on a house or property of another and in the use of violence against the owner or his property. A perpetrator was subject to a death penalty.[36]

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[28] J. Bardach, *Historia państwa…*, p. 277.

[29] Z. Kaczmarczyk, B. Leśnodorski, *Historia państwa…*, p. 356; B. Groicki, *Artykuły prawa majdeburskiego*, Warsaw 1954, pp. 40–41.

[30] B. Groicki, *Tytuły prawa majdeburskiego*, Warsaw 1954, pp. 244–245, 254–255.

[31] B. Groicki, *Artykuły prawa…*, p. 65.

[32] W. Maisel, *Poznańskie prawo karne do końca XVI w*., Poznań 1963; M. Mikołajczyk, *Przestępstwo i kara w prawie miast Polski południowej XVI–XVIII wieku*, Katowice 1998; *idem*, *Proces kryminalny w miastach Małopolski XVI–XVIII wieku*, Katowice 2013.

[33] M. Mikołajczyk, *Przestępstwo i kara…*, p. 235; W. Maisel, *Poznańskie prawo…*, p. 296.

[34] M. Mikołajczyk, *Przestępstwo i kara…*, p. 54.

[35] W. Maisel, *Poznańskie prawo…*, p. 296; M. Mikołajczyk, *Proces kryminalny…*, p. 398.

[36] D. Janicka, *Prawo karne w trzech rewizjach prawa chełmińskiego z XVI wieku*, Toruń 1992, pp. 6, 90. The three amendments to the bills mentioned in the title of the monograph were never

2. PERIOD OF THE PARTITIONS OF POLAND

As a result of the three Partitions (of 1772, 1793 and 1795), Poland lost its independence. From that time, the offence of the trespass to the domestic peace was penalised based on the provisions of criminal codes of the invading countries.[37]

The law that was in force in the Kingdom of Prussia was introduced to the territory of Poland occupied by Prussia in the course of the three successive partitions in a gradual and complicated way. For some time, Polish law was in force as provincial law.[38] The provisions of the General State Laws for the Prussian States (*Landrecht*) of 1794 were permanent in nature. The offence of the trespass to the domestic peace was called "the violation of the laws of the home". It was included in Chapter 9 entitled "On private offences".[39]

The provisions of Prussian *Landrecht* stipulated that nobody could invade a house, a flat or another place of a person's residence against his or her will. The concept of the violation of the laws of the home was defined very broadly because it covered all forms of acts committed by an invader, which he had no right to do. A house resident had the right to force the intruder to desist from his illegal activities (but after a warning). The resident's rights resulting from the laws of the home were to be applied in such a way that would not violate the inviolability and honour of the intruder. In case of the perpetrator's persistent and lawless conduct that was not intended to insult or commit an offence, he was fined or imprisoned. However, in case of the trespass to the domestic peace in conjunction with another crime, a more severe penalty was to be imposed. The above-presented rules of punishment for the infringement of the laws of the home were also applied to squares surrounded by walls or fences and even open-space fields in case their owner by its cultivation or special border signs banned other people from trespassing on them.[40]

Prussian *Landrecht* of 1794 was binding until the Prussian criminal code of 1851 entered into force and constituted the basis for the criminal code of the North German Confederation of 1870. The latest codification was then recognised as the criminal code of the German Reich based on the statute of 15 May 1871. The

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passed and did not come into force officially but were used in judicial practice in Royal Prussia and assessors' crown courts in the Kingdom, *ibid.*, p. 3.

[37] In my opinion, what constituted an exception was the Penal Code of the Kingdom of Poland of 1818 (*Kodeks karzący Królestwa Polskiego z 1818 roku*) that from the formal point of view was a statute passed by the Sejm of the Kingdom of Poland. A question arises whether the Kingdom of Poland was autonomous at the time, and the Sejm was the only autonomous body. However, it seems that this code should not be recognised as the legislation of the occupying countries because Polish scholars and to a great extent also politicians elected to the lower chamber of the Sejm had influence on the development of its content.

[38] Z. Radwański, J. Wąsicki, *Wprowadzenie Pruskiego Prawa Krajowego na ziemiach polskich*, Czasopismo Prawno-Historyczne Vol. VI, No. 1, Warsaw 1954, pp. 196–208; J. Bardach, M. Senkowska-Gluck (eds), *Historia państwa i prawa Polski*, Vol. 3: *Od rozbiorów do uwłaszczenia*, Warsaw 1981, pp. 30–31.

[39] *Powszechne Prawo Kryminalne dla Państw Pruskich*, Part two, I. Stawiarski (trans.), Warsaw 1813, p. 103.

[40] *Ibid.*, pp. 105–107, §§525–537.

provisions of the code of 1871 were in force in the Republic of Poland when it regained independence in 1918.[41]

The provisions of *Theresiana* of 1768, the codification fundamental for the Habsburg Monarchy, were not introduced in the Polish territories occupied by Austria. It was decided that it was "totally different from Polish law". *Josephina* of 1787 was another great and important code. The West-Galician criminal law statute of 1796, which was introduced in the Polish territories acquired as a result of the Third Partition (the territory occupied by Austria was called West Galicia), can be recognised as an extraordinary experiment. The provisions of this codification were copied to a great extent (it also concerned the issue of the trespass on the domestic peace) in the Austrian national criminal code of 1803 called *Franciscana*. After several years of changes in the legal status in the Habsburg Monarchy at the turn of the nineteenth century, the latest codification stabilised the situation in the field of criminal substantive law for almost half a century.[42]

The provisions of *Franciscana* regulated the trespass to the domestic peace rather briefly. The act was classified as a felony and was placed in Chapter IX entitled: "On public assaults".[43] It was decided to penalise the invasion of land by a group of intruders. An attack on a house or an apartment is mentioned in the successive part but, in such a case, it was assumed that only one person could be a perpetrator. Moreover, the feature of an attack on a house or an apartment was its armed nature connected with the use of violence against the owner or residents, or their property. It is characteristic that a perpetrator's reasons for committing the act were listed (revenge for the supposed wrong, hatred, claiming the presumed right, an attempt to exact a promise or obtain some kind of evidence). The sanction for this offence was increased-rigour imprisonment for a period of one to five years. A penalty for accomplices was to be more lenient (imprisonment for six months to one year).[44]

The provisions of *Franciscana* were in force in the Habsburg Monarchy, and thus also in the Polish territories occupied by Austria, till 1952. The Austrian statute of 27 May 1852 was a successive codification of criminal substantive law. The provisions of that legal act were in force in Poland after it regained independence in 1918.[45]

In the Duchy of Warsaw (1807–1815), as far as the protection of the domestic peace is concerned, the above-mentioned provisions of Prussian *Landrecht* of 1794

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[41] T. Maciejewski, *Historia ustroju…*, p. 262.

[42] §58 of the Penal Code of West Galicia (Chapter VI: "O gwałtach publicznych"), *Zbiór ustaw dla Galicyi Zachodniej, drukiem Józefa Hraszańskiego, C.K. Niemieckiego i Polskiego nadwornego Topografa i Bibliopoli*, Vienna 1796, p. 32; S. Salmonowicz, *Prawo karne oświeconego absolutyzmu. Z dziejów kodyfikacji karnych przełomu XVIII/XIX w.*, Toruń 1966, pp. 47–167; S. Grodziski, S. Salmonowicz, *Ustawa karna zachodniogalicyjska z roku 1796. Zarys dziejów i charakterystyka*, Czasopismo Prawno-Historyczne Vol. XVII, No. 2, Warsaw 1965, pp. 134–144; J. Bardach, M. Senkowska-Gluck (eds), *Historia państwa…*, Vol. 3, pp. 775–782.

[43] *Księga ustaw na zbrodnie i ciężkie policyjne przestępstwa*, Vienna 1817, Chapter IX, pp. 44–48.

[44] *Ibid.*, p. 45, §§72–73.

[45] A. Korobowicz, W. Witkowski, *Historia ustroju i prawa polskiego (1772–1918)*, Warsaw 2009, pp. 226–227.

remained in force. In the southeast territories attached to the Duchy in 1809, the regulations of *Franciscana* of 1903 were in force.[46]

During the Congress of Vienna (1814–1815) the Polish territories were divided again, which also influenced the situation concerning the criminal substantive law in force. The Duchy of Warsaw stopped existing. Part of its territory constituted the Grand Duchy of Posen subordinate to the King of Prussia (thus, the provisions binding in the territories occupied by Prussia were in force there). The remaining territories of the Duchy of Warsaw were included in Congress Poland and the free city of Kraków.[47]

"The Free, Independent and Strictly Neutral City of Kraków with its Territory", most often called the Republic of Kraków in the literature on the history of law, existed in the period 1815–1846 and was controlled by the three neighbouring superpowers, which partitioned Poland. It covered a very small territory of 1,150 square kilometres with Kraków, three small towns (Trzebinia, Chrzanów and Nowa Góra) and 224 villages. As far as the issue of the trespass on the domestic peace is concerned, the provisions of *Franciscana* of 1803 were in force there.[48]

After the foundation of the Kingdom of Poland, work on the codification of criminal substantive law started in 1816. In its course, the solutions tested in the judicial practice of the Habsburg Monarchy were used starting with the West Galician criminal statute of 1796 through *Franciscana* of 1803. However, the construction of the offence of the trespass on the domestic peace constituted one of the moot points in the discussion over the project in the Council of State of the Congress Kingdom of Poland. Joining and equalising two actual states in one article: the trespass on peaceful possession of land of another by a few people and armed invasion of a house of another by a single perpetrator and the use of violence against the inhabitants or property. As a result, it was decided to distinguish the two different offences.[49]

The Sejm passed the penal code of the Kingdom of Poland as a statute in 1818. The offence of invasion of a house was classified as a felony and was placed in Chapter X entitled "On felonies of public assault". A perpetrator who on his own or with other persons committed an armed invasion of a house or an apartment with the use of violence against the owner, residents or property was subject to punishment. The sanction was increased-rigour imprisonment for a period of three to six years. Accomplices were liable as perpetrators of a crime, not felony. As it has been mentioned above, the model known from *Franciscana* of 1803 was abandoned because the felony of invasion of a house was distinguished from the crime of trespass on peaceful possession of land of another. However, some significant

[46] *Ibid.*, p. 49.

[47] W. Witkowski, *Prawo karne na ziemiach polskich w dobie zaborów i w pierwszych latach II RP (1795–1932)*, [in:] T. Bojarski (ed.), *System Prawa Karnego*, Vol. 2: *Źródła prawa karnego*, Warsaw 2011, Chapter I, § 2, pp. 114–115; J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju…*, p. 360.

[48] A. Korobowicz, W. Witkowski, *Historia ustroju…*, p. 182; W. Witkowski, *Prawo karne…*, p. 116.

[49] J. Śliwowski, *Kodeks karzący Królestwa Polskiego (1818). Historia jego powstania i próba krytycznej analizy*, Warsaw 1958, pp. 38–40, 115–116; W. Witkowski, *Prawo karne…*, pp. 109–110.

similarities can be indicated. In the penal code of the Kingdom of Poland, also some reasons that could make an invader commit this act were listed (revenge for the wrong incurred, satisfying one's anger, obstinacy or hatred and pursuit of the exercise of the claimed rights).[50]

The Code of main and corrective penalties of 1847 was another codification in the territory of the Kingdom of Poland. The Russian code of 1847 having the same title was its prototype. The Code of main and corrective penalties was at the clearly lower level than the Polish statute of 1818, both from the point of view of the previous content and the types and severity of penalties as well as the legislative technique.[51]

The trespass on the domestic peace in the code of 1845 was called breaking into or invasion of an apartment of another. It was placed in Chapter X entitled "On offences against private persons' life, health, freedom and honour". Within this Chapter, Subchapter VIII entitled "On violent assault" was distinguished. An intruder who broke into or invaded an apartment of another with no legal reasons was recognised as a perpetrator of this offence. The act could not be connected, however, with an attempt to kill, rob or steal. But its violent nature was the feature and the reason for its commission was the intent to insult or threaten. Prosecution took place as a result of a complaint made by a landlord, an administrator or a person attacked. The sanction was imprisonment for a period of three weeks to three months. A special exception connected with abuse of alcohol is worth pointing out. A perpetrator "in the state of drunkenness" (and not intending to threaten or insult) was subject to a penalty of imprisonment only for a period of seven days to three weeks.[52]

An invader was also obliged to redress any damage to property and compensate financial loss. A case of personal insult to a landlord or residents was treated in a more detailed way. A perpetrator was obliged to apologise to the insulted person and the possible punishment was "confinement in a correctional house and deprivation of some (…) special rights and privileges, or the same penalty for a period of six months to one year without deprivation of special rights and privileges". Personal insult could be prosecuted *ex officio*.[53]

In 1876, the Russian criminal code of 1866 was introduced in the Kingdom of Poland. In fact, it was a new edition of the code of 1845. The changes did not constitute a reform of criminal law.[54] However, they influenced the issue of the trespass on the domestic peace we are interested in. The act lost its special status

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[50] *Prawo Kodeksu karzącego dla Królestwa Polskiego z 14 kwietnia 1818 r.*, Dziennik Praw Królestwa Polskiego Vol. V, pp. 52–53, Articles 95–96.

[51] A. Korobowicz, W. Witkowski, *Historia ustroju...*, p. 139.

[52] *Kodex kar głównych i poprawczych, Warszawa w Drukarni Kommissyi Rządowej Sprawiedliwości 1847*, p. 751, Article 1034.

[53] *Ibid.*, p. 753, Article 1035; F. Maciejowski, *Wykład prawa karnego w ogólności z zastosowaniem kodeksu kar głównych i poprawczych z dniem 20 grudnia/1 stycznia 1848 r. w Królestwie Polskim obowiązującego tudzież ustawy przechodniej i instrukcji dla sądów*, Warsaw 1848, p. 442.

[54] K. Grzybowski, *Historia państwa i prawa Polski*, Vol. 4: *Od uwłaszczenia do odrodzenia państwa*, Warsaw 1982, pp. 239–244; W. Witkowski, *Prawo karne...*, pp. 112–113; A. Korobowicz, W. Witkowski, *Historia ustroju...*, pp. 140–141.

of a separate offence (in the former codification, as it has been indicated above, these were Articles 1034 and 1035). In the code of 1866, liability was laid down in accordance with general rules.[55]

This legal state remained until the Russian authorities evacuated from the territory of the Kingdom of Poland in 1915, i.e. until the end of the Partition era. However, it is necessary to mention the code of 1903, commonly called Tagantsev's one. Only some of its parts were introduced in 1904 (the provisions concerning internal and external security of the state and the provisions of the general part that were in conjunction with the former). However, as a result of the decisions made by the Central Powers' occupational authorities and the new bodies of Polish authorities created in the period of World War I, it was in force in the independent Polish state (after its adaptation to the new Polish reality). It was not until 1932 that the Polish Criminal Code substituted for it.[56]

3. SECOND POLISH REPUBLIC

The actual state concerning the trespass on the domestic peace known in all criminal statutes of the states occupying Poland was in force in the country after it regained independence (until the Criminal Code of 1932 entered into force).

In the Russian criminal code of 1903, the offence was regulated (in a rather casuistic way) in Articles 511 and 512 (placed in Part 26 "Offences against personal liberty"). Article 511 criminalised the failure to leave an apartment of another or another place inhabited or staying in such an apartment or a place at night without consent of the entitled person,[57] and Article 512 (in the first part) stipulated liability for intentional breaking into "somebody else's building or another facility or place fenced with the use of violence against a person, a punishable threat, and damage to or removal of an obstacle blocking access".[58] Apart from that, there were aggravated types of the offence (intrusion at night – Article 512 part 22[59]) or intrusion at night by two or more people, which did not constitute a criminal gathering or by one

[55] S. Budziński, *O przestępstwach w szczególności. Wykład porównawczy z uwzględnieniem praw obowiązujących w Królestwie Polskim i Galicyi austriackiej*, Warsaw 1883, p. 53.

[56] A. Korobowicz, W. Witkowski, *Historia ustroju...*, pp. 141–142, 235–236; W. Witkowski, *Prawo karne...*, pp. 113–114.

[57] Article 511: "A person guilty of: (1) intentional failure to leave inhabited house of another or another place like this in spite of the host's or his representative's request when the guilty person entered such a building or place secretly or without permission; (2) intentional stay in the inhabited house of another or another place like this at night without the host's or his representative's knowledge when the guilty person entered the building or the place secretly or without permission; shall be subject to a penalty of imprisonment for up to three months or a fine of up to 12,000 Polish marks."

[58] The offence carried a penalty of imprisonment or a fine of up to 20,000 Polish marks.

[59] Article 512, part 2: "If the intrusion takes place at night, the perpetrator shall be subject to a penalty of imprisonment for up to six months."

person but armed (Article 512 part 3). An attempt to commit offences determined in Article 512 was punishable (Article 512 part 4).[60]

The German criminal code of 1871, in §123 (contained in Chapter VII "Felonies and crimes against public order"), linked two forms of a criminal act (breaking into a house of another and not leaving it). In accordance with §123 part 1, criminalisation concerned illegal breaking into somebody else's apartment, company premises or fenced real estate, or locked public premises or public traffic facilities as well as failure to leave them by persons without authorisation to be in them when requested by an entitled person (carrying a penalty of a fine of 300 marks or imprisonment for up to three months). As W. Makowski wrote, the German criminal code "in relation to the two, takes into account a danger of committing other offences, which may be connected with this activity, and from that point of view, recognises an aggravated case when the trespass to the domestic peace is committed by an armed perpetrator or a few persons in cooperation (Article 123 para. 2)[61]". Prosecution of offences classified in §123 was initiated on a motion, which could be withdrawn (§123 part 4).

On the other hand, the Austrian criminal code of 1852 determined the trespass on the domestic peace as a case of public assault (in Chapter IX "On public assault"). Section 83 regulated the trespass on the domestic peace (*Hausfriedensbruch*) together with the trespass on the peace of the land (*Landfriedensbruch*).[62] As E. Krzymuski wrote, "The offences of the trespass on the peace of land are committed by those who in company of a few, thus more than two, other people (*mit gesammelten mehreren Leuten*) without permission, because with omission of superiority, by violent intrusion of the land of another, restrict a person's free possession of this land or the rights attached to it".[63] On the other hand, the trespass on the domestic peace occurred when "somebody because of any reason or in company of a few persons, or on his own but armed, invades somebody else's house or apartment and there commits an assault against residents or their property".[64] In accordance with §83, he should be subject to a penalty of increased-rigour imprisonment for a period of one to five years, and those "who agreed to be used as accomplices should be imprisoned for six months to one year".

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[60] For more on offences under Article 512 of Tagancev's code, compare W. Makowski, *Kodeks karny obowiązujący czasowo w Rzeczypospolitej Polskiej na ziemiach b. zaboru rosyjskiego*, Vol. 3, Warsaw 1922, pp. 178–181.

[61] W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austriackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warsaw 1924, pp. 317–318. Under §123 part 2 it is stipulated as follows: "If an act is committed by an armed person or a few persons together it shall result in a fine of up to 1,000 marks or imprisonment for up to one year".

[62] For more details, compare E. Krzymuski, *Wykład prawa karnego (ze stanowiska nauki i prawa austriackiego)*, Vol. 2, Kraków 1902, pp. 331–335. The provision of §83 stipulated as follows: "Whoever without authorisation and with a few other people in a violent attack violates peaceful possession of land and related rights of another person or whoever, even without accomplices, being armed intrudes somebody else's house or apartment, commits an assault on a host or residents, the property and objects either in order to take revenge for his alleged loss or in order to claim his rights, obtain a promise or evidence, or to satisfy hatred."

[63] E. Krzymuski, *Wykład…*, p. 332.

[64] *Ibid.*, p. 334.

The trespass on the domestic peace was placed in Chapter XXXVI ("Offences against liberty") of the Criminal Code of 1932. Apart from the trespass on the domestic peace (Article 252), the Chapter also listed four other prohibited acts: false imprisonment (Article 248), trafficking in slaves (Article 249), punishable threat (Article 250) and extortion (Article 251). In general, personal liberty of an individual used within the limits of the legal order established in society was recognised as the object of legal protection of the entire above-mentioned group of offences. It was stated that the liberty might be interpreted in two ways: (1) as physical liberty, freedom to move from place to place; and (2) as moral liberty, the freedom to dispose of one's property, the right to exercise one's rights or not and to undertake any type of activities.[65] However, in the above-mentioned cases, personal liberty may be an object of crime only when criminal conduct is targeted at it. Therefore, a man's free will (as an indication of liberty) makes use of protection only when it conforms to the legal order and concerns only those man's rights that he may freely dispose of.[66] In case of a link between the infringement of such a decision and other personal or financial rights, it was recognised that the classification should be based on that other special right. And thus, e.g. the infringement of the freedom to dispose of property was recognised as an assault against property, and the infringement of the freedom to decide on sexual life as an assault against sexual liberty.[67] Therefore, Chapter XXXVI of the Criminal Code of 1932 unambiguously covered only this group of assaults against a person's rights in case of which the physical or moral liberty constitutes the dominant right and cannot be recognised as supplementation (or a component) of another infringed private or public right. Thus, consistently, such offences as rape (Article 204), an indecent act with a person with mental disorder or under the age of 15 (Article 203), and an indecent act resulting from the abuse of the relationship of subjection (abuse of power and control) (Article 205) were not included in Chapter XXXVI. All these offences were placed in Chapter XXXII entitled "Indecency". In accordance with Article 252, whoever invades somebody else's house, apartment, premises, room, company, fenced real estate because it is a place of residence, or fenced and serving as a place of stay, or in spite of the request of an entitled person does not leave the place, is subject to a penalty of imprisonment for up to two years or a fine (prosecution was initiated based on a private charge).[68] In the legislative motives for the Criminal Code of 1932 we can read:

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[65] Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego, Projekt kodeksu karnego, Vol. 5, No. 4, Warsaw 1930, p. 193.

[66] *Ibid.*

[67] *Ibid.*

[68] As J. Makarewicz noticed, "An offence under Article 252 is a relic of the former trespass on the domestic peace (of a sacred nature: the infringement of the peace of someone under the care of gods): thanks to this origin, the former statute recognised this offence as an incident of the so-called public assault or a crime against public order, while in fact it is an offence against an individual's interests, i.e. against an individual's freedom to be in disposal of one's apartment (in accordance with the English castle principle: 'my home is my castle'). The Polish code, moving the centre of gravity in the field of individual's liberty, gives this offence a specific nature. What is going to be decisive is not the modus operandi of getting into an apartment of another but just the fact whether the entry to somebody else's apartment covers the infringement of the freedom of disposal of this apartment, which in these conditions is the right that is subject to violation."

"According to the bill, the intrusion of a house is an offence against personal rights, it is an infringement of an individual's liberty within a broad sense of the word, i.e. a breach of the right to exclusive and free use of the home. At the same time, the home should be interpreted not only as a citizen's apartment in the everyday meaning of the word, but also the area where a citizen works or which he, as a result of residence or work, can freely dispose of. (…) The method of acting was specified in Article 252 as a criminal act in two forms: invasion of or refusal to leave places listed in Article 252. The bill did not maintain any forms of acting or classification of circumstances such as intrusion at night, possession of firearms, commission of an act by a few persons collectively, use of threat, etc., of the binding legislation and did not adopt them from other statutes and projects. All these circumstances were partially linked with the former treatment of the trespass on the home as a form of public assault. In particular cases, e.g. in case of violence against a person or damage to objects preventing access etc., one can speak about concurrence of offences. If invasion of somebody else's premises is part of another criminal intent, e.g. theft or robbery etc., the liability for the invasion of a house will embrace the main act."[69]

4. POLISH PEOPLE'S REPUBLIC

Article 143 of the Criminal Code Bill of 1956 (placed in Chapter XVI "Offences against a citizen and his rights", and more precisely under its second title: "Offences against a man's liberty and dignity")[70] treated the trespass on the domestic peace in a rather concise way. The mentioned provision stipulated: "Whoever invades somebody else's apartment, premises or a fenced place is subject to a penalty of deprivation of liberty for up to one year or correctional work, or a fine of up to PLN 5,000".

J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1932, p. 350. Also compare the Supreme Court judgment of 15 April 1935, III K 196/35, OSN/K 1935, No. 12, item 500 ("In order to recognise a criminal act under Article 252 of the Criminal Code, it is not decisive what the modus operandi of getting to the apartment is but the fact whether it covers the concept of the infringement of the freedom of disposal of the apartment; thus, it is enough to recognise any methods of getting to an apartment without permission, even the deemed one, of an entitled person, i.e. by force, deception, under false pretences, opening the door with the use of a master key, etc.").

[69] Motives, Vol. V, No. 4, p. 202. For more on the offence under Article 252 of the Criminal Code of 1932, compare L. Peiper, *Komentarz do kodeksu karnego, prawa o wykroczeniach, przepisów wprowadzających obie te ustawy*, Kraków 1936, pp. 513–515; W. Makowski, *Kodeks karny. Komentarz*, Warsaw 1933, pp. 562–564.

[70] The whole Chapter XVI was composed of eight parts and had a total of 59 Articles. The second part of this Chapter ("Offences against liberty and dignity") includes the following offences: deprivation of liberty (Article 140), threat (Article 141), coercion (Article 142), trespass on the domestic peace (Article 143), rape and an indecent act with a mentally ill person (Article 144), an indecent act with the abuse of the relationship of subjection (Article 145), procuring, pimping and facilitating prostitution (Article 146), distribution of pornography (Article 147), infringement of bodily inviolability (Article 148), infringement of correspondence secrecy (Article 149), slander (Article 150), and insult (Article 151). Therefore, it is seen that the Bill of 1956 clearly departs from the uniform concept of the protection of liberty laid down in the Criminal Code of 1932 and mixes three areas: liberty, dignity and decency in this sub-chapter.

On the other hand, the Bill of 1963 determined the offence of the trespass on the domestic peace in a very casuistic way (placing it in Chapter XXIV "Offences against a man's liberty and dignity"),[71] in which invasion (classified in Article 261 §1)[72] was distinguished from refusal to leave (classified in Article 261 §4[73] constituting a type of lesser significance[74]), and moreover, a more aggravated type in relation to active trespass on the domestic peace was distinguished in case of a perpetrator's act committed at night, together with another person or with the use of weapons or other dangerous tools (Article 261 §2). Prosecution of the basic types (§1 and §3) was initiated based on private charges and the type of lesser significance (under §2) on the motion of the aggrieved. The Bill of 1966 classified the offence of the trespass on the domestic peace in Article 164 placed in Chapter XXII ("Offences against liberty and dignity")[75] stipulating as follows: "Whoever invades somebody else's house, apartment, premises or fenced real property connected with their use or serving as a place of stay, or does not leave them regardless of the entitled person's request, shall be subject to a penalty of imprisonment for up to two years, correctional work or a fine." Prosecution was initiated based on private charges (Article 164 §2). The successive Bill (of 1968) stipulated in Article 177 (placed in Chapter XXIII "Offen-

[71] This Chapter (XXIV) contains the following offences: deprivation of liberty (Article 258), threat (Article 259 – considerably extended in comparison with Article 250 of the Criminal Code of 1932), coercion (Article 260), trespass on the domestic peace (Article 261 – with five paragraphs added), infringement of the secrecy of correspondence (Article 262 – also with five paragraphs added), recording another person's speech on a tape or disc without the person's consent (Article 263), dissemination of another person's image without his/her consent (Article 264), disclosure of personal secrets (Article 265), performance of medical treatment without an entitled person's consent (Article 266), appropriation of somebody else's authorship (plagiarism) (Article 267), abuse of a post to the detriment of another person because of criticism the person expressed (Article 268), slander (with eight paragraphs added in two Articles 269 and 270), insult (Article 271), infringement of bodily inviolability (Article 272), sexual intercourse with a person under the age of 15 or a person mentally ill (Article 273), rape (Article 274), abuse of the relationship of subjection (Article 275), procuring, pimping and facilitating prostitution (Article 276), taking a person abroad in order to make her prostitute (Article 277), an aggravated type of offences laid down in Articles 276 and 277 (Article 278), indecent act in a public place (Article 279), and distribution of pornography (Article 280). What strikes in the Bill is its excessive casuistic approach and as far as offences against liberty are concerned, the Bill of 1963 also decidedly departs from the concept of the Criminal Code of 1932 and treats the concept of liberty too broadly and ambiguously.

[72] Whoever breaks into somebody else's building, apartment, premises or fenced area connected with their use or constituting the place of residence, or somebody else's means of transport, shall be subject to a penalty of deprivation of liberty for up to two years or a fine.

[73] Whoever, in spite of an entitled person's request, does not leave a place referred to in §1, shall be subject to a penalty of deprivation of liberty for up to one year or a fine.

[74] K. Daszkiewicz-Paluszyńska was critical about the idea to treat failure to leave a place as an aggravated type (Article 261 §4); K. Daszkiewicz-Paluszyńska, *Uwagi o przestępstwach przeciwko wolności i godności człowieka w projekcie k.k.*, Nowe Prawo No. 6, 1963, p. 669.

[75] The Chapter lists the following offences: deprivation of liberty (Article 161), threat (Article 162), coercion (Article 163), trespass on the domestic peace (Article 164), rape (Article 165), sexual intercourse with a mentally ill person (Article 166), abuse of the relationship of subjection (Article 167), homosexual prostitution (Article 168), procuring, pimping and facilitating prostitution (Article 169), distribution of pornography (Article 170), slander (Article 171), insult (Article 173), and infringement of bodily inviolability (Article 174).

ces against liberty")[76] liability of a person who invades somebody else's house, apartment, premises or fenced real estate connected with their use or serving as a place of stay, or does not leave them regardless of the entitled person's request. A perpetrator of such an act should be subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine (and prosecution was initiated based on private charges). Therefore, as it is seen, there were very insignificant changes in the treatment of the offence in comparison to the Bill of 1966: instead of the term "fenced real property" (*posiadłość*), the term "fenced real estate" (*nieruchomość*) was used (and instead of the sanction of correctional work, a penalty of limitation of liberty was introduced).[77] The provision (with slight modifications) became Article 171 of the Criminal Code of 1969 (placed in Chapter XXII "Offences against liberty")[78]. The change consisted only in the use of the phrase "fenced plot of land" instead of "fenced real estate". All the other features (as well as the sanction and the mode of prosecution) remained unchanged.[79] It was emphasised in the doctrine that Article 171 of the Criminal Code of 1969 broadly implemented the inviolability of the home guaranteed in Article 87 para. 2[80] of the Constitution of the Polish People's Republic of 1952 and that the formulation of the provision "indicates that the traditional term 'domestic peace' should be interpreted broadly; thus, the term 'the home' should cover not only residential premises but also those used for other purposes as well as plots of land, e.g. allotments".[81] It was also indicated that invasion should be interpreted as an unauthorised entry into places

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[76] The Chapter lists the following offences: deprivation of liberty (Article 171), threat (Article 172), coercion (Article 173), rape (Article 174), sexual intercourse with a mentally ill person (Article 175), abuse of the relationship of subjection (Article 176), trespass on the domestic peace (Article 177), and infringement of the secrecy of correspondence. A decision was taken not to include in the special part of the code: the provision on extradition of a person to another country (Article 248 §2 Criminal Code of 1932) and on slavery and trafficking in slaves (Article 249 Criminal Code of 1932), called the offences under conventions, which were placed in the provisions implementing the Criminal Code. In general, all the above-mentioned solutions were transferred to the Criminal Code of 1969 but the numbers of the provisions were changed; Chapter XXII "Offences against liberty" contained Articles 165–172.

[77] Very important changes were introduced to the construction (and the title) of the Chapter; instead of "Offences against liberty and dignity" (Bill of 1966), "Offences against liberty" appeared (Bill of 1968), which was an absolutely better solution (although the scope of offences listed in the Chapter raised doubts).

[78] The Chapter lists the same offences as in Chapter XXIII of the Bill of 1968. Only the numbers were changed.

[79] The final wording of this provision was as follows: "§1. Whoever invades somebody else's house, apartment, premises, fenced lot of land connected with their use or serving as a place of stay or regardless of an entitled person's request does not leave this place, shall be subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine. §2. Prosecution shall be initiated based on private charges."

[80] Article 87 para. 2: the statute protects inviolability of apartments and secrecy of correspondence. A house search is admissible only in cases determined by statute.

[81] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1977, p. 437. For more on the issue, compare T. Bojarski, *Karnoprawna ochrona*…, p. 62 ff; *idem*, *Zakres miejsc chronionych przy przestępstwie naruszenia miru domowego*, Annales UMCS, Sectio G, Vol. 10, 1970, pp. 247–272. It was controversial whether Article 171 of the Criminal Code of 1969 also took into account premises being in the disposal of state and social institutions. Compare M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks*…, p. 439.

listed in Article 171 of the Criminal Code of 1969 against the apparent or supposed will of a person entitled to dispose of them. At the same time, a perpetrator did not have to use violence or threat against a person (thus, a house could be entered deceitfully, secretly, through an open window, etc.).[82] In case of failure to leave a house or another place regardless of an entitled person's request, a perpetrator, even the one who entered the house legally, was subject to a penalty. The offence of the trespass to the domestic peace was recognised the moment a perpetrator invaded or refused to leave a place, although he was requested to do that; the latter form lasted until a perpetrator left the place.[83] It was indicated in literature that a person entitled to request that a perpetrator leave the place listed in the analysed provision was not only an owner (lessee, tenant) but also a person (family member, domestic servant, employee, caretaker, etc.) who substituted for an owner (lessee, tenant) at the time.[84] The offence under Article 171 of the Criminal Code of 1969 was a common intentional crime, and the intent was only direct.[85]

It should be emphasised that in the project to amend the Criminal Code (developed by the Committee for amending criminal law) of August 1981, it was planned to add the following phrase at the end of Article 171 §2: "when the act concerns premises owned by a state or social institution – *ex officio*".[86] This idea unambiguously indicates that, in the opinion of the Committee, there were no doubts that the trespass on the domestic peace could not be limited to private premises. On the other hand, in the so-called social project it was only planned to change the sanction under Article 171 §1 of the Criminal Code (it was to be only a penalty of limitation of liberty or a fine).[87]

5. PRESENT TIMES

In accordance with the Criminal Code Bill prepared by the Committee for criminal law reform (the version of 5 March 1990),[88] the wording of Article 180 §1 (placed in Chapter XXIII "Offences against liberty"[89]) was as follows: "Whoever invades

[82] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks…*, p. 438; O. Chybiński, [in:] O. Chybiński, W. Gutekunst, W. Świda, *Prawo karne, część szczególna*, Wrocław–Warsaw 1975, p. 173; I. Andrejew, *Polskie prawo karne w zarysie*, Warsaw 1971, p. 349.

[83] M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks…*, p. 438.

[84] *Ibid*.

[85] O. Chybiński, [in:] O. Chybiński, W. Gutekunst, W. Świda, *Prawo karne…*, p. 175.

[86] *Projekt zmian przepisów kodeksu karnego*, Wydawnictwo Prawnicze, Warsaw August 1981, p. 22.

[87] *Wstępny społeczny projekt nowelizacji ustawy z dnia 19 kwietnia 1969 r. Kodeks karny. Opracowanie Komisji Kodyfikacyjnej powołanej przez I Ogólnopolskie Forum Pracowników Wymiaru Sprawiedliwości NSZZ "Solidarność"*, Kraków January–May 1981, *Obywatelskie inicjatywy ustawodawcze Solidarności 1980–1990*, Wydawnictwo Sejmowe, Warsaw 2001, p. 197.

[88] Komisja do spraw reformy prawa karnego, Zespół prawa karnego materialnego i wojskowego, *Projekt kodeksu karnego (przeznaczony do dyskusji środowiskowej), redakcja z 5 marca 1990 r.*, Warsaw 1990, pp. 60–61.

[89] The Chapter lists the following offences: unlawful deprivation of liberty (false imprisonment) (Article 177), threat (Article 178), coercion (Article 179), trespass to the domestic

somebody else's house, apartment, premises or fenced area, or regardless of an entitled person's request does not leave the place is subject to a penalty of a fine, limitation of liberty or deprivation of liberty for a period of up to one year." An attempt to commit the offence was punishable[90] (Article 180 §2), and prosecution was initiated based on private charges, and in case of premises of an institution or public authorities, prosecution was initiated based on a motion of the aggrieved party (under Article 180 §3).

Article 193[91] of the currently binding Criminal Code of 1997 (placed in Chapter XXIII "Offences against liberty")[92] has the same wording as Article 180 of the Bill of 5 March 1990. On the other hand, in relation to Article 171 of the formerly binding Criminal Code of 1969, the only difference concerns "fenced plot of land connected with their use or serving as a place of stay". Instead of that phrase, there is a feature: "fenced area". The maximum sanction was lowered (to one year of deprivation of liberty) and the sequence of penalties laid down in the provision (from the most lenient to the most severe, i.e. a fine, limitation of liberty and deprivation of liberty for up to one year);[93] the mode of prosecution

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peace (Article 180), infringement of the secrecy of correspondence and telephone tapping (Article 181).

[90] In accordance with Article 13 §1 of the Criminal Code Bill, an attempt to commit an offence carrying a penalty not exceeding two years of deprivation of liberty or more lenient was to be punished only when the statute stipulated that. A penalty imposed for an attempt could not exceed two-thirds of the maximum penalty for the act commission (Article 13 §2).

[91] "Whoever invades somebody else's house, apartment, premises or fenced area or regardless of an entitled person's request does not leave the place shall be subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to one year."

[92] Originally the Chapter listed five types of offences: unlawful deprivation of liberty (Article 189), threat (Article 190), coercion (Article 191), medical treatment without a patient's consent (Article 192), and trespass on the domestic peace (Article 193). As a result of the changes, successive types of offences were introduced: (1) recording of an image of a naked person or a person involved in a sexual intercourse or distribution of such content (Article 191a) – based on the Act of 5 November 2009 amending the Act: Criminal Code, the Act: Criminal Procedure Code, the Act: Penalty Execution Code, the Act: Fiscal Penal Code and some other acts (Journal of Laws [Dz.U.] No. 206, item 1589, as amended); (2) trafficking in humans (Article 189a) – the Act of 20 May 2010 amending the Act: Criminal Code, the Act on the Police, the Act: Provisions implementing the Criminal Code and the Act: Criminal Procedure Code (Journal of Laws [Dz.U.] No. 98, item 626); (3) persistent stalking and impersonation (Article 190a) – the Act of 25 February 2011 amending the Act: Criminal Code (Journal of Laws [Dz.U.] No. 72, item 381). The Act of 10 September 2015 amending the Act: Criminal Code, the Act: Construction law and the Act: Misdemeanour Procedure Code (Journal of Laws [Dz.U.] of 2015, item 1549) added §1a to Article 191 (criminalising the so-called indirect violence) and it was decided to prosecute the offences based on a motion filed by the aggrieved (Article 191 §3). There were also two amendments to the provisions of Article 189, in accordance with the Act of 17 December 2009 amending the Act: Criminal Code and the Act: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2010, No. 7, item 46, which amended the wording of §2, and in accordance with the Act of 23 March 2017 amending the Act: Criminal Code, the Act on the procedure concerning juveniles and the Act: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2017, item 773, which added §2a (in case deprivation of liberty referred to in §2 concerning a person who is helpless due to their age, psychical or physical condition, a perpetrator shall be subject to a penalty of deprivation of liberty for a period of two to twelve years).

[93] It results from the new philosophy of the Criminal Code of 1997, in accordance with which the catalogue of penalties is organised pursuant to an abstract concept of hardship: from

also changed (it is an offence prosecuted *ex officio*). It is emphasized in the doctrine that public prosecution mode in case of the trespass on the domestic peace is not justified.[94] It can be deemed that the change of the mode of prosecution resulted in sudden increase in the number of offences under Article 193 of the present Criminal Code (e.g. in 1995, thus still pursuant to the Criminal Code of 1969, there were 184 cases of the trespass on the domestic peace, in 1999 there were 2,004 cases and in 2016 – 2,431 ones reported).[95] At the time when it was necessary to demonstrate a certain amount of activity (development of a private indictment and payment of a lump sum), the will to activate the apparatus of justice definitely weakened. At present, when it is enough to report the commission of an offence, the number of people willing to take such steps is much bigger.[96] Of course, inviolability of the home is recognized as a personal right in Article 23 Civil Code and guaranteed in Article 50 of the Constitution ("The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute")[97]. It is also worth reminding that the projects to change the Criminal Code of 1997 envisaged introduction of an aggravated type of the trespass on the domestic peace because of a perpetrator's modus operandi consisting in the use of violence or a threat of using violence.[98]

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the most lenient to the most severe; this organisation, together with the principles determined in Articles 3 and 53–59, is to indicate the statutory priorities a judge should take into account when choosing the type of punishment. I. Fredrich-Michalska, B. Stachurska-Marcińczak (eds), *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warsaw 1997, p. 137.

[94] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część szczególna. Komentarz*, Vol. 2: *Komentarz do art. 117–211a*, Warsaw 2017, p. 628.

[95] M. Mozgawa, [in:] J. Warylewski (ed.), *System Prawa Karnego. Przestępstwa przeciwko dobrom indywidualnym*, Vol. 10, Warsaw 2016, p. 569, http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-4/63488,Naruszenie-miru-domowego-art-193.html (accessed on 20/01/2018).

[96] Compare M. Mozgawa, [in:] J. Warylewski (ed.), *System*…, p. 587.

[97] Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warsaw 2015, p. 165. According to P. Sarnecki, "Inviolability" of the home, which can be described as undisturbed use of one's home (called domestic peace), is also an individual's classical liberty (of a personal nature), serving (in particular) his/her psychical integrity and being clearly connected with his/her declared dignity. It is also clearly connected with the right to privacy and may be treated as one of its indicators. On the other hand, the "violation of the home", within the constitutional meaning, is recognised not in case of conducting technical construction work that can result in "violation" (damage or even destruction) of the home but only in case of entry without permission of the people living there or failure to leave on residents' request. Thus, the "inviolability of the home" cannot be interpreted as only a ban on "searching" (without sufficient grounds) but also as a ban on any unwarranted entry and stay in it. Thus, not only a "search" may take place "exclusively in cases laid down in statute and in the way determined in it" but also other types of entry into other people's homes require that, in particular in case of public officials or employees of public services. It does not negate the recognition of a "search" as the most painful violation of the ban on entering the "area" of the home. P. Sarnecki, [in:] L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 2, 2nd edn, LEX el, commentary on Art. 50, thesis 3, https://sip.lex.pl/#/commentary/587744260/541700/garlicki-leszek-red-zubik-marek-red-konstytucja-rzeczypospolitej-polskiej-komentarz-tom-ii-wyd-ii?cm=URELATIONS (accessed on 20/01/2018).

[98] Compare the Bill amending the Act: Criminal Code and some other acts (undated – M.M., A.W.), https://bip.kprm.gov.pl/ftp/kprm/dokumenty/070523u2.pdf (accessed on 20/01/2018). Article 193 of the Bill has the following wording: "§1. Whoever invades somebody else's house,

Due to the fact that the topic of the Article is the historic aspect of the trespass on the domestic peace (and taking into account its frame), the below-presented analysis of the statutory features of Article 193 of the Criminal Code of 1997 (henceforth also CC) will be limited to a necessary minimum. As far as the special object of protection is concerned, it is undoubtedly liberty (which is confirmed by the placement of the provision in Chapter XXIII "Offences against liberty"). However, the doctrine treats the individual object of protection in a varied way. For instance, according to A. Zoll, the provision protects an individual's liberty against breaches of his right to decide who can stay in places of which he is a holder;[99] in R.A. Stefański's opinion, it concerns an individual's freedom from any disturbances to exclusive use of real estate specified in the provision; and according to A. Marek, it is a man's right to peaceful living, free from unwanted people's interference (and this protection is also extended on the use of commercial premises remaining in a given person's disposal permanently or temporarily)[100].

The offence of the trespass on the domestic peace may be committed by both action (invasion)[101] and omission (failure to leave the place regardless of an entitled person's request)[102]. Due to the alternative description of the features of the subject-related aspect of the offence under Article 193 CC, the implementation of both alternatives by a perpetrator (i.e. first invasion and then failure to leave a given place regardless of an entitled person's request) constitutes one offence; according to A. Zoll, a court should take this "surplus of illegal action" into account when imposing a penalty.[103]

Analysing the feature of "an entitled person's request", one should state that "request" means a definite and clear expression of an entitled person's will aimed at making a given person leave his house, apartment, premises or fenced area.[104] As a rule, a person who is present at the place should make a request; however, it is possible to express this request on the phone, by post or email, or a messenger.[105] Staying in a place becomes illegal the moment a request reaches an addressee.[106]

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apartment, premises, quarters, fenced area or vehicle or regardless of an entitled person's request does not leave such a place shall be subject to a penalty of deprivation of liberty for up to three years. § 2. If the perpetrator of an offence referred to in §1 uses violence towards a person or threatens to use it, he shall be subject to a penalty of deprivation of liberty for a period of one to ten years. §3. Prosecution of the offence referred to in §1 shall be initiated on a motion filed by the aggrieved." Also compare J. Wojciechowska, [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Komentarz*, Warsaw 2001, p. 70.

[99] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks…*, p. 622.

[100] A. Marek, *Kodeks karny. Komentarz*, Warsaw 2010, p. 443.

[101] For more on the topic of invasion, compare the Supreme Court judgment of 14 August 2001, V KKN 338/98, LEX No. 52067.

[102] For more on the verbal noun features of the analysed offence, compare T. Bojarski, *Pojęcie "wdarcia się" i "nieopuszczenia" przy przestępstwie naruszenia miru domowego*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 4, 1971, p. 35 ff.

[103] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks…*, p. 625.

[104] J. Wojciechowska, [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa…*, p. 67.

[105] M. Mozgawa, [in:] J. Warylewski (ed.), *System…*, p. 574.

[106] T. Bojarski, *Naruszenie miru domowego*, [in:] *System prawa karnego*, Vol. 4: *O przestępstwach w szczególności*, Part 2, Ossolineum 1989, p. 63.

Failure to leave somebody's house, apartment, etc. (regardless of an entitled person's request) is always an offence committed (an attempt is not possible). The trespass on the domestic peace (both invasion and failure to leave) is a permanent offence. It can be deemed that the period of illegal state maintenance should influence the imposition of a penalty for the offence under Article 193 CC.

An "entitled person" within the meaning of Article 193 CC is first of all the one who, based on the provisions of the law, has the right to dispose of the given place in the manner which causes that for other people who do not have such a legal title this place is somebody else's.[107] It may be deemed, however, that an entitled person may also be one at whose disposal the place is although he/she has no legal title to it (e.g. a real estate holder). Therefore, it should be stated that in the context of Article 193 CC the scope of entitled persons seems to be quite broad; obviously, first of all, it is the owner but also a lessee, a tenant or a holder (even without a legal title).[108] In some cases, an entitled person may also be a person authorised by the originally entitled person, also in the field of taking decisions who and when can stay in the given place (e.g. a doorkeeper, a watchman, a guard, an authorised neighbour, a relative temporarily taking care of an apartment in the owner's absence, etc.).[109] It may happen that a few people will have the status of an entitled person (e.g. in case of spouses' co-ownership or other types of co-ownership), and in such situations there may be a conflict of rights.[110]

The provision of Article 193 CC lists the following objects of an executive action: a house, an apartment, premises, and a fenced area (and definitions of those terms raise a series of interpretational doubts).[111] One can exercise the right of self-defence against a perpetrator of the trespass on the domestic peace in the

[107] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks*…, p. 626. Also compare the Supreme Court judgment of 3 February 2016, III KK 347/15, LEX No. 1976247 ("The legal relation of a perpetrator to an object that he/she is to occupy or does not want to leave is one of the essential elements of an offence under Article 193 CC. It is to constitute 'somebody else's' property for the perpetrator. The features of the offence of the trespass on the domestic peace can only be implemented by a person who does not have, based on the binding provisions or a contract entered into by the parties, the right to enter the object that is formally 'somebody else's' property"). Also compare M. Kućka, *Znamię "cudzy" i próba określenia normy sankcjonowanej: perspektywa prawa cywilnego (Głos do artykułu P. Dyluś i K. Wiśniewskiej)*, Czasopismo Prawa Karnego i Nauk Penalnych, Year XV, No. 3, 2011, pp. 33–35.

[108] Compare the Supreme Court ruling of 3 February 2011, V KK 415/10, OSNKW 2011, No. 5, item 42.

[109] A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks*…, p. 626; M. Mozgawa, [in:] J. Warylewski (ed.), *System*…, p. 575.

[110] For more details on the issue, compare M. Mozgawa, [in:] J. Warylewski (ed.), *System*…, pp. 575–576; A. Langowska, *Wielość osób uprawnionych na gruncie art. 193 k.k. – wybrane problemy*, e-Czasopismo Prawa Karnego i Nauk Penalnych No. 3, 2013, http://www.czpk.pl/index.php/preprinty/157-wielosc-osob-uprawnionych-na-gruncie-art-193-k-k-wybrane-problemy (accessed on 20/01/2018).

[111] Compare more closely, R.A. Stefański, *Prawnokarna ochrona miru domowego*, [in:] M. Mozgawa (ed.), *Prawnokarne aspekty wolności*, Kraków 2006, pp. 169–172; M. Mozgawa, [in:] J. Warylewski (ed.), *System*…, pp. 576–578.

form of action (invasion) as well as omission (failure to leave in spite of an entitled person's request).[112]

The doubts raised in the doctrine concern the question whether the legal protection under Article 193 CC covers only private or also public premises.[113] It should be highlighted that the Supreme Court in its resolution (of seven judges) of 13 March 1990 (V KZP 33/89),[114] in our opinion rightly, stated that the aggrieved party could include a legal person and a state or social institution even with no legal personality. In accordance with the binding Criminal Code, there is an additional argument for the protection of premises belonging to state or social institutions under Article 193. It is the fact that the offence is subject to public prosecution.[115]

It is a substantive offence (in both forms: invasion and failure to leave the given place), which results in the trespass on the domestic peace, not violated so far, causing a new situation constituting a change in the external world.[116] The offence of the trespass on the domestic peace is common in nature and can only be committed intentionally with a direct intent. A perpetrator must be aware of the fact that he enters a place without legal grounds and without the permission of a person entitled to a place indicated in the provision, or that he stays in the place regardless of an entitled person's request.[117] It is rightly indicated in case law that also an owner (of a house, an apartment, premises or a fenced area) may be a perpetrator of the trespass on the domestic peace.[118]

The offence of the trespass on the domestic peace is not committed in case somebody else's house, apartment, premises or fenced area is entered by a body of

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[112] T. Bojarski, *Karnoprawna ochrona…*, p. 153 ff. Also compare the Supreme Court ruling of 15 April 2015, IV KK 409/14, OSNKW 2015, No. 9, item 78.

[113] For more details on the issue, compare M. Królikowski, A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz do art. 117–221*, Warsaw 2017, pp. 631–632; M. Mozgawa, [in:] J. Warylewski (ed.), *System…*, p. 579.

[114] OSNKW 1990, No. 7–12, item 23.

[115] M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1193.

[116] Thus, inter alia, T. Bojarski, *Karnoprawna ochrona…*, p. 116; J. Wojciechowska, [in:] B. Kunicka--Michalska, J. Wojciechowska, *Przestępstwa…*, p. 68; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 594. Other authors who are for the formal character of the offence are, inter alia, O. Chybiński, [in:] O. Chybiński, W. Gutekunst, W. Świda, *Prawo karne…*, p. 174; M. Królikowski, A. Sakowicz (eds), *Kodeks karny…*, p. 634.

[117] M. Mozgawa (ed.), *Kodeks karny…*, p. 594.

[118] Compare, inter alia, the Supreme Court judgment of 7 May 2013, III KK 388/12, LEX No. 1319262: "The features of the offence referred to in Article 193 CC may be implemented only by a perpetrator who has no right, in accordance with the binding provisions or the existing relations or contracts between the parties, to enter an object that is formally 'somebody else's' property, and a person who obtains access to such an object in accordance with the binding law or as a result of civil law agreements becomes an entitled person within the meaning of Article 193 CC – also in relation to the owner of the object with limitations pursuant to civil law"; the Supreme Court ruling of 21 July 2011, I KZP 5/11, OSNKW 2011, No. 8, item 65 ("The owner of a house, apartment, premises, quarters or a fenced area may also be a perpetrator of the offence of the trespass on the domestic peace referred to in Article 193"). Also compare, inter alia, P. Dyluś, K. Wiśniewska, *Właściciel jako podmiot czynności sprawczej przestępstwa z art. 193 k.k.*, Czasopismo Prawa Karnego i Nauk Penalnych, Year XV, No. 3, 2011, pp. 17–31; M. Pająk, *Mir domowy czy właścicielski*, Czasopismo Prawa Karnego i Nauk Penalnych, Year XV, No. 3, 2011, pp. 5–15.

public authorities in situations laid down in the provisions of the law (e.g. search of premises and other places: Article 219 of the Criminal Procedure Code, Article 15 para. 1(4) of the Act of 6 April 1990 on the Police[119]; Article 23 para. 1(4) of the Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency[120]; Article 39 para. 2 of the Act of 13 October 1995: Hunting law[121]; Article 47 para. 2(4) of the Act of 28 September 1991 on forests[122]; Article 64 para. 1(6), Article 77 of the Act of 16 November 2016 on the National Revenue Administration[123]).[124] It is also necessary to remember that pursuant to the Civil Code, an owner of land may enter the neighbouring land in order to remove his tree branches or fruit hanging over it (Article 149 Civil Code), and an owner of a bee swarm chasing it on somebody else's land (Article 182 §1 Civil Code).

Analysing the solutions adopted in the Polish criminal codes (of 1932, 1969 and 1997), one should state that they are similar, which confirms that the idea of the Criminal Code of 1932 was right and stood the test of time. In each of them, the offence of the trespass on the domestic peace was placed in a chapter dealing with offences against liberty (Chapter XXXVI of the Criminal Code of 1932, Chapter XXII of the Criminal Code of 1969, Chapter XXIII of the Criminal Code of 1997). In all the three codes, the crime features were expressed in the same way (invasion or failure to leave a place regardless of an entitled person's request). The object of the executive action was formulated in a little different way: in the Criminal Code of 1932 – somebody else's apartment, premises, company, real property fenced in connection with living there or fenced and serving as a place of stay; in the Criminal Code of 1969 – somebody else's house, apartment, premises or fenced plot of land connected with their use or serving as a place of stay; in the Criminal Code of 1997 – somebody else's house, apartment, premises or fenced area. In comparison with the formerly binding codes, the sanction for the offence was made considerably more lenient in the Criminal Code of 1997. At present, it is a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year; and the Criminal Codes of 1932 and of 1969 stipulated a penalty of deprivation of liberty for up to two years.[125] Under the said codes, the offence of the trespass on the domestic peace was prosecuted based on private charges and under the presently binding code – *ex officio*. It can be deemed that the present approach to the analysed offence is in general right. However, in order to definitely eliminate doubts whether the protection of the domestic peace covers only private premises

[119] Journal of Laws [Dz.U.] of 2017, item 2067, consolidated text.

[120] Journal of Laws [Dz.U.] of 2017, item 1920, consolidated text.

[121] Journal of Laws [Dz.U.] of 2017, item 1295, consolidated text.

[122] Journal of Laws [Dz.U.] of 2017, item 788, consolidated text.

[123] Journal of Laws [Dz.U.] of 2016, item 1947.

[124] Also compare comments by S. Hoc, *Czy potrzebny jest kontratyp naruszenia miru domowego*, [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011, pp. 123–132.

[125] Precisely speaking, the Criminal Code of 1932 laid down a penalty of imprisonment (or a fine) for the infringement of the domestic peace and the Criminal Code of 1969 – a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine.

or also public ones, it is necessary to solve the problem unambiguously. It seems that it can be achieved by the implementation of the proposal of the Committee for criminal law reform (in the version of 5 March 1990), and concerning the mode of prosecution. It appears justified to adapt an idea of initiating the prosecution of this offence based on private charges, and in case an act concerns promises of public authorities or an institution, prosecution should be initiated on a motion of the aggrieved party. Such an idea, first of all, would eliminate the existing doubts concerning the scope of the provision; secondly, as it seems, it might considerably decrease the number of reported offences under Article 193 CC. On the other hand, the proposal concerning the introduction of an aggravated type of the offence because of a perpetrator's use of violence or a threat of using it should be considered carefully.[126] Over the last 85 years, this aggravated type has not existed in our legal system and, nevertheless, the law enforcement bodies have managed to deal with the problem within the basic type. The currently binding Criminal Code is very casuistic, thus it is not necessary to increase this casuistry. *De lege lata* when a perpetrator commits the trespass on the domestic peace with the use of violence or illegal threat, it should be reflected in the application of cumulative classification (Article 193 in conjunction with Article 191 §1 in conjunction with Article 11 §2 CC) and the imposition of a penalty.

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[126] Compare J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 1158.

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CRIMINAL-LAW PROTECTION OF DOMESTIC PEACE IN THE TERRITORY OF POLAND

Summary

The trespass on the domestic peace has been a prohibited act in the Polish state (or in the territories that were originally Polish) for over a thousand years (from the Middle Ages till now). During that long period, one can observe various modifications to the definition of the offence. It seems that invasion or intrusion is the main concept. In some periods, the invasion of land and the intrusion of an apartment, a church, a school, a fenced square, a cemetery, a cultivated field, etc. were penalised following the same rules. Gradual but consistent mitigation of penalties: from death penalty in old times through imprisonment (deprivation of liberty) to an alternatively determined (and relatively lenient) sanction under the currently binding Criminal Code of 1997 (a fine, limitation of liberty or deprivation of liberty for up to one year) should be recognised as a regularity. What is worth mentioning is a very similar approach to the trespass on the domestic peace in the Polish Criminal Codes of 1932, 1969 and 1997 (the features of the act were formulated in the same way: invasion or failure to leave, regardless of an entitled person's request, but the objects of the executive action were specified differently).

Keywords: domestic peace, intrusion, invasion, failure to leave, house, apartment, premises, fenced area, entitled person's request

PRAWNOKARNA OCHRONA MIRU DOMOWEGO NA ZIEMIACH POLSKICH

Streszczenie

Naruszenie miru domowego było czynem zabronionym w państwie polskim (bądź na ziemiach polskich) przez ponad tysiąc lat (od średniowiecza po dzień dzisiejszy). W ciągu tego długiego okresu można zaobserwować różne modyfikacje definicji tego przestępstwa. Wydaje się, że podstawowe pojęcie to bezprawny napad lub najście na czyjś dom. W różnych okresach na takich samych zasadach penalizowano także najazdy na dobra ziemskie, wtargnięcie do mieszkania, kościoła, szkoły, na ogrodzony plac, na cmentarz, na uprawiane pole i inne. Za prawidłowość można uznać stopniowe, ale konsekwentne łagodzenie zagrożenia wymiarem kary: od kary śmierci w dawnej Polsce, poprzez karę więzienia (pozbawienia wolności), do alternatywnie określonej (i stosunkowo łagodnej) sankcji na gruncie obowiązującego k.k. z 1997 r. (grzywna, kara ograniczenia wolności albo pozbawienia wolności do roku). Na uwagę zasługuje bardzo zbliżone ujęcie przestępstwa naruszenia miru domowego w polskich kodeksach karnych z lat 1932, 1969 i 1997 (tak samo ujęte zostały znamiona czasownikowe: wdzieranie się albo wbrew żądaniu osoby uprawnionej nieopuszczenie danego miejsca, zaś w nieco zróżnicowany sposób ujmowano przedmioty czynności wykonawczej).

Słowa kluczowe: mir domowy, najście, wdzieranie się, nieopuszczenie, dom, mieszkanie, lokal, ogrodzony teren, żądanie osoby uprawnionej

TUTELA DE INVIOLABILIDAD DE DOMICILIO EN EL TERRITORIO POLACO

Resumen

La infracción de inviolabilidad de domicilio es un hecho típico en el estado polaco (o en el territorio polaco) durante más de mil años (desde la edad media hasta hoy). Durante este largo periodo se podía observar varias modificaciones de la definición de este delito. Parece que el concepto básico consiste en ataque o invasión antijurídica de vivienda de alguien. En diferentes períodos se criminalizaba de la misma forma también invasión a terrenos, allanamiento de vivienda, iglesia, escuela, plaza vallada, campo con cultivos, etc. Parece correcto que paulatinamente con el trascurso del tiempo la pena por este delito se iba disminuyendo: desde la pena de muerte en Polonia antigua, a través de la pena de prisión (privación de libertad) hasta llegar a la sanción alternativa (y relativamente leve) vigente en el código penal de 1997 (multa, pena de restricción de libertad o privación de libertad de hasta un año). El delito de allanamiento de morada fue regulado de manera muy similar en los códigos penales polacos de 1932, 1969 y 1997 (los mismos verbos: invadir o no abandonar un lugar determinado previo requerimiento de la persona autorizada, sin embargo de una manera diferente denominaban sujeto pasivo de delito).

Palabras claves: inviolabilidad de domicilio, invasión, allanamiento, no abandonar, casa, piso, local, terreno vallado, requerimiento de persona autorizada

УГОЛОВНО-ПРАВОВАЯ ЗАЩИТА НЕПРИКОСНОВЕННОСТИ ЖИЛИЩА НА ПОЛЬСКИХ ЗЕМЛЯХ

Резюме

Нарушение неприкосновенности жилища в польском государстве (либо в польских регионах) было запрещённым деянием на протяжении более чем тысячи лет (от средневековья до наших дней). В течение этого длительного периода времени можно было наблюдать различные модификации дефиниции упомянутого выше преступления. Основное толкование понятия основано на ассоциациях с беззаконным нападением либо вторжением в чьё-либо жилище. В разные периоды на тех же принципах подвергались судебному преследованию вторжения на земельные участки, в квартиры, костёлы, школы, на огороженные площадки, на кладбища, посевные поля и т. д. Закономерным можно считать постепенное, но последовательное смягчение степени наказания: от смертного приговора в польском государстве древнейшей поры, через тюремное заключение (наказание в виде лишения свободы), до альтернативных (относительно мягких) санкций на основании действующего УК от 1997 года (штраф, наказание в виде ограничения свободы или лишения свободы до одного года). Внимания заслуживает достаточно схожая трактовка преступления, квалифицируемого как нарушение неприкосновенности жилища, в польских версиях УК от 1932, 1969 і 1997 гг. (подобной трактовке подверглись такие признаки состава преступления, как вторжение либо – вопреки требованию уполномоченного лица – отказ освободить ту или иную площадь или место; и в то же время более или менее дифференцированным образом были интерпретированы действия в рамках исполнительного производства).

Ключевые слова: неприкосновенность жилища, нашествие, вторжение, нападение, отказ освободить, дом, квартира, помещение, огороженная территория, требование уполномоченного лица

STRAFRECHTLICHER HAUSFRIEDENSSCHUTZ AUF POLNISCHEM LANDESGEBIET

Zusammenfassung

Der Hausfriedensbruch war ein unerlaubtes Delikt im polnischen Recht (oder auf polnischem Landesgebiet) für über eintausend Jahre (vom Mittelalter her bis zu heutigem Tage). In dieser langen Periode konnte man verschiedene Modifikationen dieser Deliktdefinition beobachten. Es scheint, dass der Hauptbegriff einen rechtswidrigen Überfall oder eine Heimsuche auf/ in jemanden Haus darstellt. Man pönalisierte auf denselben Regeln auch Landgutüberfälle, Haus-, Kirchen-, Schulen-, abgezäunter Platz-, Friedhof-, Anbaufeldeingriff u.a. Als Gesetzmäßigkeit kann man eine schrittweise, jedoch konsequente Milderung der Strafenausmaßbedrohung: von der Todesstrafe in Alt Polen, über Gefängnisstrafe (Freiheitsstrafe), bis zur alternativ bestimmten (und verhältnismäßig milden) Sanktion auf Grund des geltenden SGB von 1997 (Buße, Freiheitseinschränkung oder Freiheitsstrafe) bis zu einem Jahr. Bemerkenswert ist eine sehr ähnliche Auffassung des Hausfriedensbruches im polnischen SBG von 1932, 1969 und 1987 (es wurden genauso die verbalen Straftatbestände – „eingreifen" oder wider der Aufforderung der befugten Person „nicht verlassen" eines Platzes benannt, dennoch wurden die Gegenstände einer Rechtstätigkeit in einer ziemlich unterschiedlichen Weise erfasst).

Schlüsselwörter: Hausfrieden, Eingriff, Heimsuche, Nichtverlassen, Haus, Wohnung, Lokal, abgezäuntes Gebiet, Aufforderung einer befugten Person

PROTECTION JURIDIQUE ET PÉNALE DU DOMICILE EN POLOGNE

Résumé

La violation du domicile était un acte interdit dans un État polonais (ou sur des terres polonaises) pendant plus de mille ans (du Moyen Âge à nos jours). Pendant cette longue période, diverses modifications peuvent être observées dans la définition de cet infraction. Il semble que le concept de base soit une une agression ou violation du domicile d'autrui sans son autorisation. À différentes époques, les perquisitions de biens-fonds, l'intrusion dans l'appartement, l'église, l'école, une cour clôturée, un cimetière, un champ cultivé, etc., étaient également sanctionnées dans les mêmes conditions. L'atténuation progressive mais cohérente de la menace de punition peut être considérée comme une régularité : de la peine de mort dans l'ancienne Pologne, en passant par la peine d'emprisonnement (privation de liberté), à une sanction alternative (et relativement légère) déterminée sur la base du code pénale applicable de 1997 (amende, restriction de liberté ou peine d'emprisonnement pouvant aller jusqu'à un an). Il convient de noter une approche très similaire à l'infraction de la violation du domicile dans les codes pénaux polonais de 1932, 1969 et 1997 (les signes verbaux étaient traités de la même manière - soit pénétrer dans le domicile d'autrui ou ne pas quitter l'endroit contre la demande de la personne autorisée, alors que les objets de l'activité exécutive étaient exprimé d'une manière légèrement différente).

Mots-clés: domicile, intrusion, pénétration par force, ne pas quitter le terrain d'autrui, maison, appartement, locaux, terrain clôturé, demande de la personne autorisée

TUTELA PENALE CONTRO LA VIOLAZIONE DI DOMICILIO NEI TERRITORI POLACCHI

Sintesi

La violazione di domicilio era un atto proibito nello stato polacco (o sulle terre polacche) per oltre mille anni (dal Medioevo ai giorni nostri). Durante questo lungo periodo si possono osservare varie modifiche della definizione di questo reato. Sembra che il concetto di base sia un'aggressione illegale o un'invasione all'abitazione altrui. In epoche diverse, secondo gli stessi principi, sono state penalizzate anche le invasioni in proprietà terriere, le invasioni in appartamenti, chiese, scuole, piazze recintate, cimiteri, campi coltivati, ecc. Per la regolarità si può considerare un graduale, ma coerente alleggerimento della minaccia della pena: dalla pena di morte nell'ex Polonia, attraverso la pena detentiva (reclusione), fino alla sanzione stabilita alternativamente (e relativamente lieve) sulla base del codice penale in vigore dal 1997 (multa, pena di restrizione della libertà o detentiva fino a un anno). Vale la pena di notare che il reato di violazione di domicilio nel codice penale polacco del 1932, del 1969 e del 1997 è trattato in modo molto simile (i componenti vervali del reato sono stati resi allo stesso modo – l'intrusione oppure l'occupazione in un determinato luogo contro la richiesta di una persona autorizzata, mentre gli oggetti dell'attività esecutiva sono trattati in modo leggermente differenziato).

Parole chiave: tutela di domicilio, invasione, intrusione, occupazione, casa, appartamento, locale, area recintata, richiesta di persona autorizzata

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CUMULATIVE LEGAL CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN CRIMINAL LAW

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1. INTRODUCTION

The issue of concurrence of regulations and its consequences is often subject of study, especially in the doctrine of criminal law. A few monographs and many scientific articles have been devoted to the issue.[1] However, what is most often focused on is the essence of concurrence of regulations, its types and consequences for the grounds for sentencing and the type of penalty. The influence of a perpetrator's age on the cumulative legal classification and the relationship between the mode of prosecution of offences described in concurring provisions and the multiplication of grounds for sentencing are also considered. But the issue of the relationship between the cumulative legal classification and the statute of limitations concerning an offence described in one of the concurring provisions has not been so far the subject of a broader scientific analysis. It concerns a situation in which the same act committed by a perpetrator is classified cumulatively based on at least two provisions applying different sanctions, but in case of an offence carrying a more lenient sanction the penalisation period laid down in Article 101 of the Criminal Code (henceforth CC) has expired. A question is raised whether the provision should be eliminated from the grounds for sentencing or whether the

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[1] Compare, e.g. P. Kardas, *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna*, Warsaw 2011; W. Wolter, *Kumulatywny zbieg przepisów ustawy*, Warsaw 1960; J. Majewski (ed.), *Zbieg przepisów oraz zbieg przestępstwa w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego*, Toruń 2006; A. Spotowski, *Pomijalny (pozorny) zbieg przepisów ustawy i przestępstw*, Warsaw 1976; A. Zoll, *Zbieg przepisów ustawy w polskim prawie karnym*, Annales UMCS, Sectio G, Ius Vol. 60, No. 2, 2013, pp. 281–295 and the literature referred to therein.

statute of limitations for an offence classified cumulatively should be applied based on the sanction laid down in the most severe provision constituting grounds for penalisation in accordance with Article 11 §3 CC. The opinions of the representatives of jurisprudence can sometimes be found in commentaries on Article 11 §2 CC but they are usually limited to an indication that the problem is noticed in legal practice and to the approval of the opinions expressed by the judicature without a deepened substantiation of a particular solution. The practical values of the above-mentioned issue and the lack of its broader discussion in jurisprudence as well as the way in which the Supreme Court solved the problem in its resolution of 20 September 2018[2] inspire a closer examination of the issue.

2. CUMULATIVE CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN THE JUDICATURE AND DOCTRINE OF CRIMINAL LAW

The judicature does not solve the issue signalled in the title and the introduction in a uniform way. At least two extreme views on the subject may be indicated.

Firstly, it is assumed that in case the punishment for an act that is part of an offence classified cumulatively and described in a provision imposing a more lenient penalty is barred under the statute of limitations, it is necessary to eliminate this provision from the grounds for sentencing. This is mainly the opinion presented in appellate courts' decisions. In accordance with the systemic interpretation, it is emphasised that in case of the cumulative classification based on Article 11 §2 CC, it is necessary to take into account the rules laid down in Articles 101 and 102 CC, which must lead to elimination of a provision determining the type of offence under the statute of limitations from the grounds for sentencing.[3] At the same time, it is pointed out that in the case presented, it is not well grounded to eliminate an "act" specified in the provision imposing a more lenient penalty that is barred under the statute of limitations and discontinue proceedings in accordance with Article 17 §1(6) of the Criminal Procedure Code (henceforth CPC). In such a case, there are two contradictory decisions concerning two different "fragments" of the same act (discontinuation of proceedings and sentencing). It must be emphasised, indeed, that the cumulative legal classification resulting from the real concurrence of statutory provisions takes place only when a perpetrator commits one act that must be subject to one uniform sentence. Only a modification of legal classification is admissible. In the presented case, recognition of a new type of offence classified under a few provisions and having the same period for penalty imposition under the statute of limitations determined by the most severe of the concurring provisions would lead to sentencing a perpetrator for the conduct that could not be punished if it occurred as an act classified separately. It is assumed that the elements

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[2] I KZP 7/18, www.sn.pl.

[3] Thus, judgment of the Appellate Court in Białystok of 31 January 2013, II AKa 254/12, Legalis No. 715070.

decisive for an act unity and its cumulative classification cannot frustrate negative procedural conditions concerning its particular fragments. Due to the fact that a negative procedural condition under Article 17 §1(6) CPC is substantive in nature, it must influence the form of cumulative classification. Therefore, it is necessary to eliminate such regulations from the grounds for sentencing.[4] It is sometimes directly emphasised that if the same act matches the features laid down in at least two concurring provisions (based on the cumulative concurrence), but "one of the provisions is subject to the statute of limitations, in the light of Article 17 §1(6) CPC the cumulative classification is not admissible".[5] A similar solution is approved of in case of other circumstances excluding prosecution, such as a lack of a complaint filed by an authorised prosecutor or a motion to prosecute lodged by an authorised person, or abolition.[6]

Secondly, it is also necessary to indicate a contradictory opinion presented in case law in accordance with which, in case of the above-presented situation, the lapse of the period under the statute of limitations concerning a certain "fragment" of an act classified cumulatively does not influence the form of legal classification. This stand dominates in the Supreme Court judgments. In order to substantiate this solution, it is argued that it is not important how many features laid down in different provisions are matched by one act because in such a case this act constitutes only one offence. This means that the statute of limitations is applied to an act as a whole, although there are different limitation periods for different provisions. As a result, the period of punishment imposition barred by the statute of limitations is determined based on the most severe provision that constitutes the grounds for punishment (Article 11 §3 CC).[7] On another occasion, the Supreme Court clearly stated that since one prohibited act constitutes one offence, it is subject to one limitation period and there are no normative grounds for determining different limitation periods for particular fragments of this act. In case of the cumulative legal classification, it is necessary to determine what punishment is carried by an offence classified this way. As the issue of penalty imposition for such an act is unambiguously determined under Article 11 §3 CC laying down that a penalty must be imposed based on the most severe provision, it is necessary to assume that the limitation period determined in this provision is applicable and not the provisions stipulating a more lenient punishment. In case of the cumulative legal classification, we deal with only one act, thus only one limitation period can be considered. However, in the described situation, one offence is committed, which

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[4] See the judgment of the Appellate Court in Wrocław of 6 May 2015, II AKa 88/15, OSAWr 2015, No. 3, item 328; also see W. Daszkiewicz, *Glosa do wyroku SN z 10 kwietnia 1977 r., sygn. RW 116/77*, Nowe Prawo No. 6, 1978, p. 994; A. Wąsek, *Kodeks karny. Komentarz*, Vol. 1, Gdańsk 1999, p. 171.

[5] Compare the judgment of the Appellate Court in Wrocław of 19 June 2001, II AKa 218/01, OSA 2001, No. 10, item 63.

[6] See the judgment of the Appellate Court in Wrocław of 15 October 2015, II AKa 245/15, Legalis No. 1360975.

[7] Compare the Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1, item 1; the Supreme Court ruling of 28 May 2015, II KK 131/15, KZS 2015, No. 9, item 9.

is subject to cumulative assessment resulting from the concurrence of norms.[8] The assumption that particular fragments of an act classified cumulatively must be assessed separately from the point of view of barring punishment under the statute of limitations would mean a division of one act into a few ones.[9] Moreover, it is raised that it is not the legal classification but an act committed by a perpetrator that is subject to the statute of limitations. Therefore, in case of the cumulative classification of an offence, it is necessary to assess its prospects for punishment from the point of view of the act unity.[10] Thus, the instrument of the statute of limitations refers to the integral entirety of an act in spite of the fact that the limitation periods applicable to particular types of offences within the cumulative legal classification are different.[11] The issue was also considered in the context of a continuous act. The Supreme Court judged that particular types of conduct characterising a continuous act to which the cumulative legal classification under Article 11 §2 CC is applied, even if it is possible to separate them in a natural way and they fully match the features of particular prohibited acts, cannot be analysed in the context of limitation periods separate from the content of Articles 11 §3 and 101 CC. As a result, punishment for the entire offence, not just its particular components, is barred under the statute of limitations and the limitation period for an offence classified cumulatively should be applied based on the most severe provision.[12] It is worth adding that in the context of the above-quoted standpoint of the judicature, a penalty is an indicator of the limitation period of its application and in case of the cumulative legal classification, it is a penalty laid down in the most severe provision. Thus, it is one that determines the length of the period under the statute of limitations.[13]

Appellate courts' judgments also express the above-quoted opinion that the limitation period barring punishment for an offence classified cumulatively results from the most severe provisions the features of which a perpetrator has matched. It is also expressed, e.g. in relation to a continuous act, in which case it is stated that if it is composed of conduct that may match separate features of a prohibited act, including those within the framework of a continuous act referred to in Article 12 CC with a simultaneous application of the cumulative legal classification, it will mean that the limitation period for the entire continuous act is to be determined by the limitation period appropriate for the type of act carrying the most severe penalty and constituting grounds for the penalty imposition at the same time. The above-presented opinion results from the way in which a continuous act as a single prohibited act is treated and to which the construction laid down in Article 11 §2 CC is applied. This makes the use of Article 11 §3 CC necessary, which determines the term when punishment is barred under the statute of limitations.

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[8] Thus, W. Wolter, *Kumulatywny zbieg przepisów…*, pp. 48–49.

[9] Compare the Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 50.

[10] See the Supreme Court ruling of 22 March 2016, V KK 345/15, Legalis No. 1430515.

[11] Thus, the Supreme Court ruling of 19 October 2016, IV KK 333/16, Legalis No. 1537680.

[12] See the Supreme Court judgment of 23 November 2016, III KK 225/16, OSNKW 2017, No. 4, item 18; also compare the Supreme Court judgment of 29 October 2015, SDI 42/15, Legalis No. 1364797.

[13] See the Supreme Court ruling of 29 June 2017, IV KK 203/17, Legalis No. 1682039.

As it is emphasised, in the context of the limitation period for the imposition of punishment for an offence classified cumulatively, one cannot depart from the content of Article 11 §3 CC. There are no grounds for determining separate limitation periods for particular fragments of an act classified cumulatively.[14] Moreover, it is raised in appellate courts' judgments that due to the cumulative legal classification, particular provisions that it is composed of lose their independence. An offence determined this way carries a penalty laid down in the most severe provision and it is the indicator of the limitation period.[15] It is also worth pointing out that the cumulative classification results in a "new" type of an offence carrying a penalty laid down in the most severe provision, which determines the limitation period.[16]

The Supreme Court solved the dilemma connected with the two solutions to the problem discussed by issuing a resolution of 20 September 2018, where it states that in case of an act matching the features of two or more provisions of the Criminal Code and subject to cumulative legal classification (Article 11 §2 CC), the term of barring punishment under the statute of limitations should be determined in accordance with Article 101 CC, based on the size of punishment carried by an offence in accordance with Article 11 §3 CC or other conditions laid down in the provisions concerning the statute of limitations, and it is applicable to the whole offence classified cumulatively.[17] In the justification for the resolution, the Supreme Court first of all referred to the structure of an offence and indicated that the application of Article 11 §2 CC results in the specification of a new type of an offence. The Supreme Court highlighted that in case of the cumulative legal classification, it is necessary to examine "whether, in relation to every fragment of conduct distinguished with the use of the sets of features of concurring prohibited acts, in order to perform a legal assessment of the same act, there are also other elements that compose the structure of an offence". If, in relation to a fragment, there are e.g. grounds for excluding guilt (such as a perpetrator's age), that fragment should be eliminated in the cumulative classification. The Supreme Court noticed, however, that there are no grounds for identical treatment of the statute of limitations, which is not part of the structure of an offence. In order to leave all the concurring provisions in the grounds for sentencing, there must be conditions for criminal liability resulting from the structure of an offence related to each fragment of an act described cumulatively. In the further part of the justification, it is emphasised that if, in a particular case, there are not all conditions met for punishment for the fragments of an act classified cumulatively, i.e. not all the conditions for the application of a sanctioning norm,

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[14] Compare the judgment of the Appellate Court in Wrocław of 19 February 2015, II AKa 13/15, Legalis No. 1213468.

[15] See the judgment of the Appellate Court in Katowice of 2 August 2013, II AKa 480/12, KZS 2013, No. 4, item 15; the judgment of the Appellate Court in Wrocław of 22 December 2016, II AKa 337/16, Legalis No. 1576341; the judgment of the Appellate Court in Wrocław of 25 February 2016, II AKa 331/15, Legalis No. 1443569; the judgment of the Appellate Court in Katowice of 2 June 2016, II AKa 141/16, OSAKat 2016, No. 3, item 4; the judgment of the Appellate Court in Katowice of 22 June 2017, II AKa 150/17, Legalis No. 1658164.

[16] Compare the judgment of the Appellate Court in Katowice of 24 May 2013, II AKa 563/12, KZS 2013, No. 10, item 63.

[17] I KZP 7/18, www.sn.pl.

then there are no grounds for creating the cumulative concurrence of statutory provisions. As a result, the Supreme Court indicated in the justification that "it is necessary to recognise the stand as right but only in the part in accordance with which the lapse of the limitation period appropriate for the given type of offence, when the provision of the criminal statute containing its features remains in the cumulative legal classification with other provisions of the criminal statute, does not exclude its application in the legal classification of an act imputed to a perpetrator".

Similarly to case law, the above-discussed legal issue is not treated in a uniform way in the criminal law doctrine.

A. Wąsek is critical of the possibility of referring to a provision determining the type of offence prosecuted as a result of private charge in the legal classification not only because the prosecutor does not initiate a case *ex officio* but also when punishment is barred by the statute of limitations.[18] The author also refers to W. Daszkiewicz's opinion expressed still based on the Criminal Code of 1969, who states that in such a case the argument for elimination of the provision on an offence prosecuted as a result of a private charge is the substantive nature of the statute of limitations. As the statute of limitations bars punishment, its natural consequence is the elimination of a provision on an offence prosecuted as a result of a private charge if the term for that has expired.[19]

However, it is possible to indicate authors who interpret the issue in a different way. M. Gałązka, following some judgments of appellate courts as well as the Supreme Court, emphasises that barring punishment for an offence classified cumulatively based on the statute of limitations is applicable to the whole act and not just to particular provisions composing this classification. The length of the limitation period depends on the sanction laid down by the most severe provision, which in accordance with Article 11 §3 CC constitutes grounds for the imposition of a penalty for an offence classified cumulatively. The author does not provide any new arguments for this solution apart from those formulated by the judicature. However, she notices that there is a discrepancy in case law concerning the issue of admissibility of referring to legal classification of a provision that would decide on the lapse of the limitation period if it were an independent legal classification of an act.[20]

Probably, the only author who discusses the issue more broadly within the scope of the present analysis is M. Kulik, who asks a direct question whether in case of the cumulative concurrence in legal classification it is necessary to eliminate a provision specifying an offence for which the limitation period has lapsed. Making reference to literature, the author emphasises the essence of the cumulative concurrence, which is perceived as an instrument making it possible to describe the full content of a criminal act constituting a single offence. As a result of its application, as he continues to emphasise, "the assessment of a perpetrator's conduct is not multiplied (as it is in case of the ideal concurrence) but is a single, joint one. This means that

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[18] A. Wąsek, *Kodeks karny…*, p. 171.

[19] W. Daszkiewicz, *Glosa do wyroku SN z 10 kwietnia 1977 r., sygn. RW 116/77…*, p. 994.

[20] M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warsaw 2018, p. 149.

in such a situation we do not deal with a few types but one. It is a specific type. In a particular case, a new type of a prohibited act is created for the needs of a single case, the scope of statutory features of which is co-determined by the concurring provisions".[21] At the same time, the author points out, following P. Kardas's standpoint,[22] that it has nothing to do with any kind of legislative activity of a court but with "decoding one norm sanctioned by a few statutory provisions".[23] Next, he states that in the presented situation, we deal with a prohibited act with its own set of statutory features determined by concurring provisions and carrying its own statutory penalty resulting from the most severe of the concurring provisions. He directly adds that it is what determines the limitation term. It does it with respect to the entire type, which is composed of the features originally belonging to prohibited acts being in cumulative concurrence of provisions, those that specify such prohibited acts as well as those with a short limitation period.[24] In this author's opinion, a different assessment of the issue must mean that we deal with many offences and the statute of limitations barring punishment not concerning the offence but the legal classification.[25]

3. AUTHOR'S STAND ON THE ISSUE

It seems that the answer to the question whether a provision describing an offence for which the limitation period has lapsed remains in the cumulative classification of an act should be preceded by the solution of another problem, i.e. whether the cumulative classification results in the creation of a new type of an offence carrying a penalty laid down in the most severe provision. The question asked in this way should be given a definitely negative answer. It must be reminded that the types of prohibited acts are not determined by practice but by the legislator. It is a statute that, following the *nullum crimen sine lege* principle, determines the features of a prohibited act. Moreover, the quoted principle results in a different rule, i.e. *numerus clausus* of the types of prohibited acts and a ban on developing them with the use of legal constructions laid down in the criminal statute.[26] If it were assumed that thanks to the cumulative classification a new type of a prohibited act is created, it would be necessary to state that the catalogue of prohibited acts is indeed open.

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[21] M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warsaw 2014, p. 232.

[22] P. Kardas, *Zbieg przepisów ustawy…*, pp. 233–234.

[23] M. Kulik, *Przedawnienie karalności…*, p. 232.

[24] *Ibid.*, p. 233.

[25] *Ibid.*

[26] As a prohibited act can only be determined in statute, it means that the catalogue of such acts is limited to those that are clearly specified in such a legal act. For more on the issue, see, e.g. W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 94; R. Dębski, *Zasada nullum crimen sine lege i postulat wyłączności ustawy*, Acta Universitatis Lodziensis, Folia Iuridica No. 50, 1992, p. 100; T. Bojarski, *Typizacja przestępstw i zasada nullum crimen sine lege (wybrane zagadnienia)*, Annales UMCS, Sectio G, Vol. 24, 1977, p. 147; J. Długosz, *Ustawowa wyłączność i określoność w prawie karnym*, Warsaw 2016, p. 146.

There are many configurations of overlapping features laid down in statute because of a big number of types and it is not possible to classify them all as the practice is richer than the statutory law and often occurs faster. An open catalogue of prohibited acts cannot be in agreement with the *nullum crimen sine lege* principle. Thus, it is necessary to agree with P. Kardas who states that "the directive expressed in the provision constituting the construction of cumulative classification does not lead to awarding law enforcement bodies legislative functions in any case".[27] A law enforcement body does not develop a new type of an offence by applying the cumulative legal classification but performs the assessment of one act through the prism of a few provisions, to which it is obliged pursuant to the content of Article 11 §2 CC. However, it is difficult to agree with another opinion of the same author assuming that the application of the legal construction discussed results in "the creation of a new type of a prohibited act composed of the elements expressed in the features of concurring provisions of the Criminal Code".[28] The function of the provision of Article 11 §2 CC is not to develop a new type of a prohibited act but to indicate regulations that will constitute grounds for sentencing. In other words, the provision determines the regulation (all concurring provisions) as a point of reference in the assessment of one act.

What confirms the fact that the provision of Article 11 §2 CC does not constitute grounds for creating a new type of a prohibited act is its style. Indeed, the regulation expresses a rule that in case of real concurrence of statutory provisions, a court must sentence a perpetrator for the commission of one offence in accordance with all concurring provisions. All the concurring provisions become grounds for sentencing. In such a case, no new type developed ad hoc is attributed to a perpetrator as a result of circumstances in which he/she has acted. This kind of statement cannot be interpreted as sentencing for a new prohibited act classified in concurring provisions. In fact, provisions classifying various prohibited acts concur. The legislator only instructs to perform the assessment of an act committed from the perspective of all concurring provisions.

One also cannot agree with the thesis quoted above that the concurrence of provisions results in the development of a new type of a prohibited act, which carries a penalty laid down in the most severe provision. This opinion is in conflict with the function of Article 11 §3 CC, which does not determine a penalty for a new type but provides an interpretational directive addressed only to a court and indicating which of the concurring provisions should constitute grounds for the imposition of a penalty. The literal content of Article 11 §3 CC is for such interpretation because it does not mean that a penalty laid down in the most severe provision is a statutory one for the new type, that an offence with such a construction carries a penalty laid down in the most severe provision, but only that it constitutes grounds for the imposition of a penalty.

In fact, the function of the provision of Article 11 §2 CC is to fully express the criminal content of an act, its entire unlawfulness, in the course of its legal

[27] P. Kardas, *Zbieg przepisów ustawy…*, pp. 233–234.
[28] *Ibid.*

classification. It might be an argument against elimination of a provision concerning an offence for which the limitation period has lapsed from the grounds for sentencing. However, it is not a rule without exceptions. It should be assumed that in case of an act committed by a perpetrator under the age of 17 but over the age of 15, classified cumulatively in accordance with one the provisions referred to in Article 10 §2 CC and a provision from outside of this catalogue, the rule resulting from Article 10 §1 CC requires that the latest provision should be eliminated from the grounds for sentencing.[29] In case of concurrence of provisions concerning prosecution *ex officio* and that based on a motion, the legal classification of such an act taking into account the provision concerning prosecution based on a motion depends on whether such a motion has been filed.[30] A lack of a motion means it must be ignored in the grounds for sentencing. Finally, in case of concurrence of a provision concerning an offence prosecuted *ex officio* with that based on private charges, considering both provisions within one legal classification is admissible only when a prosecutor decides to prosecute the entire offence *ex officio* in order to protect social interests (Article 60 §1 CPC).[31] If a prosecutor does not make such a decision, the legal classification should not take into account the provision concerning an offence prosecuted based on a private charge. There is still another exception to the principle of expressing the entire unlawfulness in the cumulative legal classification. It is a situation in which a perpetrator commits what is called aggravated attempt but voluntarily prevents the consequence belonging to the features of a substantive offence initially intended. It can be exemplified by a case in which a perpetrator shoots a victim in order to kill but realises what happens, calls emergency services and saves the victim's life, although does not prevent a serious damage to the victim's health in the form of loss of his/her lung. In such a case, in order to express the whole criminal content of the act, it would be necessary to consider Article 148 §1 CC in conjunction with Articles 13 §1 and 156 §1(2) CC in conjunction with Article 11 §2 CC. The features of the indicated offences are matched in this case. However, due to the content of Article 15 §1 CC, which bans prosecution for an attempt to kill, the provisions of Article 13 §1 CC in conjunction with Article 148 §1 CC must be ignored because this conduct is not subject to punishment.

The presented situations indicate exceptions to the rule concerning demonstration of the entire unlawfulness in the legal classification of an act. Those exceptions are necessary because of the need to respect the principles of criminal liability, modes of prosecution, and first of all, the will of the aggrieved concerning prosecution of some of them. If those exceptions to the rule concerning demonstration of the entire unlawfulness in the legal classification of an act are admissible in order to

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[29] Compare the judgment of the Appellate Court in Wrocław of 15 October 2015, II AKa 245/15, Legalis No. 1360975; the judgment of the Appellate Court in Katowice of 20 November 2014, II AKa 313/14, LEX No. 1665550.

[30] See A. Zoll, [in:] A. Zoll, W. Wróbel (eds), *Kodeks karny. Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, Warsaw 2016, p. 204; also compare the Supreme Court judgment of 14 June 2002, II KKN 267/01, Legalis No. 59429; the Supreme Court judgment of 15 October 2003, IV KK 299/03, Legalis No. 98122.

[31] M. Czekaj, *Ingerencja prokuratura w sprawach o przestępstwa prywatnoskargowe*, Prokuratura i Prawo No. 7–8, 1999, p. 46.

maintain a coherent existence of various instruments within the criminal law, then, for harmonious co-existence of the cumulative legal classification and the statute of limitations, it is necessary to ignore the classification of a provision determining a type of an act for which the limitation period has lapsed. And it does not mean that one act is divided into several ones because only one act is still subject to assessment. In such a case, the assumption that a division of one act takes place constitutes confusion of the ontic foundation of an assessment (act) with the point of reference for that assessment, i.e. concurring provisions. The act remains the same, only its legal assessment is modified.

Exceptions to the rule of expressing the entire unlawfulness in the legal classification of an act and, in particular, the necessity of taking into account also circumstances annulling punishment, which occur in criminal law, only confirm that a provision concerning an offence for which the limitation period has lapsed must be eliminated from the legal classification of the act. It is hard to resist an impression that reference made to such a provision in the grounds for sentencing is in conflict with the principle resulting from Article 101 CC, which stipulates that a perpetrator cannot be prosecuted for a given conduct in case the term indicated thereof has lapsed. The maintenance of such a regulation in the legal classification, in fact, also means prosecution of a perpetrator for implementation of the features of an act for which the limitation period has lapsed. If one considers the fact that barring punishment by the statute of limitations is a circumstance that excludes the punishment for an offence, then, like in the case of a provision in Article 15 §1 CC, it becomes necessary to modify the legal classification of the act in the way taking into account the consequences of both instruments. Sentencing a perpetrator also based on the provision concerning an offence for which the limitation period has lapsed violates the guarantee function of criminal law and, first of all, the statute of limitations. Although a perpetrator holds no expectation that the statute of limitations will bar punishment for an act he/she has committed, if the period for that lapses, the scope of criminal liability changes to one that can be executed. The change takes place *ipso jure*, regardless of the aggrieved or law enforcement bodies' will; even regardless of a perpetrator's will.

What also constitutes an argument for ignoring a provision specifying an offence for which punishment is barred by the statute of limitations in the cumulative classification is also a procedural consequence of the instrument and the negative procedural condition in the form of a lack of complaint of an authorised prosecutor in case of an offence prosecuted based on a private charge. There is no doubt that in both cases there is an obstacle to conducting a trial, although they are determined in two different sub-sections in Article 17 §1 CPC. However, it must be emphasised that a lack of private complaint as well as punishment barred by the statute of limitations do not annul unlawfulness of an act committed by a perpetrator but obstruct the proceeding of a trial and thus, a perpetrator's criminal liability. In both cases there are obstacles to impose a penalty. As it has been emphasised above, if provisions specifying offences prosecuted *ex officio* and based on a private charge concur, a lack of a prosecutor's decision in accordance with Article 60 §1 CPC results in the necessity of eliminating the latter from the grounds for sentencing. The lapse

of the limitation period for a fragment of an act classified cumulatively must have the same consequence.

The supporters of the opinion that the provision for which the limitation period has lapsed should not be eliminated from the cumulative classification argue that the whole offence is subject to the statute of limitations (in accordance with Article 101 §1 CC) and not just its legal classification, and in such a case an act is subject to entire and not fragmentary assessment, which could decide that the term of punishment limitation is determined by a provision laying down the most severe penalty and constituting, in accordance with Article 11 §3 CC, grounds for the imposition of a penalty. It is hard to resist an impression that in such a case the legal assessment of an act from the point of view of punishment barred by the statute of limitations is fragmentary because it is limited to a provision laying down the most severe penalty. Within the scope of the statute of limitations, in this case, we also refer to a fragment of an act and not an offence as a whole, i.e. only to the provision determining the most severe penalty. Referring the statute of limitations to the whole offence classified cumulatively requires that the legal classification should be modified depending on the lapse of the limitation period in relation to fragments described in the provisions laying down more lenient penalties.

Finally, it is worth noting one more issue. Article 8 §1 of the Fiscal Penal Code (henceforth FPC) determines the ideal concurrence, inter alia, of a fiscal offence and a common crime. It results in the prosecution of a perpetrator for two offences, although he/she committed only one act because each of the provisions is applicable, i.e. a provision of common criminal law and a provision of fiscal penal law. In such a situation, we actually deal with one act but the legislator makes us accept a fictitious occurrence of two prohibited acts. One cannot rule out that in such a case the limitation period will be different for a common crime and for a fiscal offence. Regardless of one act in the ontic sense, it is not possible to apply one limitation period because the Criminal Code regulates it independently (Article 101 CC) of the Fiscal Penal Code (Article 44 §1 FPC). It can be exemplified by a situation in which a perpetrator does not keep books (Article 60 §1 FPC) and this way causes financial loss (Article 303 §2 CC). It is emphasised in the doctrine of fiscal penal law that in such a situation, there is the ideal concurrence of a fiscal offence with a common crime.[32] A fiscal offence carries a penalty of 240 daily rates, which means that its punishment is barred after five years (Article 44 §1(1) FPC). A common crime carries a penalty of imprisonment for three months to five years and its punishment is barred after ten years (Article 101 §1(3) CC). If the shorter period lapses, it becomes obvious that the provision specifying the act being subject to the statute of limitations in that shorter period cannot be applied. In the presented example, there will be no liability for a fiscal offence. A similar situation will take place in case of the ideal concurrence of a fiscal misdemeanour and a common crime as well as a common misdemeanour and a common crime (Article 10 §1 CC). In such situations, the limitation period lapses separately for a misdemeanour and a crime, and the lapse of the shorter one

[32] Thus, e.g. I. Zgoliński, [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz*, Warsaw 2018, p. 408.

results in a lack of possibility of prosecuting a perpetrator for an act that is subject to the shorter limitation period. Thus, the legislator knows situations in which two limitation periods are applied in relation to actually the same act. The similarity between the cumulative concurrence and the ideal concurrence consists in their ontic foundation, which is an act. The difference results only from the adoption of a particular normative solution, which requires multiplication of assessment without multiplication of prohibited acts, or multiplication of assessment equivalent to multiplication of prohibited acts. In case of the ideal concurrence, sentencing for two separate offences (misdemeanours) constitutes a certain fiction accepted by the legislator and resulting from the separation of common criminal law and fiscal penal law, and law on misdemeanours. Therefore, it seems that we would risk accusation of violating the systemic coherence if, in case of the ideal concurrence of prohibited acts, we assumed a necessity of taking into account the lapse of the limitation period for one of them and, in case of the cumulative legal classification, also based on one committed act, we did not. It should be assumed that because of the fact that the real basis for both instruments is the same (one act), it is necessary to avoid application of a provision specifying an offence for which the limitation period has lapsed. Exclusion of the application of such a provision will take place in the form of discontinuation of proceedings concerning one of the acts in case of the ideal concurrence, and in the form of modification in case of the cumulative classification.

The considerations presented so far show that the Polish legal system knows situations in which, regardless of one act classified cumulatively under at least two statutory provisions, some of them are eliminated for various reasons. The elimination of liability for the implementation of the features of a prohibited act in such a case is forced by the need to adopt a systemic approach and maintain the coherence of different legal constructions. The conditions are fulfilled by a solution in accordance with which, in case of the lapse of the limitation period for an offence specified cumulatively in a provision concurring with other regulations, it is necessary to ignore the former one.

Obviously, one must be aware of the fact that such a solution, although in the dogmatic sense it matches the cumulative legal classification (Article 11 §2 CC) with barring punishment by the statute of limitations (Article 101 CC), in practice may cause problems concerning the description of an act attributed to a perpetrator. If, as a result of elimination of one of the concurring provisions due to the lapse of the limitation period for one of the offences specified in it, it is not possible to describe a means a perpetrator used to commit an act, it may be difficult to describe the entire act. It can be exemplified by concurrence of the provisions of Articles 273 and 286 §1 CC, where a perpetrator using a falsified document deceives the aggrieved and this way makes them dispose of their property disadvantageously. Elimination of the provision of Article 273 CC from the legal classification as a result of the lapse of the limitation period means that it will not be possible to indicate in the act description that a perpetrator has used a falsified document, and consequently, that it will not be possible to emphasise in what way the perpetrator has deceived the aggrieved. One cannot describe an act of deception in a general way; it is necessary to give a detailed account of the way in which the perpetrator has done it. In the

presented situation, there is a problem with the description of an act the perpetrator is charged with and then attributed to him/her.

The presented example indicates that the solution to the problem proposed in the present article aimed at bringing together the cumulative legal classification and barring punishment by the statute of limitations may make the practice of application of concurring provisions more difficult. However, the above-mentioned practical problems can be avoided by adopting a solution pursuant to which the length of the limitation period is laid down in the most severe provision. The issue signalled in the title is only a proof that it is not always possible to bring together dogmatic solutions and needs in the field of law application.

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CUMULATIVE LEGAL CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN CRIMINAL LAW

Summary

The issue of the relation between the cumulative legal classification and barring punishment by the statute of limitations in criminal law is seldom a subject of broader considerations in literature. It concerns a situation in which provisions laying down different sanctions concur, and for one of the offences specified in them the limitation period has lapsed. This raises a question whether the provision specifying that act should be referred to in the grounds for sentencing or whether it should be eliminated. Two extreme opinions on the issue were deve-

loped in the practice of law enforcement, which inspired the First President of the Supreme Court to file a motion to the Supreme Court to adopt a resolution that shall make case law uniform. The Supreme Court adopted a resolution concerning the case I KZP 7/18 on 20 September 2018. The article aims to solve the problem in a different way from the one the Supreme Court proposed in its resolution.

Keywords: law, criminal law, cumulative legal classification, barring punishment by the statute of limitations

KUMULATYWNA KWALIFIKACJA PRAWNA A PRZEDAWNIENIE KARALNOŚCI W PRAWIE KARNYM

Streszczenie

Zagadnienie relacji pomiędzy kumulatywną kwalifikacją prawną a przedawnieniem karalności w prawie karnym jest rzadko przedmiotem szerszych rozważań w literaturze. Chodzi o sytuację, w której zbiegają się ze sobą przepisy operujące różnymi sankcjami, a w stosunku do przestępstwa opisanego w jednym z nich upłynął już termin przedawnienia karalności. Rodzi się pytanie, czy przepis typizujący ten czyn należy powoływać w podstawie skazania, czy też trzeba go pominąć. W praktyce wymiaru sprawiedliwości wykształciły się dwa skrajne stanowiska w tym zakresie, co skłoniło Pierwszego Prezesa Sądu Najwyższego do złożenia wniosku do SN o podjęcie uchwały w tym przedmiocie, która ujednolici orzecznictwo. Uchwała zapadła przed SN w dniu 20 września 2018 r. w sprawie I KZP 7/18. Celem niniejszego opracowania jest próba rozwiązania zasygnalizowanego problemu w sposób odmienny od tego, który zaproponował SN w swojej uchwale.

Słowa kluczowe: prawo, prawo karne, kumulatywna kwalifikacja prawna, przedawnienie karalności

LA CALIFICACIÓN CUMULATIVA Y LA PRESCRIPCIÓN DE DELITO EN EL DERECHO PENAL

Resumen

La relación entre calificación cumulativa y la prescripción de delito en el derecho penal no es frecuentemente un objeto de analisis más amplia en la doctrina. Se trata de caso en el cual hay un concurso de normas que prevén sanciones diferentes y un delito descrito por estas normas ya ha prescrito. Por lo tanto, cabe considerar si se puede mencionar dicho precepto en los fundamentos de la condena, o hay que prescindir de él. En la práctica, existen dos posturas opuestas en este ámbito, lo que motivó al Presidente del Tribunal Supremo a presentar solicitud al Tribunal Supremo de adoptar un acuerdo al respeto que consolide la jurisprudencia. El acuerdo fue dictado por el Tribunal Supremo el 20 de septiembre de 2018 en la causa I KP/18. El presente artículo intenta solucionar este problema de forma distinta a la que propone el Tribunal Supremo en su acuerdo.

Palabras claves: derecho, derecho penal, calificación cumulativa, prescripción de delito

НАКОПИТЕЛЬНАЯ ПРАВОВАЯ КЛАССИФИКАЦИЯ И ИСТЕЧЕНИЕ СРОКА ДАВНОСТИ СУДИМОСТИ В УГОЛОВНОМ ПРАВЕ

Резюме

Проблематика, касающаяся отношений между накопительной правовой классификацией и истечением срока давности судимости в уголовном праве не столь часто служит предметом более широкого обсуждения в предметной литературе. Речь идёт о ситуации, в которой правовые положения, касающиеся различных санкций, соприкасаются между собой, а в случае преступления, содержащемся в одном из них, срок давности судимости уже истёк. Возникает вопрос: следует ли классифицировать положение, определяющее это действие, на основании приговора, или его следует пропустить? В практике правосудия разработаны две крайние позиции в этой области, что побудило Первого Председателя ВС представить заявление в Верховный суд о принятии Постановления по этому вопросу, которое унифицировало бы судебную практику. Постановление было принято Верховным судом 20 сентября 2018 года по делу I KZP 7/18. Целью настоящего исследования является попытка решения представленной проблематики, отличного от предложенного в Постановлении Верховного суда.

Ключевые слова: право, уголовное право, накопительная правовая классификация, истечение срока давности судимости

KUMULATIVE RECHTSFINDUNG UND STRAFBARKEITSVERJÄHRUNG IM STRAFRECHT

Zusammenfassung

Die Beziehungsangelegenheit zwischen kumulativer Rechtsfindung und der Strafbarkeitsverjährung im Strafrecht ist selten Gegenstand breiterer Erwägungen in der Literatur. Es handelt sich hier um eine Lage, in welcher Vorschriften verschiedene Sanktionen anwendend, zusammen münden, und angesichts eines Verbrechens mit einer solchen Vorschrift beschrieben worden zu sein, dessen Strafbarkeitsverjährungstermin bereits abgelaufen ist. So entsteht die Frage, ob die Vorschrift, welche dieses Delikt typisiert, in der Rechtsgrundlage für die Verurteilung berufen werden soll, oder diese Vorschrift gemieden werden soll. In der Gerichtsbarkeitspraxis sind zwei krasse Standpunkte in diesem Umfang entstanden, was den Ersten Vorsitzenden des Obersten Gerichtes (OG) dazu geneigt hat, einen Antrag zum OG einzureichen, um einen diesbezüglichen Beschluss zu fassen, welcher die Rechtsprechung zu vereinheitlichen vermag. Der Beschluss fiel vor dem OG am 20. September 2018 mit Aktenzeichen I KZP 7/18. Das Ziel dieser Bearbeitung ist ein Lösungsversuch des angedeuteten Problems auf einem anderen Wege, als das OG es in seinem Beschluss vorgeschlagen hat.

Schlüsselwörter: Recht, Strafrecht, kumulative Rechtsfindung, Strafbarkeitsverjährung

CLASSIFICATION JURIDIQUE CUMULATIVE ET PRESCRIPTION EN DROIT PÉNAL

Résumé

La question de la relation entre la qualification juridique cumulative et le délai de prescription en droit pénal fait rarement l'objet de considérations plus larges dans la littérature. Il s'agit d'une situation dans laquelle les dispositions relatives à diverses sanctions coïncident et où, pour l'infraction décrite par l'une d'elles, le délai de prescription de la responsabilité pénale a expiré. La question qui se pose est de savoir si la disposition qui caractérise cet acte doit être invoquée dans le fondement de la condamnation ou si elle doit être omise. Dans la pratique de la justice, deux positions extrêmes dans ce domaine se sont développées, ce qui a amené le Premier Président de la Cour suprême à soumettre à la Cour suprême une demande d'adoption d'une résolution à ce sujet, qui unifierait la jurisprudence. La résolution a été adoptée devant la Cour suprême le 20 septembre 2018 dans l'affaire n° I KZP 7/18. Le but de cette étude est d'essayer de résoudre le problème signalé d'une manière différente de celle proposée par la Cour suprême dans sa résolution.

Mots-clés: droit, droit pénal, classification juridique cumulative, prescription pénale

RELAZIONE TRA LA QUALIFICAZIONE GIURIDICA CUMULATIVA E LA PRESCRIZIONE IN DIRITTO PENALE

Sintesi

La questione della relazione tra la qualificazione giuridica cumulativa e i termini di prescrizione è raramente oggetto di ampie considerazioni in letteratura. Si tratta di una situazione in cui convergono norme con sanzioni diverse, e nei confronti del reato descritto in una di esse il termine di prescrizione è già decorso. Sorge la domanda se la disposizione che caratterizza questo atto debba essere invocata nella base della condanna o se debba essere omessa. Nella prassi della magistratura si sono sviluppate due posizioni estreme al riguardo, il che ha spinto il primo Presidente della Corte suprema a presentare una mozione alla Corte suprema per adottare una deliberazione in materia, che unificherà la giurisprudenza. La delibera è stata adottata dinanzi alla Corte suprema il 20 settembre 2018, in causa I KZP 7/18. L'obiettivo di questo studio è tentare di risolvere il problema segnalato in modo diverso da quello proposto dalla Corte suprema nella deliberazione.

Parole chiave: diritto, diritto penale, qualificazione giuridica cumulativa, prescrizione

Cytuj jako:

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BANKS' OBLIGATIONS RELATED TO PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING IN THE LIGHT OF AMENDED REGULATIONS

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1. INTRODUCTION

On 13 July 2018, the Act of 1 March 2018 on preventing money laundering and terrorist financing (hereinafter APML)[1] entered into force. It repealed the former act under the same name, which was binding till 12 July 2018, and introduced new provisions. The repealed Act of 16 November 2000 was the first national regulation of a complex nature aimed at preventing the phenomenon of money laundering (originally, in accordance with its name, on preventing the introduction of financial assets originating from illegal or undisclosed sources to financial transactions)[2] and providing the core provisions regulating the issue. As a result of the amendment of 27 September 2002, it additionally covered preventing terrorist financing.[3] The Act of 1 March 2018 did not change anything within the regulation but laid down provisions concerning the prevention of the two above-mentioned phenomena. As

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1 Journal of Laws [Dz.U.] of 2018, item 723, as amended. The Minister of Development and Finance was the initiator of the Bill, which was filed on 5 May 2017 and given the number of 2233. The Sejm print No. 2233 is available at: http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2233 (accessed on 30/05/2018).

2 Originally: Act of 16 November 2000 on preventing the introduction of financial assets originating from illegal or undisclosed sources to financial transactions, Journal of Laws [Dz.U.] No. 116, item 1216.

3 Act of 27 September 2002 amending the Act on preventing the introduction of financial assets originating from illegal or undisclosed sources to financial transactions, Journal of Laws [Dz.U.] of 2002, No. 180, item 1500.

a result, fundamental questions are raised whether it was necessary to introduce the changes, about the main reason (*ratio legis*) for them and what obligations APML imposed on institutions.

Answering the first two of the above questions, having taken into consideration the legislative "tradition" of the successive amendments to the former Act of 16 November 2000, there are no doubts that in general the European Union norms were the only motives for the change of the status quo in this respect. Like all the other successive amendments to the "former" act, the "new" APML also resulted from the need to adjust the national regulation to the European requirements. Thus, the Act of 1 March 2018 constituted the implementation of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (referred to as 4th AML Directive), amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. However, it is worth mentioning that extensive work on legislative change is being carried out due to the successive, 5th AML Directive (see Procedure 2016/0208: COM (2016) 450: Proposal for a Directive of the European Parliament and of the Council, presented by the European Commission on 5 July 2016 and adopted by the Council on 14 May 2018) aimed, inter alia, at enhancing the process of exchanging information by financial analysis units, extending the regulation in the field of preventing risks of using modern technologies to commit the offence of money laundering or financing terrorism and taking into account the possibility of increased risks of involving representatives of legal professionals in active commission of such offences.[4]

On the other hand, in response to the question concerning the scope of changes introduced by APML, it is necessary to explicitly point out that the "new" statute introduces many far-reaching changes in the provisions laid down in the Act of 16 November 2000. Not only does it define obliged institutions but also imposes a series of new obligations on them, in particular those connected with the need to assess the risk of money laundering and terrorist financing as well as to use financial security measures. At the same time, this constitutes motivation to look at the regulations of 1 March 2018 and analyse them more thoroughly. However, coming to the point determined by the title of the article, it is worth focusing on those legal aspects that result from the imposition of new obligations connected with combating money laundering and terrorist financing on obliged institutions, especially banks, at least within the scope in which differences in comparison with the former regulations (i.e. the Act of 16 November 2000) are significant enough to discuss them below.

[4] The document is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15849_2017_INIT&from=PL (accessed on 19/07/2018).

2. BANKS AS ENTITIES OBLIGED TO PREVENT MONEY LAUNDERING AND TERRORIST FINANCING

In the same way as in accordance with the Act of 16 November 2000, under APML banks are also classified as entities obliged to prevent the discussed activities. The issue of applying the regulations concerning the prevention of money laundering and terrorist financing to banks should not raise any doubts, at least from the historical point of view.

Banks were the first entities (potentially most vulnerable to negative consequences of money laundering) that introduced regulations dealing with the problem, e.g.:

- Ordinance No. 16/92 of the President of NBP (the National Bank of Poland) of 1 October 1992 (Dz.Urz. NBP No. 9, item 20), issued based on the statutory delegation under Article 100 paras. 5(2) and (3) of the Act of 31 January 1989: Banking Law,
- Ordinance No. C/2/I/94 of the President of NBP of 17 January 1994, which substituted for the above legal act, and
- Resolution No. 4/98 of the Commission for Banking Supervision of 30 June 1998, issued based on the statutory delegation under Article 106 para. 1 of the Act of 29 August 1997: Banking Law[5].

Thus, it is not surprising that banks are entities, as it is confirmed by the findings of the analysis of the Department of Financial Information, which prevent most diligently money laundering and terrorist financing. According to the Report of the General Inspector of Financial Information (GIIF) on the implementation of the Act of 16 November 2000 in 2017, the General Inspector received 3,272 notifications from the obliged entities (of the total of 4,115 notifications of suspicious activities and transactions, called SARs: Suspicious Activity Reports, which were included in the conducted analytical proceedings).[6] Like in the past years, most notifications came from banks/foreign bank branches, in fact 3,104 notifications in 2017, which constitutes 94.87% of the total number registered in the information system as those originating from obliged entities.[7]

In this context, one cannot be surprised that banks represent the financial services market that is most vulnerable to the potential use for the purpose of money laundering or terrorist financing, regardless of what their position is from the point of view of strategy or the role of their involvement in carrying out a given activity. Banks may indeed take a passive position (however, the assumption of their complete "exclusion" from participation in such an activity, at least from the practical point of view, as it is emphasised, is in general impossible in the present economic conditions). They may also take an active position and act as entities "involved in legitimisation of income from illegal activities unwittingly and in the way that is impossible to detect by those entities", which may result, inter alia, from non-adjustment to or

[5] Consolidated text, Journal of Laws [Dz.U.] of 2017, item 1876 as amended.

[6] GIIF's Report on the implementation of the Act of 16 November 2000 in 2017, Warsaw, March 2018, available at: https://www.mf.gov.pl/documents/764034/1223641/Sprawozdanie+2017 (accessed on 23/07/2018).

[7] *Ibid.*

non-compliance with obligations or procedures laid down in the binding provisions, and sometimes from their excessively "free" interpretation (e.g. in relation to the scope of transactions subject to obligatory registration, in particular, recognition that a transaction is the suspicious one).[8] Moreover, financial institutions may be wittingly involved in such activities, in particular, if they carry out legal and illegal transactions (e.g. credit institutions, which our legislator has taken into account at present by including also these institutions in the catalogue of obliged entities),[9] or banks may also found them exclusively in order to perform some of the discussed activities.[10] In the latter case, we deal with shadow banking, i.e. financial institutions that, unlike banks, are not subject to any restrictions resulting mainly from Banking Law such as financial supervision, capital obligations, organisational and legal limitations or deposit insurance requirements. Due to that, they are classified as non-banking financial companies. The above was decisive for emphasising the role of banks in the system of preventing money laundering and terrorist financing, and making them, in a way, "model" obliged institutions for the need of the present article.[11]

3. BANKS' OBLIGATIONS RESULTING FROM AMENDMENTS TO THE PROVISIONS ON THE PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING

The amended Act on money laundering, following the example of the European Union regulation being implemented, i.e. the 4th AML Directive, is also mainly based on the assessment of risks of money laundering (risk-based approach – RBA). It should be interpreted as "a process serving the presentation of information on the nature and scale of money laundering/terrorist financing and basic offences connected with them as well as weaknesses in the AML/CFT system and other elements of the legal system that make it attractive for money launderers and

[8] Compare P. Chodnicka, *Zarządzanie ryzykiem prania pieniędzy w systemie bankowym*, Problemy Zarządzania Vol. 10, No. 4(39), 2012, pp. 206–207.

[9] In accordance with Article 2 para. 1(25) APML, making reference to the Act of 12 May 2011 on consumer loans (Journal of Laws [Dz.U.] of 2016, item 1528 and of 2017, item 819), the term "credit institution" should be interpreted as a lender other than: (a) a national or foreign bank, a foreign bank branch, a credit institution or a credit institution branch within the meaning of the Act of 29 August 1997: Banking Law; (b) a credit union and Krajowa Spółdzielcza Kasa Oszczędnościowo-Kredytowa (SKOK credit union); (c) an entity whose operations consist in providing consumer loans in the form of postponement of the payment of a price or remuneration for the purchase of goods and services it offers (Article 5(2a)).

[10] P. Chodnicka, *Zarządzanie ryzykiem…*, pp. 206–207.

[11] A bank is recognised as an obliged entity in accordance with Article 2 para. 1 APML. The catalogue of those entities laid down in Article 2 para. 1 APML is very abundant and includes entities such as, inter alia, investment funds, insurance firms, insurance intermediaries, legal profession representatives to certain extent (solicitors, legal advisors, notaries), entrepreneurs involved in currency exchange, entities providing accounting and book-keeping services, real estate agents, postal services operators, foundations, and entrepreneurs within the meaning of the Act of 2 July 2004 on the freedom of business operations within the scope of settlement of cash payment for goods worth or exceeding the worth of 10,000 euros, regardless of whether the transaction is a single operation or concerns a few operations that seem to be linked, etc.

terrorism backers".[12] Thus, the obligations laid down by the new provisions concerning obliged entities, *ad meritum,* consist in the need to take into consideration risk factors concerning customers, states or geographical areas, products, services, transactions or their delivery channels. More precisely, they include identification and assessment of risk connected with money laundering and terrorist financing as well as the use of financial security measures in case of establishing "business relationships" or carrying out "an occasional transaction" worth 15,000 euros or more, regardless of whether the transaction is conducted as a single operation or a few operations that seem to be linked with each other (in case of cash transactions worth 10,000 euros or more), and in case of money transfer when the value of an occasional transaction exceeds 1,000 euros (Article 35 APML). Due to the above, the statute discussed laid down legal definitions of the formerly unknown concepts as "business relationships" or "occasional transaction".

The term of business relationship means "the relationship between an obliged entity and a client that is connected with the professional activities of the obliged entity, which have an element of duration at the time when the contract is established" (Article 2 para. 1(20) APML). On the other hand, an occasional transaction is any transaction outside of a business relationship (Article 2 para. 1(22) APML**).** It should be added that within the meaning of APML, a transaction should be interpreted as "a legal or actual activity based on which property or financial assets are transferred or a legal or actual activity carried out in order to transfer property or possess financial assets" (Article 2 para. 1(21) APML).

However, attention is drawn to the fact that only those transactions that have an element of duration "at the time when" they are carried out (or more precisely "when the contract is established") should be recognised as "business relationships", which is not only imprecise but can cause real problems with the assessment when a given entity is involved in a business relationship. As the feature of "duration" may and should include the scope of activities undertaken so far, thus, the issue of a business relationship duration should be concluded from the entire activities carried out for a client by a given obliged entity or possibly, which seems to be less adequate, a certain "forecast" of a business relationship duration should be made based on a transaction carried out in a given period (not at the time). In other words, in the latter case, it is assumed that based on the nature of a transaction, it is possible to draw a conclusion that it leads to entering into durable business relationships with a client (e.g. opening of an account). The sense of "the time" absolutely does not constitute an indicator of duration that is essential for distinguishing between a "business relationship" and "occasional transaction". However, there should be no doubts that the assessment of the risk of money laundering or terrorist financing looks different in a situation when a transaction is carried out by a bank in accordance with the relationship established with a client and it would look different if it concerned an "occasional transaction" commissioned by an entity unknown to the given institution.

[12] 4th AML Directive – Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141, 5.6.2015, pp. 73–117.

What is interesting, in the light of the provisions of APML, apart from "typical" relationships with a client, there is an additional category called correspondent relationships. As far as this is concerned, the obligation to introduce appropriate regulations also results from the implementation of the 4th AML Directive. In accordance with Article 2 para. 2(18) of the Act of 1 March 2018, the relationships should include:

a) correspondent banking performed by a service-providing bank on behalf of a user bank,
b) relationship between credit institutions and financial institutions, including relationships within which similar services are offered by a service-providing institution on behalf of a user institution, and relationships established for the needs of transactions concerning securities or for the needs of transferring funds.

A correspondent bank is a credit institution providing payment and other services on behalf of another credit institution. Payments are made with the use of mutual accounts (called *nostro* and *loro* accounts), which can be linked with permanent lines of credit.[13] A bank, in order to settle payments within international transactions with another bank, must possess its own account in another foreign bank for holding currencies (the best one is that to be used for the settlement). A bank's (its own) account opened in a foreign bank is called a *nostro* account. On the other hand, following the rule of a "mirror image", a *loro* account (their account) is a foreign bank's account for a bank in which it is opened.[14]

Including crypto currencies within the scope of the regulation is another novelty, which is laid down in APML and is extraordinarily significant from the practical point of view.[15] As it was rightly emphasised, the development of crypto currencies, including the best known bitcoin (BTC), as a relatively new phenomenon without our full knowledge of its possibilities or threats to the economic transactions connected with its use, needs continuous monitoring and analysing as a criminogenic risk factor.[16] Due to that, many organisations and financial analysis units comparable to the GIIF in other countries (not only the EU member states) and international organisations founded to prevent money laundering and terrorist financing are now involved in a series of activities aimed at full recognition of threats posed by the development of crypto currencies.[17] Such currencies "are based on a complex system

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13 Compare: Guidelines of the European Central Bank of 20 September 2011, 2011/817/EU on monetary policy instruments and procedures of the Eurosystem (ECB/2011/14); available at: http://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:32011O0014 (accessed on 30/04/2018).

14 Compare T.T. Kaczmarek, J. Królak-Werwińska, *Handel międzynarodowy. Zarządzanie ryzykiem. Rozliczenia finansowe,* Wolters Kluwer, Warsaw 2008, p. 115.

15 Also compare *Komunikat Narodowego Banku Polskiego i Komisji Nadzoru Finansowego w sprawie "walut" wirtualnych of 7 July 2018*, available at: http://www.nbp.pl/home.aspx?f=/aktualnosci/wiadomosci_2017/ww-pl.html (accessed on 12/07/2018).

16 Compare a document of 28 May 2015: Undersecretary of State in the Ministry of Finance [FN7.054.9.2015], *Regulacje dotyczące wirtualnej waluty bitcoin*. The document presents the explanation of the Ministry of Finance concerning the functioning of crypto currencies, Monitor Prawa Bankowego No. 6, 2016, pp. 13–17.

17 Compare the GIIF's report on hazards connected with crypto currencies, available at: http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/giif/komunikaty/-/asset_publisher/8KnM/

of cryptographic protocols. The creation of bitcoin consists in generating a code (a cipher) with the use of the so-called excavator, which is a particular programme and computer hardware with big calculation power in the peer-to-peer network".[18]

On the other hand, in accordance with APML, the crypto currency should be interpreted as "digital reflection of value that is not:

a) the legal tender issued by NBP, foreign banks or other public administration bodies,
b) an international unit of settlement established by an international organisation and recognised by its member states or countries cooperating with it,
c) electronic money in the meaning of the Act of 19 August 2011 on financial services,
d) a financial instrument in the meaning of the Act 29 July 2005 on financial instruments turnover,
e) a bill of exchange or a cheque,

– and is subject to exchange in economic transactions into legal tenders or recognised as a means of exchange, and may be retained or transferred electronically or may be an object of sales conducted electronically" (Article 2 para. 2(26) APML). In addition, Article 2 para. 2(27) APML lays down that financial assets in the meaning of APML include not only, as so far, property rights or other movable or immovable property, legal tenders, financial instruments in the meaning of the Act of 29 July 2005 on financial instruments turnover, other securities and foreign currencies but, at present, also crypto currencies. It seems that crypto currencies, *de lege lata*, are of secondary importance for banks. However, if we take into consideration the development of the financial services sector and, first of all, the mutual "penetration" of the risk areas (profits generated from transactions in "dirty" financial assets originating in bitcoin transactions may be legitimised with the use of banking services after a transaction with its use),[19] it is not possible to omit the issue in this article. It is also worth mentioning that in the light of the Bill on the Central Database of Accounts, which is envisaged in the 4th AML Directive and, as a result, also by the Polish legislator, there is also a definition of crypto currency laid down.[20] In accordance with Article 2(6)

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content/komunikat-generalnego-inspektora-informacji-finansowej-w-sprawie-niebezpieczenstw-zwiazanych-z-walutami-wirtualnymi?redirect=http%3A%2F%2Fwww.mf.gov.pl%2Fministerstwo-finansow%2Fdzialalnosc%2Fgiif%2Fkomunikaty%3Fp_p_id%3D101_INSTANCE_8KnM%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1%26_101_INSTANCE_8KnM_advancedSearch%3Dfalse%26_101_INSTANCE_8KnM_keywords%3D%26_101_INSTANCE_8KnM_delta%3D5%26_101_INSTANCE_8KnM_cur%3D1%26_101_INSTANCE_8KnM_andOperator%3Dtrue%23p_p_id_101_INSTANCE_8KnM_ (accessed on 1/01/2018).

[18] J. Dąbrowska, *Charakter prawny bitcoin*, Studia i Artykuły, Człowiek w Cyberprzestrzeni No. 1, 2017, p. 55.

[19] This concerns the system with two-directional monetary flow in which a crypto currency may be exchanged into other currencies without reservations, as exemplified by bitcoin, which is convertible in online money exchange firms and on the stock exchange – compare P. Mackiewicz, M. Musiał, *Rozwój wirtualnych systemów monetarnych*, Nauki o Finansach (Financial Sciences) No. 1(18), 2014, pp. 136–139.

[20] For more on the issue, see J. Czarnecki, *Wirtualne waluty w projekcie ustawy o Centralnej Bazie Rachunków*, Biuletyn Nowych Technologii No. 2, 2017. The Article is available at: http://www.wardynski.com.pl/biuletyn_nowych_technologii/2017-02/Wirtualne_waluty_w_projekcie_ustawy_o_CBR.pdf (accessed on 10/07/2018).

Bill on the Central Database of Accounts (Centralna Baza Rachunków, CBR) dated 22 December 2016, a "crypto currency" means "a transferable property right which represents value in a digital form, has its equivalent in a legal tender, is treated as a means of exchange and a unit of settlement, has no status of a legal tender and is not electronic money within the meaning of the Act of 19 August 2011 on financial services, which may be transferred, retained or sold as legal tenders electronically".[21]

Although the Act on CBR has not entered into force yet, banks (in the same way as SKOK credit unions) introduced their own Central Information on Accounts, i.e. Centralna Informacja o Rachunkach (CIR).[22] This makes it possible to obtain access to information on accounts in every bank and SKOK. Before the introduction of CIR, a query about an account looked for had to be addressed to every bank and SKOK credit union separately. Thanks to CIR, it is possible to obtain information in one place, i.e. in the office where a client files a request. At present, thanks to CIR, an account owner who is a natural person and a member of SKOK, has an opportunity to, inter alia, get access to his own accounts and find a deceased person's (testator's) account. CIR also makes it possible to fulfil the obligations resulting from APML, in particular those relating to the necessity of constant monitoring of economic transactions, especially as banks and SKOK credit unions are obliged to use this database.[23] On the other hand, the Central Register of Beneficial Owners (Centralny Rejestr Beneficjentów Rzeczywistych, CRBR) is a novelty introduced by APML. The CRBR is an IT communications system used to process information about beneficial owners of companies referred to in Article 58 APML.[24]

Due to APML's *ratio legis* as well as the issues raised here, it seems that the amendments to provisions preventing money laundering are the most important as they result in obligations to "assess risk" imposed on banks as obliged entities. Thus, it is worth devoting more attention to those regulations.

The basic obligation concerning this issue that was imposed on all obliged entities results from Article 27 para. 1 APML and includes identification and assessment of risk connected with money laundering and terrorist financing involving a given institution;[25] however, in accordance with Article 27 para. 2, when assessing risk,

[21] The Bill is available on the website of Rządowe Centrum Legislacji: https://legislacja.rcl.gov.pl/projekt/12293403/katalog/12400913.

[22] CIR is available at: https://www.centralnainformacja.pl/ (accessed on 1/05/2018).

[23] *Ibid.*

[24] In accordance with Article 55 APML, entities that are subject to the obligation to report information on beneficial owners include general partnerships, limited partnerships, limited stock companies, limited liability companies and joint-stock companies with the exception of public companies in the meaning of the Act of 29 July 2005 on public offer and conditions for the introduction of financial instruments to the organised system of transactions and on public companies (Journal of Laws [Dz.U.] of 2016, item 1639 and of 2017 items 452, 724, 791 and 1089). It is worth indicating that in accordance with the legal definition (Article 2 para. 2(1) APML), a natural person who has not been recognised as one that is subject to control by another entity shall be, at the same time, assumed to be a beneficial owner.

[25] In accordance with Article 27 para. 1 APML, obliged entities shall identify and assess risk connected with money laundering and terrorist financing in relation to their operations "with consideration of risk factors concerning their clients, states or geographical areas, products, services, transactions or their delivery channels", and the activities should be "proportionate to the nature and size of the obliged entity".

obliged entities may (sic!) take into account the binding national risk assessment as well as the European Commission report referred to in Article 6 paras. 1–3 Directive 2015/849 (Article 27 para. 2). An obliged entity must develop its own risk assessment as a paper and electronic document and update it "if necessary", at least every second year, in particular in connection with the change in risk factors concerning clients, countries or geographical regions, products, services, transactions or channels of their delivery (Article 27 para. 3 APML).

Such wording makes one raise a few fundamental questions: What does "risk" mean? What criteria should be used to determine risk factors (taking into account that an obliged entity's activities aimed at preventing discussed processes should be "proportionate to the nature and size of the obliged entity")? And finally, what does "the national risk assessment" mean and why is it not significant enough to require that the obliged entity must base on it when developing its own document? The last issue raises another doubt connected with the criteria for the assessment of the risk level that should be taken into account and which of them, in case the national risk assessment is not taken into account, may be deemed to be typical "alternative" criteria on which an obliged entity should base its assessment of money laundering or terrorist financing risk.

In accordance with the EU regulations, one can assume that the concept of "risk" refers to the likelihood of money laundering or terrorist financing occurrence, or its potential consequences. "Risk" interpreted this way refers to inherent risk, i.e. one existing before its mitigation, and does not refer to residual risk, i.e. one that exists after its mitigation or elimination. On the other hand, "risk factors" should be recognised as variables that on their own or in combination with others may increase or decrease the risk of money laundering or terrorist financing and result from a given business relationship or an occasional transaction. Finally, we can speak about the "risk-based approach" when "competent authorities and firms identify, assess and understand the ML/TF risk to which firms are exposed and take AML/CFT measures that are proportionate to those risks".[26]

We can speak about such an approach in the context of the obligation imposed on obliged entities in accordance with Article 27 APML (identification and assessment of risk connected with money laundering and terrorist financing). Based on that provision, obliged entities should also consider such (generally determined) criminogenic factors as those concerning customers (behavioural factors), the country (of a customer and a beneficial owner[27] – geographical factors), including "delivery channels" as well as

[26] For definitions, compare Joint Guidelines of 4 January 2018 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (JC 2017 37), available at: https://esas-joint-committee.europa.eu/Publications/Guidelines/Guidelines%20on%20Risk%20Factors_PL_04-01-2018.pdf (accessed on 25/07/2018).

[27] In accordance with Article 2 para. 2(1) APML, a beneficial owner is (in general) a natural person or natural persons having direct or indirect control over a client through the rights resulting from legal or factual circumstances making it possible to exert decisive influence on activities or actions undertaken by the client or natural person or natural persons on whose behalf business relationships are established or an occasional transaction is carried out.

products and services (economic factors).[28] Assessing risk, obliged entities may base on the national risk assessment (NRA). The Act of 1 March 2018 devotes Chapter 4 to such assessment. It does not determine, however, what this assessment is. One cannot find there a definition of NRA or detailed criteria for the assessment of the level of risk. It seems that there can be no mention of them *in abstracto*.[29] In the "new" Act on preventing money laundering and terrorist financing, however, one can find information on what the document is to contain, namely:

1) a description of the methodology of the national risk assessment;
2) a description of the phenomena connected with money laundering and terrorist financing;
3) a description of the binding regulations concerning money laundering and terrorist financing;
4) an indication of the level of risk of money laundering and terrorist financing in the Republic of Poland with its justification;
5) conclusions drawn from the assessment of money laundering and terrorist financing risk;
6) identification of the issues concerning the protection of personal data connected with the prevention of money laundering and terrorist financing.

Apart from recommendations concerning the document structure, the GIIF (as a body responsible for the development of NRA "in cooperation with the Committee, cooperating units and obliged entities" – Article 25 para. 1 APML) is obliged to consider the European Commission report.[30] It identifies, assesses and estimates the risk of money laundering and terrorist financing at the Union level and covers at least the issues concerning: areas of internal market that are recognised as the most exposed to the threat of being used in those processes, a risk connected with every sector concerned and most common methods used by criminals to launder money from illegal profits. It seems that one can interpret those indications as certain regular threats or tendencies on which, with regard to various industries or in more general terms to the type of business activity or the nature of provided services, obliged entities may base when developing their own matrices of assessment of the risk of committing the offence referred to in Article 299 or Article 165a of the Criminal Code (henceforth CC).[31] They contain a certain "model

[28] In accordance with Article 33 para. 3 APML, obliged entities shall document a recognised risk of money laundering or terrorist financing associated with business relationships or an occasional transaction and its assessment considering in particular factors concerning: the type of client, geographical area, account appropriation, type of products, services and methods of their distribution, value level of financial assets deposited by a client or the value of transactions carried out as well as the aim, regularity and period of business relationship existence.

[29] For other than those generally specified factors the consideration of which is required when obliged entities assess risk, compare in particular Article 27 and Article 33 para. 3 APML.

[30] Report from the Commission to the European Parliament and the Council, Brussels, 26.6.2017, COM 92017, 340 final available at: http://ec.europa.eu/transparency/regdoc/rep/1/2017/PL/COM-2017-340-F1-PL-MAIN-PART-1.PDF (accessed on 12/07/2018).

[31] An example of a standard client assessment (matrix) developed for investment funds, available at: https://www.izfa.pl/download/file/id/15/n/standard-oceny-klientow-funduszy-inwestycyjnych-w-celu-okreslenia-poziomu-ryzyka-zwiazanego-z-praniem-pieniedzy-oraz-finansowaniem-terroryzmu (accessed on 25/07/2018).

pattern" of identifying main types of internal risk with its division into sectors of provided services, specification of threats existing in particular sectors (horizontal exposure) and indication of financial security measures adjusted to those threats.[32]

On the other hand, discussing the issue of factors that should be considered in the context of the provisions laid down in APML in a relatively general way, theoretically, one should make use of such documents as Joint Guidelines developed based on Articles 17 and 18(4) of Directive (EU) 2015/849, of 4 January 2018, on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions.[33] However, the risk management introduced based on it will not, in fact, meet the expectations resulting from the new provisions' entry into force. It is due to the fact that, on the one hand, Joint Guidelines in a very detailed way list recommendations for each of the three (main) groups of factors that, according to that document, may be conducive to participation in the performance of one of the discussed processes,[34] and on the other hand, some statements in this document are quite often imprecise and not clearly determined, not to say that they may sometimes lead to irrational results of the risk assessment. An example that can be presented here is the factor of the level of risk concerning a customer's "reputation" and an indication that it should be also considered whether there are any "adverse media reports or other relevant sources of information about the customer, for example (…) any allegations of criminality or terrorism against the customer or the beneficial owner". It is worth mentioning here that in accordance with Joint Guidelines, "other relevant sources" should include, inter alia, "the firm's own knowledge" (however, it is not clear whether it refers to what an employee or the institution knows and what constitutes this extremely arbitrary source of information), professional expertise, including e.g. the tenure in the financial services market, information from industry bodies such as typologies and information on emerging risks and, what is interesting, also "information from civil society". Joint Guidelines also recommend recognition of other sources of information, e.g. "credible and reliable open sources" such as reports in reputable newspapers, information from credible private entities like risk assessment reports and analyses, and information from statistical organisations and academia. However, the decision on "credibility" or the "value" and reliability of information about money laundering and terrorist financing risks is absolutely arbitrary in nature.

It is also worth reminding that activities concerning the assessment of the level of risk undertaken by particular obliged entities should be proportionate to the nature and size of a given obliged entity. Therefore, in fact, the assessment of

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[32] Act of 1 March 2018 maintains the former obligation to develop internal procedures (Article 50 APML), however, it introduces a requirement concerning the approval of such procedures by senior level management before their implementation and application.

[33] The Guidelines are available in Polish at: https://esas-joint-committee.europa.eu/Publications/Guidelines/Guidelines%20on%20Risk%20Factors_PL_04-01-2018.pdf (accessed on 25/07/2018).

[34] It concerns factors associated with a client, geographical area (jurisdiction) as well as a product, service or transaction (including delivery channels); *ibid.*

the level of ML/TF risk will be different when conducted by a bank and when conducted by an entrepreneur who operates in accordance with the Act of 2 July 2004 on the freedom of business activity within the scope in which he carries out an occasional transaction paying in cash for goods that are worth 10,000 euros or more. The above indication, although fully understandable and justified, results in an obvious conclusion that referring to such criteria as the type of an institution, the scope of its operations and the likelihood that it may be involved in money laundering or terrorist financing, the territorial range, the size of business, etc. when assessing the level of risk may turn out to be a typical "legal justification" of a given institution's avoidance of undertaking steps ensuring diligent fulfilment of the APML provisions and, as a result, really contributing to the prevention of money laundering and terrorist financing.

Apart from the above, the discussed Act continues to maintain the obliged entities' fundamental obligations connected with the prevention of the discussed phenomena, which result from (negative) risk assessment. They are mainly stipulated in Article 74 APML (the obligation to notify the General Inspector of Financial Information without delay, however not later than in two working days from the confirmation of the suspicion by the obliged entity, about the circumstances that can raise suspicion of the commission of an offence under Article 299 CC [money laundering] or Article 165a CC [terrorist financing], with an indication of the scope of data taken into account in this notification – Article 74 para. 3), Article 86 APML (obligation to notify the GIIF without delay by means of electronic communication about raising justified suspicion that a given transaction or specified financial assets may be connected with money laundering or terrorist financing) and Article 90 APML (the so-called resultant submission of this notification in case its submission without delay has not been possible).

On the other hand, national banks, foreign banks' branches, credit institutions' branches or credit unions/cooperatives are exempt from the application of Article 89 APML stipulating the obligation to notify a prosecutor without delay about raising justified suspicion that financial assets subject to transactions or deposited in an account originate from an offence other than money laundering or terrorist financing, or fiscal crime, or are connected with an offence other than money laundering or terrorist financing, or fiscal crime.[35] The reason is obvious and is connected with *leges speciales* laid down in the provisions of Banking Law, which, within the discussed scope, what is worth mentioning here, were also subject to change.[36]

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35 The provision is aimed at detecting the source of "dirty income", called the source act (in other words: the base act) from which laundered financial assets originate.

36 Compare Article 106a of the Act of 29 August 1997: Banking Law (Journal of Laws [Dz.U.] of 2017, item 1876, as amended), and also the amendment to Article 106a para. 3a of the Act that entered into force based on Article 166 APML, which resulted in the following wording of Article 106a para. 3a: "In case of a justified suspicion that an offence referred to in Article 165a or Article 299 CC was committed, or bank operations were used in order to conceal criminal activities or for the purpose associated with an offence or a fiscal offence, a prosecutor may, by means of a decision, freeze a particular transaction or resources in a bank account for a specified period not exceeding six months, also regardless of the lack of notification referred to in para. 1

Due to the extensive nature of amendments introduced by the Act of 1 March 2018, their exhaustive discussion in a scientific article like this does not seem possible. Moreover, this is not its aim. Its essential objective is to indicate those new provisions that determine obligations of banks as obliged entities in the way that is different from the one binding so far (i.e. laid down in the Act of 16 November 2000). Therefore, reference to the provisions that determined measures of financial security as well as identification or verification of a client's identity, or what kind of transactions are subject to mandatory registration (what has been mentioned in the introduction) will be ignored here as they are less significant for the discussed subject matter.[37] With regard to many of those issues, the provisions of the Act of 1 March 2018 are not much different from those laid down in the former Act. It can be only indicated here that financial security measures should be applied "within the scope and with the intensity taking into account the recognised risk of money laundering or terrorist financing connected with business relationships or an occasional transaction and its assessment" (Article 33 para. 4). Moreover, assessing business relationships, "in the way adequate for the situation", an obliged entity should also obtain information about the aim and intended nature of those relationships, and carry out their ongoing monitoring. This "monitoring" should cover, inter alia, the analysis of transactions conducted with a client "within business relationships" in order to ensure that the transactions are in compliance with the obliged entity's knowledge of the client, the type and scope of its operations, the "examination of the source of financial assets" in the client's disposal and, in cases justified by circumstances, ensuring that the documents, data or information in possession concerning business relationships are continually updated (Article 34 para. 1(1) and (4) APML). Apart from "traditional" financial security measures, obliged entities should ensure, in cases referred to in Articles 43–46 APML, the application of "increased financial security measures", in particular in case of the establishment of business relationships in untypical circumstances or with clients from a high risk third country or having a head office registered there.

Finally, it is worth adding that APML imposes a new obligation on obliged entities, which is not a novelty in case of banks. It is a duty to appoint "higher level management staff" responsible for the fulfilment of the obligations stipulated in statute. This should be interpreted as "a board member, a director or an employee of the obliged entity having the knowledge of the risk of money laundering and terrorist financing connected with an obliged entity's operations and taking decisions that can influence this risk" (Article 2 para. 2(9) APML).[38] Moreover, there is still a binding obligation to appoint an employee holding a senior managerial position responsible for ensuring that the operations of an obliged entity and its employees and other persons performing activities for the benefit of an obliged entity are in compliance with the provisions of the Act on preventing money laundering and terrorist financing (Article 8 APML).

[providing a prosecutor with information that is subject to bank secrecy – A.G.]. The decision shall include the scope, method and time for freezing a transaction or resources in the account".

[37] With regard to this, compare Article 35 APML.

[38] In accordance with Article APML, in case of an obliged entity, in which there is a board or another management body, a person responsible for the implementation of the statutory obligations should be appointed from among those body members.

4. CONCLUSIONS

Summing up, the entry into force of new provisions on preventing money laundering and terrorist financing results from the adjustment of Polish regulations to the EU norms, namely to the 4th AML Directive, which is binding at present. What indicates the fulfilment of the proposals resulting from the implementation of the provisions of the above-mentioned Directive to the national legal system is not just a "cosmetic" change in the provisions that were in force for over 17 years but the introduction of a completely new legal act.[39] The Act of 1 March 2018, adopting the solutions of the 4th Directive, imposes totally new (as far as their essence and wording are concerned) obligations on entities that are subject to its norms. Their catalogue was extended by new categories of institutions, such as e.g. entrepreneurs, in the meaning of the Act of 2 July 2004 on the freedom of business operations, within the scope of the provision of bank deposit safes, and foreign entrepreneurs' branches conducting such operations in the territory of the Republic of Poland or credit institutions in the meaning of the Act of 12 May 2011 on consumer loans. The change in this area was caused by the need for adjusting domestic legal solutions to the "patterns" determined by the EU regulations. The change should be approved of. Undoubtedly, it should also be recognised as right to notice hazards that crypto currencies may pose to business transactions (from the point of view of the possibility of using them to legitimise "dirty" profits). However, as far as this is concerned, the practice will show whether the regulation alone is sufficient enough to prevent financial assets laundering within bitcoin transactions or with the use of other crypto currencies. On the other hand, serious doubts should be raised in connection with new duties imposed on obliged entities, which in fact constitute the essence of the Act of March 2018 and also *ratio legis* for its enacting. This concerns obligations connected with risk assessment. In default of clear and precise criteria for the assessment of the level of risk, taking them into account may be difficult in practice. Much will depend on the procedures used so far, which obliged entities worked out in the years when the Act on preventing money laundering (i.e. the Act of 16 November 2000) was in force and to which they are likely to first of all refer in order to estimate the level of risk of money laundering or terrorist financing. Therefore, it can be expected that banks will continue to be leaders in sending SARs to the GIIF because they have been working out the methods of preventing making use of the financial system to launder money for over twenty years. As a result, banks may be treated as obliged entities that can be expected to diligently implement the provisions of the Act of 1 March 2018. The reasons for that are in general good because of the well-prepared and, first of all, applied in practice procedures of preventing the phenomena referred to in the discussed regulations, the compliance with which constitutes the best guarantee of proper (and efficient) communication between the obliged entities and the GIIF. On the other hand, the imposition of the unclearly defined risk-based approach on obliged entities or the imposition of obligations that are practically impossible for them to fulfil does not

[39] This concerns the Act of 16 November 2000, which entered into force on 23 June 2001.

constitute it. It is enough to indicate such an obligation as ongoing "monitoring of business relationships" with the whole load of imprecise phrases, including the term itself. Thus, it seems that efficient counteracting money laundering or terrorist financing will be possible, first of all, thanks to maintaining in the "new" APML the provisions concerning the mode of proceeding and competences of the entities participating in its implementation, i.e. apart from obliged entities, also the GIIF (performing its statutory duties through the Department of Financial Information), cooperating bodies and entities supervising the implementation of APML within the framework of supervision and control over obliged entities as well as emphasising their efficient cooperation in the field of detecting cases of suspicion that an offence of money laundering or terrorist financing has been committed. At the same time, it is necessary to express a conviction that, following the model of the provisions being in force so far, the efficiency of preventing the discussed phenomena will result from diligent identification of a client by obliged entities, which in case of banks cannot be overestimated, or the application of financial security measures adequate for the situation, which, in close cooperation with the GIIF, may result in freezing accounts, transactions or financial assets, and at the stage of preparatory proceedings in securing incriminating financial assets.

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BANKS' OBLIGATIONS RELATED TO PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING IN THE LIGHT OF AMENDED REGULATIONS

Summary

The Act of 1 March 2018 on preventing money laundering and terrorist financing entered into force on 13 July 2018 and repealed the Act of 16 November 2000, substituting for it and introducing a series of changes in the system of preventing those negative phenomena. They consist in the need for obliged entities to assess the level of risk of money laundering or terrorist financing and, as a result, to take adequate financial security measures. A deeper analysis of the Act results in a conclusion that many of the newly enacted regulations, in fact, refer to terminology that is quite often not clear and unambiguous enough. Such a state may cause difficulties with the application of its provisions, which in particular concerns obliged entities, i.e. entities on which the Act imposes obligations connected with the protection of the financial system against the use of those entities to launder money or finance terrorism. On the other hand, banks hold a leading position in this system both in the sphere of regulations and actual, active involvement in preventing those phenomena. It results, inter alia, from prevention mechanisms that have been worked out for many years as well as internal regulations that can really contribute to the elimination of those financial institutions' participation in money laundering or terrorist financing. Therefore, it can be assumed that they constitute a kind of "model" obliged institutions for which the Act of 1 March 2018 is of fundamental importance. It seems to be especially significant that the presented expectations are not always supported by adequate norms, which concerns not just the idea of preventing money laundering but the requirements and methods of determining them in the Act of 1 March 2018. The present article is devoted to those issues.

Keywords: money laundering, terrorist financing, banks, obliged entities

OBOWIĄZKI BANKÓW ZWIĄZANE Z PRZECIWDZIAŁANIEM PRANIU PIENIĘDZY ORAZ FINANSOWANIEM TERRORYZMU W ŚWIETLE ZNOWELIZOWANYCH PRZEPISÓW

Streszczenie

W dniu 13 lipca 2018 r. weszła w życie ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu, która uchyliła obowiązującą do tej daty ustawę z dnia 16 listopada 2000 r., zastępując ją i wprowadzając szereg zmian w systemie

prewencji przed tymi negatywnymi zjawiskami. Sprowadzają się one do potrzeby przeprowadzania przez instytucje obowiązane oceny poziomu ryzyka prania pieniędzy oraz finansowania terroryzmu, a w ślad za tym podejmowania stosownych środków bezpieczeństwa finansowego. Bardziej dogłębna analiza przedmiotowej ustawy nasuwa jednak spostrzeżenie, że wiele z nowowprowadzonych regulacji odwołuje się w istocie do terminologii, która nierzadko jest niewystarczająco klarowna i jednoznaczna. Taki stan rzeczy może powodować trudności w stosowaniu jej postanowień, co odnosi się w szczególności do instytucji obowiązanych, czyli podmiotów, na które przedmiotowy akt prawny nakłada obowiązki związane z ochroną systemu finansowego przed wykorzystaniem tych instytucji w celu prania pieniędzy lub finansowania terroryzmu. W systemie tym zaś banki od lat zajmują pozycję lidera zarówno w sferze regulacji, jak i faktycznego, aktywnego zaangażowania w zapobieganie tym procederom. Wynika to m.in. z wypracowanych mechanizmów prewencyjnych, a także wewnętrznych regulacji, które realnie mogą przyczynić się do wyeliminowania przypadków udziału tych instytucji finansowych w praniu pieniędzy lub finansowaniu terroryzmu. Można więc uznać, że stanowią one rodzaj „modelowych" instytucji obowiązanych, dla których zarazem ustawa z 1 marca 2018 r. ma kardynalne znaczenie. Wydaje się ono tym bardziej istotne, że tak nakreślone oczekiwania nie w każdym przypadku znajdują poparcie w stosownych unormowaniach, co dotyczy nie tyle samej idei zapobiegania praniu pieniędzy, ale raczej wymagań i sposobu ich określenia w ustawie z dnia 1 marca 2018 r. Tym zagadnieniom poświęcone jest niniejsze opracowanie.

Słowa kluczowe: pranie pieniędzy, finansowanie terroryzmu, banki, podmioty obowiązane

OBLIGACIÓN DE BANCOS EN RELACIÓN CON LA LUCHA CONTRA EL BLANQUEO DE CAPITALES Y FINANCIACIÓN DEL TERRORISMO A LA LUZ DE LOS PRECEPTOS REFORMADOS

Resumen

El 13 de julio de 2018 entró en vigor la ley de 1 de marzo de 2018 sobre lucha contra el blanqueo de capitales y financiación del terrorismo que derogó la ley de 16 de noviembre de 2000 vigente hasta dicha fecha y la sustituyó, introduciendo numerosas modificaciones en el sistema de prevención ante estos fenómenos negativos. Dichas modificaciones consisten en la necesidad de realizar juicio de nivel de riesgo de blanqueo de capitales y de financiación del terrorismo por parte de las instituciones obligadas y adoptar medidas adecuadas de seguridad financiera. El análisis más profundo de dicha ley lleva a la conclusión que muchas de las regulaciones nuevas hacen referencia a la terminología que es equívoca o no es clara. Tal estado de las cosas puede ocasionar dificultades en aplicación de sus disposiciones, lo que se refiere en particular a las instituciones obligadas, o sea sujetos a los que esta ley impone obligaciones relacionadas con la protección del sistema financiero ante utilización de estas instituciones para fines de blanqueo de capitales o financiación del terrorismo. En este sistema, los bancos desde hace años son líderes en la regulación y participan activamente en prevenir tales procesos. Esto viene, entre otros, de mecanismos de prevención puestos en práctica desde hace muchos años, así como de regulación interna que realmente puede ayudar a eliminar casos de participación de estas instituciones financieras en el blanqueo de capitales o financiación de terrorismo. Por lo tanto, pueden ser consideradas como instituciones obligadas "ejemplares", para las cuales la ley de 1 de marzo de 2018 tiene importancia fundamental. Tal expectativa no en cada caso

es fundada en la normativa adecuada, lo que se refiere no sólo a la idea en sí en prevenir el blanqueo de capitales, sino también a los requisitos y forma de su determinación por la ley de 1 de marzo de 2018. El artículo versa sobre todas estas cuestiones.

Palabras claves: blanqueo de capitales, financiación del terrorismo, bancos, instituciones obligadas

ОБЯЗАННОСТИ БАНКОВ, СВЯЗАННЫЕ С ПРОТИВОДЕЙСТВИЕМ ОТМЫВАНИЮ ДЕНЕГ И ФИНАНСИРОВАНИЮ ТЕРРОРИЗМА В СВЕТЕ НОВЕЛИЗИРОВАННЫХ ПОЛОЖЕНИЙ

Резюме

13 июля 2018 года вступил в силу Закон от 1 марта 2018 года о противодействии отмыванию денег и финансированию терроризма. Упомянутый Закон отменил и заменил действующий до этого времени Закон от 16 ноября 2000 года, что привело к введению ряда изменений в системе превенции этих негативных явлений. Они сводятся к необходимости проведения институтами обязательного анализа уровня риска отмывания денег и финансирования терроризма, с последующим принятием соответствующих мер финансовой безопасности. Тем не менее, более глубокий анализ упомянутого закона приводит к размышлениям о том, что многие из нововведённых норм фактически опираются на терминологию, которая нередко является недостаточно точной и однозначной. Такое положение вещей может усложнить соблюдение его положений, что касается в первую очередь специализированных учреждений, то есть субъектов, на которые этот правовой акт накладывает обязательства, связанные с защитой финансовой системы от использования этих учреждений в целях отмывания денег или финансирования терроризма. В данной системе в течение многих лет банки занимают лидирующие позиции как в сфере регулирования, так и в фактическом активном участии в деле по предотвращению этой практики. Это основано на разработанных в течение многих лет превентивных механизмах, а также внутренних нормах, которые могут на деле способствовать предотвращению участия финансовых учреждений в отмывании денег или финансировании терроризма. В связи с этим можно утверждать, что они выступают в качестве своего рода «образцовых» специализированных учреждений, для которых Закон от 1 марта 2018 года является ключевым. Представляется это тем более существенным, поскольку так чётко обозначенные потребности не всегда находят поддержку в соответствующих нормативных актах, что касается не столько самой идеи предотвращения практики отмывания денег, сколько предписаний и способа её определения в Законе от 1 марта 2018 года. Данной проблематике посвящено настоящее исследование.

Ключевые слова: отмывание денег, финасирование терроризма, банки, специализированные учреждения

VERPFLICHTUNGEN DER BANKEN VERBUNDEN MIT DER GEGENWIRKUNG VON GELDWÄSCHEREI UND TERRORISMUSFINANZIERUNG IN ANSEHUNG VON NOVELLIERTEN VORSCHRIFTEN

Zusammenfassung

Am 13. Juli 2018 trat in Kraft das Gesetz vom 01. März 2018 über die Gegenwirkung von Geldwäscherei und Terrorismusfinanzierung, welches das bis zu diesem Datum geltende Gesetz vom 16. November 2000 aufhob, dieses damit ersetzend und einige Änderungen im Präventionssystem vor diesen negativen Vorgängen einführend. Diese Änderungen führen zur Notwendigkeitsdurchführung eines Risikoniveaus Geldwäscherei und Terrorismusfinanzierung seitens dazu verpflichteter Institutionen, darauffolgend auf entsprechende finanzielle Sicherheitsmaßnahmen, einzugehen. Eine tiefere Analyse des gegebenen Gesetzes bietet jedoch eine Anmerkung, dass zahlreiche von neu eingeführten Regulierungen sich allerdings auf die Terminologie berufen, welche des Öfteren unzureichend klar und eindeutig ist. So ein Sachverhalt kann es erschweren, die Gesetzbestimmungen anzuwenden, besonders in Bezug auf dazu verpflichtete Institutionen, also Subjekte, auf welche der gegebene Rechtsakt Verpflichtungen auferlegt, die mit dem Finanzsystemschutz vor der Ausnutzung dieser Institutionen zum Zweck von Geldwäscherei und Terrorismusfinanzierung verbunden sind. In diesem System rangieren wiederum die Banken seit Jahren auf führenden Positionen nicht nur in dem Regulierungsbereich, sondern auch im tatsächlichen, aktiven Einsatz in Vorbeugung solcher Aktivitäten, was u.a. aus seit Jahren ausgearbeiteten Präventionsmechanismen resultiert, darüber hinaus auch aus internen Bestimmungen, welche durchaus zur Eliminierung von Teilnahmefällen solcher Institutionen in der Geldwäscherei beziehungsweise Terrorismusfinanzierung beitragen können. Es kann demnach angenommen werden, dass diese Institutionen etwa „Modellinstitutionen" darstellen, für welche zugleich das Gesetz vom 01. März 2018 eine Grundbedeutung hat. Es scheint umso wichtiger, dass auf diese Weise vorgezeichnete Erwartungen nicht in jedem einzelnen Fall Unterstützung in dementsprechenden Normalisierungen finden, dies betrifft nicht die Idee als solche gegen die Geldwäscherei entgegenzuwirken, aber eher die Erwartungen von deren Bestimmungsweisen im Einklang mit dem Gesetz vom 01. März 2018. Die vorliegende Bearbeitung dient diesem Zweck.

Schlüsselwörter: Geldwäscherei, Terrorismusfinanzierung, Banken, verpflichtete Institutionen

LES OBLIGATIONS DES BANQUES VISAIENT À LUTTER CONTRE LE BLANCHIMENT DE CAPITAUX ET LE FINANCEMENT DU TERRORISME À LA LUMIÈRE DES RÈGLEMENTS MODIFIÉS

Résumé

Le 13 juillet 2018, la loi du 1er mars 2018 sur la lutte contre le blanchiment de capitaux et le financement du terrorisme est entrée en vigueur. Elle a abrogé la loi du 16 novembre 2000, applicable jusqu'à cette date, en la remplaçant et en introduisant un certain nombre de modifications du système de prévention contre ces phénomènes négatifs. Ces modifications concernent la nécessité pour les institutions engagées d'évaluer le niveau de risque de

blanchiment de capitaux et de financement du terrorisme et, en conséquence, de prendre les mesures de sécurité financière appropriées. Cependant, une analyse plus approfondie de cette loi suggère que nombre des réglementations nouvellement introduites font essentiellement référence à une terminologie souvent insuffisamment claire et sans ambiguïté. Cet état de fait peut entraîner des difficultés dans l'application de ses dispositions, ce qui s'applique notamment aux institutions soumises à obligations, c'est-à-dire les entités auxquelles cet acte juridique impose des obligations relatives à la protection du système financier contre l'utilisation de ces institutions à des fins de blanchiment de capitaux ou de financement du terrorisme. Dans ce système, les banques occupent depuis de nombreuses années la position de leader en matière de réglementation et de participation active à la prévention de ces pratiques. Ceci est dû à des mécanismes de prévention mis au point depuis de nombreuses années, ainsi que des réglementations internes pouvant effectivement contribuer à éliminer les cas de participation des institutions financières au blanchiment de capitaux ou au financement du terrorisme. On peut donc considérer qu'il s'agit d'un type d'institutions «modèles» soumises à des obligations, pour lesquelles l'acte du 1er mars 2018 revêt une importance capitale. Il semble d'autant plus important que de telles attentes ne trouvent pas toujours leur soutien dans des réglementations appropriées, qui concernent non pas tant l'idée de prévenir le blanchiment de capitaux, mais plutôt les exigences et la manière de les définir dans la loi du 1 er mars 2018. Ce sens semble d'autant plus important que des attentes décrites de cette façon ne sont pas toujours étayées par les réglementations pertinentes, ce qui concerne non pas tant l'idée de prévenir le blanchiment de capitaux, mais plutôt les exigences et la manière de les définir dans la loi du 1 er mars 2018. Cette étude est consacrée à ces questions.

Mots-clés: blanchiment de capitaux, financement du terrorisme, banques, institutions soumises à obligations

OBBLIGHI DELLE BANCHE IN MATERIA DI PREVENZIONE DEL RICICLAGGIO DI DENARO E DEL FINANZIAMENTO DEL TERRORISMO ALLA LUCE DELLE NORME MODIFICATE

Sintesi

Il 13 luglio 2018 è entrata in vigore la legge del 1° marzo 2018 sulla lotta al riciclaggio di denaro e al finanziamento del terrorismo, che ha abrogato la legge del 16 novembre 2000, in vigore fino a tale data, sostituendola e introducendo una serie di modifiche al sistema di prevenzione contro questi fenomeni negativi. Si riducono alla necessità che gli enti obbligati valutino il livello di rischio di riciclaggio e di finanziamento del terrorismo e, di conseguenza, adottino adeguate misure di sicurezza finanziaria. Tuttavia, un'analisi più approfondita della legge in questione suggerisce che molte delle nuove norme introdotte fanno riferimento a una terminologia spesso non sufficientemente chiara e priva di ambiguità. Tale circostanza può causare difficoltà nell'applicazione delle sue disposizioni, che si riferisce in particolare agli enti obbligati, vale a dire entità alle quali l'atto giuridico in questione impone obblighi relativi alla protezione del sistema finanziario contro l'uso di tali enti a scopo di riciclaggio o di finanziamento del terrorismo. In questo sistema, le banche sono da anni all'avanguardia sia in termini di regolamentazione che di effettivo e attivo coinvolgimento nella prevenzione di tali pratiche. Il che è il risultato, tra l'altro, dei meccanismi di prevenzione sviluppati nel corso degli anni, nonché della regolamentazione interna, che può dare un reale contributo all'eliminazione dei casi di partecipazione di queste istituzioni finanziarie al riciclaggio di

denaro o al finanziamento del terrorismo. Si può quindi concludere che essi costituiscono una specie di "modello" di istituzioni obbligatorie, per le quali la legge del 1° marzo 2018 è di importanza fondamentale. Sembra tanto più importante in quanto tali aspettative non sempre sono sostenute da norme pertinenti, il che riguarda non solo l'idea stessa di pervenire il riciclaggio di denaro, ma piuttosto i requisiti e il modo di definirle nella legge del 1° marzo 2018. Tali questioni sono oggetto del presente studio.

Parole chiave: riciclaggio di denaro, finanziamento del terrorismo, banche, istituzioni obbligatorie

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NATIONAL HERITAGE IN THE POLISH CONSTITUTIONAL ORDER

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In the traditional meaning, “heritage” is movable property or immovable property inherited, or inheritance, legacy and succession.[1] In more modern dictionaries of the Polish language, it is also defined as “culture, science, art, etc. left by former generations”, i.e. cultural heritage.[2] In Latin, “heritage” is called *patrimonium*, i.e. first of all inherited property, legacy from the father, family estate, property[3] or patrimony[4]. In constitutional law, the concept of “heritage” is not so unambiguous. In the Preamble to the Constitution,[5] heritage is associated with nation, on the one hand, and culture, on the other hand. It refers to “culture rooted in the Christian heritage of the Nation and in the universal values”. Further indications of the Preamble are ambiguous and the possible interpretation is that “culture rooted in the Christian heritage of the Nation” should be bequeathed to future generations but also that the obligation to bequeath to all generations does not concern “culture rooted in the Christian heritage of the Nation” but “all that is valuable from our over one thousand years’ heritage”. It seems that there is another difficulty concerning cultural heritage referred to in Article 6 para. 2 of the Constitution. Cultural heritage is undoubtedly part of the national heritage. However, a question is raised whether the term “national heritage” equals “cultural heritage”. It is hard to agree with an opinion that the national heritage is only the heritage that is part of culture rooted in the Christian system of values, although it seems that many publicists tend

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1 M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 1, Warsaw 1988, p. 498.

2 S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 1, Warsaw 2003, p. 761.

3 J. Sondel (ed.), *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2006, p. 718.

4 K. Kumaniecki (ed.), *Słownik łacińsko-polski*, Warsaw 1968, p. 354.

5 The Constitution of the Republic of Poland of 2 April 1997, Journal of laws [Dz.U.] No. 78, item 483, revised [Dz.U.] of 2001, No. 28, item 319.

to support this stand. Some of them go even further and believe that it does not concern the Christian heritage but only the Catholic one.[6] In the circumstances of the Republic of Poland, the heritage of the Nation also includes, both in material and non-material terms, the heritage of the Jewish, Tatar and Karaim culture developed in the Polish lands, which undoubtedly does not belong to the Christian tradition. Obviously, it is on the fringe of heritage but should not be ignored.

In accordance with Article 5 of the Constitution, "the national heritage" is a constitutional value that must be safeguarded.[7] From the legal point of view, "the national heritage" means "factors of material and spiritual nature that occurred in the history of the Polish state and society giving evidence of its identity and equal position among other nations, and constituting leaven for further development".[8] However, there is a problem whether this obligation to safeguard the national heritage laid down in Article 5 of the Constitution means safeguarding "the heritage of the Nation" in the meaning of the Preamble or "the national heritage", and next, what the scope of that obligation is.

In the doctrine as well as case law, it is indicated that the lack of a legal definition of "national heritage" does not allow the recognition of Article 5 of the Constitution as the basis of legal obligations imposed on relevant bodies, institutions and citizens. However, it does not deprive the constitutional declaration of the value as a guideline for state bodies on acting within the scope of their competence concerning

6 G. Horst, *Co oznacza "dziedzictwo chrześcijańskie"?,* [in:] *Europa dla Chrystusa!*, http://www.europe4christ.net/fileadmin/media/pdf/polish/List_do_Europy_5.pdf (accessed on 8/09/2018, 12.22); J.M. Jackowski, *Chrześcijańskie dziedzictwo narodu,* Niedziela Ogólnopolska No. 16, 2016, p. 38; M. Przeciszewski, *Kościół katolicki w Polsce dziś*, http://dziedzictwo.ekai.pl/text.show?id=4501 (accessed on 8/09/2018, 12.27); *Kultura wyrazem człowieczeństwa i tożsamości narodów*, http://civitaschristiana.pl/kultura-wyrazem-czowieczestwa-i-tosamoci-narodow/ (accessed on 8/09/2018, 12.29); O. Szczypiński, *Chrześcijaństwo jako źródło kultury europejskiej w myśli Josepha Ratzingera*, https://depot.ceon.pl/bitstream/handle/123456789/5421/chrzescijanstwo_jako_zrodlo_kultury.pdf?sequence=1 (accessed on 8/09/2018, 12.33); S. Mulvey, *Wartości europejskie – zjednoczeni w różnorodności?*, http://www.bbc.co.uk/polish/040114_europe_values.shtml (accessed on 8/09/2018, 12.36); Rev. N. Brzózy, *Chrześcijaństwo, Kościół, demokracja*, https://idmjp2.pl/index.php/pl/wydarzenia/prelekcje/1157-wyklad-otwarty-chrzescijanstwo-kosciol-demokracja (accessed on 8/09/2018, 12.42); Ł. Cieślak, *Chrześcijaństwo – religia państwa i Kościoła*, http://www.bibliotekacyfrowa.pl/Content/21965/015.pdf (accessed on 8/09/2018, 13.05); J. Sosnowski, *Respekt dla wartości*, Gazeta Wyborcza No. 15, 1993; Rev. W. Piwowarski, *Wartości podstawowe*, Ład No. 2, 1993; Rev. W. Nasta, *Co to są wartości chrześcijańskie*, Polityka No. 48, 1992; Rev. J. Salij, *Co to są wartości chrześcijańskie*, Polityka No. 48, 1992; Rev. M. Krąpiec, *Teokracja,* Gazeta Wyborcza No. 215, 1993. For more on the issue also see Rev. A. Zwoliński, *Wprowadzenie do rozważań o narodzie*, Kraków 2005, p. 56 ff.

7 It is emphasised in the judicature that the constitutional legislator treated the term "safeguard" and "ensure" used as the substitute for the former in a broad way, covering all forms of the state's activities. It is also reminded that the types of instruments with which the state's tasks can be implemented depend on the nature of the tasks and restrictions on public authorities' activities resulting from other provisions of the Constitution. Compare justification for the Constitutional Tribunal judgments: of 8 October 2007, K 20/07 OTK-A 2007, No. 9, item 102; of 25 May 2016, Kp 2/15, OTK-A 2016, item 23.

8 See P. Sarnecki, *Uwagi do art. 5 Konstytucji*, [in:] L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Vol. 1, 2nd revised edn, Warsaw 2016, p. 234

heritage *sensu largo*.[9] In the judicature, attention is drawn to the fact that, although the phrases "the national heritage" and "the national cultural heritage" do not have legal definitions at the constitutional level, the linguistic context in which "heritage" is used in the Preamble and Article 5 of the Constitution makes it possible to assume that the constitutional legislator referred to the idea of generational solidarity and continuity of cultural and state system tradition of the Republic of Poland.[10]

There is an opinion in literature that by safeguarding the national heritage we pay back "our debt of gratitude" to former generations for their struggle for independence and the culture they created, which is referred to in the Preamble to the Constitution. At the same time, it is highlighted that the fulfilment of this obligation means not only preserving this national heritage in an unimpaired state but also bequeathing it.[11] In order to solve the issue concerning the content of the national heritage, P. Sarnecki presents an opinion that "the national heritage does not only mean the historical events that Polish society may be proud of but also those that are rightly condemned if they can serve as an element of social education".[12]

Against this background, an issue concerning the perception of the nation arises; it is spelled with the capital letter "N" in the Preamble to the Constitution but with "n" in Articles 5 and 6 para. 2. According to L. Garlicki, the concept of the nation is philosophical and social, not ethnic, in nature, and the Polish nation in the constitutional meaning cannot be identified with the entirety of people having Polish nationality with the exclusion of citizens of different nationality; however, in the light of Article 27 and Article 35 paras. 1 and 2 of the Constitution, national and ethnic minorities have the right to maintain their identity. He indicates at the same time that, on the one hand, the decisions of the citizens who have electoral rights constitute the source of authority, but on the other hand, Article 6 para. 2 of the Constitution refers to "Poles living abroad", which goes beyond the traditional criterion for citizenship. In this situation, L. Garlicki states that the development of a precise definition of the nation is neither possible nor necessary because suffrage is a decisive criterion.[13]

According to Z. Witkowski, the term "nation" used in the Constitution has a political and not ethnic meaning. A political definition of the nation, according to him, is both a permanent element of the Polish tradition and an element integrating all people who have the citizenship of the Republic of Poland and feel responsible for its good. He emphasises that the nation is a legal community composed of all

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[9] Justification for the Constitutional Tribunal judgment of 8 October 2007, K 20/07; J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, Vol. 2, Kraków 2001, p. 514.

[10] Justification for the Constitutional Tribunal judgment of 25 May 2016, Kp 2/15. It should be highlighted that the legislator indicated the criteria for the entry into Lista Skarbów Dziedzictwa (Register of Heritage Treasures) in Article 1(6) of the Act of 10 July 2015 on amending the Act on the protection of antiquities and taking care of them and the Act on museums in the part adding Article 14a para. 2 to the Act of 23 July 2003 on the protection of antiquities and taking care of them, consolidated text, Journal of Laws [Dz.U.] of 2014, item 1446.

[11] M. Florczak-Wątor, *Uwagi do art. 5 Konstytucji*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. 1: *Komentarz. Art. 1–86*, Warsaw 2016, p. 289.

[12] P. Sarnecki, *Uwagi do art. 5 Konstytucji…*, p. 234.

[13] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2016, p. 70.

citizens and highlights that the concept of the nation used without a preceding adjective is rather general and imprecise. Such an approach is purposeful. He indicates that the legislator uses the term "nation" with reference to "the community of all citizens" (Article 1 of the Constitution). The Preamble emphasises "We, the Polish Nation – all citizens of the Republic", but further on, Article 6 para. 2 of the Constitution refers to "Poles living abroad".[14]

P. Sarnecki notices that the Constitution cannot provide a definition of the nation because it is not a legal term, thus neither a constitutional one, but a political or social-political one, and its content should be determined by means of an analysis and interpretation of legal provisions. He emphasises that the nation living in its own state "is a certain community united by numerous ties developed throughout its history and political emotions (patriotism) also united by common history". Then he concludes that a political concept of the nation used in constitutions differs from the concept of the nation used in ethnography or ethnology, where mainly a community is essential.[15] B. Banaszak draws attention to the fact that an opinion referring to the French doctrine of constitutional law became popular. According to it, the nation is a political community encompassing all citizens regardless of their ethnic origin. In his opinion, the Constitution treats the nation within the political meaning as a community directly deciding about its rights. He approves of the opinion that the nation is not treated in the Constitution as an ethnic category, although some doubts can be raised in the light of the phrases used in the Preamble.[16] M. Gulczyński agrees with the opinion that the concept of the nation used in the Constitution is not equal to its ethnic meaning.[17]

K. Działocha, analysing the opinions presented in the doctrine, points out that in general there are no controversies concerning the statement that the constitutional concept of the nation does not refer to the ethnic sphere but means a broader community. He also concludes that the phrases in the Preamble referring to "the Polish Nation" as "all citizens" of the Republic of Poland cannot be recognised as a definition of legal nature.[18] W. Orłowski's opinion seems to be interesting as he notices that the Constitution in its Preamble as well as in its further articles refers to the nation in its ethnic and political meaning; however, the nation in the political meaning is the basic concept.[19]

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[14] Z. Witkowski, [in:] Z. Witkowski, A. Bień-Kacała (eds), *Prawo konstytucyjne,* Toruń 2015, p. 82.

[15] P. Sarnecki, [in:] *Prawo konstytucyjne RP,* 7th edn, Warsaw 2008, pp. 177–178.

[16] B. Banaszak, *Prawo konstytucyjne,* 7th edn, Warsaw 2015, p. 221; *idem*, *Konstytucja Rzeczypospolitej Polskiej*, 2nd edn, Warsaw 2012, p. 63.

[17] M. Gulczyński, *Zasada zwierzchnictwa narodu*, [in:] W. Sokolewicz (ed.), *Zasady podstawowe polskiej Konstytucji*, Warsaw 1998, p. 110.

[18] K. Działocha, *Uwagi do art. 4 Konstytucji*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 5, Warsaw 2007, p. 9. The author did not repeat the statement in the second edition of this commentary.

[19] W. Orłowski, [in:] W. Skrzydło, S. Grabowska, R. Grabowski, *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warsaw 2009, p. 249 ff. It is reminded in literature that when the Constitution was being developed, the opposition demanded that the Polish Nation be indicated in the Preamble and opposed the use of a phrase "We, Polish citizens". Also Rev. Professor J. Krukowski, the representative of the Polish Bishops' Conference Secretary, was for

The constitutional concept of the Polish Nation cannot be identified only with people having Polish nationality. The Constitutional Tribunal unambiguously expressed this stand in its rulings.[20]

It also unambiguously results from the content of Article 4 of the Constitution. Thus, the concept of "the nation", which is used in the Constitution, means a broader community and not only a cultural or ethnic one.[21] However, the content of Article 6 of the Constitution seems to negate this thesis because it stipulates equal access to the products of culture "which are the source of the Nation's identity, continuity and development". There are no doubts that the products of culture that are the source of identity of Armenians, Tatars, Karaims, Germans and Jews who are Polish citizens are different from the products of culture which are the sources of the identity of the Polish Nation as an ethnic nation. Approving of the broad interpretation of the content of Article 6 para. 1 of the Constitution, one can state that the Republic of Poland creates conditions for popularising and equal access to the products of

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the introduction of a phrase referring directly to the Polish Nation, indicating the possibility of speaking about the nation in the political sense. Compare M. Piechowiak, *Uwagi do preambuły*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP…*, Vol. 1, p. 134.

[20] The Tribunal stated that in order to establish the belonging to the Polish Nation in the meaning of the Preamble, no factors other than citizenship are significant, even such as nationality, race or denomination, and the essence of belonging to the Polish Nation in this meaning is the sense of state expressed by the possession of Polish citizenship. In a further part, it was emphasised that the legislator "treats the Polish nation spelled with an 'n' letter as a community that is not only ethnic (in the meaning of 'the community of blood', which would be irrelevant to migration and mixture of various nationalities in the multinational First and Second Polish Republics, as a result of wars and foreign armies' marches across Poland) but also cultural". Compare the justification for the Constitutional Tribunal judgments of 25 May 2016, Kp 2/15 and of 21 September 2015, K 28/13. In the judgment Kp 2/15, it was stated that the constitutional legislator assumed that the Polish Nation is a community within which there is a multigenerational relationship expressed in universal values connected with a set of systematised principles and directives indicating how to achieve those values and what methods should be abandoned when pursuing them. Interpreting the content of the Preamble, the Constitutional Tribunal stated that it fully approves of the opinion that the Constitution uses the concept of the nation in the political sense and not the ethnic one, and in the meaning of the constitutional norms, which were the basis for the formulation of the Preamble, the concept of the nation refers to a community composed by the citizens of the Republic of Poland (judgment of the Constitutional Tribunal of 31 May 2004, K 15/04, OTK-A 2004, No. 5, item 47). A similar standpoint is expressed in the judgment of the Constitutional Tribunal of 12 January 2005 (K 24/04, OTK-A 2005, No. 1, item 3), in which it is stated that the nation should be interpreted as the entirety of citizens, not just in the ethnic sense (para. 9 of the considerations presented by the Tribunal in the justification).

[21] L. Garlicki, *Polskie prawo konstytucyjne…*, Warsaw 2006, p. 55; Z. Witkowski, *Prawo konstytucyjne*, Toruń 2009, pp. 62–66. As K. Działocha notices, the fact that using the phrase that can be found in the Preamble, compared with that used in the articles, especially in the references concerning individuals' rights, the legislator refers to the term "citizen" supports the statement that the legislator makes use of a legal concept of the "nation". See K. Działocha, *Uwagi do art. 4. Konstytucji…*, p. 9.

culture which are sources of identity not only for the citizens who are of the Polish nationality but also for those citizens[22] who belong to national minorities.[23]

It is worth mentioning that in line with the Preamble, citizens who currently form the Polish Nation are "bound in community with our compatriots dispersed throughout the world". This phrase must raise legal doubts. Its simple interpretation makes us state that it concerns people of Polish nationality living abroad. But it would negate an established conclusion that the concept of "the Polish Nation" used in the Constitution does not refer to the ethnic nation but is legally significant and it

[22] Citizenship constitutes a legal institution based in constitutional, international and administrative law strongly connected not only with the state but also society and having its psychological and sociological dimension. It is emphasised in literature that citizenship is a permanent or relatively permanent, in terms of time and space, legal tie binding an individual (a natural person) with the state. See J. Jagielski, *Obywatelstwo polskie: zagadnienia podstawowe*, Warsaw 1998, pp. 16–17; Z. Sokolewicz, *Obywatelstwo a narodowość. Uwagi w związku z ustanowieniem obywatelstwa Unii Europejskiej*, Studia Europejskie No. 1, 1997, pp. 13–35; J. Trzciński, *Obywatelstwo w Europie. Z dziejów idei i instytucji*, Warsaw 2006, in particular pp. 181–236; *idem*, *Obywatelstwo w Europie. Idea i jej wyraz formalny w perspektywie historycznej*, Studia Europejskie No. 2, 2002, pp. 45–67; M. Wyrzykowski, *Obywatel i biurokracja*, [in:] A. Rzepliński (ed.), *Prawa człowieka w społeczeństwie obywatelskim*, Warsaw 1993, p. 52; M. Magoska, *Obywatel w procesie zmian*, Kraków 2001, p. 38 ff; E. Smoktunowicz, *Status administracyjno-prawny obywatela*, [in:] *System prawa administracyjnego*, Vol. 4, Wrocław 1980, p. 7 ff; E. Smoktunowicz (ed.), *Wielka encyklopedia prawa*, Białystok–Warsaw 2000, p. 541. In sociological thought, mainly under the influence of T.H. Marshall, it is emphasised that citizenship shapes a public-legal status of a natural person, the scope of their rights and obligations. See T.H. Marshall, *Class, Citizenship and Social Development*, London 1963, *passim*. According to T.H. Marshall, there are three dimensions of citizenship: civil, political and social ones. Citizenship in the civil meaning is civil rights, in general citizens' liberties, typical of and prescribed to all natural persons belonging to a particular society understood as a great social group creating the state, claimable before a court and not subject to an arbitrary refusal by the state or any other entities. The social dimension of citizenship means social guarantees, the right to an appropriate standard of living, healthcare, educational opportunities, using social security means and cultural heritage. In the doctrine, it is concluded that the scope of the concept of "citizenship" is constantly extending as a result of society modernisation and structural differentiation, which causes the development of new institutions and transformation of old simple social structures into complex ones. See T. Parsons, *The System of Modern Societies*, New York 1971, p. 23. Also see T. Parsons, R. Holton, B.S. Turner, *Parsons and Modernity*, London 1986, p. 17. According to J. Habermas, there are two visions of citizenship. He draws the first one from liberal tradition of John Locke's natural law, where a citizen's belonging is based on determined legal regulations, freedoms and liberties that should be ensured by the authorities, and private life is a value that the state should protect. He associated the second one with classical tradition and Aristotle's thought. According to this conception, a citizen is a subject shaping the political will of the community and his belonging to the state is based on collective development of the community in the ethical and cultural sphere. In this case, a political community creates a new quality that determines an individual through the possibility of participating in collective self-determination. J. Habermas, *Obywatelstwo a tożsamość narodowa: rozważania nad przyszłością Europy*, Warsaw 1993, pp. 12–16. On this occasion, J. Habermas refers to the ideas of Ch. Taylor, who noticed that being a citizen of the liberal model consists in the protection of the rights of individuals and equal treatment as well as possession of real influence on decision-taking. In the classical (Aristotle's) model, participation in management alone is the essence of freedom. See Ch. Taylor, *The Liberal-Communitarian Debate*, [in:] N.L. Rosenblum (ed.), *Liberalism and the Moral Life*, Cambridge 1989, p. 178 ff.

[23] For this issue, see M. Banaś, A. Krzywonos, *Prawo do obywatelstwa*, [in:] B. Banaszak, A. Preisner, *Prawa i wolności obywatelskie w Konstytucji RP*, Warsaw 2002, pp. 157–208; S. Konopacki, *Obywatelstwo europejskie w kontekście członkostwa Polski w Unii Europejskiej*, Łódź 2005, pp. 67–116.

should be interpreted as Polish citizens who may belong to various nations.[24] It seems that the term "compatriots" used in the Preamble to the Constitution does not match the term "nation". Compatriots are only citizens of Polish nationality. The feeling of being bound in community with compatriots "dispersed throughout the world" constitutes another axiological basis of the Constitution. It is worth mentioning that the Polish Basic Law declares the need for cooperation with all countries for the good of the Human Family but does not transfer this onto a particular ground and does not notice the need for and possibility of cooperation between individuals, or at least such cooperation is not one of the constitutional values.

Article 6 para. 1 of the Constitution, which guarantees equal access to the products of culture that are the source of the Polish Nation's identity, continuity and development, results in another problem. At the same time, Article 6 para. 2 lays down that the Republic of Poland should assist Poles living abroad in maintaining their links with the national cultural heritage. In the light of the above-presented statements, there are no doubts that, firstly, the products of culture are the source of the Polish Nation's identity and, secondly, that the products of culture are part of national heritage because cultural heritage is part of national heritage. However, a doubt arises in connection with Article 35 of the Constitution in conjunction with Article 6 para. 2 of the Constitution. It concerns the question whether the content of Article 6 para. 2 of the Constitution refers to Poles in the ethnic or political meaning. In other words, whether a man who used to be a Polish citizen but is a member of a national minority, e.g. Tatars, Karaims, Armenians or a descendant of such a citizen, who feels like a Pole but already has another citizenship yet wants to maintain ties with Poland, may expect that the Republic of Poland will assist him in maintaining the links with the national cultural heritage as well as the area which is part of the cultural heritage of the national or ethnic minority. In other words, the question is whether the national cultural heritage is the Polish Nation's

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[24] It is not possible here to try to summarise the whole, rich and multi-dimensional discussion concerning the issue of national identity, which was carried out within the framework of a few disciplines. I devoted my attention to this issue and referred to abundant literature in *Kryzys polskiej tożsamości narodowej, narodziny tożsamości europejskiej – antynomie, dylematy, miraże*, [in:] L. Dyczewski, D. Wadowski (eds), *Tożsamość polska w odmiennych kontekstach*, Lublin 2009, pp. 227–260. It is not possible to repeat those comments or even summarise them here. Also see J. Sobczak, *Mniejszości narodowe i wyznaniowe w polskim porządku prawnym*, [in:] J. Sobczak, A.W. Mikołajczak, B. Hordecki (eds), *Zderzenie czy dialog państw narodowych w Europie*, Poznań 2008, pp. 9–43; *idem*, *Wokół problemu definicji mniejszości narodowych*, Środkowoeuropejskie Studia Polityczne No. 1, 2003, pp. 25–62; *idem*, *Europa mniejszości. Standardy prawne ochrony mniejszości narodowych i etnicznych oraz ich realizacja w polskim systemie prawnym*, [in:] M. Musiał-Karg (ed.), *Europa XXI wieku. Pespektywy i uwarunkowania integracji europejskiej*, Poznań 2007, pp. 167–201; *idem*, *Kryzys polskiej tożsamości narodowej, narodziny tożsamości europejskiej – antynomie, dylematy, miraże*, [in:] M. Janowski, J. Jonczek, L. Ślepowroński (eds), *Quo vadis Europa? Kulturowe oblicza Europy*, Vol. 1, Szczecin 2008, pp. 23–51; compare, W. Konarski, *Naród, mniejszość, nacjonalizm, religia – przyczynek do dyskursu o pojęciach i powiązaniach między nimi*, [in:] A. Hołub (ed.), *Narody XXI wieku*, Olsztyn 2007, pp. 17–51; M. Jasińska, *Podstawowe prawa i wolności mniejszości narodowych w systemie Rady Europy*, Politologia i Stosunki Międzynarodowe No. 2, 2007, pp. 156–168. It is necessary to emphasise that many researchers, inter alia, J. Habermas, believe that political democracy does not require identification with identity determined historically or culturally, although he admits that a national state led to a relationship between ethnicity and democracy, but it was done in a specific historical period.

heritage in the ethnic meaning or the heritage including all products of culture of those ethnic or national minorities that used to live in the First Polish Republic, the Second Polish Republic and on Polish lands after World War II.

The issue is indirectly connected with ambiguity of the term "culture". The concept is highly ambiguous in the Polish legal system. There is no legal definition of it, although numerous normative acts, starting with the Constitution, use it.[25] In literature, attention is drawn to the fact that definitions of culture are usually based on a list of elements of culture, on the emphasis of the necessity of learning culture as a mechanism of acquiring it and influencing personality, on the indication of its social origin (the fact that it is an effect of social cohabitation of people), on the enhancement of social inheritance and tradition as a way of creation and continuance of culture and, finally, on the statement that a given culture is "something uniting in the given society".[26] In the doctrine, there are many conceptions of interpreting culture and its links with social life. Most of them are thoroughly described in cultural anthropology textbooks.[27]

The use of the term "culture" in legal language and the language of law is connected with the issues of "using the products of culture" and "access to the products of culture". The former term bans public authorities from creating limitations of access to the products of culture. This freedom is broad in nature, thus it can enter into conflict with other liberties and rights confirmed in legal acts of international law and guaranteed in constitutions, including property rights. "Access to the products of culture" is usually treated as a freedom, which would be an argument for rationing access to the products of culture; on the other hand, in practice, normative acts quite often limit that access, which is caused by the intention to maintain the products of culture in an unimpaired state. International legal acts, including the EU law, impose an obligation on member states to enact legal provisions preventing limitation of access to the products of culture. While the use of the products of culture is a freedom and is a subjective right in nature, it should lead to a possibility of formulating a complaint, including a constitutional one, in case of limitation of this access.[28]

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[25] For this issue, see A. Kłoskowska, *Kultura masowa*, Warsaw 1980, pp. 9–93. Also see A. Kroeber, C. Kluckhohn, *Culture. A Critical Review on Concepts and Definitions*, Papers of Peabody Museum of American Archaeology and Ethnology No. 47(1), 1952; G. Banaszak, J. Kmita, *Społeczno-regulacyjna koncepcja kultury*, Warsaw 1994; S. Bednarek, *Pojmowanie kultury i jej historii we współczesnych syntezach dziejów kultury polskiej*, Wrocław 1995; S. Czarnowski, *Kultura*, [in:] *Dzieła*, Vol. 1, Warsaw 1968; A. Kłoskowska, *Socjologia kultury*, Warsaw 1981; A. Kroeber, *Istota kultury*, Warsaw 1973; B. Malinowski, *Naukowa teoria kultury*, [in:] *Szkice z teorii kultury*, Warsaw 1958; F. Znaniecki, *Nauki o kulturze*, Warsaw 1971; G. Simmel, *O istocie kultury*, [in:] *Filozofia kultury. Wybór esejów*, Kraków 2007, pp. 15–22.

[26] A.L. Kroeber, C. Kluckhohn, *Culture. A Critical Review…*, p. 3 ff, https://ia801409.us.archive.org/19/items/papersofpeabodymvol47no1peab/papersofpeabodymvol47no1peab.pdf (accessed on 8/09/2018, 15.05). Also see A.L. Kroeber, *Istota kultury*, Warsaw 2002, pp. 151–174 and 195–213.

[27] The most common conceptions include: evolutionism, new-evolutionism, Marxism, Frankfurt School approach, Durkheim School conception, historicism, diffusionism, functionalism and systemic thinking, structuralism, psycho-culturalism, cognitive science and post-modernism. See M. Golka, *Socjologia kultury*, Warsaw 2007, p. 23 ff.

[28] See M. Królikowski, K. Szczucki, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP…*, Vol. 1, p. 1688; J. Sobczak, *Wolność korzystania z dóbr kultury – standardy europejskie i konstytucyjna*

It is believed in the doctrine that the freedom of using the products of culture is mainly vertical in nature, thus it results in obligations imposed on public authority bodies. However, it does not have a "horizontal effect" because the application of the freedom of access to the products of culture that remain in private possession might collide with property rights or privacy of domestic life.[29] We should agree with M. Piechowiak's opinion that the legislator did not mean culture in the descriptive sense but culture based on a particular axiological foundation contained in the Christian heritage of the nation and universal values.[30] In this situation it is worth considering whether "culture" as used in the Preamble is only a value or also a legal principle.[31]

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rzeczywistość polska, [in:] T. Gardocka, J. Sobczak (eds), *Prawna ochrona dóbr kultury*, Toruń 2009, pp. 7–26; M. Gołda-Sobczak, *Wolność korzystania z dóbr kultury i wolność badań naukowych*, Media i Medioznawstwo No. 1(13/IV), 2014, pp. 9–38; J. Sobczak, M. Gołda-Sobczak, *Свобода использования культурных ценностей в европейском правовом порядке. Международные стандарты*, [in:] Т.Л. Курас (ed.), *Правовая политика современной России: реалии и перспективы. Материалы международной научно-практической конференции*, Irkutsk 2014, pp. 122–137.

29 See L. Garlicki, M. Derlatka, [in:] L. Garlicki, M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 2, 2nd edn, Warsaw 2016, p. 800. Also see M. Jabłoński, *Wolności z art. 73 Konstytucji RP*, [in:] B. Banaszak, A. Preisner (eds), *Prawa i wolności obywatelskie w Konstytucji RP*, Warsaw 2002, p. 561; A. Frankiewicz, *Wolność w sferze sztuki i nauki według Konstytucji Polskiej Rzeczypospolitej Ludowej z 1952 r. oraz Konstytucji Rzeczypospolitej Polskiej z 1997 r.*, [in:] M. Sadowski, P. Szymaniec (eds), *Prawa człowieka – idea, instytucje, krytyka*, Studia Erasmiana Wratislaviensia No. 4, 2010, p. 236; *idem*, *Konstytucyjna regulacja dostępu do dóbr kultury i wolności korzystania z dóbr kultury*, Przegląd Prawa Konstytucyjnego No. 3, 2013, p. 63.

30 M. Piechowiak, [in:] M. Safjan, M. Bosak (eds), *Konstytucja RP…*, Vol. 1, p. 140.

31 There may be doubts whether culture in the meaning of the Preamble may be treated as a constitutional principle or understood as a value. In the Constitutional Tribunal judgments, some kinds of states, phenomena, events, relationships or conduct are often described as values. This is how the freedom to express opinions as the freedom of speech is treated. See the judgment of the Constitutional Tribunal of 7 June 1994, K 17/93, OTK 1994, part I, item 11, p. 90. In the justification it is stated: "Freedom to express opinion, as a form of freedom of speech, is a constitutional value protected under Article 83 of the constitutional provisions; however, it is not absolute in nature". By the way, it is worth mentioning that there is a statement: "Restrictions are admissible in situations clearly expressed in other constitutional provisions or when it is necessary to mutually harmonise the freedom of speech with other constitutional principles, norms and values". In this situation, the Constitutional Tribunal clearly, at least in this judgment, does not identify constitutional values with principles and norms. It should be noticed that the freedom of conscience and religion is also included in the justification as a constitutional value. In the theory of the state and law, there were conceptions of the principles of law developed that may be applied in all fields of law. It is indicated that principles may be expressed in the descriptive or directive form. Sometimes, it is said that statements given a status of principles in jurisprudence are in the form of descriptions, directives or assessment. See M. Kordela, *Zasady prawa. Studium teoretyczno-prawne*, Poznań 2012, pp. 23–30. For the issue of the relationship between principles and values, see S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Warsaw 1974, *passim*. At the same time, attention is drawn to the fact that in the process of law application, it is not enough to simply refer to a particular principle but it is necessary to recover its content thoroughly and provide basis for its application. M. Kordela, *Zasady prawa…*, p. 23 ff. In the Polish doctrine, following the solutions adopted in the Anglo-Saxon literature, it is indicated that the most characteristic types of legal sentences are created by norms determining obligations including two supplementing classes: rules and principles. M. Atienza, J. Ruiz Manero, *A Theory of Legal Sentences*, Dordrecas 1998, p. ix; citated after M. Kordela, *Zasady prawa…*, pp. 36–37.

The lack of a legal definition of "culture" causes that it can be in practice interpreted as cultural heritage or understood as the concept of "the products of culture as the source of the nation's identity", or possibly the national cultural heritage. It is assumed in literature that the national heritage, and putting it more precisely the cultural heritage, encompasses not only material elements of former generations' attainment[32] but also a set of thoughts or feelings. It is assumed that the products of culture, i.e. cultural heritage, constitute the evidence of culture.[33] This heritage also includes scientific attainment, and effects of creative work.[34] We are accustomed to distinguishing material and non-material aspects of cultural heritage. Attention is also drawn to difficulties in classifying a particular product of culture as the cultural heritage of a particular nation.[35] Making an attempt to formulate a definition of cultural heritage, J. Pruszyński states that it is "a resource of movable and immovable objects together with spiritual values connected with them, historical and moral phenomena, believed to be worth legal protection for the good of society and its development as well as bequeathing to next generations due to understandable and accepted historical, patriotic, religious, scientific and artistic values that are significant for the identity and continuity of the development of political, social and cultural provision of proofs of truths and commemoration of historical events, preservation of the sense of beauty and civilizational community".[36]

It is raised in literature that the content of Article 6 of the Constitution is one of the most detailed principles of the state policy. The term "principles" should be interpreted as provisions imposing obligations on public authorities and their bodies, which are however not connected with those entities' particular rights. Undoubtedly, culture in the meaning of Article 6 of the Constitution, i.e. as "the source of the Polish Nation's identity", is one of the elements of the national heritage in the meaning of Article 5 of the Constitution. The issue of identity occurs when an individual faces a broader possibility of choice. It concerns many spheres of life, education, occupation, participation in social and political associations, and functioning in a social group. Questions about national identity and the issue of the choice of language and religion seem to be especially important.

The question of national identity is one of those issues in which a few scientific disciplines are interested. On the one hand, it is the subject matter of sociological research,

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[32] J. Pruszyński, *Dziedzictwo kultury w świetle Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, [in:] J. Wawrzyniak, M. Kruk, J. Trzciński (eds), *Konstytucja i władza we współczesnym świecie. Doktryna, prawo, praktyka. Prace dedykowane Profesorowi Wojciechowi Sokolewiczowi na siedemdziesięciolecie urodzin*, Warsaw 2002, p. 130 ff.

[33] J. Pruszyński, *Dziedzictwo kultury. Teorie. Dylematy restytucji*, Przegląd Wschodni Vol. 8, 2002, p. 360; K. Zeidler, *Pojęcie "dziedzictwa narodowego" w Konstytucji RP i jego prawna ochrona*, Gdańskie Studia Prawnicze Vol. 12, 2004, pp. 343–344.

[34] T. Kotarbiński, *Sprawność i błąd*, Warsaw 1970, p. 94.

[35] A. Gerecka-Żołyńska, *W kwestii definicji dobra kultury i dzieła sztuki,* Prokuratura i Prawo No. 9, 1999, p. 104.

[36] J. Pruszyński, *Dziedzictwo kultury Polski…*, Vol. 1, p. 125. It should be noted that, according to J. Pruszyński, the protection of the national heritage in the precise meaning is unfeasible and the protection of "cultural heritage" in the general meaning is doubtful. On the other hand, the only protection that is justified and feasible is the protection of products defined in terms of types, genres or single items.

and on the other hand, it constitutes the object of analysis for historians, historians of law and ideas, political scientists, experts in culture, psychologists and ethnologists. As a result, various research methods typical of particular disciplines have been used in the course of exploration of the content, prospects and features of national identity. The phenomenon has undoubtedly broadened and enriched the area of research. However, it has led to misunderstandings that make the assessment of national identity more difficult. The issue of a conceptual framework proves to be important.

While it seems that since the late 1980s the concept of "social awareness" or "historical awareness" has dominated scientific considerations, since the early 1990s, with the explosion of sociological research observed in Poland, in particular that into the concept of "the nation", the term "national identity" has more and more often appeared in publications. Most scientists seem to be of the opinion that the terms "national awareness" and "national identity" are synonymous.[37]

Article 35 of the Constitution guarantees national and ethnic minorities the right to establish their own educational and cultural institutions, institutions designed to protect religious identity as well as to participate in the resolution of matters connected with their cultural identity (Article 35 para. 2).[38] It is worth noticing that the Constitution,

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[37] Compare H. Kubiak, *Świadomość i tożsamość narodowa. Swobodny wybór czy wymuszone zobowiązanie?*, [in:] K. Doktór, W. Kwaśniewicz, A. Kwilecki (eds), *Socjologia: Teoria i działanie. Księga pamiątkowa ku czci Władysława Markiewicza*, Warsaw 1997, pp. 265–284; reprint, H. Kubiak, *U progu ery postwestfalskiej*, Kraków 2007, p. 214. There are many treatises in literature devoted to the analysis of the definition of identity only, including inter alia: Z. Bokszański, *Tożsamość, integracja, grupa. Tożsamość jednostki w perspektywie socjologicznej*, Łódź 1989; T. Paleczny, *Typy tożsamości kulturowej a procesy globalizacji*, [in:] K. Gorlach, M. Niezgoda, Z. Seręga (eds), *Władza, naród, tożsamość*, Kraków 2004; P. Schlesinger, *On National Identity: Some Conceptions and Misconceptions Criticized*, Social Science Information Vol. 26, 1997. Refraining from a dispute whether this type of assumption is right, it is necessary to conclude that both quoted concepts are not clear enough and were interpreted and explained in different ways. "Identity" in general terms means "being the same", "sameness" or "awareness of oneself, one's features and distinctiveness". Finally, it means: "personal facts, features and data that make it possible to distinguish, recognise and identify a person". With respect to society, "identity" means "awareness of common features and the sense of unity"; cf. S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 4, Warsaw 2003, p. 96. In the dictionary definitions, the concept of identity is clearly defined with the use of the term "awareness" and the expressions are treated as equal. "Awareness" in colloquial speech means "knowledge of something", "realising something", "being conscious of something". It also means "ideas, opinions, beliefs and aims shared by a group of people". As far as the synonymous meaning of the two terms is concerned, it must also be noticed that the former (i.e. identity) seems to emphasise a certain state of "passiveness", "inevitability". On the other hand, awareness is characterised by a certain emotional content. The content of the term seems to focus on the conviction that awareness results from a certain process, that it is an effect of striving to recognise one's belonging and does not result from accidental identification. However, the issue of the presented differences in meaning has not drawn much attention in literature. It must be admitted that their perception is to a great extent subjective and intuitive in nature.

[38] The regulation laid down in Article 35 is not strongly rooted in the Polish constitutional tradition, although it is stated in literature that "the issues of the protection of minorities' rights were subject to regulation in the March Constitution with respect to both an individual dimension (Article 109 para. 1 and Article 110), and a collective one (Article 109 para. 2)", because neither case law nor literature has developed based on them. In the period of the Polish People's Republic, there were no (apart from a general ban on discrimination) special constitutional regulations concerning minorities' rights. Propagating a thesis of political and moral unity of the Polish nation, the authorities tried to minimise the possibility of cultivating

due to its nature, does not define (because it could not define) the concepts of "national minority" and "ethnic minority". However, the adoption of the above-mentioned distinction was a decisive factor that influenced the shape of successive regulations. It is worth remembering that distinguishing national minorities from ethnic minorities is not universal in nature in international law and both terms are recognised as synonyms. In accordance with the Constitution, however, they are not equivalent, which is confirmed by the course of work on its content and the fact that the legislator uses only the term "national minority" in some situations.[39] The Constitution clearly distinguishes an objective element, i.e. actual existence of both national and ethnic minorities, from a subjective one, which lets a citizen make a free choice whether he wishes to reveal his belonging or he wants to be treated as a member of a minority.

It is worth noticing that the subjective scope of freedom referred to in Article 35 of the Constitution is limited to Polish citizens and leaves foreign stateless persons outside the area of its application, even if they stay in Poland permanently. Article 35 of the Constitution is applicable only to persons who "belong to national and ethnic minorities", thus those who are really connected with a particular minority.

The Constitution clearly distinguishes an objective element, i.e. actual existence of both national and ethnic minorities, from a subjective one, which lets a citizen make a free choice whether he wishes to reveal his belonging or wants to be treated as a member of a minority. It is worth mentioning that values referred to in Article 35 para. 1 of the Constitution were expressed in a negative form, which means that public authorities should refrain from interfering into particular spheres. The rights stipulated in Article 35 para. 2 of the Constitution are determined in a positive form, which imposes obligations on public authorities to create conditions making it possible to exercise those rights.[40] There is also a guarantee that national and ethnic

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tradition and demonstrating diversity by national minorities. L. Garlicki, *Komentarz do art. 35 Konstytucji*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warsaw 2003, pp. 4–5; also see *Prawne aspekty mniejszości narodowych w Polsce*, Materiały i Dokumenty No. 52, Biuro Studiów i Ekspertyz, Warsaw 1993; M. Kallas, *Prace parlamentarne nad uregulowaniem statusu mniejszości w Polsce (1989–1995)*, Przegląd Sejmowy No. 3, 1995, pp. 63–78; also compare Z. Galicki, *Zapisy konstytucyjne dotyczące mniejszości narodowych i etnicznych – praktyka polska*, Materiały i Dokumenty No. 52, Biuro Studiów i Ekspertyz, Kancelaria Sejmu, Warsaw 1993. For the issue of the Polish state policy towards national minorities, see S. Pawlak, *Ochrona mniejszości narodowych w Europie,* Warsaw 2001, pp. 130–134. The issue of minorities was thoroughly analysed by the standing Committee for National and Ethnic Minorities established in the course of discussions in the Sejm of the 10th term. It was the first such body in the work of the Sejm. Such committees were also established during successive terms. It is worth noticing that none of the constitutional bills included a definition of the concept of national, ethnic or linguistic minorities.

[39] Compare Article 134 of Electoral Law determining elections to the Sejm and the Senate of the Republic of Poland, Journal of Laws [Dz.U.] of 2001, No. 46, item 499, as amended in 2001, No. 74, item 786, in accordance with which, only electoral committees established by voters associated in registered national minorities' organisations may be subject to exemption from the five per cent electoral threshold that entitles their lists to participate in the process of granting seats. See S. Gebethner, *Wybory do Sejmu i do Senatu. Komentarz do ustawy z dnia 12 kwietnia 2001 r. – Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej*, Warsaw 2001, pp. 2004–2004.

[40] It is raised in literature that Article 35 guarantees minorities the rights that are institutional (the right to establish their own educational and cultural institutions, and institutions designed to protect religious identity, i.e. the right to their own schools, cultural facilities and religious

minorities have the right to establish their own educational and cultural institutions, institutions designed to protect religious identity as well as to participate in the resolution of matters connected with their cultural identity (Article 35 para. 2 of the Constitution). The legislator included the issue of national and ethnic minorities' culture in Article 35 of the Constitution in a dynamic way, emphasising not only freedom to preserve their culture but also to develop it.[41]

The issue of national heritage is not excessively explored in legal and constitutional considerations. Undoubtedly, it results from the fact that it is not possible, as it seems, to work out subjective rights from the content of Articles 5 and 6 of the Constitution, and the issues from this area occur mainly in connection with disputes of administrative nature, concerning the protection of the products of culture.[42] In literature, the issue of ownership of material cultural heritage is sometimes also contested and there are proposals to adopt the theory of common ownership, which should result in the principle of free access to the values of cultural heritage. It is emphasised that cultural heritage should constitute public property so that everybody could have equal access to the spiritual values that this heritage contains.[43]

On the one hand, the latter opinion seems to be inspired by socialist conceptions of the ownership of the works of art in the extreme, Soviet interpretation. At the same time, it is absolutely utopian in the present social and economic circumstances. On the other hand, as far as "spiritual values" are concerned, they should be recognised as being in conflict with the concept of copyright not only protected by respective statute but also by legal acts of international law.

Finally, it is worth reminding that if the protection of cultural heritage is looked at in a broader way, e.g. from the point of view of the European Union, it is protected by various EU normative acts at present, although the member states' cultural policy remains within their domain and the EU may only encourage those states to cooperate and supplement their activities.[44] There is no doubt that the national heritage is one of the elements shaping national identity, and the freedom to use the products of culture also safeguards it.

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missions, but not the right to establish their own political, administrative or economic institutions) and procedural (the right to participate in the resolution of matters connected with their identity). This results not only in the possibility but also the necessity of establishing organisations by minorities.

[41] See P. Czarny, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP…*, Vol. 1, p. 808.

[42] A. Frankiewicz draws attention to this, *Znaczenie prawne regulacji dziedzictwa narodowego i dóbr kultury w rozdziale I Konstytucji RP,* Acta Universitatis Wratislaviensis No. 3440, Przegląd Prawa i Administracji LXXXVIII, Wrocław 2012, p. 9 ff.

[43] Z. Kobyliński, *Czym jest, komu jest potrzebne i do kogo należy dziedzictwo kulturowe?*, Mazowsze. Studia Regionalne No. 7, 2011, pp. 21–47.

[44] W. Sobczak considered the issues in *Ochrona dziedzictwa kultury w systemie prawnym Unii Europejskiej*, Środkowoeuropejskie Studia Polityczne No. 3, 2009, pp. 105–123. For more on this issue, compare also K. Kowalski, *O istocie dziedzictwa europejskiego. Rozważania*, Kraków 2013, p. 15 ff.

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NATIONAL HERITAGE IN THE POLISH CONSTITUTIONAL ORDER

Summary

In accordance with Article 5 of the Constitution, the Republic of Poland safeguards the national heritage, which is a constitutional value, in the same way as it safeguards independence. The national heritage can be understood as culture rooted in the Christian heritage of the Nation,

as it is laid down in the Preamble, or cultural heritage referred to in Article 6 para. 2 of the Constitution. This latter concept seems to be an integral part of the national heritage. The national heritage cannot, as it has been proved, be perceived as the heritage of the Polish ethnic nation, although the term "nation" used in the Constitution can be interpreted in various ways. In practice, the status of national minorities' cultural heritage and whether it is part of the Polish national heritage also constitute a problem.

Keywords: national heritage, cultural heritage, nation, national minority, culture, national identity

DZIEDZICTWO NARODOWE W POLSKIM PORZĄDKU KONSTYTUCYJNYM

Streszczenie

Dziedzictwa narodowego, będącego wartością konstytucyjną, strzeże podobnie jak niepodległości Rzeczpospolita Polska, zgodnie z art. 5 Konstytucji. Może być ono pojmowane jako kultura zakorzeniona w chrześcijańskim dziedzictwie narodu, tak jak to ujmuje preambuła, lub jako dziedzictwo kulturalne, o którym mowa w art. 6 ust. 2 Konstytucji. To ostatnie wydaje się być integralną częścią dziedzictwa narodowego. Dziedzictwo narodowe nie może być, jak dowiedziono, ujmowane jako dziedzictwo polskiego narodu etnicznego, aczkolwiek używane w Konstytucji pojęcie „naród" bywa różnie interpretowane. W praktyce problemem jest także status dziedzictwa kulturowego mniejszości narodowych i to, czy wchodzi ono w skład polskiego dziedzictwa narodowego.

Słowa kluczowe: dziedzictwo narodowe, dziedzictwo kulturowe, naród, mniejszość narodowa, kultura, tożsamość narodowa

PATRIMONIO NACIONAL EN EL ORDEN JURÍDICO CONSTITUCIONAL

Resumen

El patrimonio nacional es un valor constitucional, lo protege, tal como la independencia de la República de Polonia, el art. 5 de la Constitución. Puede entenderse como cultura con raíces en el patrimonio nacional cristiano, tal como lo denomina el preámbulo, o bien como patrimonio cultural, al que se refiere el art. 6 ap. 2 de la Constitución. Este último parece formar parte integral del patrimonio nacional. El patrimonio nacional no puede entenderse, tal como se demuestra, como patrimonio de la nación polaca étnica, aunque el término "la nación" utilizado en la Constitución puede interpretarse de varias formas. En la práctica, el estatus del patrimonio cultural de minorías y su inclusión en el patrimonio nacional polaco nacionales causa problemas.

Palabras claves: patrimonio nacional, patrimonio cultural, nación, minoría nacional, cultura, identidad nacional

НАЦИОНАЛЬНОЕ НАСЛЕДИЕ В ПОЛЬСКОМ КОНСТИТУЦИОННОМ ПОРЯДКЕ

Резюме

Национальное наследие, представляющее собой конституционную ценность, в той же мере, как и национальная независимость, охраняется Республикой Польша – в соответствии со ст. 5 Конституции. Оно может пониматься, как культура, укоренившаяся в христианском наследии нации, что содержится в преамбуле, или культурном наследии, упоминаемом в ст. 6 п. 2 Конституции. Последнее представляется неотъемлемой частью национального наследия. Национальное наследие не может интерпретироваться, как это можно бы было резюмировать, в категории наследия польской этнической нации, хотя используемый в Конституции термин «нация» может толковаться различным образом. На практике проблема заключается также в статусе культурного наследия национальных меньшинств и в том, является ли он частью польского национального наследия.

Ключевые слова: национальное наследие, культурное наследие, народ, национальное меньшинство, культура, национальная идентичность

DAS NATIONALERBE IM POLNISCHEN GRUNDGESETZSYSTEM

Zusammenfassung

Das Nationalerbe als Grundgesetzwert wird von der Republik Polen gemäß Art. 5 des Grundgesetzes (GG) bewahrt, ähnlich wie die Unabhängigkeit es wird. Es kann als verwurzelte Kultur im christlichen Nationalerbe entgegengenommen werden, so, wie es die Präambel oder das Kulturerbe bestimmt, wovon die Rede im Art. 6 Abschn. 2 des GG ist, welches einen integralen Bestandteil des Nationalerben zu bilden scheint. Das Nationalerbe kann nicht nachweislich als Erbe des polnischen ethnischen Volkes aufgefasst werden, obwohl laut GG der Begriff „Volk" verschiedentlich interpretiert wird. Ein anderes praktisches Problem ist auch der Status des Kulturerben von Volksminderheiten und die Tatsache, ob es als ein Teil des polnischen Nationalerben zählt.

Schlüsselwörter: Nationalerbe, Kulturerbe, Volk, Volksminderheit, Kultur, Volksidentität

LE PATRIMOINE NATIONAL DANS L'ORDRE CONSTITUTIONNEL POLONAIS

Résumé

Le patrimoine national étant une valeur constitutionnelle, tout comme l'indépendance, est gardé par la République de Pologne, conformément à l'article 5 de la Constitution. Il peut être compris comme une culture enracinée dans l'héritage chrétien de la nation, tel qu'il est inclus dans le préambule ou l'héritage culturel mentionné à l'article 6 paragraphe 2 de la Constitution. Ce dernier semble faire partie intégrante du patrimoine national. Le patrimoine national ne peut être, comme il a été exposé, présenté comme un patrimoine de la nation ethnique polonaise, bien que le terme «nation» utilisé dans la Constitution soit interprété

différemment. En pratique, le problème concerne également le statut du patrimoine culturel des minorités nationales et son appartenance ou non au patrimoine national polonais.

Mots-clés: patrimoine national, patrimoine culturel, nation, minorité nationale, culture, identité nationale

PATRIMONIO NAZIONALE NELL'ORDINE COSTITUZIONALE POLACCO

Sintesi

Il patrimonio nazionale, che è un valore costituzionale, viene custodito in modo analogo all'indipendenza dalla Repubblica di Polonia, conformemente all'articolo 5 della Costituzione. Esso può essere inteso come una cultura radicata nel patrimonio cristiano della nazione, così come è presentato nel preambolo, o come il patrimonio culturale di cui all'articolo 6. paragrafo 2 della Costituzione. Quest'ultimo sembra essere parte integrante del patrimonio nazionale. Il patrimonio nazionale non può, come è stato ricavato, essere considerato come patrimonio della nazione etnica polacca, anche se il termine "nazione" usato nella Costituzione può essere interpretato in modo diverso. In pratica, anche lo status del patrimonio culturale delle minoranze nazionali e la sua appartenenza o meno al patrimonio nazionale polacco è un problema.

Parole chiave: patrimonio nazionale, patrimonio culturale, nazione, minoranza nazionale, cultura, identità nazionale

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ON TAXPAYERS' REACTIONS TO TAXATION AND ON TAX SHIFT

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1. INTRODUCTION

Although indirect taxes (VAT and excise) are most important for the budgets of most European states, public discussion on taxation concentrates on income tax, corporate income tax (CIT) and personal income tax (PIT). The reason for that is the political significance of taxes, which concerns PIT in particular, because it is a burden for every voter in person. However, various taxes result in different consequences, which depends on various factors. As Henry Hazlitt noticed, "taxes inevitably influence the conduct of those on whom they are imposed."[1] There are not only, or not always, purely economic grounds for taxpayers' reactions. They are frequently psychologically conditioned. The taxpayer's assessment of his ability to carry the tax burden in the context of one's own economic situation is of key importance. According to Andrzej Gomułowicz, "due to economic and psychological conditions, there may be a phenomenon described in the doctrine and confirmed in tax practice as 'counter-reaction to fiscal pressure'".[2] The author also emphasises that both reasons, economic and psychological, are mutually conditioned: "taxation meets a psychological barrier when a tax burden causes that taxation effect is not obtained at the planned level".[3]

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[1] H. Hazlitt, *Ekonomia w jednej lekcji*, Kraków 1993, p. 37.

[2] A. Gomułowicz, *Zasada sprawiedliwości podatkowej*, Warsaw 2001, p. 82.

[3] *Ibid*.

2. TAXPAYERS' VARIOUS REACTIONS TO TAXATION

Six different reactions of taxpayers to taxation are described in science:
1) adjusting to tax, i.e. fulfilling tax obligations;
2) tax shift;
3) legal avoidance of tax;
4) tax compensation;
5) illegal tax evasion;
6) withdrawal from activities that are subject to taxation.[4]

According to Mirosław Pietrewicz, tax compensation consists in introducing "improvements in a company that lead to the reduction of costs or to the increase in production or sales so that the benefits obtained this way compensate the increase in tax burdens".[5] Unfortunately, many politicians involved in the legislative process seem to share this opinion. They pass regulations as if they believed that the increase in taxes resulted in a tendency to work harder and longer in order to maintain the same level of net tax after additional taxation of their gross income. This belief is based on an assumption that taxpayers will accept the increase in taxes and will not undertake any counter-measures in such circumstances. However, even if taxpayers reacted in the way expected by politicians, their hard work would result in worse economic results, and in general a decrease in production. It is due to the fact that if a taxpayer, an entrepreneur, operates on the fringe of profitability from the point of view of the unit margin, the increase in tax rates makes him move to the grey market or give up doing business. Two hundred years ago Jean-Baptiste Say asked: "Can it be said that the necessity of paying tax makes the class of hard working people double their efforts, which results in the increase in production? First of all, it must be noticed that efforts alone will not be sufficient to produce; to do that it is necessary to have capital, and tax is what hampers saving that generates capital".[6]

No improvement of production will compensate the loss caused by the increase in tax rates. Taxpayers running small and medium-sized businesses calculate the amount of tax and not the amount of net profit. Moreover, their most common response to the increase in income tax rates is the increase in one's own margin. What is true is a statement that a tax shift is one of the most popular forms of taxpayers' reaction, which is developed later.

On the other hand, economic practice negates the statement that taxpayers react to the increase in taxation by reducing costs. The reduction of costs increases gross income that is subject to taxation. Thus, what is much more common is the opposite reaction: an increase in costs in order to decrease income. Hasty purchases are made, which have no sufficient economic justification and are based only on tax calculation. If there is a possibility of making tax saving investments, the inclination to incur such not really necessary expenditures is even stronger. In addition, non-

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4 M. Pietrewicz, *Polityka fiskalna*, Warsaw 1993.

5 *Ibid*., pp. 65–66.

6 J.-B. Say, *Traktat o ekonomii politycznej*, Warsaw 1960, p. 764.

investment activities are undertaken, which are purely accounting-related and are aimed at decreasing tax; thus, various strategies of tax optimisation are popular.

Having the choice between adjusting to tax by complying with tax obligations, which Mirosław Pietrewicz recognises as "the most common citizens' response",[7] and trying to avoid or evade tax, taxpayers often decide to choose the latter solution. The assessment which reaction is more common may be carried out based on theoretical models of the nature of human behaviour and/or by empiric observation of them. Some time ago, Lionel Robbins stated that economics is a science that examines *human choices* concerning relationships between objectives and rare measures having alternative applications.[8] Quoting those words, Tomasz Mickiewicz emphasises that economics understood that this way adopts a certain conception of man that is clearly distinguished from the world of nature determined by the rules of physics. Peoples' originality against the background of atoms consists in the ability to make choices based on specific objectives they set on their own. And the choices are made in compliance with the principle of maximisation, which means that:

i. a man strives to achieve an objective set with the use of the smallest input possible that is sufficient to achieve that objective, or
ii. with the use of the given input, a man tries to maximise his objectives.[9]

Business activity aims to produce goods and services and to sell them in the most efficient way. Profit is the measure of this efficiency. Income taxes constitute the input necessary to affect gross income. To be able to sell and, as a result, obtain net profit, it is necessary to do business; and paying taxes that are obligatory in the country of operation is one of the requirements for doing it. Thus, it is possible to formulate a thesis that everyone will try to minimise this input. Taking into account that paying taxes evokes bad feelings, one cannot be surprised that taxpayers' reactions aim to minimise tax burdens. Empiric observations of taxpayers' conduct confirm this theoretical model. Most of them look for legal methods of tax avoidance. However, some of them try to apply illegal methods of tax evasion.

Legal tax avoidance means the use of legal regulations making it possible to decrease tax burdens thanks to various reductions, allowances or exemptions. What serves it is the concept of international tax planning based on differences in tax regulations in various countries and on differences in bilateral agreements on the avoidance of double taxation. It is also possible to make use of loopholes in the law: the more complicated the taxation system, the easier it is. And the more reductions, allowances and exemptions there are, the more complicated the system must be. Such *frater legem* activities are legal. According to Robert Hall and Alvin Rabushka,[10] they consist in "making use of opportunities created by the law and giving preference to some type of expenses or investment. The problem consists in

[7] M. Pietrewicz, *Polityka fiskalna…*, p. 64.
[8] L. Robbins, *An Essay on the Nature and Significance of Economic Science*, London 1932, quotation after T. Mickiewicz, *Wybór w gospodarce*, Lublin 1996, p. 11.
[9] T. Mickiewicz, *Wybór w gospodarce*, Lublin 1996, p. 12.
[10] R.E. Hall, A. Rabushka, *Podatek liniowy*, Dom Wydawniczy ABC, Warsaw 1998, p. 50.

the fact that higher tax rates inspire investors to deal with the tax aspect of their undertakings rather than their economic usefulness".[11]

It is expensive to avoid tax. Many finest minds in the field of law and accounting are continually working on how to optimise tax liabilities. Then they develop "products" that are to reduce tax obligations in the form of various tools and optimisation structures, they devote their time to sell them to interested taxpayers and, finally, they safeguard tax profits and protect them against revenue authorities. "It cannot be called a productive activity in the sense of creating whatever value for society. Their only aim is to help taxpayers to pay less tax. The real cost of that may amount to goods and services that those talented people would be able to provide if they did not devote their life to excavation of the tax system".[12]

However, taking steps *contra legem* is illegal. Tax evasion is "a polite word describing fraud".[13] It should be shameful and discrediting. Unfortunately, the contemporary states' tax policy, which has more in common with expropriation than taxation, causes that tax evasion becomes the reason for pride and boasting. It is always so when society perceives the tax system as unjust. And this is how the Polish tax system is perceived, which is reflected in the size of the grey market and the number of detected tax offences committed by registered businesses.

This results in activities aimed at hiding income or increasing costs. Hiding income may consist in failure to reveal property that is subject to taxation, which most often takes place in case of inheritance, failure to issue invoices, which most often occurs in case of services provided by representatives of freelance professions, entering false invoices in the books, and transferring payments for fictitious services to the tax havens.

Globally, most of the unpaid taxes result from the submission of dishonest tax returns concerning legal activities. In general, fraud consists in underrating turnover, overrating costs or just failing to pay due tax. There are few instances of failing to submit any tax returns. In Poland, however, due to marginal significance of illegal sources of income such as trafficking in arms and drugs, a higher percentage of fraud does not only result from the submission of false tax returns but also from failure to submit them at all. There are also many more activities aimed at overrating costs.

The stronger the temptation to evade tax is, the higher the probability that many taxpayers will yield to the temptation. And the strength of it results from the level of tax system complexity and efficiency of fiscal control, i.e. the risk of being "caught" on the one hand, and the amount of profit expected, i.e. the obligation that someone tries to evade on the other hand. Thus, too high taxes encourage people to evade them. Almost 70 years ago, Roman Rybarski wrote that: "tax morale is inversely proportional to tax level; the higher the taxes, the lower the morale".[14] Sometimes, as a result of the rise of taxes, the increase in "tax fraud"[15] causes that tax becomes something illusory; the rise does not pay because people start to hide income. On

[11] *Ibid*., p. 51.
[12] *Ibid*.
[13] *Ibid*.
[14] R. Rybarski, *Nauka skarbowości*, Warsaw 1935, p. 108.
[15] *Ibid*.

the other hand, complicated tax regulations constitute perfect opportunities for people who will take the risk of escaping from taxation.

Taxpayers who do not want to act illegally may decide to give up doing business. "If an increased tax on electricity is imposed, everyone may respond to that starting to use lamp oil. If the prices of other consumption goods are raised, consumption may be eliminated".[16] Today many taxpayers react in a similar way, which is reflected e.g. in drivers' growing interest in LPG installation in their cars after each rise of excise on petrol. Sometimes, the legislator introduces draconian taxes in order to achieve this objective as it most probably happened at the early 1990s in connection with import duty on cars, which was intended to encourage Fiat and General Motors to invest in Poland. More often, however, it also happens that taxpayers' reaction consisting in the limitation of production or consumption is not what the authorities have actually intended to achieve.

3. REASONS FOR TAXPAYERS' VARIOUS RESPONSE TO TAXATION

Taxpayers' reactions depend on their subjective perception of tax burdens, which is expressed as "a sum of taxes reducing a taxpayer's income, i.e. the difference between the income that would be in a taxpayer's disposal if he did not have to pay it"[17] and real income that a taxpayer has after paying taxes. Both economic and political factors determine those taxpayers' reactions.

3.1. SUBJECTIVE STIMULI: POLITICAL AND PSYCHOLOGICAL

Taxpayers' feelings with regard to the way in which the state spends the money collected from them is a very important element that has impact on their behaviour. However, at the beginning of the century, after the first decade of the transformation, most Poles did not trust people responsible for public money management and believed that those spending public funds did not become rich in an honest way. Those who thought that public funds were spent for the benefit of all the citizens were clearly in the minority.

The research was conducted when the popularity of Leszek Miller's government reached its apogee just after the 2001 general election and voters hoped that the new government would put an end to the phenomena of corruption revealed during the last period of Jerzy Buzek's government. After successive financial scandals, when the trust to the new government fell dramatically, the number of taxpayers convinced that their taxes were defrauded shot up. The 2003 CBOS surveys showed that as many as 87% of Poles thought that politicians first of all cared for their own interests and 77% believed that politicians were not honest. The number of people who believed that politicians were idealists who wanted to do something good for the country fell to 6% from 22% reported in 1993. The number of people who stated

[16] *Ibid.*, p. 109.

[17] A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Poznań 1995, p. 111.

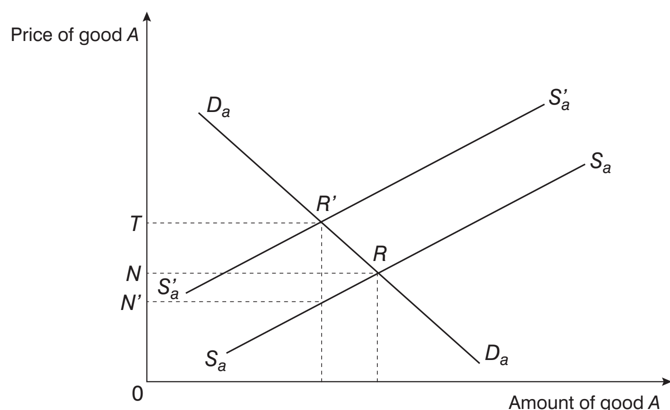
that politics attracted people because of money rose from 31% to 52%. 75% of the respondents believed that, regardless of political differences, politicians formed one organised clique.[18] It is interesting what would be the findings of such a survey if we conducted it today. Taxpayers defend themselves against such a state with the use of every possible method. Thus, in such a situation, how can they be expected not to avoid or even evade taxes?

3.2. OBJECTIVE STIMULI: RELATED TO ECONOMICS AND ECONOMY

Taxpayers' reactions do not depend only on political assessment. Undoubtedly, they also depend on how taxes influence the development of (or changes in) demand and supply in a given market, on changes in particular markets,[19] and finally on manufacturers, consumers and investors' decisions.[20]

3.2.1. INFLUENCE OF TAXES ON PRICES AND DEMAND

In the economic sense, taxpayers' reactions are strictly connected with the state of the national economy and those of its sectors that affect a given tax burden to the biggest extent. Economic results of the imposition of taxes from the point of view of their influence on demand and supply concerning a particular good may be presented with the use of the coordinate axes as follows:[21]



Curve *Da* represents the demand for good *A*, and curve *Sa* represents the supply of that good. The equilibrium between the demand for good *A* and its supply is at the point where the two curves cross, i.e. point *R*. In the equilibrium point *R* good *A* reaches the price equivalent to curve segment *0N* and this is the price for which

[18] GW of 20 June 2003, *Zła gęba polityka*.

[19] R.A. Musgrave, P.B. Musgrave, *Public Finance in Theory and Practice*, New York 1984, p. 268.

[20] S. Owsiak, *Finanse publiczne. Teoria i praktyka*, Warsaw 1997, p. 155.

[21] *Ibid.*, p. 156.

a seller is willing to sell good *A*; on the other hand, a purchaser is willing to buy good *A* in the amount equivalent to curve segment *0C*. The equilibrium price for a seller is a net price without tax. If good *A* is burdened with a higher tax on selling equivalent to curve segment *NT*, the curve of demand will be raised up because the imposition of or increase in tax on good *A* will result in the rise in its price. The demand for good *A* will fall by the amount equivalent to curve segment *BC*. As a result of the imposition of or increase in tax, the gross price of good *A* rises, and its net price decreases, which is depicted by curve section *0N'*. In consequence, the demand for good *A* falls, thus, supply goes down, too. The equilibrium point moves to point *R'*.[22]

The imposition of or increase in tax on a good results in the increase in the price that a purchaser must incur or in the seller's profit margin decrease. The proportion of a purchaser's and a seller's share of the price depends on economic factors such as demand and supply elasticity in relation to the price and a seller's ability to influence his costs. Demand elasticity means vulnerability of one amount (treated as a dependent variable – a reaction) to a change in another amount (treated as an independent variable – a stimulus). The amounts are supply and demand, which react to a price, or a price, which reacts to the changes in the supply-demand relationship. Theoretical market models distinguish price-related elasticity of supply (elasticity of supply in relation to a price) and price-related elasticity of demand (elasticity of demand in relation to a price).[23] The rate of elasticity is a measure of elasticity and it is the value which reflects the level of vulnerability of dependent variable y to changes in independent variable x. It determines the number of units by which value y changes if x changes by one unit.

In the mainstream theory of economics, demand is treated as a dependent variable. Independent variables include factors that shape demand: income, prices of given goods, and prices of substitute and complementary goods. Depending upon which factor has the stronger influence on the size of demand, one can distinguish its: (i) income-related elasticity, i.e. elasticity of the function of demand in relation to the level of income; (ii) price elasticity, i.e. elasticity of the function of demand in relation to the price of a given good; and (iii) mixed elasticity (also called cross elasticity), i.e. elasticity of the function of demand for good *A* in relation to the price of good *B*.

The dependence between consumers' income and the size of demand for a given good is most often unidirectional: when income rises and other factors remain unchanged, the demand for it rises and vice versa. That is why, the rate of income-related elasticity of demand, which informs about changes in demand expressed in percentages in cases of 1% changes in income, most often has positive values. Income-related elasticity of demand has different values not only depending upon consumers' income but also on the type of a good. In the economic theory, there are three basic categories of goods: inferior goods, necessary goods and superior goods. While income-related elasticity of demand is subjective in nature because it

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[22] *Ibid*.

[23] The inverse of those elasticity types is called price expansiveness and flexibility.

is correlated with entities generating market demand, price elasticity of demand is objective in nature because it is correlated with the object of exchange.[24]

Price elasticity of demand measures the strength of the response of demand to changes in the price of a given good. It is a proportion of the percentage change in the size of demand to the percentage change in the price of a given good, provided that other variables do not change (*ceteris paribus*). Due to the response of demand to the change in price, one can distinguish:
- proportional demand (when the percentage change in price is exactly equivalent to the same percentage change in the size of demand in a reverse direction);
- elastic demand (when the percentage change in demand is higher than the percentage change in price);
- inelastic demand (when the percentage change in demand is lower than the percentage change in price);
- perfectly elastic demand (when demand may be of different size for a given price);
- perfectly inelastic demand (when the change in demand equals zero for any change in price).

Price elasticity of demand is determined by a few factors:
- the level at which a given good satisfies consumers' basic needs;
- the availability of substitutes for a given good;
- the share of expenses on the purchase of a given good in a consumer's budget;
- the level of the price of a given good;
- sometimes, consumers' adjustment to the change in price.

Price flexibility is the opposite of price elasticity of demand. The price flexibility rate shows by what percentage is necessary to change the price of a given good so that the demand for it can change by 1%. If elasticity of demand is perfectly inelastic, a purchaser will incur the whole burden of the tax imposed/raised. The size of supply and the net price of good *A* will not change. However, if elasticity of supply is perfectly inelastic, imposition of/increase in tax will not result in the change in the gross price for good *A*. On the other hand, its net price will fall down by the amount equivalent to the size of the tax imposed/raised. In such a case, a seller will incur the whole tax burden. If demand for good *A* were infinitely elastic, the imposition of/increase in tax, provided the gross price is unchanged, would result in the limitation of demand and the decrease in the net price because of inability to shift tax onto a purchaser. However, if the supply of good *A* were infinitely elastic, the imposition of/increase in tax would result in the limitation of supply, provided there is an increase in the gross price, until the equilibrium price determined by purchasers' readiness to pay a higher price is reached. Thus, the less elastic the demand and supply are, the smaller the influence of tax on a given

[24] The demand curve shows the basic relation between the price and demand. It demonstrates what amount of a given good consumers will buy in case of different price levels in a given period and on a given market. The demand curve has a negative slope: the higher the price of a given good, the smaller the amount the customers are eager to buy and vice versa. The demand principle formulated by Alfred Marshall illustrates that. The flatter (steeper) the curve of demand in a given point, the bigger (smaller) the absolute price elasticity of demand.

type of business activity is because the imposition of/increase in tax does not result in bigger changes in the allocation of resources. However, the bigger elasticity, the bigger influence of taxes on the allocation of resources.[25]

Therefore, the interdependence of taxes and economic processes is obvious. Tax has influence on the price of a good taxed and, thus, on demand for it, which, on the other hand, has impact in its sales, *ergo* its production and supply. The law of demand and supply takes effect automatically. The market for each good is shaped by demand and supply, and its price. The increase in price as a result of tax imposed or increased must influence a market situation.

Various taxes have different consequences. Direct taxes produce different results than other indirect consumption taxes.

In case of increase in direct taxation rates on the part of consumers, there must be a decrease in consumption or savings because they have lower net income. On the part of sellers, we can observe a situation in which their net income after taxation will fall or will remain unchanged thanks to a rise in gross income. The increase in gross income may be obtained thanks to a price rise, i.e. a shift of the tax burden on consumers with a similar effect as in case of taxation of consumers. A price rise must lower consumption or savings. Roman Rybarski wrote: "taxes that cause the decrease in savings result in more damage than benefit because if a tax causes a decrease in capitalisation, it automatically causes an increase in interest rates since the supply of capital in insufficient".[26]

4. TAX SHIFT

The phenomenon of tax shift is extremely significant. Almost a hundred years ago Adam Krzyżanowski wrote: "The study of tax shift looks for the answer to the question who in fact pays tax. The state burdens some categories of people. *Eo ipso*, it inspires taxpayers to try to reduce the tax burden".[27] "A taxpayer's direct reaction is an intention to raise the price of a good or service he or she sells at least by the amount of loss resulting from taxation".[28]

However, in contemporary democratic societies, the fact of tax shift is not exposed; quite the opposite, it is hidden. Maybe, so that society will not demand the reduction of taxes. In a democracy, politicians who come to power convince the poorer majority that it is necessary to tax the richer minority. However, taking into account that all taxes can be shifted, one can say that the poorer who vote in favour of taxing the richer in fact vote for imposing taxes they themselves will have to pay. Realising that, the poorer majority would have to generally review their electoral preferences.

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[25] *Ibid.*, pp. 155–158.
[26] R. Rybarski, *Nauka skarbowości…*, p. 111.
[27] *Ibid.*, p. 129.
[28] A. Krzyżanowski, *Nauka skarbowości*, Poznań 1923, p. 130.

The opinions about tax shift have been changing over the whole period of the development of the fiscal study.[29] In the 18th century, when fiscal study was not distinguished from economics, tax shift was seen through the prism of economic rules as a purely economic phenomenon. In the 19th century, when fiscal study was distinguished from economics as a separate study, there was a tendency to analyse the issue of tax shift from the purely fiscal point of view. Finally, in the third stage, at the turn of the 20th century, many theoreticians started to link the two aspects of tax shift. From the present perspective, a fourth epoch characterised by the lack of deepened reflection on tax shift may be added to the three epochs distinguished by Roman Rybarski.

4.1. ON TAX SHIFT IN CLASSICAL ECONOMICS

Physiocrats who were first to raise the issue of tax shift in a way that was deepened theoretically focused on its economic aspect. They emphasised that the imposition of tax on such social classes as land lessees, merchants or manufacturers affects the net income of land owners. It is due to the fact that all taxes are shifted by those who are to pay them onto the only class that is in disposal of net profit (*product net*), and only agricultural production generates such profit. They drew a conclusion that the best solution would be to introduce a single tax to be imposed on land owners because other "sterile classes" shift their own tax burden on that class.

Adam Smith believed that income may originate from land rent, capital gain or labour. Thus, every tax must be paid from one of the three sources. However, "many taxes are not eventually paid from the fund or source of income that was intended to be taxed".[30] According to Smith, taxes on land rent, residential tenancy rent, capital gains, remuneration for work as well as consumption goods are shifted. To tell the truth, land tax is paid by land lessees but in economic sense it burdens land owners. It is so because if the profit from agricultural production is constant, the land tax paid by a lessee inevitably results in the decrease of land rent a lessee pays to a land owner. Even if the profit from agricultural production increases, it occurs thanks to a lessee's resourcefulness. Therefore, it cannot be expected to cover the growing burden of land tax. Thus, as physiocrats believed, in practice land rent burdens land owners. On the other hand, residential tenancy rent in practice constitutes a gain from capital invested in construction. That is why, a construction investor, a building owner, does not cover the tax on that capital, i.e. rent, but shifts it on a tenant by including it in the lease price. Thus, the tax is financed from a tenant's income from one of the above-mentioned sources: land, capital or labour. In case of tax on investment capital gain, the price of raising this capital rises. This means that the method of shifting tax on capital gains depends, to some extent, on the allocation of capital. If it is invested in agriculture, the cost of its raising increased by the tax will reduce land rent, which will burden a land owner. If it is invested in industry or trade, the cost of raising it increased by the tax will result in the

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29 *Ibid.*, p. 117.

30 A. Smith, *Badania nad naturą i przyczynami bogactwa narodów*, Vol. 2, Warsaw 1954, p. 584.

increase in prices of goods and will burden customers. On the other hand, labour tax always results in the increase in the price of workforce. Thus, first of all, the tax burdens an employer but he will try to shift this tax burden onto customers buying his products. Eventually, consumers bear payroll tax. A similar situation takes place in case of tax on consumer goods: this tax burdens customers. However, in case of taxation of basic necessities, tax shift is a bit more complicated. Due to the fact that the demand for labour and an average price of goods that labourers need to live regulate pay, every instance of increasing that average results in the necessity to raise pay so that a labourer can continue buying necessities he used to buy in the past provided that the demand for labour is not rising or falling at the same time.[31] "This way", Smith concludes, "tax on basic necessities acts precisely in the same way as payroll tax".[32] The situation with tax on luxuries is a bit different: the increase in their price does not cause the necessity to raise labourers' pay.[33]

On the other hand, in his work *On the Principles of Political Economy and Taxation*, David Ricardo focuses on industrial activities and draws a bit different conclusions than Smith, who devotes more attention to land ownership. Ricardo states that tax on land rent does not burden a land owner because it can be shifted on the consumers of agricultural products. In his opinion, the increased price of those products raises the cost of labourers' maintenance, which inevitably must lead to their pay rise and, in consequence, to the entrepreneurs' profit fall. And it is them, not land owners, who bear real burden of potential rise in tax on agricultural products. However, Ricardo makes a reservation that not the whole tax is subject to shift as he writes: "if every merchant and every manufacturer raised prices by the amount of tax he has to pay, the process would never end".[34] It is hard to disagree with this observation. But it would be even more difficult to calculate to what extent taxes are shifted and what percentage of them is paid by taxpayers on whom they are directly imposed and by those onto whom they are shifted. However, it is also hard to disagree with the thesis that each taxpayer intends to shift as big part of tax as possible onto others.

Jean-Baptiste Say is also sure that the phenomenon of tax shift exists. He writes: "We would be mistaken if we thought that taxes definitely burden those who pay them.[35] Many of them are not actual taxpayers; for them, tax is an advance payment which they manage to recover, more or less as a whole, from the consumers of the products they produce".[36] He also emphasises that among all the manufacturers of the same product some may avoid tax consequences easier than others.[37] To a big extent, it depends on the nature of a taxed product and the location of a given taxpayer in the economic process. "Taxes burden those who cannot defend against them because they constitute a burden everyone wants to get rid of but the methods

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[31] *Ibid.*, p. 652.

[32] *Ibid.*, p. 653.

[33] A. Gomułowicz, J. Małecki, *Podatki i prawo…*, pp. 22–29.

[34] Quotation after A. Gomułowicz, J. Małecki, *ibid.*, p. 31.

[35] J.-B. Say, *Traktat o ekonomii…*, p. 796.

[36] *Ibid.*, p. 796.

[37] *Ibid.*, p. 801.

of eliminating this burden infinitely differ depending on the types of tax and the function they play in society".[38] Consumption tax burdens every manufacturer proportionally to the share he has in the production of the taxed good. If tax on wine is introduced, vineyard owners will suffer. On the other hand, if very high tax is imposed on lace, farmers growing and selling flax will hardly notice that. But lace manufacturers and merchants will be very strongly affected.[39]

There is also a difference between the consequences of taxing basic necessities and luxury goods. Tax imposed on basic necessities has impact on almost all other goods; thus, it is indirectly collected from the income of all consumers.[40] However, if the supply of products and demand for them do not remain the same, regardless of the imposition of or increase in tax on them, the prices do not change and a customer does not pay the smallest part of tax.[41] The nature of land tax has been just like that for years. The amount of agricultural products remains unchanged, regardless of the tax imposed. Potential decrease in agricultural products has reduced the consumer population for centuries. Therefore, demand has also fallen and the relationship between supply and demand has quickly regained equilibrium.

4.2. ON TAX SHIFT IN THE POLISH ECONOMICS OF THE 20TH CENTURY

Physiocrats, Smith, Ricardo and Say focused on the economic aspects of tax shift. The German writers were first to state that the possibility of shifting tax depends on the nature of a given tax. In their opinion, some taxes, e.g. indirect taxes, can be shifted and others, e.g. income tax, land tax and capital gain tax cannot. Roman Rybarski criticises this approach. According to him, it cannot be assumed that a tax will be shifted due to its nature and another cannot. "The issue of tax shift does not depend on the nature of tax but on economic relations."[42] Rybarski formulates a few rules concerning tax shift: shifting is easier in case of a monopoly and more difficult in case of free competition; it is easier in the period of prosperity and more difficult during the periods of recession when prices fall down and demand decreases; due to the tax nature, it is easier to shift indirect taxes when a certain economic act is taxed than direct taxes when income or property is subject to taxation. The possibility of shifting tax depends on its range: it is easier to shift taxes when their subject or object is limited and it is more difficult when taxes are more common; due to the technique of taxation, it is more difficult to shift a kind of special, fragmentary tax, e.g. inheritance tax: it is more difficult for a group of heirs inheriting buildings to shift inheritance tax on tenants than it is for all landlords to shift the residential rent tax.[43] On the other hand, according to Adam Krzyżanowski, the political system guaranteeing the freedom of competition, the material equivalent

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38 *Ibid.*, p. 804.
39 *Ibid.*, p. 799.
40 *Ibid.*, p. 800.
41 *Ibid.*, p. 802.
42 R. Rybarski, *Nauka skarbowości…*, p. 126.
43 *Ibid.*, p. 127–134.

of which is economic ease of withdrawing labour and capital from a company and placing it in another one, makes tax shift easier. It is more probable and easier, in this author's opinion, to shift tax when its imposition and collection is close to the moment a product or service is sold and it decreases when the period lengthens. It is due to the fact that "the increase in the price of a product is more probable when the manufacturer pays the tax that he recognises as part of the production costs (...) The more distant the object of taxation is from the good that is to be more expensive because of taxation, the more difficult the shift, *ceteris paribus*, is".[44] The possibility of shifting tax also depends on the relationship between the potential rise in price and customers' income and the nature of goods that are subject to the price rise. If as a result of tax rise manufacturers increase the price of a product that does not constitute a big share in a customer's budget, the probability of accepting the price rise is higher. The situation is going to change in case of the increase in prices of goods that constitute a big share in a consumer's income. "He will suffer the consequences of the price rise for bread more than for needles", concludes Adam Krzyżanowski.[45] However, what plays a decisive role in the possibility of shifting tax is the structure of demand and the buyers' wealth rather than the nature of a good. The demand of hungry poor people is not going to cause the increase in prices for basic food products. On the other hand, the wealth of people who drink champagne makes it possible to push up its price.[46] The comparison of the price of a product and the wealth of a taxpayer alone does not make it possible to conclude that it is easier to shift tax imposed on cheaper goods or even relatively expensive ones that are relatively seldom bought. The rise in prices for the necessities will be perceived in a different way than "excise duty" products if the purchasers can maintain a financial margin necessary to meet the demand for them. It seems that tax shift is easier in case of necessities if the cost of their purchase does not constitute the majority of a consumer's spending and which, in such a situation, will be bought than in case of luxury goods from the purchase of which it is easier for a customer to refrain. It might seem that Adam Krzyżanowski recognised that issue intuitively when he compared bread with needles. His opinion on tax shift in the periods of prosperity and recession is totally different from Roman Rybarski's. While, according to Rybarski, the increase tendency makes tax shift easier because the rise in prices is more acceptable in the atmosphere of some kind of economic euphoria and it is less acceptable in the period of recession when consumers' income falls, according to Krzyżanowski it is quite the opposite. "Those who argue that the period of prosperity makes tax shift easier and a recession makes it more difficult (...) based on the principle of *post hoc, ergo propter hoc* (...) and do not ask a question whether the price rise would or would not take place in case of maintaining taxes unchanged present a contradiction in terms."[47] It is hard to unequivocally approve of one of the opinions. Looking at successive periods of economic boom and slump, one can draw a conclusion that tax shift depends on many factors and not just one.

[44] A. Krzyżanowski, *Nauka skarbowości…*, p. 136.
[45] *Ibid.*, p. 138.
[46] *Ibid.*, p. 149.
[47] *Ibid.*, p. 137.

Once tax shift is easier in the period of economic growth, on another occasion it is easier in the period of recession, depending on the level of monopoly, inflation and the level of increase or decrease. However, it must be stated that if all the other variables are the same, the prosperity period is more conducive to tax shift than the period of decline. An economic crisis is always connected with the fall in demand. The potential increase in prices resulting from additional taxation limits this demand even to a greater extent. On the other hand, Krzyżanowski is right to say that reproducibility of goods the price of which is to be raised is an important factor affecting the possibility of tax shift.[48] The rarer the goods, the bigger the chance of tax shift within the price. Krzyżanowski believes, however, that a buyer of a non-reproducible good, a very rare one, pays such a tax "out of the seller's pocket". It is hard to agree with this opinion completely. It would be true if a buyer had to pay some kind of property tax. If he offers the highest price for a good that is unique, establishing the price he takes into account the necessity to pay this tax and will not offer a price that together with the tax will exceed his purchasing power. Thus, he bargains to reach the price level that exceeds prices offered by other potential buyers at the lowest possible rate. However, in a situation when a seller pays income tax, this tax is for sure calculated in the price of the good for sale. The best example of that is a fiscal charge for purchase-sale agreements, which is most often incurred by a purchaser, not a seller, regardless of how unique the good in question is.

Krzyżanowski also disagrees with Rybarski's statement that a monopoly makes tax shift easier. "A monopoly only modifies the issue of tax shift with regard to goods that are cheaply reproduced",[49] the increase in production of which lowers a unit price thanks to the distribution of production costs to more units of the manufactured good. In case of goods expensively reproduced, the increase in production of which does not reduce overhead costs, there is no difference between the situation of a monopolist and of many manufacturers. Prices for such goods will always be close to the demand barrier. Manufacturers of such goods "are able to squeeze out of consumers the price that matches their total consumption ability also when there are many of them".[50] A monopoly results in such exorbitant prices that after a tax rise there is no space for another price rise in the market due to the demand barrier only in relation to goods expensively reproduced. In case of goods cheaply reproduced, a monopolist as well as members of a cartel creating such a monopoly must always take into account a potential appearance of competition that can originate from the too high prices of the goods produced and supplied. That is why, prices cannot be freely and endlessly raised. Therefore, not a monopoly or free competition is a decisive factor in tax shift but the decreasing or increasing cost of production of a bigger number of goods the price for which is to include shifted taxes. "In most general terms", writes Krzyżanowski, "a monopoly is a factor hampering tax shift, but the influence of reproducibility on this economic process is stronger".[51] From the perspective of

[48] *Ibid.*, p. 138.
[49] *Ibid.*, p. 148.
[50] *Ibid.*, p. 147.
[51] *Ibid.*, p. 148.

today's economic practice, it is hard to agree with this stance. Even in a situation when a monopoly exists, prices are never so high that they cannot be raised to a higher level. It can be exemplified by the increase in the price of fuel after every instance of excise rise, regardless of the dominant position of Polski Koncern Naftowy ORLEN on the Polish market of liquid fuel.

On the other hand, Krzyżanowski is right to state that "prices of reproducible goods are identical to the level of production costs of the most expensive manufacturer whose production is essential to satisfy demand".[52] As a result, potential tax shift onto purchasers of reproducible goods is possible only when the demand for given goods was not satisfied for the former price level. Otherwise, a price rise would inevitably lead to limitation of production and this would have to result in the fall of price, which would annihilate the former rise connected with tax shift. In such a situation, tax shift is most often delayed. Producers limit production, which causes that the equilibrium between supply and demand for a given good starts reaching a different, lower quantitative level, which makes it possible to raise the price for a given good. Therefore, there is tax shift but postponed, unfortunately with a simultaneous limitation of production. However, this happens only in case of reproduction of goods at growing costs, when the costs of the growth in production exceed the cost of the most expensive manufacturer so far. We deal with a different situation when the reproduction of goods takes place at falling costs, which means that the increase in production is accompanied by the fall in production costs and thus unit prices, as it happened with computers in the last decade of the twentieth century. In case the tax on this type of goods rises, the possibility of tax shift is much bigger. Customers benefited from the price fall, and that is why, they will be more eager to accept the price rise. On the other hand, in case of decreasing costs of production of a given good, a unit margin is usually already so small that there is no possibility that producers might incur higher tax burdens. If production were reduced as a result of increase in taxes, there would immediately occur a rise in prices for the products that formerly had been getting cheaper thanks to the increase in production. Thus, the price rise resulting from the reduction of production might prove to be higher than in case of tax shift. "The price of every good is established at the level adequate to the weakest consumer's demand and the weakest manufacturer's supply. Every price ensures consumer's rent for stronger consumers, those who would be ready to give more and a producer's rent for manufacturers who produce more cheaply", concludes Krzyżanowski.[53] Every price ensures profits to the strongest consumers who are ready to pay more for a given good and the best manufacturers who produce that good most cheaply. In a situation when many consumers are ready to pay more for a given good, tax shift is relatively easy. In a situation when there are big differences in costs incurred by particular manufacturers, and manufacturers producing most cheaply have free production capacity or there is a possibility that a new producer having relatively low costs might enter a given market, tax shift is adequately more difficult.

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[52] *Ibid.*, p. 140.
[53] *Ibid.*, p. 145.

4.3. ON TAX SHIFT IN TODAY'S ECONOMIC REALITY

In the majority of cases theoreticians have analysed the possibility of shifting a particular tax so far. However, regardless of whether they burden property, income, turnover, labour or capital, taxes affect economic relations. In order to be able to pay whatever tax, understood as monetary contribution, it is necessary to have money. Every taxpayer obtaining some income from any source, after the introduction of or increase in some tax burdens, first of all tries to compensate his loss by increasing his income from the source from which its increase is the simplest to obtain. Most often, it is done by an increase in the price of what one has for sale: a product or service as well as a service in the form of labour, which means the payroll pressure. Whether it is possible to demand a higher price or a higher salary depends on the aforementioned relation between supply and demand for a good one has for sale. In the same way as there are no free meals, there are no taxes that might not be eventually paid by consumers of goods available on a given market.

Not only indirect taxes but also direct ones, including income tax as a leader, can be shifted. Indirect consumption taxes have impact on the gross price and burden consumers. On the other hand, direct income taxes imposed on sellers constitute their costs, and imposed on labourers may become those costs if employees can shift those taxes onto employers. In order to maintain profitability after a potential rise in taxes, sellers must raise net prices, which has the same impact on a gross price as a rise in indirect taxes.

According to Andrzej Gomułowicz, "while still not long ago the tax doctrine perceived tax shift as being exclusively connected with indirect taxation, at present it is hard to question the thesis that also burdens resulting from direct taxes are shifted".[54] A consumer in fact pays not only customs duty, import tariffs, VAT and excise, which affects the price for a product to the biggest extent, but also income tax imposed on a seller. That is why, there are attempts to increase income by increasing payroll or, in case of taxpayers who are entrepreneurs, a rise in their profit margin. A situation in which the remuneration of good employees who are in demand is expressed in a net amount is not an exception. This means that a gross amount is raised each time the remuneration exceeds a tax threshold. And an employee's remuneration constitutes an employer's cost. Therefore, he tries to compensate this type of rise in costs by raising income. "The key issue connected with taxation of productive powers, more precisely: with income from labour, is the question whether, in case of the imposition of income tax on employees' pay, they will force employers to pay them higher salaries, and whether they, on the other hand, are able to shift that increase in cost of labour onto product prices and eventually on a consumer", says Stanisław Owsiak.[55] In general, it depends on the level of elasticity of demand and supply of labour force and, in a particular case, on the attractiveness of a given employee.

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[54] A. Gomułowicz, *Zasada sprawiedliwości…*, p. 21.
[55] S. Owsiak, *Finanse publiczne…*, p. 160.

The situation is similar in case of entrepreneurs who operate as sole traders. If a taxpayer obtains the revenue of "100" and incurs costs of "50", which gives him income of "50" that is taxed 10% and provides the net profit of "45", after the rise in a tax rate to 20%, he will first of all raise the price for his products or services in order to reach the revenue of "106.5", which will provide the same net income ("45") as before the rise in tax rates.

The price of a good that is taxed increases and, as a result of the demand and supply game, is somewhere between the price before the tax imposition and the value of "price plus tax". If a product that costs "100" is subject to a 10% tax rate, the price will not always reach "110", although it may sometimes happen. Sometimes, it can exceed "110" if a seller, due to the situation concerning demand, can use the imposition of or increase in tax to raise the price. However, the new price usually is somewhere between "100" and "110". Where exactly? It is not known in advance. A demand barrier may prevent the rise in price as a result of the increase in tax. Everything depends on demand elasticity. It may happen that demand will not react to the change in price (will be inelastic) and it may happen that prices before the change of taxation are so high that their rise will result in the decrease in demand. It is difficult to predict that but we can expect that the price of goods that are difficult to substitute for will rise. However, if the rise in price for goods that are easy to substitute for reaches the barrier of demand, the reduction of a seller's costs may be an alternative to tax shift. But it is the sellers' "second choice". If they cannot reduce the costs, they reduce their profit margin. However, they can reduce it to the level which exceeds satisfaction from free time or the costs of moving business to a different tax jurisdiction or the risk of moving to the grey market. In case of a business run on a small scale, mainly to earn a living, the first option (limiting business activities in favour of more free time) is not taken into account. But there is an inclination to take risk and to operate in the grey market. Thus, if a taxpayer meets the demand barrier, the increase in taxes also affects the state revenue, which the famous Laffer curve illustrates.[56]

Tax shift can be partial or complete. The general economic situation in the country and the market position of a given taxpayer who tries to shift taxes are decisive factors in this area.

Mirosław Pietrewicz notes a possibility of shifting taxes "forwards or backwards" but he does not define the phenomena.[57] In order to understand his intention, we must refer to the earlier works by the authors who used those concepts.[58] A wholesaler in Rybarski's example may raise the price for retailers who will successively raise the price to be finally paid by a consumer and we deal with tax shift forwards, towards the end of an economic process. Krzyżanowski introduced the distinction between the first degree (direct) shift onto a consumer of products or services, and a further one when this purchaser shifts the consequences

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[56] R. Gwiazdowski, *Krzywa Laffera. Rzecz o tym jak obniżki stawek podatkowych mogą skutkować zwiększeniem wpływów podatkowych i vice versa*, Przegląd Prawniczy No. 1, 2005.

[57] M. Pietrewicz, *Polityka fiskalna…*, p. 64.

[58] R. Rybarski, *Nauka skarbowości…*, p. 116.

of the raised price he had to pay onto the next group of buyers or final receivers.[59] A wholesaler may also demand that his suppliers, producers, increase the margin and then we deal with a tax shifted backwards towards the former stages of the economic process.[60] Based on this example one can state that it does not concern the "time" but "space" related shift. Taxes are shifted "sideways", onto another taxpayer, regardless of the time chain in the production and sale process he is in. In case of a new tax shifted forwards the final price rises, in case of tax shifted backwards, it does not change or can even fall, although it rarely happens. Indeed, it is a purely hypothetical possibility because in the era of common taxation of income and consumption the rise in taxes concerns a wholesaler and his suppliers to the same extent. Therefore, tax shift more often takes the direction towards a final consumer by an increase in the retail price. According to Witold Modzelewski, "the shift consists in the fact that with the use of the change in the level of prices, remuneration or other economic categories on which a taxpayer has or can have impact, he increases his income by the whole or part of the tax sum (...) The tax legislator has little possibility of limiting tax shift. It can be done, however, with the use of other instruments of financial laws, in particular by *legal limitations of the freedom to determine prices and legal regulation of payroll* and other costs of generating income" [emphasis added by R.G.].[61] Indeed, income (not revenue) can be increased by cost reduction (including the cost of remuneration). However, it is not tax shift but tax compensation discussed by Pietrewicz. Due to the minimum remuneration and the requirement of terminating an employment contract in order to reduce pay, it is hard to imagine another legal solution concerning possible limitation of remuneration as a response to the increase in taxes. The legislator can limit tax shift with the use of price regulation. It is, however, a mechanism known and commonly applied in the socialist directive planning economy. In market economy, which is the topic of this analysis and taxes in socialism constitute a subject matter for a totally different work, the mechanism of price regulation can function as a certain break in the system but its common application is hard to imagine.

The most surprising fact is that at present the economists who study taxes totally or almost totally ignore the aspect of tax shift. And indeed, "economics is a science that studies human *choices* concerning relations between objectives and rare measures (input) that have alternative applications."[62] The term "choices" used in the definition is of extraordinary importance. Man is not an atom that is subject to the rules of mechanics without his own participation. The originality of a human being against the background of the world of atoms, about which the authors of tax regulations sometimes forget, consists in making continual choices based on the objectives a man sets.[63] Tomasz Mickiewicz writes that "human activities are characterised by predicting and the possibility of responding to future, predictable

[59] A. Krzyżanowski, *Nauka skarbowości…*, p. 133.

[60] R. Rybarski, *Nauka skarbowości…*, p. 116.

[61] W. Modzelewski, *Wstęp do nauki polskiego prawa podatkowego*, Instytut Studiów Podatkowych Modzelewski i Wspólnicy, Warsaw 1998, p. 21.

[62] T. Mickiewicz, *Wybór w gospodarce…*, p. 11.

[63] *Ibid*.

activities of others".[64] The assumption that the participants of an exchange act rationally based on maximisation is a fundamental element of economic thinking. This means that having a set objective, a man will try to maximise input necessary to achieve it and having given input, he will try to maximise the effects of his activities. A man acting rationally in conformity with the principle of maximisation tries to minimise tax burdens that are part of the cost of his business operations. Therefore, it can be expected that he will try to use all legal possibilities of avoiding taxation and he will or will not undertake potential activities aimed at tax evasion, depending on the calculation of the potential profit and risk of this offence detection. If the potential profit is high because the tax rate is high and the risk is low because of inefficiency of the fiscal apparatus, we can expect that he will decide to act to reduce tax burdens, even in an illegal way.

"The narrowing of the possibility of developing a company resulting from a price rise introduced in order to shift tax is incalculable loss. If it did not occur, consumption would grow faster or it would decrease to a smaller extent. A price rise hampers the increase in demand. It reduces a manufacturer's profits. A price rise by the amount of tax compensates *damnum emergens* but not *lucrum cessans*. The term *shift* means a total rise by the amount of tax without the percentage loss in accordance with the principle: *De minimis non curator*."[65] At the same time, "loss that entrepreneurs suffer in case of tax shift because of a negative influence of the price rise on sales, i.e. also on the size of production, are often ignored when the whole tax burden is considered. Its size accounts for amounts paid to fiscal authorities in the form of tax. The sums are a visible tax burden but there is an invisible and incalculable burden beside. Shifted taxes are a visible economic sacrifice of consumers and an invisible one of manufactures because taxes limit their opportunities to increase production."[66]

If tax shift fails, its capitalisation takes place. The inheritance tax is its best example. Its imposition does not affect the price of particular assets composing the property that is subject to inheritance or the inheritance as a whole. An heir must pay inheritance tax using his own money or take a loan for this purpose. "In both cases, the amount of capital for the purpose of production is reduced", writes Krzyżanowski, "Economic values that formed capital in private hands moved to the State Treasury. They stopped being capital in the hands of public authorities. Authorities usually decide to use them for the purpose of consumption. We know that the state is not really capable of using goods in a productive way."[67]

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[64] *Ibid*.

[65] A. Krzyżanowski, *Nauka skarbowości…*, pp. 131–132.

[66] *Ibid*., p. 132.

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

4.4. TAX SHIFT EXEMPLIFIED BY NEW TAXATION SOLUTIONS IN POLAND

The phenomenon of tax shift may be observed in connection with the introduction of the "bank" tax[68] and attempts to introduce "retail" tax[69] in Poland in 2016. Although the retail tax has not been introduced because of the opinion of the European Commission, it is worth comparing the situation on both markets and refer the effects of the introduction of the tax on one of them to the other because the government announces that the "retail" tax will be introduced in a different form.

What banks' reactions could be observed after the introduction of the bank tax? Were they in the reason-cause relation with the introduction of the bank tax? Or was the correlation only a coincidence?

The Act on taxation of some financial institutions, commonly called the bank tax, entered into force on 1 February 2016. The new tax is imposed on banks, credit unions with over PLN 4 billion in assets, insurance and reinsurance companies with over PLN 2 billion in assets and credit firms with over PLN 0.2 billion in assets. The tax is property related. The institutions' assets, i.e. the surplus of the sum of their assets resulting from a trial balance for the last day of a month over the amount exempt from tax, are subject to the tax. In case of banks, it is mainly the present amount of mortgages and other loans for households, the present amount of investment loans and working capital loans for businesses as well as the present state of securities other than treasury bonds that are exempt from taxation. The tax rate is 0.0366%, and it is collected monthly, which makes the 0.44% rate annually.

The government planned that the new contribution would provide the state budget with PLN 5.5 billion and the officials from the Ministry of Finance assured that they could prevent tax shift onto banks' customers. PKO BP, which is controlled by the state, was to maintain former terms for deposits and loans and to exert pressure on other banks to refrain from the increase in margins. From the very beginning, the argument of the influence of competition seemed erroneous. In the conditions of general market equilibrium, there is an automatic mechanism maintaining a "justified" level of capital profitability, the same as that before the change in circumstances disturbing the equilibrium, which is the introduction of a new tax in this case. One could expect that mainly the customers of financial institutions would eventually become the taxpayers of the bank tax.

After a year, it can be noticed that the results of the introduction of the new contribution are lower that planned and that customers incur costs, as it should have been expected. Until the end of November 2016, the revenue from the bank tax was PLN 3.15 billion, which suggests the annual total of PLN 3.5 billion. This accounts for only 64% of the plan. The first month of the new tax regulation in force gave the budget PLN 304.8 million, however, in the months to follow banks paid less and less. This resulted from avoiding taxation with the application of

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[68] Act of 15 January 2016 on taxation of some financial institutions, Journal of Laws [Dz.U.] of 2016, item 68.

[69] Act of 6 July 2016 on taxation of retail revenues, Journal of Laws [Dz.U.] of 2016, item 1155.

various legal solutions. One of the methods was the application of the so-called administration procedures. A bank that goes into administration is exempt from tax. Bank Ochrony Środowiska and Bank BPH used that solution at the very beginning. Getin Noble Bank did the same after the first quarter, which resulted in a considerable decrease in that tax revenues between March and April. Another method used was the purchase of treasury bonds, which banks could deduct from the tax base. Until the end of 2015, banks' interest in this form of assets was rather stable. From January 2016, it was possible to notice a dynamic increase in the share of this component of assets exempt from taxation. From January till the end of May 2016, banks' involvement in the purchase of treasury bonds rose by PLN 54 billion, i.e. by 33%. This was the main element that caused the reduction of their taxation base by PLN 57 billion. If banks had paid the tax in December 2015, the revenue of the state budget would have risen by PLN 20 billion in comparison with May 2016. Therefore, thanks to such shifts, in the first quarter of the new tax rate being in force, the effective bank tax rate was ca. 0.27%.

On the other hand, regardless of the introduction of the new tax, banks had higher net profits. In 2016 it reached PLN 13.91 billion, i.e. 24.3% more than the year before and similarly to the level in the record years of 2011–2014.[70] The budget also recorded revenue. So, who lost? Of course, the customers did.

Bank tax is not imposed on certain products or services but on the sum of assets, i.e. what makes a bank earn or lose (loans, bonds). Thus, the identification of its influence on the increase in prices for different products or services is difficult but, due to limited competition on the banking services market resulting from the high entry barrier, it could have been expected that such increase would occur. And, indeed, it did.

Over the whole 2016, the WIBOR index reflecting the price of money in trade between banks fluctuated around 1.7%. At the same time, the interest on deposits systematically fell. By the end of 2015, the average interest on the best yearly deposits was 2% and at the end of 2016, it was only 1.7%. Individuals have ca. PLN 660 billion deposited in banks. Part of the money is kept in savings accounts which pay no interest. However, almost PLN 300 billion constitute time deposits and the interest on them fell throughout the year, which let banks increase their interest margin. Therefore, as interest on deposits of PLN 300 billion fell by 0.3%, banks' savings reached a billion. Another PLN 100 billion is deposited in savings accounts that pay interest but this interest fell by ca. 0.4%. This generated PLN 400 million in banks' savings at the customers' expense. This means they "paid" PLN 1.4 billion worth of bank tax because this was the amount by which the interest on their deposits was reduced.

Another method that banks applied to cover the new tax was the increase in mortgage profit margins. After taxation of banks' assets, its profitability is the lowest and, that is why, the price of mortgage was raised. At the beginning of

[70] However, it should be remembered that the 2015 result was burdened with the cost of insolvency of a few SKOKs and SK Bank, and the 2016 result was affected by the sale of shares in Visa Europe to the American Visa.

2016, an average new mortgage margin was 1.7–2% (depending on a customer's own input). At the beginning of 2017, it was 2.1–2.3%. The increase by 0.3% means that banks lending PLN 40 billion annually for an average period of 25 years earn PLN 200 million annually (i.e. PLN 2 billion throughout the whole mortgage period). For a statistical customer taking a mortgage of PLN 300,000 this means the rise in costs by almost PLN 20,000.

These are aggregate data. From the point of view of consideration of tax shift a more detailed comparison is necessary. However, the analysis of prices of products and services on the financial market is not simple because those products and services are configured in a different way in various banks. In order to make it easier for customers to compare offers, an annual percentage rate of charge (APR) was created. According to the price comparison website of Bankier.pl,[71] on 10 February 2016 the lowest APR in case of a mortgage of PLN 200,000 with PLN 50,000 of one's own input and the collateral value of PLN 250,000 was 3.58%, and the highest one was 4.79%. The difference accounts for 33.5%! But the requirements for granting a mortgage were varied. The higher APR, the easier it was to get a loan. Moreover, the lowest instalment was PLN 880, the highest one was PLN 1,000. Thus, the difference in an instalment accounted for 13.5%; the change was over two times lower than in case of APR.

The prices of other financial products and services also rose. One bank raised the charge for the increase in the revolving credit limit. In 2015 it charged 2.1–2.5%; in 2016 the rate reached 5%. It also introduced a charge for email calls for due payments. In 2016 the operation cost PLN 8. A new fee for valuation of real property to be a collateral was introduced to the new price list; it was priced from PLN 300 to 800. Also the fee for credit card use was raised from PLN 10 to 15 and the bank withdrew from the exemption from the charge in case of a certain amount of payments made. Moreover, the commission for revolving a credit in a current account rose from 2% to 2.5%, and a charge was introduced for internal currency transfer performed between corporate accounts from a foreign currency account. The charge was 0.35% of the amount transferred but not less than PLN 20. The maximum commission was PLN 200.

Another bank introduced a fee for using other banks' ATMs. In the past its customers could use all ATMs in the country free of charge. Since January 2016, only operations with the use of the bank's own ATMs and those of one network have been free of charge. In case of the use of other banks cash machines, only the first operation in a month is free, each successive operation costs PLN 2.5. The bank also raised the fee for using foreign ATMs. In 2015 such an operation cost 3%, and in February 2016 it rose to 6%. In addition, the bank introduced a 3% fee for foreign currency exchange calculation.

Still another bank introduced an account management fee of PLN 3 in March 2016. However, if a customer does not have a monthly inflow of PLN 3,500, the bank charges PLN 5 extra (in case of an inflow of over PLN 2,000) or PLN 12 (in case of an inflow below PLN 2,000). In addition, a new fee of PLN 3 was introduced for

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71 www.bankier.pl/kredyty-hipoteczne/porownaj-oferty (accessed on 10/02/2016).

a foreign currency sub-account and PLN 10 for a savings account if a customer has no current account. Also charges for some money transfers were raised and a charge of PLN 1.5 for online transfers from corporate accounts was introduced.

New fees were also introduced for the use of debit cards. There was a change of terms of exemption from charges for some types of services: in order not to pay for a card, the customers of some banks must make a defined number of payments by card each month. Some banks also introduced charges for corporate accounts. Only customers into whose accounts a certain amount is paid each month are made exempt from the fee, provided that the transfer is not made from another account in the same bank.

Bank tax was to a great extent shifted onto banks' customers as it could have been predicted based on scientific literature on this matter. Would it have been the same with retail tax if it had entered into force? The situation in the retail sector is incomparable to the situation on the banking services market. There are over 300,000 shops and fewer than 30 well-established banks. However, the price differences in retail let us suppose that a potential rise in prices would not have met a demand barrier, thus they probably would not have been a natural consequence of the introduction of a new tax in accordance with the principle that the first response of the taxpayer is an attempt to shift the tax burden onto somebody else.

Social sciences ignore the practice of everyday life to a greater extent than exact sciences. However, in case of tax analysis, practical observation seems to be inevitable. We will not find many data in textbooks and spreadsheets. In a town that is located within a five-kilometre radius from Warsaw, there are four big supermarkets and 14 small shops. During the first week of February 2016, the same 150-gramme piece of light cottage cheese made by the same producer cost PLN 1.79 to 2.10 in 12 shops (including all the supermarkets). The most common price was PLN 1.99. But it was not available in all the shops. The average price in the shops having it in stock was PLN 1.99. The same type of 400-gramme kefir cost PLN 1.99 to 2.49. It was available in 10 shops. A few shops sold it for PLN 1.99 and PLN 2.35. The average price was PLN 2.32. The differences between the price of cheese accounted for 17.5% and the price of kefir 25%! What is interesting, in a shop where the cheese was the cheapest, the kefir was more expensive than in a few other shops. In the second week of February 2016, in the shop where the price of cheese was formerly the highest (PLN 2.10), it dropped to PLN 1.95, i.e. below the average level in the first week. The new price was not only for the new supply (a different "best before" date) but all cheese, including that supplied before. The shop that had the cheapest cheese in the first week did not have it in stock in the second week. In one shop the price increased by PLN 0.10 and in another shop it dropped by PLN 0.10. In some other shops the price remained unchanged. The situation with kefir was similar. Manoeuvring the price level in case of such ranges does not pose any problems.

A situation in a town in the north-east of Poland where there is no such competition as close to Warsaw looks completely different. In three shops there, the brand of cheese advertised on television was not in stock. The light version was not available, either. A 200-gramme packet of cottage cheese cost PLN 1.44 to

PLN 1.49. The possibility of "amortisation" of a new product by sellers would look totally different there than near Warsaw.

Thus, it can be assumed that the shift of tax burden onto customers to such an extent as occurred in case of banks would have been much more difficult. The regulatory impact assessment should take into account all these nuances. Unfortunately, the legislators treat the so-called RIA as necessary evil. As a result, the consequences of regulations are totally different from the expected ones or at least the declared ones.

5. CONCLUSIONS

Paraphrasing the title of a famous book by Richard Weaver *Ideas Have Consequences*, Krzysztof Dzierżawski states that "taxes have consequences". Bad taxes have bad consequences. The best way to raise the tax revenue is to support economic growth, which can generate tax income without the need to increase tax rates. Another method is the improvement of the efficiency of the state's activities; it results in a better assessment of the state by taxpayers, which reduces their inclination to tax evasion or avoidance and lowers the cost of the state functioning, thanks to which the same "revenue" of the state may mean higher "income". The third method is to construct the tax system and particular taxes in the way that makes tax avoidance or evasion difficult or not profitable. From this point of view, indirect taxes are better. Although it is easier to shift them, taxpayers cannot find a method making it possible not to pay them. On the other hand, for those who in fact collect them and transfer to the budget (sellers), they are neutral. Those who de facto pay them (customers) pay less attention to taxes included in the price of goods than to direct taxes, especially if their opinion on the quality of the state's activities is negative.

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ON TAXPAYERS' REACTIONS TO TAXATION AND ON TAX SHIFT

Summary

Numerous governments' growing interest in extending the tax base can be observed. The article discusses the conditions determining taxpayers' attitudes and their reactions to taxation and the mechanisms of their most common conduct, i.e. tax shift. It takes into account the Polish scientists', Adam Krzyżanowski's and Roman Rybarski's, output in the area in the twenty-year interwar period, as well as the contemporary experience with some new types of tax, such as bank tax that was imposed on some financial institutions.

Keywords: elasticity of demand, tax limits, indirect tax, direct tax, tax progressiveness, tax shift, taxpayers' reactions, tax avoidance, tax evasion, tax rates

O REAKCJACH PODATNIKÓW NA OPODATKOWANIE I PRZERZUCALNOŚCI PODATKÓW

Streszczenie

Obserwujemy wzmożone zainteresowanie rządów wielu państw zwiększaniem bazy podatkowej. Niniejszy artykuł dotyczy uwarunkowań determinujących postawę podatników i ich reakcji na opodatkowanie oraz mechanizmów najpowszechniejszego ich zachowania, czyli przerzucania podatków. Uwzględniono dorobek nauki polskiej w tym obszarze w okresie XX-lecia międzywojennego, Adama Krzyżanowskiego i Romana Rybarskiego, a także współczesne doświadczenia z nowymi rodzajami podatków, jak podatek od niektórych instytucji finansowych, nazywany podatkiem bankowym.

Słowa kluczowe: elastyczność popytu, granice podatkowania, podatki pośrednie, podatki bezpośrednie, progresja podatkowa, przerzucalność podatków, reakcje podatników, unikanie opodatkowania, uchylanie się od opodatkowania, stawki podatkowe

SOBRE REACCIONES DE SUJETOS OBLIGADOS A IMPUESTOS

Resumen

Somos testigos de interés incrementado de gobiernos de muchos países en aumentar la base tributaria. El presente artículo analiza condiciones que determinan la actitud de sujetos obligados y su reacción a impuestos y mecanismos de su comportamiento común – desde gravar el impuesto a terceros, teniendo en cuenta la ciencia polaca en este ámbito en el periodo entre guerras mundiales – Adam Krzyżanowski y Roman Rybarski, y también experiencias contemporáneas con nuevos tipos de impuestos – como impuesto de algunas instituciones financieras denominado el impuesto bancario.

Palabras claves: elasticidad de la demanda, límites de tributación, tributos indirectos, tributos directos, progresividad tributaria, gravar impuesto a terceros, reacciones de sujetos obligados, evasión fiscal, fraude fiscal, tasas tributarias

О РЕАКЦИЯХ НАЛОГОПЛАТЕЛЬЩИКОВ НА НАЛОГООБЛОЖЕНИЕ И УКЛОНЕНИЯ ОТ НАЛОГОВ

Резюме

Наблюдается повышенный интерес правительств многих государств к увеличению налоговой базы. В данной статье рассматриваются детерминанты, определяющие позицию налогоплательщиков и их реакции на налогообложение, а также механизмы наиболее характерного для них поведения – уклонения от уплаты налогов. С этой целью в исследовании использованы достижения польской науки в данной области в межвоенный период, прежде всего труды Адама Кжижановского и Романа Рыбарского, а также современный опыт с новыми разновидностями налогов – такими, как налог на некоторые финансовые учреждения, называемый банковским налогом.

Ключевые слова: эластичность спроса, пределы налогообложения, косвенные налоги, прямые налоги, налоговая прогрессия, уклонение от уплаты налогов, реакции налогоплательщиков, налоговые ставки

REAKTION VON STEUERZAHLERN AUF BESTEUERUNG UND STEUERABWÄLZUNGSMÖGLICHKEIT

Zusammenfassung

Man beobachtet ein erhöhtes Interesse von Regierungen zahlreicher Staaten bezüglich Erhöhung der Steuerbasis. Dieser Artikel handelt von Bedingtheiten, welche die Steuerzahlerhaltung und deren Reaktion auf Besteuerung, sowie auch von Mechanismen einer allgemein herrschenden Haltung der Steuerzahler – also der Steuerabwälzungsmöglichkeit unter Berücksichtigung des polnischen Wissenschaftsgutes auf diesem Gebiet in der Zwischenkriegszeit – von Adam Krzyżanowski und Roman Rybarski, sowie auch aus zeitgeschichtlichen Versuchen mit neuen Steuerarten – wie Steuern von gewissen Finanzinstitutionen, anders genannt die Banksteuer

Schlüsselwörter: Elastizität der Anfrage, Besteuerungsgrenzen, indirekte Steuern, direkte Steuern, Steuerprogression, Steuerabwälzungsmöglichkeit, Steuerzahlerreaktionen, Besteuerungsentzug, Steuersätze

SUR LES RÉACTIONS DES CONTRIBUABLES FACE À LA FISCALITÉ ET À L'ÉVASION FISCALE

Résumé

Nous constatons l'intérêt croissant de nombreux gouvernements pour l'augmentation de l'assiette fiscale. Cet article traite des déterminants de l'attitude des contribuables et de leur réaction à la fiscalité et aux mécanismes de leur comportement le plus courant, c'est-à-dire transfer des impôts en tenant compte des réalisations de la science polonaise dans ce domaine pendant l'entre-deux-guerres (Adam Krzyżanowski et Roman Rybarski) et des expériences modernes avec de nouveaux types de taxes, comme une taxe sur certaines institutions financières, appelée taxe bancaire.

Mots-clés: flexibilité de la demande, limites d'imposition, impôts indirects, impôts directs, progression fiscale, transfer des impôts, réactions des contribuables, évasion fiscale, soustraction fiscale, taux d'imposition

SULLE REAZIONI DEI CONTRIBUENTI ALLA TASSAZIONE E ALLA TRASFERIBILITÀ FISCALE

Sintesi

Vi è un crescente interesse da parte dei governi di molti paesi ad aumentare le loro basi imponibili. Questo articolo riguarda le condizioni che determinano l'atteggiamento dei contribuenti e le loro reazioni alla tassazione e i meccanismi del loro comportamento più comune – ossia la trasferibilità fiscale, tenendo conto dei risultati della scienza polacca in questo settore nel periodo tra le due guerre – Adam Krzyżanowski e Roman Rybarski – così come le esperienze contemporanee con nuovi tipi di tasse – come la tassa su alcune istituzioni finanziarie, chiamata tassa bancaria.

Parole chiave: flessibilità della domanda, limiti fiscali, imposte indirette, imposte dirette, imposte dirette, progressione fiscale, trasferibilità fiscale, reazioni dei contribuenti, elusione fiscale, evasione fiscale, aliquote fiscali

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HEAD OF A WARD AS A PERSON PERFORMING A PUBLIC FUNCTION IN THE LIGHT OF ACT ON ACCESS TO PUBLIC INFORMATION

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The Act of 6 September 2001 on access to public information[1] constitutes amplification of the citizens' constitutional right to be informed by entities exercising public authority. The right is laid down in Article 61 of the Constitution of the Republic of Poland,[2] where para. 1 stipulates that a citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right includes also receipt of information on the activities of self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury. The above-mentioned constitutional provision for the first time in history laid down a political right to direct control of public authorities. Thus, the provision is of fundamental and critical importance for the functioning of democracy in Poland as a system in which citizens and not the state or limited social groups constitute bodies that can decide on public matters. As it was indicated in the Constitutional Tribunal judgment of 9 April 2015, K 14/13, the right to information in a democratic state ruled by law serves ensuring that public authorities, within all forms and aspects, meet the requirement of transparency. Thus, what constitutes the object of public information is,

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1 Journal of Laws [Dz.U.] of 2013, item 1330; hereinafter AAPI.

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

first of all, the activity of all bodies listed in Article 61 para. 1 of the Constitution and, secondly, the activity of persons performing public functions. However, due to Article 47 of the Constitution, this refers to only such activity that is connected with the public functions the persons perform.[3] The political right laid down in Article 61 para. 1 of the Constitution of the Republic of Poland is to ensure transparency of the functioning of the state in relation to the citizens who, having been informed about public matters, can assess the functioning of authorities in a rational way free from manipulation and thanks to that can take rational electoral decisions. This right, in the light of the above-mentioned Constitutional Tribunal judgment, covers two elements connected with the state of being informed, i.e. the right to be informed about:

– public entities' activities,
– activities of persons performing public functions.

The constitutional provision was developed in the form of the Act on access to public information in accordance with which the right to public information is subject to limitation due to a natural person's privacy or an entrepreneur's secret. The limitation does not apply to information about persons performing public functions, connected with the performance of those functions, including the conditions for entrusting them with those functions and for performing them, and a case when a natural person renounces the right (Article 5 para. 2 AAPI). Thus, a person performing a public function has a limited right to protection resulting from the right to privacy and all the information concerning their functioning in the course of dealing with public matters is subject to disclosure.

There are no doubts in case law that healthcare institutions are entities obliged to provide public information.[4] In such entities, heads of hospital wards perform certain functions connected with ward management. Therefore, persons that are interested make requests for public information concerning those persons, e.g. the content of contracts entered into with heads of wards, the scope of their responsibilities, or even the rules of offering them bonuses. Such questions, especially those concerning salaries or the content of employment contracts, concern issues that are protected by the right to privacy, which is however limited in accordance with the above-mentioned Article 5 para. 2 AAPI in relation to persons performing public functions. Thus, a question arises to what extent a head of a ward is a person performing a public function in the light of the provisions in force.

[3] OTK-A 2015, No. 4, item 45.

[4] Compare the judgment of the Supreme Administrative Court of 15 November 2013, I OSK 1933/13; and the judgment of the Voivodeship Administrative Court in Szczecin of 25 January 2018, II SAB/Sz 100/17, where it was directly indicated that "a hospital that is an independent public healthcare institution performs actions serving maintenance, rescue, rehabilitation or improvement of health. An entity of this kind performs public tasks and is financed from public funds, thus it is governed by Article 4 para. 1(5) AAPI. Information concerning the rules of functioning of an entity performing public tasks within the scope of legal assistance for a hospital concerns the mode of action of public entities' organisational units, thus it constitutes public information referred to in Article 6 para. 1(3) AAPI"; the judgment of the Voivodeship Administrative Court in Gdańsk of 19 October 2016, II SAB/Gd 110/16, published in CBOSA.

The Act of 15 April 2011 on healthcare services[5] is a kind of constitution for healthcare institutions in Poland. However, its regulations refer to the position of a head of a ward in a rather insufficient way. In accordance with its wording, a healthcare institution that is not an entrepreneur (e.g. Samodzielny Publiczny Zakład Opieki Zdrowotnej – SPZOZ, i.e. an independent public healthcare institution) is obliged to hold a contest for the position of a head of a ward in accordance with Article 49 para. 1(3) AHS. On the other hand, in accordance with Article 49 para. 7 AHS, if a department in a healthcare institution that is not an entrepreneur is managed by a physician who is not a head of a ward in accordance with its organisational rules, the institution is not obliged to hold a contest for the head of this ward. Thus, the Act on healthcare services only indicates that a head of a ward is such a manager only in some types healthcare institutions.

In literature, consideration is given[6] to the nature of the function connected with the performance of the obligations of a head of a ward or a physician managing it. There is a debate over the issue concerning the characteristic features of a person performing the function of a head or a manager of a ward as a public official or a person performing a public function, and a person who has no such features. A definition of a public official or a person performing a public function is laid down in the Act of 6 June 1997: Criminal Code.[7] In accordance with Article 115 §13 CC, a public official is: (1) the President of the Republic of Poland; (2) a member of Parliament, a senator and a councillor; (2a) a member of the European Parliament; (3) a judge, a lay-judge, a prosecutor, an officer of a financial organ for preparatory proceedings or its superior body, a notary, a bailiff, a probation officer, an official receiver, a supervisor appointed by a court and a trustee, and a person adjudicating within disciplinary bodies acting based on statute; (4) a person who is an employee of state administration, another state organ or territorial self-government, except those who only perform service-related activities, as well as another person within the scope he/she is authorised to issue administrative decisions; (5) a person who is an employee of a state control organ or an organ of territorial self-government control, except those that only perform service-related activities; (6) a person holding a managerial position in another state institution; (7) an officer of an organ appointed to protect public security or the Penitentiary Service officer; (8) a person serving in the armed forces with the exception of the territorial military service performed on demand; (9) an employee of an international criminal court except those who only perform service-related activities. In accordance with Article 115 §19 CC, a person performing a public function is a public official, a member of a self-government body, a person employed in an organisational unit that manages public funds, except one who only performs service-related activities, as well as

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[5] Journal of Laws [Dz.U.] of 2018, No. 160; hereinafter AHS.

[6] Thus, e.g. A Marcinkowska, *Lekarz jako osoba pełniąca funkcję publiczną*, Czasopismo Prawa Karnego i Nauk Penalnych, Year XVIII, No. 1, 2014; R. Krajewski, *Funkcjonariusz publiczny i osoba pełniąca funkcję publiczną jako kategorie prawa karnego istotne z perspektywy funkcjonowania administracji publicznej*, Studia z Zakresu Prawa, Administracji i Zarządzania Uniwersytetu Kazimierza Wielkiego Vol. 1, 2012.

[7] Journal of Laws [Dz.U.] of 2018, item 1600; hereinafter CC.

any other person whose rights and obligations in the field of public activities are defined or recognised by statute or an international agreement binding the Republic of Poland.

As far as criminal liability of a physician as a public official is concerned, the Supreme Court stated in its judgment of 27 November 2000, WKN 27/00, that a physician employed in a public healthcare institution may be recognised as a public official within the meaning of Article 115 §13 CC only in case the job is linked with an administrative function. It should be emphasised that the definitions of some terms and phrases in the Criminal Code (called glossary) are binding in nature and this, as a result, fulfils the guarantee functions of law by limiting the possibility of applying broadened interpretation of regulations. In order to recognise someone as a public official or not, it is necessary, inter alia, to establish the scope of their duties and rights. Thus, vocational activities do not become administrative functions only because they are performed within the state (as well as self-government) administrative structures of the healthcare system. A physician might be recognised as a public official only if he/she performed vocational activities in the administrative structure of the healthcare system, i.e. if he/she combined the job of a physician with a public (administrative) function. Thus, the circle of such persons includes, e.g. a hospital director, a doctor employed in the voivode's office or a healthcare fund. They would be public officials because being physicians they would perform specified administrative functions.[8] The Voivodeship Administrative Court in Kraków issued a similar judgment on 14 December 2016, II SA/Kr 1323/16, concerning a decision on refusal to provide public information, and stated that in some circumstances, in case of some functions performed together with a job of a doctor, it is possible to attribute such a feature to them. This is possible when a doctor at the same time:

- is an employee of, e.g. the Ministry of Health or self-government administration, except when he/she performs exclusively service-related functions;
- performs a function of a manager of a healthcare entity that is not an entrepreneur, e.g. SPZOZ;
- is an employee of the National Health Fund (Narodowy Fundusz Zdrowia – NFZ) or is a board member of a voivodeship branch of the NFZ;
- adjudicates in disciplinary bodies operating based on the Act on physicians and dentists' self-government;
- within the scope in which physicians are entitled to take administrative decisions (Article 115 §13(4) CC), i.e. members of physicians' self-government bodies, e.g. making decisions on granting the right to perform a medical job.[9]

With regard to the determination of the function of a head of a ward as a person performing a public function, the Supreme Court issued a judgment of seven judges on 20 June 2001, I KZP 5/2001, where it stated that doctors' activities consisting in the provision of healthcare services in public healthcare institutions performed within the scope of healthcare services financed from public funds for the insured

[8] OSNKW of 2001, No. 3–4, item 21.

[9] Published in CBOSA.

and other entitled persons pursuant to other regulations are included in the scope of the performance of a public function within the meaning of Article 228 CC. Due to the fact that healthcare services financed from public funds may be also provided by non-public healthcare institutions, a physician employed in such an institution and performing vocational activities listed in Article 2 of the Act on medical professions is also a person performing a public function referred to in Article 228 CC. What plays a decisive role in recognising healthcare services as ones covered by the concept of performing a public function is not the type of healthcare institution they are provided in, i.e. whether in a public or a non-public healthcare institution, but whether they are provided for a person entitled (a patient) within the healthcare services financed from public funds.[10] The Supreme Court decided that a public healthcare institution the aim of which is to provide healthcare services cannot be recognised as "another state institution" within the meaning of Article 115 §13(6) CC, even if a state administration body were its founding organ, and thus, holding a managerial position in this institution does not result in being a public official. Based on this assumption, the Supreme Court decided that performing a public function referred to in Article 228 §1 CC covers the performance of the function of a head of a ward in a public healthcare institution connected with both managing and providing healthcare services referred to in Article 2 of the Act of 5 December 1996 on medical professions[11] and Article 3 of the Act of 30 August 1991 on healthcare institutions[12], financed from public funds. According to R.A. Stefański, the Supreme Court judgment means that: "it is rightly indicated that a person performs a public function only in case the tasks assigned to them serve those institutions' authoritative activities. It concerns functions that require special trust to persons who perform them, and their violation directly endangers the functioning of state institutions that in general perform them and only occasionally entrust them to other institutions, and which are performed on their behalf by persons who are not public officials within the meaning of Article 115 §13 CC".[13]

Thus, it should be recognised that performance of a public function is connected with the implementation of specific tasks in an office within the structure of public authorities or holding another post connected with a decision-making process in the structure of public administration as well as other public institutions. As the Constitutional Tribunal raised in its judgment of 20 March 2006, K 17/05, where it interpreted the concept of a "person performing a public function" in the light of Article 5 para. 2 AAPI, it is not possible to precisely and unambiguously determine whether and in what circumstances a person functioning within the structure of a public institution may be recognised as one performing a public function. Not every public person will be one that performs public functions. Performing a public function is connected with the fulfilment of specified tasks in an office within the structure of public authorities or holding another post connected with

[10] OSKW of 2001, No. 3–4, item 21.

[11] Journal of Laws [Dz.U.] of 1997, No. 28, item 152, as amended.

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

[13] R.A. Stefański, *Glosa do postanowienia SN z dnia 15 listopada 2002 r., IV KKN 570/99*, OSP of 2003, No. 9, item 106, after LEX.

decision-making in the structure of public administration as well as other public institutions. Indication whether we deal with a public function should refer to examination whether a given person in a public institution to some extent performs public tasks imposed on this institution. Thus, it concerns entities that are entitled to at least narrow discretion to take decisions in a public institution. Hence, not every employee of such an institution will be a public official whose sphere of protected privacy may be limited from the perspective of the justified interest of third parties materialised in the right to public information. Making an attempt to indicate general features that are decisive factors in determining that a given entity performs a public function, without the risk of error, one can assume that it concerns posts and functions the performance of which means undertaking activities directly influencing the legal situation of other people or is at least connected with the preparation of decisions concerning other entities. Therefore, the scope of public functions does not include such posts as, e.g. those performed within public authority bodies that are technical or services-related in nature.[14] Thus, anyone who performs a function in public authority bodies or in the structures of legal persons and organisational units that are not legal persons should be recognised as a person performing a public function if it is connected with having control over the disposal of state or self-government property or management of matters connected with the performance of tasks by public authorities or other entities that exercise that power or manage public or State Treasury's property. Legal grounds for performing a public function by a person are not important.[15]

The above-presented stand seems to mean that when analysing whether a head of a ward or a physician managing a ward performs a public function, it is necessary to take into account his/her competences determined in the employing entity's organisational rules and regulations and its statute, and first of all the scope of activities (duties correlated with competences). As practice shows, the head of a ward performs a hospital's public tasks by performing managerial functions in a hospital ward. As the Supreme Administrative Court stated in its judgment of 21 June 2018, I OSK 166/18, "in the Court's opinion, there are no doubts that a person employed as a head of a ward in a public hospital, a coordinator of healthcare services provided in a hospital ward, is a person performing a public function. Performing managerial functions in a hospital ward, the head of a ward performs a public task imposed on that hospital. It is confirmed by the content of contracts included in the files, according to which the tasks of persons employed as heads of a ward – coordinators of healthcare services provided in hospital wards – include, inter alia, management, organisation, coordination and supervision of medical activities in the ward in order to ensure permanent medical healthcare for hospitalised patients".[16] The Supreme Administrative Court decided in the above-mentioned judgment that the data contained in the contracts entered into with heads of a ward – coordinators of healthcare services provided in a ward – concerning the number of a physician's

[14] OTK-A 2006, No. 3, item 30.

[15] Compare the judgment of the Supreme Administrative Court of 8 July 2015, I OSK 1530/14, CBOSA.

[16] Published in CBOSA.

diploma, the number of entry to the Businesses Registry and the salary constitute data connected with the performance of the function and the conditions for assigning those functions and their performance. Thus, they cannot be subject to protection due to the privacy of those persons and shall be subject to disclosure in the mode determined in the provisions of the Act on access to public information.

However, it is worth indicating that, as the Supreme Administrative Court emphasised in the above-quoted judgment of 8 July 2015, including a head of a ward in the category of persons performing public functions does not mean that all information about them may be disclosed because in the course of preparing an answer to a motion to provide public information, it is necessary to establish whether the requested information is connected with the performance of a public function by a person referred to in Article 5 para. 2 second sentence AAPI. It should be taken into account that even if a given person is recognised as a person performing a public function at the moment when the motion is filed or in the past, this does not mean, in the light of Article 5 para. 2 AAPI, that each piece of information concerning that person is subject to availability regardless of that person's privacy protection. As it has been indicated, it concerns only information connected with the person's performance of a public function. Article 5 para. 2 AAPI should be carefully applied to limit the right to privacy. It is absolutely required that the requested information about a person performing a public function should be connected with the performance of that function. In other words, there must be an adequate relation between information concerning a given person and this person's functioning in the public sphere.[17] Proper protection of the right to privacy of people performing public functions should be based on appropriate and precise determination of the limits of such a relation.

A head of a ward or another person holding a managerial position in a healthcare institution is in general a "person performing a public function" unless their activities, based on internal regulations that are in force in a particular healthcare institution, are service-related or technical and not connected with performing a public function in the ward. From the point of view of the judicature, a person performing a public function is anyone who performs a function in public authorities or in the structures of legal persons and organisational units that do not have legal personality in case the function is connected with managing the state or self-government property or managing matters connected with fulfilling tasks of public authorities or other entities that exercise these powers or manage public property or the property of the State Treasury. It is so regardless of what legal basis authorises a person to perform a public function.[18] What deserves special emphasis is the fact that classifying a person within the group referred to in Article 5 para. 2 second sentence AAPI does not mean that a head of a ward is completely excluded from the right to privacy. The right constitutes a type of obligation for an entity providing public information to consider the nature of information to be provided and the context of

17 Compare the judgment of the Supreme Administrative Court of 18 February 2015, I OSK 695/14.

18 M. Bidziński, [in:] M. Bidziński, M. Chmaj, P. Szustakiewicz, *Ustawa o dostępie do informacji publicznej. Komentarz*, Warsaw 2010, pp. 73–74.

its provision consisting in the scope of competences of a head of a ward (a physician managing a ward). Information that is not directly connected with the function he/she performs is subject to protection connected with the right to privacy.

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HEAD OF A WARD AS A PERSON PERFORMING A PUBLIC FUNCTION IN THE LIGHT OF ACT ON ACCESS TO PUBLIC INFORMATION

Summary

The article is aimed at presenting, analysing and assessing legal aspects of classifying a head of a ward as a person performing a public function in the light of the Act on access to public information. Access to public information is a citizen's right of key importance in a democratic state ruled by law. The right has its basis in the Constitution of the Republic of Poland, where in accordance with Article 61 para. 1, "A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury." The right to healthcare is also a constitutional right laid down in Article 68 para. 1 of the Constitution. Healthcare services are financed from public funds. The function of the head of a ward is deeply rooted in the practice of hospital functioning and plays a significant role in the organisation of 24-hour inpatient healthcare. In case law and literature, there are differences in the classification of heads of a ward as persons performing public functions. The article presents an analysis of the status of the head of a ward as an obliged entity in the light of the Act on access to public information.

Keywords: head of a ward, access to public information, health protection, hospital, healthcare institution, healthcare services, physician managing a ward, Constitution

ORDYNATOR JAKO OSOBA PEŁNIĄCA FUNKCJĘ PUBLICZNĄ W ŚWIETLE USTAWY O DOSTĘPIE DO INFORMACJI PUBLICZNEJ

Streszczenie

Przedmiotem artykułu jest prezentacja, analiza i ocena prawna kwalifikacji ordynatora jako osoby pełniącej funkcję publiczną w świetle ustawy o dostępie do informacji publicznej. Dostęp do informacji publicznej należy do praw obywatela o kluczowym znaczeniu w demokratycznym państwie prawa. Prawo to znajduje oparcie w Konstytucji, gdzie zgodnie z art. 61 ust. 1 "Obywatel ma prawo do uzyskiwania informacji o działalności organów władzy publicznej oraz osób pełniących funkcje publiczne. Prawo to obejmuje również uzyskiwanie informacji o działalności organów samorządu gospodarczego i zawodowego, a także innych osób oraz jednostek organizacyjnych w zakresie, w jakim wykonują one zadania władzy publicznej i gospodarują mieniem komunalnym lub majątkiem Skarbu Państwa". Prawo do ochrony zdrowia jest również prawem konstytucyjnym, określonym w art. 68 ust. 1 Konstytucji. Świadczenia ochrony zdrowia finansowane są ze środków publicznych. Funkcja ordynatorska jest głęboko zakorzeniona w praktyce funkcjonowania szpitali, pełniąc doniosłą rolę w organizacji całodobowej stacjonarnej opieki zdrowotnej. W orzecznictwie i literaturze istnieją rozbieżności co do zakwalifikowania ordynatorów do grupy osób, których działalność jest pełnieniem funkcji publicznej. W niniejszym artykule przedstawiono analizę statusu ordynatora jako podmiotu zobowiązanego w świetle ustawy o dostępie do informacji publicznej.

Słowa kluczowe: ordynator, dostęp do informacji publicznej, ochrona zdrowia, szpital, zakład opieki zdrowotnej, działalność lecznicza, lekarz kierujący oddziałem, Konstytucja

EL DIRECTOR MÉDICO COMO PERSONA QUE DESEMPEÑA FUNCIÓN PÚBLICA A LA LUZ DE LA LEY DE ACCESO A LA INFORMACIÓN PÚBLICA

Resumen

El articulo presenta, analiza y valora la calificación legal del director médico como persona que desempeña función pública a la luz de la ley de acceso a la información pública. El acceso a la información pública es un derecho de ciudadano de máxima importancia en el estado democrático de derecho. Este derecho tiene su respaldo en la Constitución, ya que conforme con el art. 61 ap. 1, el ciudadano tiene derecho a obtener información sobre actividad de órganos de autoridad pública y de personas que desempeñan funciones públicas. Este derecho comprende también la obtención de la información sobre la actividad de órganos de autogobierno económico y profesional y de otras personas o unidades de organización en el ámbito en el cual ejercen funciones de autoridad pública y gestionan bienes comunales o el patrimonio de la Tesorería del Estado. El derecho a la protección de la salud es también un derecho constitucional determinado en el art. 68 ap. 1 de la Constitución. Las prestaciones relativas a la protección de salud son financiadas de los fondos públicos. La función del director médico es profundamente arraigada en la práctica de funcionamiento de hospitales y desempeña importante papel en organizar el servicio médico que dura todo el día y la noche. En la doctrina y jurisprudencia existen discrepancias en cuanto a la inclusión de los directores médicos al grupo de personas cuya actividad constituye el desempeño de la función pública. El presente artículo analiza el estatus del director médico como sujeto obligado a la luz de la ley de acceso a la información pública.

Palabras claves: director médico, acceso a la información pública, protección de la salud, hospital, centro de atención médica, actividad médica, médico que dirige un servicio, Constitución

ОРДИНАТОР КАК СУБЪЕКТ, ВЫПОЛНЯЮЩИЙ ПУБЛИЧНУЮ ФУНКЦИЮ В СВТЕ ЗАКОНА О ДОСТУПЕ К ПУБЛИЧНОЙ ИНФОРМАЦИИ

Резюме

Предметом статьи является представление, анализ и правовая оценка квалификации ординатора как субъекта, выполняющего публичную функцию в свете Закона о доступе к публичной информации. Доступ к публичной информации является одним из гражданских прав, имеющих ключевое значение в демократическом правовом государстве. Данное право находит отражение в Конституции, в которой, в соответствии со ст. 61 п. 1 гражданин имеет право получать информацию о деятельности органов государственной власти. Данное право касается также получения информации о деятельности органов хозяйственного и профессионального самоуправления и других лиц и организационных подразделений в том объёме, в котором они выполняют задачи органов государственной власти и управляют муниципальной собственностью или имуществом, принадлежащим Государственной казне. Право на охрану здоровья также является конституционным правом, определяемым в ст. 68 п. 1 Конституции. Медицинские услуги финансируются из государственных средств. Ординаторская функция глубоко укоренилась в практике функционирования больничных учреждений, выполняя значительную роль в организации круглосуточной стационарной медицинской помощи. В судебной практике и предметной литературе наблюдаются расхождения в вопросе о квалификации ординатора как представителя той или иной группы лиц, чья деятельность представляет собой выполнение

публичной функции. В данной статье представлен анализ статуса ординатора как субъекта, несущего ответственность в свете Закона о доступе к публичной информации.

Ключевые слова: ординатор, доступ к публичной информации, здравоохранение, больница, медицинское учреждение, медицинская деятельность, врач – заведующий отделением, Конституция

CHEFARZT ALS PERSON DES ÖFFENTLICHEN LEBENS ANGESICHTS DES GESETZES ÜBER ZUGANG ZU ÖFFENTLICHEN INFORMATIONEN

Zusammenfassung

Gegenstand dieses Artikels ist eine Analyse und rechtliche Beurteilung des Chefarztes als Person des öffentlichen Lebens angesichts des Gesetzes über Zugang zu öffentlichen Informationen. Der Zugang zu öffentlichen Informationen gehört zu Staatsbürgerechten von Schlüsselbedeutung im demokratischen Rechtsstaat. Dieses Recht stützt sich auf dem Grundgesetz (GG) , wo unter Art. 61 Abschn. 1 der Staatsbürger das Recht zum Erlangen von Informationen über die Aktivitäten der öffentlichen Gewaltorgane und über eine Person des öffentlichen Lebens besitzt. Dieses Recht umfasst auch die Erlangung über Aktivitäten der wirtschaftlichen und berufsbezogenen Selbstverwaltungsorgane, darüber hinaus über andere Personen und Organisationseinheiten in demjenigen Bereich, in welchem sie Aufgaben der öffentlichen Gewalt ausführen und worin sie mit dem Kommunalgut oder mit dem Staatsschatz wirtschaften. Das Recht zum Gesundheitsschutz bildet auch ein grundgesetzliches Recht, bestimmt im Art. 68 Abschn. 1 des GG. Die Leistungen des Gesundheitsschutzes werden von öffentlichen Mitteln finanziert. Die Funktion eines Chefarztes ist profund in der Praxis des Krankenhäuserfunktionierens eingebettet, indem diese Funktion eine bedeutungsschwere Rolle in dem 24-stündigen stationären Gesundheitsschutz spielt. In der Rechtsprechung und in der Literatur gibt es Diskrepanzen, ob die Chefärzte zu einer Personengruppe eingestuft werden sollen, welcher Aktivität in der Tat eine öffentliche Funktion darstellt. In diesem Artikel wurde die Analyse des Chefarztstatus als subjektpflichtig angesichts des Zugangs zu öffentlichen Informationen vorgeführt.

Schlüsselwörter: Chefarzt, Zugang zu öffentlichen Informationen, Gesundheitsschutz, Krankenhaus, Gesundheitszentrum, Gesundheitsaktivität, leitender Abteilungsarzt, Grundgesetz (GG)

LE MÉDECIN EN CHEF EN TANT QUE PERSONNE EXERÇANT UNE FONCTION PUBLIQUE AU REGARD DE LA LOI SUR L'ACCÈS À L'INFORMATION PUBLIQUE

Résumé

Le sujet de l'article est la présentation, l'analyse et l'évaluation juridique des qualifications du médecin en chef en tant que personne exerçant une fonction publique à la lumière de la loi sur l'accès à l'information publique. L'accès à l'information publique fait partie des droits d'un citoyen d'importance capitale dans un État de droit démocratique. Ce droit trouve son appui dans la Constitution où, conformément à l'article 61 alinéa 1 un citoyen a le droit d'obtenir des

informations sur les activités des autorités publiques et des personnes exerçant des fonctions publiques. Ce droit comprend également l'obtention d'informations sur les activités des organes de l'autonomie économique et professionnelle, ainsi que des autres personnes et unités organisationnelles, dans la mesure où elles exécutent de tâches d'autorité publique et gèrent des biens municipaux ou des biens du Trésor. Le droit à la protection de la santé est également un droit constitutionnel prévu à l'article 68 paragraphe 1 de la Constitution. Les services de santé sont financés par des fonds publics. La fonction du médecin en chef est profondément enracinée dans la pratique du fonctionnement des hôpitaux et joue un rôle majeur dans l'organisation des soins de santé stationnaires 24 heures sur 24. Dans la jurisprudence et la littérature, il existe des divergences quant à la classification des médecins en chef à un groupe de personnes dont l'activité est l'exercice de la fonction publique. Cet article présente une analyse du statut du médecin en chef en tant qu'entité soumise à l'obligation au regard de la loi sur l'accès à l'information publique.

Mots-clés: le médecin en chef, accès à l'information publique, protection de la santé, hôpital, établissement de santé, hôpital, activité médicale, médecin responsable du sérvice, la Constitution

PRIMARIO COME PERSONA CHE SVOLGE UNA FUNZIONE PUBBLICA ALLA LUCE DELLA LEGGE SULL'ACCESSO ALL'INFORMAZIONE PUBBLICA

Sintesi

L'oggetto dell'articolo è la presentazione, l'analisi e la valutazione giuridica dell'abilitazione del primario in quanto una persona che svolge una funzione pubblica alla luce della legge sull'accesso all'informazione pubblica. L'accesso all'informazione pubblica è un diritto fondamentale di un cittadino in uno stato di diritto democratico. Tale diritto si basa sulla Costituzione, dove, conformemente all'articolo 61. paragrafo 1, un cittadino ha diritto di ottenere informazioni sulle attività delle autorità pubbliche e delle persone che esercitano funzioni pubbliche. Tale diritto comprende anche l'ottenimento di informazioni sulle attività degli organi di autogoverno commerciale e professionale, nonché di altre persone e unità organizzative nell'ambito delle quali svolgono compiti di pubblica autorità e gestiscono beni comunali o del Tesoro. Il diritto all'assistenza sanitaria è anche un diritto costituzionale definito all'articolo 68. paragrafo 1 della Costituzione. I servizi sanitari sono finanziati con fondi pubblici. Il primario, svolgendo un ruolo significativo nell'organizzazione dell'assistenza sanitaria stazionaria H24, è profondamente radicato nella pratica del funzionamento degli ospedali. Nella giurisprudenza e nella letteratura, vi sono discrepanze per quanto riguarda la classificazione dei primari al gruppo di persone la cui attività consiste nell'esercizio di una funzione pubblica. Questo articolo presenta un'analisi dello status del primario in quanto soggetto obbligato alla luce della legge sull'accesso all'informazione pubblica.

Parole chiave: primario, accesso all'informazione pubblica, assistenza sanitaria, ospedale, unità sanitaria, attività medica, medico responsabile del reparto, Costituzione

Cytuj jako:

Szustakiewicz P., Bielski K., *Head of a ward as a person performing a public function in the light of Act on access to public information [Ordynator jako osoba pełniąca funkcję publiczną w świetle ustawy o dostępie do informacji publicznej]*, „Ius Novum" 2019 (Vol. 13) nr 2, s. 194–206. DOI: 10.26399/iusnovum.v13.2.2019.22/p.szustakiewicz/k.bielski

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THE SCOPE OF JUST COMPENSATION FOR COMPULSORY ACQUISITION OF REAL PROPERTY OWNERSHIP

ZBIGNIEW CZARNIK*

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The idea of personal freedom, which we strive for, is connected with the sense of economic independence possible only in societies that ensure that private ownership has an appropriate place among interests protected by law. The best example of the thesis is a totally different development of property ownership as well as freedom at the two ends of the European continent: England and Russia.[1] The former, developing ownership, created bases for a free democratic society, the latter, negating this value, cannot guarantee a minimum standard of the protection of rights against the influence of despotic authorities.[2] Due to that, determination of an appropriate standard of ownership becomes especially significant, especially as the Polish legal order is closer to the Russian rather than the English one. Obviously, such a statement is a certain simplification but may be a useful tool to present the topical issue.

There are alarming phenomena occurring in the binding law, which justify making reference to the above-mentioned comparison. However, not only the legislative process is affected by those deficiencies which induce this statement. The practice does not look better; with regard to determining the scope of ownership protection, it becomes a part of casuistry without a deeper vision of a direction as well as the scope of necessary activities that might result in the development of a coherent model of ownership protection, in particular the ownership of real

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[1] For more, see: R. Pipes, *Własność jako instytucja*, [in:] L. Balcerowicz (ed.), *Odkrywając wolność. Przeciw zniewoleniu umysłów*, Poznań 2012, pp. 483–485; also by this author, *Własność a wolność*, Warsaw 2000, pp. 9–14.

[2] See R. Pipes, *Własność jako…*, p. 485.

property expropriated for public purposes. The use of private real property by public entities for the purpose of implementing their tasks is a necessity that is hard to challenge.[3]

Nevertheless, one cannot agree with the affirmation of an assumption that starts dominating the judicature, and the doctrine silently admits that the protection of ownership should be in general subordinated to public interest. From this perspective, it is not noticed that there are threats resulting from all types of special legislation based on the assumption that it is indispensable in the period of political and social transformation. In the present circumstances, there are no justified grounds for such arguments except for ideological or political ones.

It is necessary to perceive the issue of the scope of compensation for expropriated real property in this context. The problem constitutes one of the components of the proper shape of ownership protection. It should be classified as fundamental because it determines the real sphere of protection in a situation when within the binding law an owner cannot oppose legal expropriation of the right to ownership. Thus, a properly built model of protection should take into account a lack of balance that in this situation occurs between an owner and the state. In practice, this antinomy is in general always solved in favour of the state, and it is so in various aspects of the issue analysed, including within the scope of determining the compensation that should be awarded to cover the harm resulting from expropriation of ownership rights. The above-indicated issue has been discussed in many scientific works and has become the subject of abundant case law.

Within the present analysis, the output of the doctrine and the judicature will be treated in general terms because the author's objective is not to get involved in a dispute with the use of detailed arguments raised in both areas, because they do not differ considerably, but to present general criticism of the vision of compensatory liability used in the doctrine and case law. Due to that, the presented opinions are rather summative in nature, and therefore they are not a detailed analysis of arguments offered in various works. Such an assumption allows a presentation with more formal freedom, which does not mean exemption from the need to refer to important issues related with the discussed topic, but is only justification of abandoning a thorough study of opinions that are the basis for generalisations.

The starting point is that the scope of just compensation for expropriated real property should cover full damages because just compensation means it is fair, and the constitutional principle of proportionality does not justify limitation of compensation to the loss[4] (*damnum emergens*) without the consideration of lost profits (*lucrum cessans*), thus just compensation means full compensation. At the same time, the concept of expropriation should be understood as deprivation of the right to own real property by a unilateral, authoritative and specific administrative

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[3] Indeed, the limitation of the right to real property ownership has never been challenged, even in liberalism in the 18th and 19th centuries, and the concept of "the divine right to ownership" was propagated by Marxists of different origin and has never had anything in common with science but was rather an ideology.

[4] For more on terminology, see M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warsaw 2008, pp. 270–272.

act. Having made this assumption, I shall continue discussing the issue of just compensation taking into account the fact that just compensation must be considered in various aspects.[5] With respect to such an assumption, it is necessary to determine the framework of a possible analysis.

It seems that within this scope, it will be appropriate to refer to the models operable in the European legal culture. Two solutions are possible based on the existing legal systems. In accordance with one of them, compensation for expropriated real property covers full damages. The opposite approach envisages limitation of compensation to the loss, which in some cases may be extended to cover lost profits. The above-mentioned solutions may take different forms and generate mixed models. In all those cases, it is assumed that the redress of harm legally done by the state should be limited because the harm caused by a legal reason is in some sense an owner's "advantage" as he/she will have the right to use the accomplished objective resulting from the activity violating his/her right.

There are different theories substantiating this approach, e.g. the German "victim in public interest" or the French "principle of equality in sharing public burdens".[6] Regardless of theoretical affiliation to the limitation of the scope of compensation, it should be assumed that at present it is admissible to limit the concept of damage caused by expropriation, and in general it does not refer to expropriation based on a unilateral administrative act because the concept of expropriation in many legal systems has a broader scope than expropriation in Polish law as it covers not only acts of depriving owners of property but also those that shape the content of this right, thus in fact determine its limits, e.g. neighbours' rights, etc.

The answers to the question about the scope of just compensation for expropriated real property in Polish law should be looked for among those models. For a more complete presentation of this research, it is necessary to see two extreme solutions: Swiss law, in which Article 26 para. 2 of the Federal Constitution of the Swiss Confederation stipulates that the compulsory purchase of property and any restriction on ownership that is equivalent to compulsory purchase shall be compensated in full, and Spanish law, in which only loss is subject to compensation.[7] The above examples unequivocally confirm that there is no relation between full compensation for expropriation and the level of social development, which is reflected in the necessity of limiting compensation for the reason of achieving aims with a smaller input of public resources.

It seems that the consequences of full compensation are totally different. It is legal systems that guarantee not only an appropriate level of economic development but also full implementation of the idea of civil society. This comment confirms a thesis formulated by R. Pipes that only systems sufficiently protecting ownership have a potential to create institutions materialising citizens' rights. Additionally, one can formulate a statement that in contemporary times it is not possible to convincingly

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[5] See Z. Czarnik, *Sprawiedliwe odszkodowanie za przymusowe przejęcie własności nieruchomości,* Administracja. Teoria, Dydaktyka, Praktyka No. 1, 2013, pp. 23–40.

[6] For more on the characteristics of the principles, see J. Parchomiuk, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej,* Warsaw 2007, pp. 1–38.

[7] *Ibid.*, pp. 39–44.

challenge the principle attributed to Seneca, in accordance with which "plenty of things belong to kings, and ownership to particular people".[8] Thus the state should guarantee proper protection of ownership and this is inseparably connected with the scope of compensation.

The above-presented assumptions determine the limits to the analysis of just compensation as a normative category indicating the scope of compensation for expropriated real property. In Polish law the provisions of the Constitution are the basis for such considerations. Their content leads to an unjustified, in my opinion, conclusion that the Constitution of the Republic of Poland[9] makes a definite differentiation of the scope of compensation based on the nature of the infringement, i.e. adopts the principle of full compensation in case of unlawful infringement, and its limited amount covering only actual loss in case of expropriation. This differentiation is justified by reference to Article 77 para. 1 and Article 21 para. 2 of the Constitution of the Republic of Poland. The above-mentioned provisions use the terms "harm" (Article 77 para. 1) and "just compensation" (Article 21 para. 2). A conclusion may be drawn from this terminological differentiation that full compensation is applicable only in case of unlawful infringement of ownership.

What supports this stand is the argument indicating that Article 77 para. 1 of the Constitution of the Republic of Poland lays down the right to redress harm done by unlawful activity of public authority bodies. This model of constitutional control should mean that there is a principle of full compensation laid down in this provision. This results from the fact that Article 77 para. 1 stipulates that harm must be compensated but does not state its scope. If it is assumed that reference should be made to the colloquial meaning of the term, harm referred to in this provision also covers lost profits. The concept of harm within the colloquial meaning always covers loss of property, in spite of the fact that it is imprecise and unclear. In addition, it is indicated that the elimination of doubts arising in this area cannot consist in simple reference to the statutory principle of full compensation because it would infringe the principles of interpreting the Constitution, the content of which cannot be determined by referring to the sense, scope and meaning of concepts defined in statutes.[10]

Based on this, it is also emphasised that the terminology used in Article 77 para. 1 of the Constitution of the Republic of Poland refers to the Civil Code, where the principle of full compensation is laid down. In fact, it cannot result in drawing a conclusion that Article 77 para. 1 provides grounds for full compensation, however, the concept of "harm" used in this provision should be interpreted in the manner adopted in civil law, and this means that the scope of harm that is subject to redress should be determined based on Article 361 §2 Civil Code. As a result, it should be assumed that Article 77 para. 1 of the Constitution covers every type of damage to a given entity's interests protected by law, both tangible and intangible, i.e. also one that is connected with the right to real property ownership. In the doctrine, it

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[8] Quotation after R. Pipes, *Własność jako…*, p. 474.

[9] Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

[10] Justification of the Constitutional Tribunal judgment of 23 September 2003, K 20/02, OTK-A 2003, No. 7, item 76.

is commonly assumed that, pursuant to Article 77 para. 1 of the Constitution, the principle of full compensation is binding.[11]

On the other hand, Article 21 para. 2 of the Constitution of the Republic of Poland regulates compensation for expropriation. The provision lays down just compensation, which means that every interference to the right to ownership that has the features of expropriation results in compensation. This does not always have to lead to full compensation.[12] Even complete deprivation of ownership will not always be connected with full redress of harm because the scope of compensation must meet the criteria of legitimacy, which does not mean that it must be full as the Constitution differentiates the scope of those consequences by the adoption of the criterion of legitimacy in Article 21 para. 2. This formal approach in the provision leads to a conclusion that the Constitution envisages an idea of incomplete compensation.

The differentiation of the amount of compensation derived from the difference in terminological determination of the scope of the two constitutional provisions must raise serious doubts, especially as the doctrine and the judicature have not made an attempt to make a critical reference to the thesis formulated this way. A brief analysis of doctrinal and judicial sources seems to indicate that the opinions of communitarian theorists – who solving the problem of compensation for unlawful activities of public authorities, formulated an ill-considered opinion about just compensation that is used in Article 21 para. 2 of the Constitution of the Republic of Poland – won in theoretical considerations concerning the topic.

It should be emphasised that the substantiation of such a controversial thesis was presented in a rather brief paragraph of the justification for the Constitutional Tribunal judgment of 23 September 2003[13] with no reference to former opinions presented in the Constitutional Tribunal rulings. This way, the actual state of the law in force was totally ignored and, as a result, the systemic context of Article 21 para. 2 of the Constitution was not taken into account. Undoubtedly, this is a weak point of the argument for the limitation of the scope of compensation, especially as a decade earlier the Tribunal had stated that just compensation means fair compensation, and it is fair only when it is equivalent because only such compensation does not infringe the essence of redress for real property expropriation.[14]

Such casualness is not understandable and has no grounds because the opinion about the necessity of full redress within compensation for expropriated real property resulted from the introduction of the concept of just compensation to the constitutional order, which took place on 29 December 1989;[15] thus, the change in

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[11] See J. Kremis, *Skutki prawne w zakresie odpowiedzialności odszkodowawczej państwa na tle wyroku Trybunału Konstytucyjnego*, Państwo i Prawo No. 6, 2002, p. 47.

[12] Justification of the Constitutional Tribunal judgment referred to in footnote 10.

[13] *Ibid*.

[14] See the Constitutional Tribunal judgment of 8 May 1990, K 1/90, OTK 1990, No. 1, item 2; also the Constitutional Tribunal judgment of 19 June 1990, K 2/90, OTK 1990, No. 1, item 3.

[15] The concept of just compensation was introduced to the Polish legal order in Article 1(4) of the Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Journal of Laws [Dz.U.] No. 75, item 444), which amended Article 7 of the Constitution and stipulated that the Republic of Poland shall safeguard ownership and the right to inherit and

the scope of interpretation of just compensation required that the reasons for such activities be thoroughly presented. Apart from the fact that they were not advanced, the actual state of binding law was ignored and admissibility of such conduct was uncritically adopted in the doctrine and case law.[16] It should be presumed that it was due to conformist reasons rather than the substantial ones, which should meet with an even more critical assessment because justification for the presented opinion is looked for in judgments that do not refer to compensation for expropriated real property at all or in the theses from the past epoch.[17]

Criticism of the above-discussed opinions should be started from a more general issue concerning the differentiation in the constitutional provisions on just compensation (in Article 21 para. 2) and harm (in Article 77 para. 1). It seems that drawing too far-reaching conclusions from this fact may be unjustified and even risky. Undoubtedly, the above-mentioned provisions result in the fact that Article 21 para. 2 of the Constitution lays down the principle of just compensation for legal expropriation and Article 77 para. 1 provides for the principle of harm done by action contrary to law. As far as the latter case of liability is concerned, there is no doubt that public authorities must cover the harm done by unlawful action and, at the most, it can be surprising that admitting that required the Tribunal's intense adjudication activities and not just recognition that the provisions that do not meet this criterion cannot constitute grounds for shaping the sphere of subjective rights. On the other hand, in case of Article 21 para. 2 of the Constitution, approval of the limitation of compensation only to loss seems to ignore that the legislator uses the term "expropriation" in a broad sense in this provision,[18] and this means that the scope of compensation must be referred to various forms of deprivation of the ownership right. While it is possible to state that expropriation consisting in nationalisation or another form of acquisition of property by the state may result in incomplete compensation, this rule cannot be transferred to any other particular procedures resulting in compulsory deprivation of ownership.

The justification of this stand may consist in striving to ensure axiological coherence of the legal system. The current situation resulting from case law and the opinions of the doctrine does not meet this requirement and, at the same time, leads to fragmentation of the issue of compensation connected with legitimate deprivation of the right to real property ownership. The situation should be disapproved of because, in fact, it constitutes confirmation that there is no uniform principle of the protection of ownership, which results in jeopardising the constitutional assumption

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guaranteed complete protection of personal property. Expropriation was admissible exclusively for public purposes and for compensation.

[16] See T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, Warsaw 2007, pp. 170–171; J. Stelmasiak, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego*, Vol. 7: *Prawo administracyjne materialne*, Warsaw 2017, p. 600; also: J. Parchomiuk, *Odpowiedzialność…*, pp. 169–170; also M. Kaliński, *Szkoda na mieniu…*, p. 585.

[17] See the Constitutional Tribunal judgment of 8 April 1998, K 10/97, OTK 1998, No. 3, item 29; also E. Łętowska, *Charakter odpowiedzialności za szkody wyrządzone przy wykonywaniu funkcji publicznych i jej stosunek do odszkodowawczej odpowiedzialności kodeksowej*, [in:] Z. Radwański (ed.), *Studia z prawa zobowiązań*, Warsaw–Poznań 1979, p. 99 ff.

[18] For more, see J. Parchomiuk, *Odpowiedzialność…*, pp. 141–170.

that such protection exists. This state leads to much pathology, first of all, to situations in which the state undertakes more and more resolute steps towards unprecedented limitation of owners' rights within all types of special statutes,[19] which depart from the classical model of expropriation in favour of solutions that are legally doubtful. This way of acting means flagrant evasion of rules that are to safeguard at least minimal protection of ownership, thus it should be stigmatised.

The main axiological reservation in relation to the limitation of the scope of compensation pursuant to Article 21 para. 2 of the Constitution consists in the fact that the approval of such a state must be connected with an inevitable infringement of the constitutional principle of proportionality. If an entity deprived of the right to real property is to be treated in the same way as an entity deprived of this right in an extraordinary situation, in the evaluative dimension, it is not a standard situation and it cannot be accepted, by any means. For example, it is enough to indicate the regulations concerning extraordinary situations[20] and the Act on redressing loss resulting from emergency-related situations.[21]

Article 2 para. 2 of the Act on compensation clearly stipulates that everyone who has suffered from property loss as a result of the introduction of a state of emergency has the right to compensation covering the redress of property loss, without the profits they could obtain if the loss had not occurred. In case of this regulation, the narrowing of the scope of compensation does not raise any doubts and the legislator clearly excluded profits from the scope of compensation. There are clear grounds for such action in Article 228 para. 4 of the Constitution of the Republic of Poland, which imposes an obligation on public authorities to compensate for loss of property resulting from limitation, due to the introduction of extraordinary measures. There is also its non-legal justification because the state of emergency is an extraordinary situation, thus it is fair to introduce limitations to the scope of compensation in such a situation. It is hard to approve of such arguments in case of expropriation, which is neither an extraordinary situation nor incurred in an owner's interest.

Therefore, the right solution to the problem of just compensation for expropriation requires a systemic approach to the institutions that are connected with the acquisition or limitation of ownership if it takes place based on a decision. It is important to compile a coherent system of rules and a mode of granting compensation and, moreover, to make it clear within the scope of values that constitute its basis. The current state does not meet those requirements. It is commonly assumed

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[19] For instance, Act of 10 April 2003 on special rules of preparing and implementing investment in the area of public roads, Journal of Laws [Dz.U.] of 2018, item 1474.

[20] See the Act of 18 April 2002 on the state of natural disaster, Journal of Laws [Dz.U.] of 2017 item 1897; also the Act of 21 June 2002 on the state of emergency, Journal of Laws [Dz.U.] of 2017, item 1928; also the Act of 21 June 2002 on martial law, Journal of Laws [Dz.U.] of 2017, item 1932. For more on the issue of limitation of freedoms and rights in the extraordinary situations, see K. Eckhardt, *Stan nadzwyczajny jako instytucja polskiego prawa konstytucyjnego,* Przemyśl–Rzeszów 2012, pp. 208–229.

[21] Act of 22 November 2002 on compensating tangible assets loss resulting from the limitation of human and civil freedoms and rights in the period of the extraordinary state, Journal of Laws [Dz.U.] of 2002, No. 233, item 1955, as amended; hereinafter Act on compensation.

that the amount of compensation for expropriated real property is established within the scope of loss (*damnum emergens*) resulting from the deprivation of the right of ownership and the value of the loss is equal to the market value of the expropriated real property.[22] With respect to this, Article 130 para. 1 in conjunction with Article 134 para. 1 of the Act on real property management are referred to.[23] There are exceptions to the solutions adopted there in favour of lost profits (*lucrum cessans*) but only in cases laid down in statute. In general, these are some profits from the use of land, such as perennial agricultural cultivations and crops. This regulation is treated as a standard and a universal solution because special statute refers to the rules adopted there in all situations when property is acquired by a public entity or when it is necessary to determine compensation for the acquisition of real property ownership.

However, even within the Act on real property management, there is no consistency in the way of determining compensation, which has been rightly noted,[24] but no conclusion has been drawn from that fact in order to properly define just compensation. In my opinion, this state cannot be approved of because there are no arguments for it, except for excessive dogmatism of those who justify a different amount of compensation in case of expropriation and a different one in case of the "temporary expropriation".

Temporary expropriation means limitation of ownership referred to in Article 120 and Articles 124–126 ARPM. Thus, it concerns compensation to third parties in relation to expropriation that may cause harm or inconvenience to them in the area of exercising their right as a result of expropriation (Article 120 ARPM), or compensation for temporary acquisition of real property (Article 124 ARPM), or limitation of the use of real property in connection with mining ownership (Article 125 ARPM), or finally compensation for harm done as a result of force majeure or connected with the prevention of substantial harm (Article 126 ARPM).

In all those cases, it is assumed that a harmed person is entitled to full compensation because it results from the content of Article 128 para. 4 ARPM, which stipulates that compensation should be adequate to the value of harm. The principle of full compensation is derived from this linguistic formulation of the provision, while in case of expropriation, it is believed that compensation covers only loss because Article 128 para. 1 ARPM does not use the phrase from para. 4 of the provision, and only stipulates that expropriation is subject to compensation corresponding to the value of the acquired right, and this means just compensation, i.e. one that must be limited. The logical aspect of this argument does not meet the criterion of rationality because no one can justify a stand that full compensation is required in case of temporary limitation of the right to real property ownership and, at the same time, state that an entity permanently deprived of that right is not entitled to full compensation. This way of reasoning is in conflict with the basic inferential *a minori ad maius* principle because if full compensation is awarded for a less painful

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[22] See T. Woś, *Wywłaszczenie nieruchomości…*, p. 17.

[23] Act of 21 August 1997 on real property management, Journal of Laws [Dz.U.] of 2018, item 121, as amended; hereinafter ARPM.

[24] See J. Parchomiuk, *Odpowiedzialność…*, pp. 352–370.

infringement of rights, it should be granted all the more for deprivation of that right. Such a conclusion is an obvious consequence of the interpretation of Article 128 paras 1 and 4 ARPM in conjunction with Article 21 para. 2 of the Constitution.

The adoption of the principle of full compensation for expropriation of real property poses new challenges to compensatory proceedings due to the necessity of determining the amount of harm and compensation for it. The present procedure of establishing compensation does not meet the requirements for adjudicating on such compensation. Real property appraisers certainly should not do this because they are not prepared to establish that. They can only determine the value of tangible assets of the real property subject to expropriation but the amount of compensation may be established only within a process of litigation because a court is the proper place where that can be determined. However, problems connected with the establishment of full compensation are nothing new. The procedure in compensatory proceedings is standard so a decision determining the amount of compensation will never play this role, although it may be an element of such proceedings if the person whose real property has been expropriated accepts the proposed compensation.

This means that the main direction of action aimed at ensuring an appropriate standard of protection of real property ownership should strive to guarantee a judicial method of claiming compensation. The first steps have already been taken in Article 33 para. 2 of the Act of 29 June 2011,[25] which stipulates that the party dissatisfied with the awarded compensation pursuant to the AINP provisions may initiate lawsuit in common courts. Obviously, it concerns those forms of interference into the right of ownership for which the legislator designed an administrative compensatory mode; however, with respect to this, Polish legislation is not consistent.[26] The adoption of the proposed solution is of key importance because it is an argument against a thesis on a limited scope of compensation for expropriation. If a court should decide about compensation, it is obvious that it should do this with the application of the provisions constituting compensatory liability, i.e. with the adoption of the principle of full compensation because it is a principle used in civil law.

Using bases determined this way as a starting point, it is necessary to formulate a radical thesis that just compensation must be fair compensation, and this requirement is met only when equivalence is maintained, which is feasible when the principle of full compensation is adopted. The support for this stand is a guarantee of the state's lawful operation and sufficient protection of real estate ownership, which is a fundamental institution. Departure from those assumptions results in various types of pathology of present times. Thus, based on this assumption, it should be said that Article 128 para. 1 ARPM, stipulating that expropriation is

[25] Act of 29 June 2011 on preparation and implementation of investment in nuclear power plants and accompanying investments, Journal of Laws [Dz.U.] of 2018, item 1537; hereinafter AINP.

[26] In many situations the law envisages pursuing claims concerning harm done in compliance with law via litigation, e.g. Articles 29 and 30 of the Act of 23 July 2003 on the protection of antiquities and taking care of them, Journal of Laws [Dz.U.] of 2017, item 2187, as amended.

subject to compensation, lays down a principle of full compensation within the meaning of Article 21 para. 2 of the Constitution.

Full compensation covers loss, expenditures and lost profits.[27] Loss (*damnum emergens*), called the "real harm" [28] consists in the decrease in assets or the increase in liabilities.[29] In case of expropriation, loss consists in the decrease of assets because an owner loses the right to real property ownership. In reality, loss means the market value of this right, which must be established pursuant to Article 134 para. 1 ARPM. It should be added that in case of expropriation, the state is in a more advantageous position than any other entity obliged to redress harm in accordance with civil law because statute lays down that only the market value of real property is to be taken into account and not, e.g. the loss of value of the owner's interests connected with expropriation, which also constitutes loss in civil law. In addition, the *damnum illicitum*,[30] i.e. damage to property within unlawful interest,[31] is recognised as loss in the Civil Code. Similarly, loss of claims connected with real property subject to expropriation is also loss because every claim should belong to property assets. Finally, liabilities also constitute loss.[32]

Such a conclusion can be carefully drawn based on the content of Article 130 para. 1 ARPM, which indicates that the amount of compensation is established in accordance with the state, purpose and value of real property subject to expropriation on the day of the issue of an expropriation decision. The content refers to the state and purpose of real estate, but not land, thus it seems that it clearly indicates the formal (legal) use of the term, and not just a physical way of land utilisation as it functions in practice. Consistent derivation of such results from the terminology used in Article 130 para. 1 ARPM is reasonable because real property is a legal category and land is determined as a parcel. It may be surprising that the doctrine and judicature do not draw any normative conclusions from this differentiation. The phenomenon is symptomatic because it indicates legal ignorance or defective interpretation of the indicated provision. The first option should be in general refused so it is necessary to look for an error in the interpretation because it is hard to assume that the legislator introducing such terminology acted irrationally since, in accordance with Article 56 paras 2 and 3 of the Act on land management of 1985,[33] the phrase "when establishing compensation for land", and not real estate, is used; however, in Article 56 para. 1 of the same statute, the legislator emphasised that compensation should correspond to the value of real estate subject to expropriation.

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[27] See W. Czachórski, *Zobowiązania. Zarys wykładu*, Warsaw 1994, pp. 78–79.

[28] It is rightly raised in jurisprudence that such a term is erroneous because all types of harm are always real; see M. Kaliński, *Szkoda na mieniu…*, p. 271.

[29] For more on the issue, see W. Czachórski, *Zobowiązania…*, p. 76; also M. Kaliński, *Szkoda na mieniu…*, pp. 270–273.

[30] See M. Kaliński, *Szkoda na mieniu…*, p. 273.

[31] For instance, the value of a building raised with no building permit.

[32] For instance, due based on a contract entered into in favour of a third party; however, the issue may be resolved in various ways in civil law; see T. Wiśniewski, [in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia: Zobowiązania*, Vol. 1, Warsaw 2002, p. 76.

[33] Act of 29 April 1985 on land management and expropriation of real property, Journal of Laws [Dz.U.] of 1991, No. 30, item 127, as amended.

Compensation for expropriation should cover expenditures that an owner must incur. Although a doubt can arise here which expenditures that an owner can incur result from expropriation alone, this element of harm cannot be eliminated from the scope of harm only because it is difficult to determine it. It can be cautiously assumed that such expenditures directly resulting from expropriation concern loss that the owner incurs in connection with the conducted expropriation proceedings, e.g. the cost of expert opinions developed for this purpose.

Finally, the scope of compensation for expropriation must cover lost profits (*lucrum cessans*), e.g. at least for historical reasons.[34] Obviously, the historical aspect cannot constitute sufficient justification for admission of this element of harm, however, it shows how far contemporary law has departed from reasonable roots; and all this takes place in the era of growing ideologies concerning human rights.[35] The law in force does not define the concept of lost profits because the term refers to different forms of benefits, profits from future transactions, loss of profits and income from things and the possibility of using things.[36] Proper determination of profits in expropriation proceedings is not simple. By the way, there are no proceedings in which it is easy but it seems that in this case it encounters difficulties and the perception of lost profits functions erroneously in legal conscience.

In general, it is assumed that lost profits are values connected with the loss of elements of land utilisation referred to in Article 135 paras 6–7 ARPM.[37] The stand is a certain simplification because the indicated provision applies to profits from things but their loss does not always have to be assessed as lost profits; this can be just loss. Classification of lost benefits as lost profits within the legal meaning may only take place in case of benefits from things or rights that have not been received and are future in nature in relation to an event that requires the redress to harm. In case of expropriation, it will be the result of an expropriation decision, thus concerns only the benefits under Article 135 paras 6–7, which might occur after the implementation of the decision, so it can be stated that these are lost profits within the meaning of civil law.

Earlier they do not constitute profits but loss, which must be established even in case of a very restrictive approach to the scope of compensation. This means that if real property subject to expropriation is used for agricultural purposes and there are crops there, the value of the crops should be recognised as loss if the effect of expropriation occurs before harvest. In such a situation, the addition of not harvested crops to the value of land constitutes the determination of the right subject to expropriation as the content of Article 130 para. 1 ARPM stipulates that compensation should cover the state and purpose of land. Crops would constitute lost profits if an owner claimed compensation for them in future periods following expropriation. All types of land purposes and its business utilisation should be treated in the same way, regardless of whether this concerns economic operations

[34] This type of damage is laid down in Articles 644 and 657 of Vol. X of *Zwód praw*, quoted after M. Kaliński, *Szkoda na mieniu…*, p. 285.

[35] See L. Kołakowski, *Czy Pan Bóg jest szczęśliwy i inne pytania*, Kraków 2009, p. 234.

[36] For more considerations on the issue, see M. Kaliński, *Szkoda na mieniu…*, pp. 284–302.

[37] See T. Woś, *Wywłaszczenie nieruchomości…*, p. 172.

conducted on that land or profits resulting from the use of real property by third parties based on a legal title.

Determination of harm in the field of lost benefits is connected with the necessity to indicate the probability of the occurrence of such benefits in the future. This requires that complicated evidence-related and deductive procedures should be conducted in strictly administrative proceedings because each party deriving effects in favour of them from specific facts must provide evidence confirming or denying such harm. Such a standard is not available in proceedings conducted by a public body, and thus compensatory proceedings need thorough remodelling into court proceedings if a compensatory offer presented by this body is not accepted by an owner of expropriated real property. The Polish legislator should pursue such a model if the model of real protection of ownership resulting from the content of Article 21 of the Constitution of the Republic of Poland is to be implemented.

In the constantly changing contemporary world, legislators, scientists and law practitioners should be involved in attempts to keep balance between protection of private property and the need to ensure harmonised implementation of the objectives of the public by broadening the area of public ownership. Taking those steps, it is necessary not to lose sight of the apparent truth that "the state may print a beautiful edition of Shakespeare's works, but cannot get them written".[38] Thus, it is necessary to ensure that private ownership should be subordinate to other objectives only when there are important public interests that cannot be implemented with the use of common legal measures.

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[38] See A. Shleifer, *Własność państwowa a własność prywatna*, [in:] L. Balcerowicz (ed.), *Odkrywając wolność…*, p. 493.

Shleifer A., *Własność państwowa a własność prywatna*, [in:] L. Balcerowicz (ed.), *Odkrywając wolność. Przeciw zniewoleniu umysłów*, Poznań 2012.
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THE SCOPE OF JUST COMPENSATION FOR COMPULSORY ACQUISITION OF REAL PROPERTY OWNERSHIP

Summary

Expropriation of real estate is connected with the necessity to pay compensation. Such a necessity results directly from Article 21 para. 1 of the Constitution of the Republic of Poland, which stipulates that expropriation may be allowed solely for public purposes and for just compensation. The concept of just compensation has not been normatively defined. The binding regulations stipulate the rules and procedure of determining compensation. In its basic scope, it is a solution adopted in law before the changes of the social and political system took place after 1989, i.e. before the Constitution of the Republic of Poland entered into force. In this context, there are many theoretical and practical problems connected with defining the

amount of compensation, and first of all, its scope. In other words, legal regulations do not explicitly resolve the issue whether just compensation is only the one which covers the actual, real loss, thus a market value of the real estate, or the one which includes lost profits, i.e. the profits that the property title would gain in future if it was within the area of the influence of the given entity. In jurisprudence and jurisdiction no clear solution to this problem was offered, thus the article deals with this aspect, indicating the imperfections and insufficiency of the existing special regulation evaluated from the perspective of the principles defined in the Constitution. The basic assumption presented on the basis of the considerations of the law in force is that just compensation as a condition for expropriation should also take into account the right level of protection of the real estate ownership, which can take place only if such ownership has actual economic significance.

Keywords: expropriation, just compensation, real harm, lost profits, value of the expropriated right

ZAKRES SŁUSZNEGO ODSZKODOWANIA ZA PRZYMUSOWE PRZEJĘCIE WŁASNOŚCI NIERUCHOMOŚCI

Streszczenie

Wywłaszczenie nieruchomości wiąże się z koniecznością wypłaty odszkodowania. Taki obowiązek wynika wprost z art. 21 ust. 1 Konstytucji RP, który stanowi, że wywłaszczenie jest dopuszczalne tylko wtedy, gdy dokonywane jest na cele publiczne i za słusznym odszkodowaniem. Pojęcie słusznego odszkodowania nie zostało normatywnie określone. Obowiązujące przepisy przewidują zasady i tryb ustalania odszkodowania. W swoim zasadniczym ujęciu jest to rozwiązanie przyjęte w prawie jeszcze przed zmianą systemu społeczno-politycznego, jaka dokonała się po 1989 roku, a więc przed wejściem w życie Konstytucji RP. Na tym tle rodzi się wiele problemów teoretycznych i praktycznych związanych z określeniem wysokości odszkodowania, a przede wszystkim z jego zakresem. Inaczej rzecz ujmując, przepisy prawa nie rozstrzygają jednoznacznie, czy słuszne odszkodowanie to tylko takie, które obejmuje faktyczną, rzeczywistą stratę, zatem wartość rynkową nieruchomości, czy też takie, w którego skład powinny wchodzić utracone korzyści, a więc zyski, jakie przyniosłoby prawo własności w przyszłości, gdyby było w sferze oddziaływania podmiotu. W nauce i orzecznictwie ten problem nie znalazł jednoznacznego rozwiązania, a zatem artykuł podejmuje te zagadnienia, wskazując na ułomność i niedostatek istniejącej regulacji szczególnej, ocenianej z perspektywy zasad określonych w Konstytucji. Podstawowym założeniem prezentowanym na kanwie rozważań nad obowiązującym prawem jest to, że słuszne odszkodowanie jako warunek wywłaszczenia powinno uwzględniać również wartość utraconych korzyści, gdyż jedynie przy takim założeniu można osiągnąć należyty poziom ochrony własności nieruchomości, co może nastąpić tylko wtedy, gdy ta własność będzie miała rzeczywiste ekonomiczne znaczenie.

Słowa kluczowe: wywłaszczenie, słuszne odszkodowanie, rzeczywista szkoda, utracone korzyści, wartość wywłaszczonego prawa

ÁMBITO DE JUSTIPRECIO POR LA EXPROPIACIÓN FORZOSA DE UN INMUEBLE

Resumen

La expropiación forzosa de un inmueble está relacionado con la necesidad de pagar el justiprecio. Tal obligación resulta directamente del art. 21 ap. 1 de la Constitución de la República de Polonia que prescribe que la expropiación forzosa es admisible sólo cuando se efectúa con fines públicos y contra el justiprecio. El concepto de justiprecio no ha sido definido normativamente. En su planteamiento básico es una solución adoptada en el derecho antes del cambio del sistema social-político que se efectuó tras el año 1989, o sea antes de la entrada en vigor de la Constitución de la República de Polonia. Surgen muchos problemas teoréticos y prácticos relacionados con la determinación del importe de justiprecio y sobre todo con su alcance. Dicho de otra manera, la regulación no resuelve si el justiprecio sólo incluye la pérdida real, o sea el valor del mercado del inmueble, o si incluye también el lucro cesante, o sea los beneficios que generaría el derecho de propiedad en el futuro, si perteneciese al sujeto. La doctrina y la jurisprudencia no resuelve de manera uniforme este problema, por lo tanto el articulo trata de estas cuestiones, señalando la insuficiencia y pobreza de la regulación especial existente, valorada desde la perspectiva de los principios plasmados en la Constitución. La premisa básica presentada a la luz del derecho vigente parte de que el justiprecio, como la condición de la expropiación forzosa, debería incluir también el valor de lucro cesante, ya que sólo entonces se puede conseguir el nivel adecuado de la protección de propiedad de inmueble, lo que tiene lugar sólo cuando la propiedad representará la importancia económica real.

Palabras claves: expropiación forzosa, justiprecio, daño real, lucro cesante, valor de derecho expropiado

РАЗМЕР СООТВЕТСТВУЮЩЕЙ КОМПЕНСАЦИИ ЗА ПРИНУДИТЕЛЬНЫЙ ЗАХВАТ ИМУЩЕСТВА

Резюме

Принудительное отчуждение недвижимости предполагает выплату компенсации. Это обязательство напрямую касается ст. 21 п. 1 Конституции Республики Польша. В данной статье предусматривается положение, что отчуждение допустимо только в том случае, когда оно осуществляется для общественно полезных целей и справедливой компенсации. Понятие справедливой компенсации не получило своего нормативного определения. В действующих положениях предусматриваются принципы и порядок определения размера компенсации. Согласно базовому подходу, это является решением, принятым в законодательстве ещё до реформы общественно-политической системы, которая имела место после 1989 года, то есть до вступления в силу Конституции Республики Польша. В данном контексте возникает множество теоретических и практических проблем, связанных с определением размера компенсации, и прежде всего ее объёма. Другими словами, правовые нормы не позволяют установить однозначным образом, учитываются ли при определении справедливой компенсации фактический, действительный ущерб, аналогичный рыночной стоимости недвижимости; или же необходимо принимать во внимание упущенную прибыль, а, следовательно, ту прибыль, которая гарантировала бы право собственности в будущем, если бы она находилась в рамках сферы влияния субъекта. Как в теории, так и в судебной практике, упомянутая проблема не решена окончательно и однозначно, вследствие чего в статье рассматриваются связанные с этим

вопросы, с указанием на ущербность и недостатки существующего специального регулирования, оцениваемого с точки зрения принципов, определяемых в Конституции. Основное предположение, представленное на основе рассуждений относительно действующего законодательства, исходит из предпосылки, что при определении размера справедливой компенсации как условия отчуждения следует учитывать также размер упущенной прибыли, так как только при таком подходе можно достичь надлежащего уровня защиты прав собственности на недвижимость, который может считаться обоснованным, если эта собственность имеет реальное экономическое значение.

Ключевые слова: отчуждение, справедливая компенсация, фактический ущерб, упущенная прибыль, стоимость отчуждаемого права

UMFANG GEBÜHRENDER ENTSCHÄDIGUNG FÜR ZWANGSMÄSSIGE IMMOBILIENÜBERNAHME

Zusammenfassung

Die Immobilienenteignung ist mit der Erforderlichkeit einer Entschädigungsbezahlung verbunden. Solch eine Pflicht ergibt sich direkt aus Art. 21 Abschn. 1 des Grundgesetzes (GG) der Republik Polen, welcher bestimmt, dass eine Enteignung nur dann möglich ist, wenn es für öffentliche Zwecke und entgegen einer richtigen Entschädigung erfolgt. Der Begriff einer rechten Entschädigung wurde bislang normativ nicht bestimmt. Die geltenden Vorschriften sehen die Prinzipien und den Modus einer Entschädigungsbestimmung vorher. In ihrer Grundfassung ist das eine Lösung rechtlich angenommen noch vor der gesellschaftlich-politischen Systemänderung stattgefunden nach 1989, demnach vor dem Inkrafttreten des Grundgesetzes der Republik Polen. Auf diesem Gebiet werden zahlreiche theoretische und praktische Probleme erwogen, verbunden mit der Feststellung (Evaluierung) der Entschädigungshöhe, aber vor allem deren Umfangs. Andererseits dirimieren die Rechtsvorschriften nicht eindeutig, ob rechte Entschädigung eine solche ist, welche einen tatsächlichen, wirklichen Verlust umfasst, ergo den Immobilienmarktwert, oder vielleicht auch eine solche, welche entgangene Benefits, also auch Profite beinhaltet, eben solche Profite, welche durch das Eigentumsrecht künftig hätten generiert werden können, falls diese im Bereich der Subjektwirkung gewesen wäre. Weder in der Wissenschaft, noch in der Rechtsprechung, hat dieses Problem keine eindeutige Lösung gefunden, ergo berührt dieser Artikel die vorliegenden Angelegenheiten, die Gebrochenheit und den Mangel an vorhandener Sonderregulation, die von Seiten der GG-Prinzipien einzuschätzen und abzuwägen sind. Die Hauptvoraussetzung vorgeführt anhand Erwägungen über das geltende Recht setzt voraus, dass eine rechte Entschädigung als Enteignungsbedingung auch den Wert entgangener Profite und Nutzen berücksichtigen soll, weil ausschließlich unter einer solchen Voraussetzung ein gebührendes Schutzniveau des Immobilieneigentums erzielt werden kann, was nur dann stattfinden kann, wenn dieses Eigentum eine tatsächliche wirtschaftliche Bedeutung ausweisen wird.

Schlüsselwörter: Enteignung, rechte Entschädigung, tatsächlicher Schaden, entgangene Profite und Nutzen, Enteignungswert

LA PORTÉE DE JUSTE COMPENSATION POUR LA PRISE DE CONTRÔLE FORCÉE DE LA PROPRIÉTÉ

Résumé

L'expropriation de biens immobiliers implique le versement d'une indemnité. Cette obligation est strictement basée sur l'article 21 paragraphe 1 de la Constitution de la République de Pologne, qui stipule que l'expropriation n'est autorisée que si elle est faite à des fins publiques et moyennant une juste compensation. Le concept de juste compensation n'a pas été défini de manière normative. Les dispositions applicables prévoient des règles et une procédure pour la détermination du montant de la compensation. Dans son approche fondamentale, il s'agit d'une solution juridique adoptée avant le changement de système social et politique intervenu après 1989, c'est-à-dire avant l'entrée en vigueur de la Constitution de la République de Pologne. Dans ce contexte, de nombreux problèmes théoriques et pratiques se posent concernant la détermination du montant de la compensation et, surtout, de son étendue. En d'autres termes, la loi ne détermine pas explicitement si une juste compensation couvre uniquement la perte réelle, donc la valeur marchande du bien immobilier, ou qui devrait inclure la perte de profit, et donc le bénéfice qui donnerait le droit de propriété à l'avenir s'il était dans la sphère d'influence de l'entité. En science et dans la jurisprudence, ce problème n'ayant pas trouvé de solution définitive, l'article aborde ces problèmes en soulignant l'imperfection et les faiblesses de la réglementation spéciale existante, évaluée du point de vue des principes énoncés dans la Constitution. L'hypothèse présentée sur la base de considérations relatives au droit applicable suppose qu'une juste compensation, en tant que condition d'expropriation, devrait également tenir compte de la valeur des profits perdus, car seule cette hypothèse permet d'atteindre un niveau de protection de la propriété adéquat, ce qui ne peut se produire que si cette propriété a une importance économique réelle.

Mots-clés: expropriation, juste compensation, dommages réels, pertes de profits, valeur du droit exproprié

PORTATA DELL'EQUO COMPENSO PER L'ACQUISIZIONE FORZATA DI PROPRIETÀ

Sintesi

L'espropriazione immobiliare è legata alla necessità di pagare un compenso. Tale obbligo deriva direttamente dall'articolo 21. paragrafo 1 della Costituzione della Repubblica di Polonia, che stabilisce che l'espropriazione è consentita solo se effettuata per scopi pubblici e con un equo compenso. Il concetto di equo compenso non è stato definito a livello normativo. Le disposizioni vincolanti prevedono norme e procedure per la determinazione del compenso. Nel suo approccio di base, si tratta di una soluzione adottata nella legge anche prima del cambiamento del sistema sociale e politico avvenuto dopo il 1989, ossia prima dell'entrata in vigore della Costituzione della Repubblica di Polonia. In questo contesto, sorgono molti problemi teorici e pratici relativi alla determinazione dell'importo del compenso e, soprattutto, alla sua portata. In altre parole, le disposizioni di legge non determinano in modo inequivocabile se l'equo compenso sia tale da includere solo le perdite effettive e reali, quindi il valore mercantile degli immobili, o tali, che dovrebbero includere lucro cessante, vuol dire i profitti che il diritto di proprietà porterebbe in futuro se fosse nella sfera di influenza del soggetto.

Nella scienza e nella giurisprudenza questo problema non ha trovato una soluzione univoca, per cui l'articolo affronta tali questioni, evidenziando la debolezza e la carenza della normativa specifica esistente, valutata dal punto di vista dei principi stabiliti nella Costituzione. L'ipotesi principale presentata sulla base di considerazioni sul diritto vincolante parte dal presupposto che l'equo compenso, in quanto condizione di espropriazione, dovrebbe tenere conto anche del valore dei mancati profitti, perché solo con tale presupposto si può raggiungere un adeguato livello di protezione della proprietà immobiliare, il che può avvenire solo quando questa proprietà

Parole chiave: espropriazione, equo compenso, danno effettivo, lucro cessante, valore del diritto espropriato

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IMPACT OF DIFFERENCES IN LEGAL RISK ASSESSMENT ON COMPLIANCE NORMS IN MULTINATIONAL CORPORATIONS

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1. VARYING LEGAL RISKS MANAGEMENT AND CREATION OF COMPLIANCE NORMS

The differences in methods of creating internal regulations observed in various corporations stem not only from legal differences, but also from different methods of estimating legal compliance risks adopted by them. These estimations are made on the basis of quantitative methods. There the legal risks management is based on continuous measurements. While performing such measurements, it is assumed that any risks accompanying activity of corporations, including non-compliance risks should be assessed similarly as it is done in the case of other operational risks.[1] Namely, it is based on two basic parameters: probability of occurrence and the severity of impact. The probability of an unwanted future occurrence is reflected in percentage terms based on the estimations of experts (best guess approach). Its analysis is made on the basis of historic observations considering the recorded past events. The impact of foreseeable consequences, on the other hand, is measured on

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[1] Interestingly, some researchers indicate there are other, less measurable, factors influencing the risk profiles of companies. This article refers to the cultural differences as one of the groups of these factors to be taken into account. It does not refer, however, to other factors, like e.g. the individual characteristics of leaders that equally could be factored into the analysis of this matter. See J.B. Delgado-García, J.M. De La Fuente-Sabaté, E. De Quevedo-Puente, *Too Negative to Take Risks? The Effect of the CEO's Emotional Traits on Firm Risk*, British Journal of Management Vol. 21, No. 2, 2010, pp. 313 ff.

the basis of the magnitude of potential losses that could be suffered by the corporation if an unwanted occurrence took place.[2]

Another key question for this kind of analyses refers to culture-related differences in the degree of acceptance of a risk level.[3] The lack of acceptance of a high level of risk entails the necessity of creating mitigating mechanisms which decrease its probability and impact.[4] The size of this risk acceptance primarily has been universally jargonized and then adopted into the official language as a risk appetite, i.e. the level of the accepted risk. Consequently, this legal risks acceptance or appetite influences the decisions on the types of risk mitigations to be applied.

Therefore, analysing the impact that cultural differences may have on the method of creating compliance norms refers to the tradition of legal cultures, yet not only.[5] The characteristics for various geographies have to be taken into account as well as the individually appropriate readiness, unique for each corporation that decides upon the particular types of risks it is ready to take.[6] Be it the risk of non-compliance with the normative environment or just the risk of suffering reputation losses. For multinationals operating simultaneously on multiple markets, it is the geographical division based on different legal systems in differing jurisdictions together with their particularities that are the criteria of thorough legal risks assessment.[7] One but not a sole variable that is taken into account in this equation is the probability of the infringement of binding regulations. Actually, this becomes the key element in the decision-making process that needs to be taken into account while researching the complexity of this issue.[8]

1.1. GENERAL FACTORS INFLUENCING THE PROCESS OF CREATING COMPLIANCE NORMS

Varying legal customs and cultures have an undeniable impact on the process of creating any norms in general. They also influence the way the compliance norms are created. They relate to the norm-creation process in different ways and refer to:

[2] For more on legal and compliance risk monitoring and management, see E.I. Brick, N.K. Chidambaran, *Board Monitoring, Firm Risk, and External Regulation*, Journal of Regulatory Economics Vol. 33, No. 1, 2008, p. 87 ff.

[3] *Ibid.*, p. 104 ff.

[4] M. Faure, *Tort Law and Economics*, Cheltenham 2009, p. 444.

[5] L. Bebchuk, A. Cohen, A. Farrell, *What Matters in Corporate Governance?*, Review of Financial Studies Vol. 22, No. 2, 2009, p. 785.

[6] The relation between company risk management in the context of complex multinational and multicultural structures and the way these corporates are organized is a subject of separate thorough studies conducted by numerous authors. This article only briefly mentions the topic but does not aim to focus on it. For more specific texts on this subject, see S. Mathew, S. Ibrahim, S. Archbold, *Corporate Governance and Firm Risk*, Corporate Governance: The International Journal of Business in Society Vol. 18, No. 1, 2018, p. 57. Also see L. Laeven, R. Levine, *Bank Governance, Regulation and Risk Taking*, Journal of Financial Economics Vol. 93, No. 2, 2009, p. 263.

[7] See P.J. Gallo, L.J. Christensen, *Firm Size Matters: an Empirical Investigation of Organizational Size and Ownership on Sustainability-Related Behaviors*, Business and Society Vol. 50, No. 2, 2011, pp. 325–328.

[8] J.H. Bracey, *Exploring Law and Culture*, Long Grove 2006, p. 121 ff.

a) identifying the areas that should be regulated;
b) stating whether already existing regulations apply to the market, in which a given organization operates, are complete or whether they require an additional subsidiary regulation with corporate norms;
c) assessing the way in which the regulation should be introduced (e.g. how casuistic the compliance norms should be, what form they should take, what kind of internal normative act is the most appropriate for regulating a given issue);
d) adjusting compliance norms in a way that most effectively ensures that these norms are successfully applied (e.g. in what way they should be promulgated and published, how to inform about them and educate with regard to their content, but also in what way it should be decided whether and how the sanctioning of their application should be regulated);
e) establishing the way in which the interpretation of norms and the elimination of possible inconsistencies in their understanding and application should take place (e.g. what the most appropriate interpretation principles of understanding their content in accordance with the intention of the corporations creating them are.[9] In the case of corporate compliance norms, systemic interpretation rules are of bigger importance than the linguistic interpretation as well as more information whether and to what extent authentic interpretations are applied).

The observations on the impact of cultural legal differences on the method of creating compliance norms within the international corporations that operate simultaneously on multiple markets refer indirectly to such issues as defragmentation of law under intercultural conditions, conclusions on reflexive and responsive law and the problem of lack of clarity of the norms. The issue of creating compliance norms in a way that would ensure their effective use in international entities is connected in particular with the application of soft provisions considering intercultural conditions.[10] It is exactly for this purpose that the codes of ethics, different kinds of international and global standards, etc. are created internally in corporations.[11] On the one hand, they take into account the cultural specificity of given areas. On the other hand, they contribute to creating something that is referred to with the overused concept of corporate culture.[12] The impact of legal cultures is also important when it is necessary to remove natural conflicts with

[9] See R. Michaels, J. Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law*, [in:] T. Broude, Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law*, Oxford 2011, p. 40.

[10] See L. Benton, *Law and Colonial Cultures*, Cambridge University Press: Cambridge 2002, p. 32 ff.

[11] E.J. Rudolph, *The Board Must Take the Lead in Establishing a Corporate Culture of Ethics and Compliance*, www.corporatecomplianceinsights.com (accessed on 3/11/2019). For a role of codification of intra-corporate rules for assurance of efficiency in homogeneous implementation of rules despite unequal compliance standards, see A. Zattoni, F. Cuomo, *Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives*, Corporate Governance: An International Review Vol. 16, No. 1, 2008 p. 7.

[12] J.B. Delgado-García, J.M. De La Fuente-Sabaté, E. De Quevedo-Puente, *Too Negative to Take Risks?...*, p. 322.

local provisions that consist in the necessity to harmonize the mode of operating of these corporations on different markets for their own interest and due to demands expressed by their regulators.[13]

1.2. CULTURE-RELATED MATTERS GOVERNED BY COMPLIANCE NORMS

The observations of the corporate compliance practices lead to the conclusion that different traditions and legal cultures may refer to very different understanding of the following issues:

a) corporate governance,[14]
b) approach to the necessity of ensuring the operation of a corporation in a transparent manner and assuring corruption prevention,
c) ensuring efficient flow of information about clients and employees,[15]
d) approach to the matter of Corporate Social Responsibility.[16]

The analysis of cultural differences in relation to the attention and importance they receive in the field of creating corporate compliance norms consists to a large extent of generalisations. These generalisations in the analysis of cultural differences in relation to legal norms involve certain simplifications. Still, despite their obvious flaws, all the generalisations are characterised by the three below-mentioned functions.

Firstly, they may be a point of reference to some adopted assumptions and interpretations. For example, the observations prove that corruptive acts in Nordic European countries will be construed and defined differently than corruptive acts in some Middle East or Asian countries.[17]

Secondly, they make it easier to foresee certain behaviour types. Due to that, they facilitate introducing norms that are appropriate and corresponding with the aim. This is an especially valid feature that concerns the interpretation and application of these norms.

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[13] The difficulties in harmonising internal norms within corporations are also due to many other different reasons, see, e.g. G. Bierbrauer, *Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism Between Kurds, Lebanese and Germans*, Law and Society Review Vol. 28, No. 2, 1994, pp. 243–264.

[14] R. Aggarwal, I. Erel, R. Stultz, R. Williamson, *Differences in Governance Practices Between US and Foreign Firms: Measurement, Causes and Consequences*, Review of Financial Studies Vol. 23, No. 3, 2009, p. 3140; W.H. Starbuck, *Why Corporate Governance Deserves Serious and Creative Thought*, The Academy of Management Perspectives Vol. 28, No. 1, 2013, p. 17.

[15] L. Bebchuk, A. Cohen, A. Farrell, *What Matters…*, p. 801 ff.

[16] Interestingly, this issue is currently of interest to shareholders, but also of media and other external entities to such an extent that banking institutions include information on it in their annual financial statements, next to financial reports, e.g. dozens of pages of the annual report of HSBC Holdings plc for 2013 are devoted to it. See HSBC Holdings plc., Report of the Directors: Corporate Governance 2013, pp. 329–371.

[17] For comments on understanding certain terms deeply rooted in the European legal cultures, see A. Sulikowski, *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*, Acta Universitatis Wratislaviensis No. 2878, 2006, p. 235 ff.

Thirdly, they help building self-consciousness both among persons appointed to apply these norms (this refers to the boards' members of corporations, lawyers, compliance officers), and among all other addressees thereof.[18]

The impact of cultural legal differences on individual compliance tasks relates to many areas regulated by internal corporate norms that include compliance metanorms regulating non-compliance risk assessment and norms introduced internally in the form of policies and procedures.[19] The non-compliance risk assessment is usually performed in corporations according to the formalised processes. They consist of discussions within the framework of committees on different organizational levels, they are regulated within the formalised analyses, they are stress-tested, properly measured, regularly reported, etc.[20] It has become a formal necessity as all elements that may impact the magnitude, probability of occurrence or financial results of a corporation have to be recorded, measured and reported.[21]

Moreover, from the business point of view, the non-compliance risk, as one of the elements of operational risk should be assessed in accordance with the methodology of assessing the operational risk adopted by a given corporation. To avoid a frequent deficiency that the general documentation referring to operational risk assessment may often be based on information that is insufficient for the application of the analysis of non-compliance risk management, a separate methodology related specifically to the non-compliance risk assessment is often created. At the same time, compliance units' tasks include ensuring that the non-compliance assessment is consistent with the applied elements of assessment, control and regular monitoring of other operational risks and with the general risk assessment procedures.[22]

1.3. HARMONISING COMPLIANCE NORMS DESPITE CULTURAL DIFFERENCES

Ensuring the harmonisation of compliance norms despite differences or even against differences resulting from cultural diversities consists of establishing coherent rules of applying tools such as the above-mentioned compliance reports. These rules specify that it is necessary to identify all binding legal provisions, whose application may encounter obstacles as a result of which a substantial non-compliance risk may occur.[23] Identification of these provisions leads to recording them in compliance

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[18] See R. Cotterell, *The Concept of Legal Culture*, [in:] D. Nelken (ed.), *Comparing Legal Cultures*, Brookfield 1997, p. 15 ff.

[19] B. Roach, *A Primer in Multinational Corporations*, [in:] A.D. Chandler, B. Mazlish (eds), *Leviathans: Multinational Corporations and the New Global History*, Cambridge University Press: Cambridge 2005, pp. 21–23.

[20] I.E. Brick, N.K. Chidambaran, *Board Meetings, Committee Structure, and Firm Value*, Journal of Corporate Finance Vol. 16, No. 4, 2010, pp. 533–553 *passim*.

[21] D. Diavatopoulos, A. Fodor, *Does Corporate Governance Matter for Equity Returns?*, Journal of Accounting and Finance Vol. 16, No. 5, 2016, p. 39 ff.

[22] C. Mallin, *Corporate Governance*, 4th edn, Oxford University Press: Oxford 2013, p. 51 ff.

[23] Apart from the subject of analysis of this paper, there are other supra-regional factors having influence on corporations in different jurisdictions. One of such factors is the supervisory role of the regulators with regard to the issues systemically important for the appropriate

reports or in other similar documents that strive to map all relevant non-compliance risk areas. It is the accountability of companies being part of the multinationals and ultimately of the mother companies to ensure that these documents fairly reflect the relevant risks of the areas in which they render services, that they are complete and consistent with the actual state of affairs.[24] These documents are subsequently presented to the appropriate global compliance structures that after the collection of such summaries are able to make a comprehensive assessment whether the whole group operates in compliance with the binding legal and regulatory provisions.[25] These documents include also information allowing them to perform internal controls encompassing the assessment of significant non-compliance risks.

Creating and updating these documents that include compliance reports is an important part of compliance employees' obligation regardless of the fact that their obligations in this respect are much broader and more comprehensive.[26] They consist in supporting individual business specialists in matters related to compliance with legal provisions taking into consideration the local cultural diversities and conditions. It is delivered through the direct involvement in creating compliance norms, performing control activities, monitoring, reporting, etc.

Thus, the scope of obligations of compliance officers in multinational corporations comprises the non-compliance risk assessment. It mainly refers to these areas of corporations' activities that are supported by and ascribed to them. Still, these areas may have their cultural specificity. All the risks the management of which was entrusted to the compliance units are identified and assessed with the aim of planning appropriate preventive measures or measures minimising their consequences if they materialise. According to the procedures created in corporations, such assessments of non-compliance risk are documented and periodically reviewed in order to ensure that the identified risks are complete and their rating remains updated.[27]

There is an expectation that the risk assessment is reviewed each time when such a need arises, namely in the situation of poor results discovered by external controls, negative outcome of compliance reviews, and unsatisfactory assessments resulting from reports prepared by internal or external auditors. These assessments are detailed to the extent that they enable identifying areas requiring particular approach and focusing on matters that need specific attention. Analyses show that the most frequent example applies to compliance with anti-money laundering provisions.

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operating in the territory of the European Union. See further on the subject in M. Fedorowicz, *Nadzór na rynkiem finansowym w Unii Europejskiej*, Warsaw 2013, p. 379 ff.

[24] J.V. Frias-Aceituno, L. Rodríguez-Ariza, I.M. Garcia-Sánchez, *Is Integrated Reporting Determined by a Country's Legal System? An Exploratory Study*, Journal of Cleaner Production Vol. 44, 2013, p. 50.

[25] I. Love, *Corporate Governance and Performance around the World: What we Know and What we Don't*, World Bank Observer Vol. 26, 2011, p. 44.

[26] See, e.g. T.M.J. Moellers, *Sources of Law in the European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosière*, European Business Organisation Law Review Vol. 3, No. 11, 2010, p. 379 ff.

[27] P.R. Wood, *International Legal Risk for Banks and Corporates*, London 2014, p. 97.

Importantly, the core of such processes of harmonisation of the compliance approach consists of the introduction of regularity despite differences.[28] The efficiency of the process requires that such actions should not take place on a one-off basis. There are areas that involve particular care and a structured approach due to either the economic interest of corporations or the recommendations of regulators. These comprise diligence in relation to client service, particular attention to high risk clients (including dealing with politically exposed persons) and monitoring the suspicious transactions.

To cope with the cultural differences, it is assumed that each kind of activity should be described in detail in instructions and procedures in order to ensure unified non-compliance risk management despite differences stemming from particularities of specific markets. The responsibility for applying compliance requirements introduced in corporations and for assuring their application as stated in instructions, procedures and other forms of compliance regulations practically rests within the management of corporations. In practice it means both: ensuring that the companies and their employees act in compliance with these norms and that these regulations are easily accessible for all addressees. This also means the employees, contractors and business partners are properly trained in regard to the scope of the content of these regulations and that they are aware of requirements imposed on them. Simultaneously, it remains the responsibility of compliance officers, who know the cultural and market specificity of a given area, to secure that the management, that includes the formal boards of a corporation, have appropriate control mechanisms at their disposal in order to ensure that these norms are in compliance with the binding legal provisions. In this case, the verification takes place also periodically, that is together with the regularly performed assessments, monitoring and reviews.[29]

The requirements referring to the manner of conducting activity and maintaining compliance are included in coherent sets of procedures of the structure that may be applied in the daily work.[30] Although the concept of one set of procedures is usually a recommended solution, decisions that recommend creating separate procedures with reference to individual compliance areas are often taken due to practical reasons. It is also an obligation of the compliance officers to ensure that managements of corporations are timely notified of necessary updates of compliance regulations both due to the pace of changes taking place within the corporations themselves and due to changes within their legal and regulatory environment.

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[28] M.A. Glynn, *Review of "The Institutional Logics Perspective: a New Approach to Culture, Structure and Process (by Thronton, Ocasio & Lounsbury)"*, Administrative Science Quarterly Vol. 58, No. 3, 2013, pp. 493–495.

[29] S.A. Zahra, J.A. II Pearce, *Boards of Directors and Corporate Financial Performance: a Review and Integrative Model*, Journal of Management Vol. 15, No. 2, 1989, p. 291 ff.

[30] There are also exceptions, such as areas in which certain compliance procedures do not lie within the scope of everyday activities, an example being private securities transactions made by bank employees.

2. DIFFICULTIES IN APPLYING COMPLIANCE NORMS DUE TO CULTURAL DIFFERENCES

The complexity of the analysis of compliance norms in international companies results also from the fact that cultural differences play a particular role not only in their creation, but also in the approach to applying these norms.[31] Namely, the same terms may convey a completely different meaning in different legal cultures and similarly in different cultures in general.[32] Therefore, it is equally important to use appropriate terms as it is to take into account the cultural context while applying them. Multinational corporations often propose in their interpretation rules to use common sense while formulating guidelines regarding the application of these norms.[33] This approach is meant to enable them to partly minimise cultural differences present in various jurisdictions where they operate.[34] Therefore, apparently, despite of the fact that the term "common sense" is not a juridical one, it is widely used in the practice of interpreting norms created within international corporations.[35] As it turns out, applying unified rules based on the common understanding of certain terms regardless of cultural differences appears to be the easiest but also the most helpful interpretation hint.

As a simple example of a tool supporting the first signs of legal or compliance risks assessment is a commonly known warnings of "too – to" directed to employees. The practical examples of use of such rules are "too hot to handle", "too good to be true", etc. However, anecdotally, some expressions that have made a career recently regarding banks not coping well with the latest crisis, like "too big to fail", did not become a universal interpretation rule. The condition for their effectiveness is the existence of legal and compliance risks management and control mechanisms.[36] Theoretical difficulties with the application of compliance rules due to cultural differences presented in this article refer to the individual types and methods of harmonisation of their application irrespective of cultural differences within given multinational corporations.

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[31] The difficulty in application of compliance despite the cultural specificities is not new and can be universally observed across and regardless the industries. See P.J. Robertson, J.V. Speier, *Organizing for International Development: a Collaborative Network-Based Model*, International Journal of Technical Cooperation Vol. 4, No. 2, 1998, p. 169.

[32] For cultural differences in understanding changes taking place in law in connection with frequent withdrawals of countries from their traditional role and global commercial organizations taking over their place, see A.C. Aman, *The Democracy Deficit: Taming Globalization Through Law Reform*, New York 2004, p. 139 ff.

[33] P.J. Robertson, J.V. Speier, *Organizing for International Development…*, p. 175.

[34] See J. Winczorek, *Systems Theory and Puzzles of Legal Culture*, Archiwum Filozofii Prawa i Filozofii Społecznej No. 1(4), 2012, p. 106 ff.

[35] A "common sense test" term is used in the practice of interpretation of corporate norms comprising recommendations of specified actions for the assessment of which such recommendations should be announced in a given legal environment.

[36] See S. Schelo, *Bank Failing or Likely to Fail*, [in:] *Restoring Confidence. The Changing European Banking Landscape*, London 2014, p. 23.

2.1. CULTURE-RELATED DIFFICULTIES IN APPLYING COMPLIANCE NORMS

The analysis of the influence of legal cultures on application of compliance norms indicates a closer look at the difficulties related to the same issues which have been previously listed as those relating to difficulties in formulating these norms. [37] Seven types of issues presented below describe the identified difficulties.

The first of them refers to compliance recommendations related to building corporate governance and organizational structure inside companies being part of a capital group.[38] In companies within the common law jurisdictions there is one board being the main directing body, in the framework of which their members possess executive or non-executive competences.[39] Therefore, they perform various functions, with various engagement expected, including their participation in boards' committees.[40] The differences apply also to the understanding of responsibilities of persons performing similar roles within different local structures with respect to regional structures and vice versa – regional ones with respect to global structures.[41]

A distinctive example illustrating difficulties with the unified application of the same compliance norms, depending on cultural aspects is the whole range of issues related to the corruption prevention. Influence peddling, i.e. accepting unlawful benefits in exchange for rendering certain services or rendering them in a way that is in line with the expectations of the person offering these benefits, may be regarded as a criminal activity not only in a situation when none of the parties is a public entity. It is always so when the result turns to the detriment of other entities and

[37] Considerations on different functions that law has, depending on cultural legal traditions, are separate and remaining outside of the scope of this analysis, although indirectly connected with this matter. Regarding in particular the communicative function, including the function of programming and coding social behaviour through legal rules under the analysed cultural conditions, see N. Luhmann, *Law as a Social System*, Oxford 2004, p. 173 ff.

[38] R. Bozec, Y. Bozec, *The Use of Governance Indexes in the Governance-Performance Relationship Literature: International Evidence*, Canadian Journal of International Sciences Vol. 29, No. 1, 2012, pp. 79–89.

[39] P. Andres, V. Azofra, F. Lopez, *Corporate Boards in OECD Countries: Size, Composition, Functioning and Effectiveness*, Corporate Governance: An International Review Vol. 13, No. 2, 2005, p. 201 ff. On the independence of non-executive board directors in the context of compliance assurance within corporates, see E.M. Fogel, A.M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, Deleware Journal of Corporate Law Vol. 32, No. 32, 2007, pp. 33–72 *passim*.

[40] On the correlation between the board members' engagement and the overall results of companies, see: N. Vafeas, *Board Meeting Frequency and Firm Performance*, Journal of Financial Economics Vol. 53, No. 1, 1999, pp. 113 ff.; M.A. Valenti, R. Luce, C. Mayfield, *The Effect of Firm Performance on Corporate Governance*, Management Research Review Vol. 34, No. 3, 2011, p. 270.

[41] About the importance of rethinking the role of appropriate structuring of corporations' layers and the scope of accountabilities in particular in relation to their responsibilities before the shareholders and the companies themselves, see: W.H. Starbuck, *Why Corporate Governance…*, p. 19. On other examples of local-regional and regional-global levels manifesting in interpretation of corporate social responsibility policies within corporates and the discrepancies thereof, see: R. Streurer, A. Martinuzzi, S. Margula, *Public Policies on CSR in Europe: Themes, Instruments and Regional Differences,* Corporate Social Responsibility and Environmental Management Vol. 19, No. 4, 2012, pp. 15–21.

involves losses of shareholders or other market participants.[42] The understanding of the same terms may, however, be completely different in such a case. Therefore, it is important to create clear guidelines with regard to the benefits that must not be accepted in a given situation, that may be accepted and that actually ought to be accepted.[43]

Similarly, compliance norms relating to the issue of exchanging information between entities belonging to the same capital group are differently construed and applied within the same corporation. Especially, this is the case if these are the entities or at least the higher-ranked representatives of those entities who perform functions at a decision-making level of the organizational structure. The issue refers also to the exchange of information concerning clients, which in case of certain types of entities (e.g. financial institutions) involves particularly sensitive data, and to information on the rules of cooperation with the clients.

Relations with investors, media, suppliers and third parties in general are the areas where the manner of applying internal corporate norms differ within the same capital group due to cultural legal differences. Examples of such areas include media treated as a significant partner of public trading, deserving reliable and possibly complete information regarding the matters which may be subject to information requests. This is the case in jurisdictions where democratic rules of law are well established and applied. However, this matter looks completely different in the countries where political systems are characterised by deficiency of democracy and where transparent information for a wider public is not a commonly adopted standard.

Similarly, as in the case of relations with media, the approach to market regulators very often depends on the maturity of democratic institutions in a given jurisdiction and on the presence of a tradition of open cooperation between private sector companies and public administration. In mature jurisdictions, these relations are usually based on a partnership, consultations and allow lobbying within the clearly determined frameworks conducted in accordance with transparent legal rules. In the developing countries, usually the inequality in the relationship between a citizen and the state makes it impossible to shape the regulatory reality for the society's common good.

An element differing significantly, depending on the tradition and legal maturity of jurisdictions, is the approach to regulations which shape the relations between employees and employers. In global corporations, there is a tendency towards broadening interpretation of norms referring to the guarantee of employees' rights extended into involving employees in the consultation process regarding any matter that relates to the development of a company. At the same time, in many other corporations, including those acting on international markets, there are still appalling

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[42] R. Bozec, M. Dia, *Governance Practices and Firm Performance: Does Shareholders' Proximity to Management Matter?*, International Journal of Disclosure and Governance Vol. 12, No. 3, 2015, pp. 185–209.

[43] Regarding cultural differences in understanding what is and what may not be in compliance with law, see, e.g. S.S. Silbey, *Legal Culture and Cultures of Legality*, [in:] J.R. Hall, L. Grindstaff, M.Ch. Lo (eds), *Handbook of Cultural Sociology*, London–New York 2010, p. 472.

practices of exploitation of employees, extortion of their absolute obedience or even limitation of their freedom through unacceptable practices, like for example confiscating their passports.[44] All in apparent accordance with provisions of internal norms binding these corporations.[45]

As much as in the case of interpretation of norms, cultural differences may also be reflected in the application of recommendations resulting from compliance norms adopted in international corporations. An example could be an approach to norms specifying recommendations concerning tasks within the scope of the Corporate Social Responsibility (CSR) and the impact of these norms on a company's image.[46] Still, it may also be otherwise: normative regulations specifying the activity of corporations in this area are a benchmark for a desired behaviour.[47] They may become the means of internalisation of values by the addressees of theses norms and, thus, through the acceptance of normative obligations created by a corporation its activities are regarded as worth following.[48] Therefore, in spite of different cultural backgrounds the employees come from, behaviour that contributes to building a coherently positive image of the corporation which conducts socially responsible activity is promoted among them.[49]

Intricacies connected with the interpretation of norms in multicultural corporations were also noticed by the Basel Committee with regard to banks that operate in various countries within different legal jurisdictions. The Committee points out that in any such case there should be procedures of identifying and evaluating probability of non-compliance risk occurrence, including in particular the risk of reputational losses of a bank as a consequence of non-compliance with the compliance norms or their incorrect interpretation. This type of situation may take place when a bank offers products or when a bank decides to conduct activities in some of these areas

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[44] Depriving employees of passports as a guarantee to ensure loyalty remains still a widely used practice in service centres of banks and other international corporations in some developing countries.

[45] Regarding limitation of employee and human rights by corporations participating in world trade, see M.B. Likosky, *The Silicon Empire: Law, Culture and Commerce*, London 2005, p. 185 ff.

[46] S. Shanahan, S. Khagram, *Dynamics of Corporate Responsibility*, [in:] G.S. Drori, J.W. Meyer, H. Hwang (eds), *Globalization and Organization. World Society and Organizational Change*, Oxford 2006, p. 196 ff.

[47] D. Prior, J. Surocca, J.A. Tribo, *Are Socially Responsible Managers Really Ethical? Exploring the Relationship Between Earnings Management and Corporate Social Responsibility*, Corporate Governance: An International Review Vol. 19, No. 3, 2008, pp. 160–177; J.P. Sánchez-Ballesta, E. García-Meca, *Ownership Structure, Discretionary Accruals and the Informativeness of Earnings*, Corporate Governance: An International Review Vol. 15, No. 4, 2007, p. 681.

[48] For more on the subject of growing Corporate Social Responsibility in the context of corporations' role as "global private authorities", shaping proactive social behaviour expected by themselves by means of normative instruments, see R. Shamir, *Corporate Social Responsibility*, [in:] B. de Sousa Santos, C.A. Rodriguez-Garavito (eds), *Law and Globalization from Below*, Cambridge 2005, p. 92 ff.

[49] Regarding the compliance role in building inner coherence of companies through the involvement of employees in CSR activities, see R. Hurley, X. Gong, A. Waqar, *Understanding the Loss of Trust in Large Banks*, International Journal of Bank Marketing Vol. 32, No. 5, 2014, p. 350 ff. For the French perspective on the same matter as confronted with the international context, see A.B. Antal, A. Sobczak, *Corporate Social Responsibility in France: a Mix of National Traditions and International Influences*, Business and Society Vol. 46, No. 1, 2007, pp. 9 ff.

that would not be permitted on the territory where it is headquartered. In spite of that, the banking groups striving to unify their offer, sometimes decide to introduce such offers on the markets where they are not permitted to do so. Frequently, the interpretation of compliance norms which provides for the possibility of conducting such activities is the way to ensure the uniformity of the offer. This type of practices is most common when the interpretation of compliance norms at the local level is transferred to the regional or global one.[50] The interpretation of compliance norms should, however, be treated as a fundamental sphere of compliance risk management within a corporation.

Often, some of the strictly defined, specific compliance tasks, mostly encompassing the activities indirectly related to the core of the company's activity, may be outsourced. Most often, this type of outsourcing is performed at a supra-local level. Then, entities conducting these activities are the subject of the proportionate oversight of local compliance units. Therefore, the whole responsibility for maintaining full compliance, including avoidance of misunderstandings with regard to the interpretation of compliance norms, remains as a core of the compliance management within the multicultural corporate environment.

2.2. ENSURING CONSISTENCY IN THE APPLICATION OF COMPLIANCE NORMS

To ensure consistency in the application of compliance norms, corporations operating in multiple countries establish procedures that ensure that personnel with substantive capabilities are appointed to positions within the compliance area. These personnel are granted the possibility of transferring information on any doubts with regard to an inappropriate application of these norms directly to the companies' boards.[51] Several most frequent types of situations in which consultations in this respect take place are presented below:

a) The planned launch of new products or services or the change of a risk appetite described earlier or proposed change of target client base.
b) The planned changes in the corporate or management structure of a corporation.[52]
c) The planned implementation of a new or an amended legal or regulatory requirement.

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[50] The complexity of sustaining uniformity in the interpretation of internal regulations increases along with the size of a company. Thus, the challenge is especially complex within the framework of global corporations. Contrary to this assumption, size and coverage of global companies may themselves be mitigators for misinterpreting risks. See more on the topic in F. Zona, A. Zattoni, A. Minichilli, *A Contingency Model of Boards of Directors and Firm Innovation: The Moderating Role of Firm Size*, British Journal of Management Vol. 24, No. 3, 2013, p. 299 ff.

[51] R.B. Adams, B. Hermalin, M.S. Weisbach, *The Role of Boards of Directors in Corporate Governance: a Conceptual Framework and Survey*, Journal of Economic Literature Vol. 48, No. 1, 2010, pp. 58 ff.

[52] H.Y. Baek, D.R. Johnson, J.W. Kim, *Managerial Ownership, Corporate Governance, and Voluntary Disclosure*, Journal of Business and Economic Studies Vol. 15, No. 2, 2009 p. 46 ff.

d) Other planned changes that may have at least an indirect impact on the current interpretation of compliance norms, such as outsourcing, when third parties that have not undergone the proper induction are to perform activities for a corporation that are related to its core operations.
e) The occurring risk of regulatory infringements or situations in which regulatory bodies negatively assess certain type of activity of a corporation.
f) Internal or external audit reports that indicate any kind of regulatory problems occurring with regard to the activity conducted by a corporation.
g) An increased number of clients' complaints related to the withdrawal of certain products or entire types of activity by a corporation, which may indicate a non-compliance with certain legal provisions or infringement of internal compliance norms by employees.
h) The occurring requirements of corrective actions or any other matters related to the reputational risk resulting from supervisory recommendations or directly from legal provisions.

The compliance officers obliged to prepare annual plans and reports on the assessment of non-compliance risk usually refer in those reports to matters related to the observed application of compliance norms. These annual reports include proposed tasks with regard to the monitoring and control of the application of compliance norms together with the proposals of guidelines, procedures and planned trainings for employees with regard to the application of these norms. The content of those reports and plans is usually agreed on with the boards of corporations.[53] In practice, compliance units' tasks also comprise ensuring ample resources, including budgetary, human and technological ones and training plans necessary for the completion of the tasks in the action plans established to ensure the uniform application of the compliance norms.

Assuring uniformed application of the compliance norms within the various traditions and legal cultures is a complex task. Internal procedures referring to the rules of the functioning of compliance require not only presentation of periodical reports on the fulfilment of adopted plans. These procedures should also comprise information on the division of responsibilities to ensure the consistent application of compliance norms. An appropriate description of obligations of the management and other employees who have been entrusted with the obligations related to those matters should also be provided within those procedures.[54]

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[53] R.B. Adams, B. Hermalin, M.S. Weisbach, *The Role of Boards of Directors…*, pp. 73–75.

[54] The quotation from the internal (confidential) procedure regarding the ensuring of uniform application of compliance norms in one of international banks: "The compliance role is to support the management in fulfilling its obligations. It is connected with a proactive support in identification and assessment of risk, taking into account non-compliance risk, in monitoring, reporting and certification, as well as in promoting corporate culture based on the compliance with uniformly understood legal provisions and the optimization of relations with regulatory bodies."

3. DIFFERENCES IN INTERPRETING COMPLIANCE NORMS

In the practice of corporations operating on multiple markets, in case of a conflict of norms stemming from different jurisdictions, the choice of interpretation methods allowing one to determine the content of these norms that should be applied in an individually analysed situation becomes a particularly interesting matter. However, in a situation when a non-compliance cannot be eliminated as it stems from the contradicting dispositions resulting from the content of these norms and when it is impossible to establish a common and non-contradicting content for the norms that remain in such a conflict, this issue extends to the methods of taking a decision on which of these norms the organization should comply with.[55] In other words, the decision is taken which of these norms are predominant and apply in practice to the corporation activities. There are examples of complications resulting from culture--related conflicts of legal norms and supervisory regulations, and they represent problems with different interpretations of the same or similar notions. Methodological mistakes that consist in ignoring the cultural differences of multinational corporations result in inconsistencies in the common comprehension of the actual meaning of these norms.

3.1. COMPLICATIONS RESULTING FROM THE CONFLICT OF LAWS AND SUPERVISORY REGULATIONS

International corporations conducting activity in multiple jurisdictions encounter conflicts of legal norms and supervisory regulations in multiple configurations.[56] The most typical of them is the one in which it is desirable from the point of view of the management of the whole capital group to introduce internal norms or to order the application of the existing norms that are inconsistent with legal norms binding in one or more jurisdictions on the territory of which the corporation conducts its activity. In consequence, lawyers and compliance officers, whose tasks are to ensure that the corporation remains compliant with the entire normative order, take numerous measures aimed at resolving the existing conflicts. When decisions that aim at selecting the interpretation of the content of various norms are taken, they refer to the available interpretation rules that would make it possible to resolve such conflicts.

In this context, it is worth analysing the approach to this issue from the point of view of the choice of interpretation rules and more precisely, their relevance. Despite

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[55] Regarding the culture-forming power of decisions as to whether a provision of law is binding, see B. Maurer, *The Cultural Power of Law? Conjunctive Reading*, Law and Society Review Vol. 38, No. 4, 2004, p. 843 ff.

[56] Large multinational corporations adjusting their activity to local conditions change these conditions themselves, thus becoming regarded as more significant influence agents with regard to what currently global business trading is than politicians or international political organizations' structures. See J. Micklethwait, A. Wooldridge, *The Company: A Short History of a Revolutionary Idea*, Washington 2005, p. 159 ff.

a different content of conflicting norms, the reference to the available interpretation rules allows determining a uniform content that would enable the corporation to remain compliant with the entire normative order in a given area and also that would meet the requirements of the corporation management.[57]

On the other hand, not all the interpretation rules may be applied in this kind of situations to the same extent. This is different than in the case when the content of a given norm is simply ambiguous and other references have to be made to obtain a meaning free from ambiguities. In the case of a conflict of several norms, particularly belonging to different orders, not all of these references prove to be equally appropriate.

Deliberating on the tasks of the compliance units co-responsible for managing the major risks in corporations, one has to indicate that their key role and particularly complicated challenge consists of ensuring the conformity of their operations with all norms that apply to them. This concerns also situations in which conflicts of simultaneously binding norms occur. These take place when a decision on the method of interpreting the content of these norms or on the rejection of the application of certain norms cannot be resolved otherwise. Frequent cases of this type have a decisive impact on the direction of a corporation's activity.

3.2. COMPLICATIONS RESULTING FROM DIFFERENCES IN UNDERSTANDING OF THE SAME TERMS

The matter of complication of the above tasks recurs due to the fact that conducting complex activities the corporates operate within various jurisdictions, which implies that they are exposed to the risk of different understanding of the same content of the same or similar norms. Unavoidable conflicts may, therefore, result not only from the differences between the content of norms binding in different jurisdictions, the compliance with which is a premise of the activity conducted by corporations. Such conflicts may also stem from differences in the methods of interpretation of these norms, and more precisely from a different understanding of notions to which the content of these norms refers to.[58] Therefore, the role of selecting appropriate interpretation rules is so important in the compliance activity. In the light of the multiplicity of legal systems in which global corporations operate, the choice of interpretation rules is based on the criteria determined by a corporation. The most important of them is the criterion of practical use. This means that such interpretation rules have to be adopted that make it possible to eliminate potential contradictions or gaps originating from cultural diversity. The consequence of this kind

[57] Determining the uniform content of internal norms within a corporation has a direct impact on the efficiency of the management processes and the ultimate performance of the company. For more on this, see S. Bhagat, B. Bolton, *Corporate Governance and Firm Performance*, Journal of Corporate Finance Vol. 14, No. 3, 2008, pp. 257–273 *passim*.

[58] Regarding differences in the interpretation of similar legal norms in different jurisdictions, see W. Twining, *Social Science and Diffusion of Law*, Journal of Law and Society, Vol. 32, No. 2, 2005, p. 210 ff.

of interpretation measures is attaining the coherence of the normative framework of the corporation's activity. It is, therefore, worth having a closer look at the most commonly used interpretation rules according to the criterion of usefulness in relation to corporations operating in diversified legal cultures.[59]

The simple use of grammatical interpretation rules based on the analysis of the content of a norm resulting from a linguistic meaning of a normative utterance is rather limited. The difficulty in the case of grammatical interpretation rules results both from the fact of the multiplicity of languages in which the norms may be expressed and from the fact that the meaning of expressions used in norms is often related to their conventional content, which is strictly associated with a cultural context and given as a result of norm-setting measures under specific conditions of a given jurisdiction. Moreover, this conventional meaning may overlap with difficulties resulting from the multiplicity of languages itself. The inconsistency of understanding of the meaning of expressions that a norm comprises, stemming from the multiplicity of languages, results from the frequent inability to ascribe the same meaning to seemingly the same terms. This is due to the fact that assuming that certain expressions are identical is erroneous as a consequence of the prerequisite that translation means a faithful reflection of the entire content included in a denominated term. This, however, may not be correct.[60] Translation difficulties arise not only in the case of complex notions referring to definitions created by the doctrine and ruling practice (e.g. what a bribe is in some low transparency highly corrupted regimes and what it is in, say, Scandinavian countries), but also in the understanding of the basics for formulating utterances with normative modal verbs and expressions such as "should", "has to", "must", "has an obligation", "is obliged", etc. A precise translation of such expressions always requires some reference to legal cultural context.[61]

Functional interpretation rules may, on the other hand, be applied in the interpretation of norms with divergent meanings and stemming from different legal orders. However, the difficulty consists here, in the first place, of the fact that it is necessary to have a full knowledge of functions these norms should serve in order to be able to make their appropriate interpretation. This difficulty results from the fact that the functions for which these conflicting norms have been created may be difficult to identify or unclear. And even if clear, they may remain contradictory similarly to these norms whose interpretation by means of identifying the initial functions was supposed to be helpful. It is not uncommon that trying to eliminate a contradiction which initially appears while interpreting a norm, it turns out that the functions that were supposed to be fulfilled by these norms are completely

[59] Regarding contradictions in the practice of interpreting norms by social institutions, including business ones with respect to cultural differences, see: P. Ewick, S.S. Silbey, *The Structure of Legality: The Cultural Contradictions of Social Institutions*, [in:] R.A. Kagan, M. Krygier, K. Winston (eds), *Legality and Community*, Berkeley 2002, pp. 149–155.

[60] For more on the subject of the linguistic aspect of law, see J. Jabłońska-Bonca, *Wprowadzenie do Prawa. Introduction to Law*, Warsaw 2012, p. 28.

[61] See L. Rosen, *Law as Culture: An Invitation*, Princeton 2006, p. 76 ff; also L. Klapper, I. Love, *Corporate Governance, Investor Protection and Performance in Emerging Markets*, Journal of Corporate Finance Vol. 10, No. 5, 2004, pp. 705–707.

different. Thus, referring to these functional rules in this context does not facilitate the effective determination of the uniform content of these norms. It is similar in the case of purposive interpretation rules whose application, in theory, may and should be the most appropriate one. The difference being that in this case it is always necessary to clearly communicate the goal, i.e. the desirable effect that should be attained by individual entities of which the corporation is composed. Such communication is expected to lead to elimination of a contradiction and to introduce uniform interpretation of the same norm in different jurisdictions.

Systemic interpretation rules, on the other hand, could be applied here to a lesser extent. Unless the system itself, being a point of reference for the interpretation, is treated differently, i.e. as a whole set of all internal and external norms binding in all jurisdictions in which an individual entity operates, and applied with regard to this entity.

3.3. RISK-BASED INTERPRETATION OF COMPLIANCE NORMS

Under conditions of probable inconsistency in the understanding of norms that results from cultural factors described herein and from the high volatility of a corporation's legal environment, the interpretations aimed at eliminating inconsistencies are very often of creative nature. Analysing such an effect, it is worth referring to the phenomena described in the literature on creative interpretation. There are several situations when the constitutive theory of the interpretation is applied by courts in which such interpretation may be of creative nature, at the same time these situations are not the only ones that may be identified. These are: interpretation of legal terms, interpretation of open terms, broadening and restrictive interpretation, as well as the interpretation of ambiguous, unclear or other terms whose meaning raises justified doubts.[62] When resolving conflicts of overlapping norms in a corporation operating in several jurisdictions, similar functions performed in the course of their interpretation may be observed, although this refers to a completely different situation. In this case an interpretation of creative nature may be conducted exactly when the interpretation concerns norms remaining in conflict that cannot be resolved and stemming from the difference seen from the point of view of legal system cultures. The interpretation of the meaning of the conflicting norms is made in this situation from the point of view of the economic interest derived from the overall business activity conducted by a corporation.

The complex normative reality, in which a corporation operates in the first place requires from the corporation, in practice from the unit responsible for compliance, to take up a task of determining an appropriate, uniform understanding of a content of different and potentially conflicting norms as early as at the stage of understanding legal terms and notions. This does not only apply to particularly complicated terms, but also to terms which are commonly used. In the case of norms

[62] See L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warsaw 2005, p. 271 ff.

stemming from different legal, regulatory and court ruling cultures, references to such commonly used terms as "data protection", "banking secrecy", "third party", "actions brought against an employee decision" or even seemingly such obvious terms as "supervisory board" or "law" (sic!) require making an interpretation effort aimed at eliminating a conflict situation.

In this context, it is a relatively difficult challenge to interpret the open terms, i.e. those whose meaning is not fully determined and should be derived from a current wider normative and legal context, but also from the social and axiological one.[63] Bearing in mind the fact that the context may differ significantly in each jurisdiction in which a given corporation operates, interpreting open terms may be particularly difficult. In this case the broadening and restrictive interpretation and in particular its creative, constitutive character may prove to be very helpful. Taking into account the economic interest of a given corporation and adjusting to it the range of terms used in norms, it is possible to achieve a close meaning of the content of norms formulated in different legal systems.

The norms governing the activity of international corporations are not a complete, clearly defined and coherent set of terms by means of which legislators determine the sphere of required actions for given entities. Just as J. Austin presented it in relation to law in general, they are not a set of norms recognized by them on the basis of the source test, specified in the concept of H.L.A. Hart by the recognition rule. These norms are a dynamically changing interpretation fact, with regard to which searching for uniform, determined semantics makes no sense. According to such interpretative approach, the task of compliance officers is to seek the most appropriate interpretation. This is to be done by eliminating contradictions in understanding of norms and values in the context of the cultural background.[64] Such reference to cultural contexts in the interpretation of different and changing with time norms may be compared with R. Dworkin's idea of constituting law as a joint writing of a novel by generations of authors adding their chapters to the text.[65]

[63] For the role that the social norms invoked in the communication between regulatory bodies and regulated entities play, including how useful they become for the enhancement of the effectiveness of a message and how the reference to these norms currently facilitates the interpretation of the content of legal norms, see S. Martin, *98% of HBR Readers Love this Article. Businesses are just Beginning to Understand the Power of Social Norms*, Harvard Business Review, October 2012, p. 23.

[64] It is defining of the cultural context that becomes crucial in the process of interpreting legal norms each time, particularly in confronting these norms with the social roles they play. T.W. Aldorno writes that including the spirit of an era in the term "culture" indicates the administrative point of view from the very beginning, which tasks are, looking from the perspective of persons of higher rank in the hierarchy: gathering, dividing, assessing and organizing. T.W. Aldorno, *Culture and Administration*, [in:] J.M. Bernstein (ed.), *The Culture Industry: Selected Essays on Mass Culture by Theodor W. Aldorno*, London 1991, p. 93.

[65] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Warsaw 2011, p. 170 ff.

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IMPACT OF DIFFERENCES IN LEGAL RISK ASSESSMENT ON COMPLIANCE NORMS IN MULTINATIONAL CORPORATIONS

Summary

International corporations operating within the multijurisdictional environment are confronted with the daily challenge of staying in compliance with constantly varying legal and regulatory risks. To assure the conformity with the binding norms, they have to introduce complex internal legal and compliance management mechanisms. These mechanisms consist of the risk identification, assessment and mitigation measures. The core of the difficulty results from the cultural differences in the legal and regulatory systems on the diversified territories in which global corporations operate. The commonly used remedy applied by corporations that strive to assure the legal and regulatory uniformity across the geographies are internal compliance norms. However, the universally introduced compliance norms trigger both difficulties in applying them due to the cultural differences and, for the same reasons, problems caused by

various interpretations of those norms. The legal workarounds addressed in this article show how corporations deal with the challenge of their multicultural legal and regulatory surroundings.

Keywords: international corporations, compliance, legal and regulatory risks, differences in legal cultures, interpretation rules, supervisory regulations

WPŁYW RÓŻNIC W OCENIE RYZYK PRAWNYCH NA NORMY *COMPLIANCE* W KORPORACJACH MIĘDZYNARODOWYCH

Streszczenie

Międzynarodowe korporacje działające w środowisku wielojurysdykcyjnym stoją przed codziennym wyzwaniem zachowania zgodności ze stale zmieniającym się ryzykiem prawnym i regulacyjnym. Aby zapewnić zgodność z obowiązującymi normami muszą one wprowadzać złożone wewnętrzne mechanizmy kontroli zgodności z prawem. Mechanizmy te obejmują identyfikację, ocenę i środki ograniczające to ryzyko. Istota trudności wynika z różnic kulturowych w systemach prawnych i regulacyjnych na różnych terytoriach, na których działają globalne korporacje. Powszechnie stosowanym środkiem zaradczym wykorzystywanym przez korporacje, które dążą do zapewnienia jednolitości działania we wszystkich regionach geograficznych, są wewnętrzne normy zgodności. Jednakże uniwersalnie wprowadzane normy zgodności powodują zarówno trudności w ich stosowaniu ze względu na różnice kulturowe, jak i z tych samych powodów problemy spowodowane różnicami w ich interpretacji. Omówione w artykule rozwiązania prawne pokazują, jak korporacje radzą sobie z wyzwaniami związanymi z wielokulturowym otoczeniem prawnym i regulacyjnym.

Słowa kluczowe: międzynarodowe korporacje, normy zgodności (*compliance*), ryzyka prawne i regulacyjne, różnice w kulturze prawnej, zasady interpretacji, przepisy nadzorcze

INFLUENCIA DE DIFERENCIAS EN LA VALORACIÓN DE RIESGOS JURIDICOS A LAS NORMAS DE *COMPLIANCE* EN EMPRESAS MULTINACIONALES

Resumen

Las empresas multinacionales que operan en el ámbito multijurisdiccional tienen reto a diario de observar el riesgo jurídico y regulador que cambia constantemente. Para garantizar el comportamiento de acuerdo con las normas vigentes han de introducir complejos mecanismos internos de conformidad con derecho. Estos mecanismos comprenden identificación, valoración y medidas que restringen dicho riesgo. La dificultad reside en diferencias culturales en los sistemas jurídicos y reguladores en diferentes teritorios, en el cual actúan empresas multinacionales. La medida común preventiva que se aplica por las empresas multinacionales que pretenden garantizar la uniformidad de actuaciones en todos regiones geográficos son nomas internas de conformidad. Sin embargo las universales normas de conformidad empleadas causan tanto dificultades de su aplicación debido a diferencias culturales, como dificultades

ocasionadas por las diferencias de su interpretación debido a las mismas razones. Las soluciones analizadas en el artículo demuestran cómo las empresas multinacionales reaccionan a los retos relativos al ámbito jurídico y regulador multicultural.

Palabras claves: empresas multinacionales, *compliance*, riesgo jurídico y regulador, diferencias culturales en sistemas jurídicos, reglas de interpretación, regulaciones de supervisión

ВЛИЯНИЕ РАЗЛИЧИЙ В ОЦЕНКЕ ПРАВОВЫХ РИСКОВ НА СООТВЕТСТВИЕ (*COMPLIANCE*) СТАНДАРТАМ В МЕЖДУНАРОДНЫХ КОРПОРАЦИЯХ

Резюме

Международные корпорации, действующие в мульти-юрисдикционной среде, сталкиваются с ежедневной проблемой необходимости соответствия постоянно изменяющимся правовым и нормативным рискам. В целях обеспечения соответствия действующим стандартам, они должны установить комплексные внутренние механизмы контроля за соблюдением закона. Данные механизмы охватывают меры по идентификации, оценке и ограничению упомянутых рисков. Сложности состоят в культурных различиях законодательных и нормативных систем на различных территориях, на которых действуют глобальные корпорации. Проверенным средством, повсеместно применяемым корпорациями, которые стремятся обеспечить единый стиль деятельности во всех географических регионах, являются внутренние стандарты соответствия. Однако повсеместно вводимые нормы соответствия вызывают как трудности, связанные с их соблюдением, вызванные культурными различиями, так и трудности, вызванные различиями в их интерпретации по этим же причинам. Обсуждаемый в статье правовой подход к их решению позволяет проследить, как корпорации справляются с проблемами, связанными с мультикультурной нормативно-правовой средой.

Ключевые слова: Международные корпорации, *compliance*, правовой и нормативный риск, культурные различия в законодательных системах, правила толкования, надзорные нормы

UNTERSCHIEDSEINFLUSS IN RECHTLICHER RISIKOEINSCHÄTZUNG AUF DIE COMPLIANCENORMEN IN INTERNATIONALEN KORPORATIONEN

Zusammenfassung

Internationale Korporationen, die in multiplen Gerichtshoheiten wirken, stehen alltäglich vor der Herausforderung, die Konformität mit ständig wechselnden rechtlichen und regulativen Risiken einzuhalten, um diese mit geltenden Normen zu gewährleisten, müssen sie komplexe, interne Kontrollmechanismen der Rechtskonformität einleiten. Diese Mechanismen umfassen die Identifizierung, Einschätzung und die Mittel, die das Risiko einschränken. Der Schwierigkeitsclou resultiert aus Kulturdifferenzen in rechtlichen und regulativen Systemen in verschiedenen Gebieten, in welchen globale Korporationen wirken. Eine allgemein angewandte Hilfsmaßnahme benutzt von Korporationen, die nach Aktivitätseinigkeit in allen geografischen Regionen streben, sind Compliancenormen, wenn man diese doch universell

einführt, verursachen sie Anwendungs- und Implementierungsschwierigkeiten wegen Kulturunterschieden, darüber hinaus Schwierigkeiten wegen Auslegungsunterschieden aus denselben oben genannten Gründen. Die im vorliegenden Artikel besprochenen Rechtslösungen deuten darauf hin, wie Korporationen angesichts Herausforderungen in einem multikulturellen rechtlichen und regulativen Umfeld zurechtkommen.

Schlüsselwörter: internationale Korporationen, *Compliance*, rechtliches und regulatives Risiko, Kulturunterschiede in Rechtssystemen, Auslegungsregel, Aufsichtsregulationen

L'IMPACT DES DIFFÉRENCES DANS L'ÉVALUATION DES RISQUES JURIDIQUES SUR LES NORMES DE CONFORMITÉ DANS LES ENTREPRISES INTERNATIONALES

Résumé

Les sociétés internationales opérant dans un environnement multi-juridictionnel sont confrontées au défi quotidien de se conformer à des risques juridiques et réglementaires en constante évolution. Pour assurer le respect des normes applicables, elles doivent mettre en place des mécanismes internes complexes de contrôle du respect de la loi. Ces mécanismes comprennent l'identification, l'évaluation et les mesures d'atténuation. L'essence des difficultés résulte des différences culturelles existant entre les systèmes juridiques et réglementaires des divers territoires où des sociétés multinationales opèrent. Les normes de conformité internes sont un recours commun utilisé par les sociétés qui s'efforcent d'assurer l'uniformité des opérations dans toutes les régions géographiques. Cependant, les normes de conformité universellement introduites posent à la fois des difficultés d'application dues à des différences culturelles et des difficultés causées par des différences d'interprétation pour les mêmes raisons. Les solutions juridiques abordées dans l'article montrent comment les entreprises relèvent les défis liés à l'environnement juridique et réglementaire multiculturel.

Mots-clés: sociétés internationales, conformité, risques juridiques et réglementaires, différences culturelles dans les systèmes juridiques, règles d'interprétation et règles de surveillance

IMPATTO DELLE DIFFERENZE NELLA VALUTAZIONE DEI RISCHI LEGALI SUGLI STANDARD DI CONFORMITÀ NELLE AZIENDE MULTINAZIONALI

Sintesi

Le multinazionali che operano in un ambiente multigiurisdizionale si trovano quotidianamente davanti alla sfida di mantenere la conformità nei confronti con i rischi legali e normativi in continua evoluzione. Per garantire la conformità alle norme vigenti, devono implementare i complessi meccanismi interni di conformità con la legge. Tali meccanismi comprendono l'identificazione, la valutazione e le misure che limitano questo rischio. L'essenza della difficoltà risiede nelle differenze culturali nei sistemi giuridici e normativi dei diversi territori in cui operano le imprese globali. Una contromisura comune utilizzata dalle aziende che cercano di assicurare la coerenza dell'attività in tutte le aree geografiche è rappresentata dagli standard

di conformità interna. Tuttavia, le norme di conformità universalmente applicabili creano sia difficoltà di applicazione (dovute a differenze culturali) sia difficoltà di interpretazione (dovute a differenze di interpretazione per le stesse ragioni). Le soluzioni legali discusse nell'articolo mostrano come le multinazionali affrontano le sfide legate al contesto giuridico e normativo multiculturale.

Parole chiave: aziende multinazionali, conformità, rischi legali e normativi, differenze culturali nei sistemi giuridici, regole di interpretazione, regolamenti di vigilanza

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ACHIEVING SUSTAINABLE DEVELOPMENT GOALS IN EUROPE AND ASIA: THE ROLE OF REGIONAL ORGANIZATIONS IN MONITORING HUMAN RIGHT TO HEALTH AND WELL-BEING

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1. INTRODUCTION

The place of humans on the planet, their prosperity, economic abilities and duties to the state and society, as well as the possibility to restrict human rights and freedoms are the issues which were of interest to ancient philosophers, both Hippocrates, Plato and Aristotle who influenced European philosophy, and Confucius who contributed to shaping Asian values.[1] Those philosophers rightly counted good health and well-being among the factors of particular importance to the development of man, society and state. In 2015, these concepts were taken into account by the UN General Assembly.[2] The UN Agenda for Sustainable Development (ASD) consists of 17 Sustainable Development Goals and 169 targets which demonstrate the scale of the new universal Agenda.[3]

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[1] N. Alecu de Flers, *EU-ASEAN Relations: The Importance of Values, Norms and Culture*, EU Centre, Singapore Working Paper No. 1(6), 2010, pp. 465–482; Y. Gao, *Confucius and Plato on Virtue and its Implementation in Education for International Understanding: A Comparative Study*, American Journal of Educational Research No. 3(19), 2016, pp. 25–30; Plato, *Państwo*, Wydawnictwo Antyk, Kęty 2001, p. 147.

[2] A/RES/70/1, 21 October 2015; R. McInnes, *Sustainable Development Goals*, [in:] C.M. Finlayson et al. (eds), *The Wetland Book*, Springer, Dordrecht 2016, pp. 1–6.

[3] UNCTAD, *Achieving the Sustainable Development Goals Through Consumer Protection*, United Nations, New York–Geneva 2017, UNCTAD/DITC/CPLP/2017/2, p. 8.

The UN Sustainable Development Goals (SDGs) are guided by the purposes and principles of the Charter of the United Nations from 1945;[4] the Charter of Human Rights: Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (ICESCR);[5] the Millennium Declaration;[6] and the 2005 World Summit Outcome[7]. Particular importance should be attached to SDG 3 (to ensure healthy lives and to promote well-being for all at all ages), which was derived from 25 of the UDHR, 12 of the ICESCR and Section I, para. 31 of the Vienna Declaration and Programme of Action[8]. At present, all these documents associate sustainable development with human rights, including the right to health, which are protected not only by the UN, but also by sub-regional organizations, such as the EU and the ASEAN.[9]

The aim of this paper is to investigate the role of sub-regional organizations in monitoring of progress towards SDG 3, and to scrutinize similarities and differences in the previous approach of the European and Asian countries to sustainable development goals. The issue of how sustainable development goals can be achieved by national authorities with respect to the health and well-being of the whole population is still debatable.[10] The goals set in the Agenda are global, however, the perception of progress toward SDGs in Europe is slightly different than it is in Asia.[11] The ways and means of implementing these goals on the two continents, as well as the possibilities for mutual cooperation, will also be different. There is a particular need to cooperate on fighting drug addiction in member states of both organizations.[12]

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[4] UN Charter and Statute of the International Court of Justice, signed on 26 June 1945 at the San Francisco Conference.

[5] Universal Declaration of Human Rights adopted 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976, UNTS 999: 171; International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, entered into force 3 January 1976, UNTS 993: 3.

[6] A/RES/55/2, 18 September 2000.

[7] A/RES/60/1, 16 September 2005.

[8] A/CONF.157/23, 12 July 1993; J. Tobin, *The Right to Health in International Law*, Oxford University Press, Oxford, 2012, pp. 23, 130–131; T. Murphy, *Health and Human Rights*, Oxford–Portland–Oregon, Hart Publishing 2013, pp. 1–3, 38–39; E.H. Riedel, *The Human Right to Health: Conceptual Foundations*, [in:] A. Clapham, M. Robinson (eds), *Realizing the Right to Health*, Rüfe&Rub, Zurich 2009, p. 28.

[9] D. McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, International and Comparative Law Quarterly No. 45, 2004, pp. 796–818.

[10] G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Open Book Publishers, Cambridge, 2016, pp. 57–62.

[11] F. Fukuyama, *Confucianism and Democracy*, Journal of Democracy No. 6(2), 1995, pp. 20–33.

[12] S. Subramaniam, *The Asian Debate: Implications for the Spread of Liberal Democracy*, Asian Affairs No. 7(1), 2000, pp. 19–35; J. Symonides, *Wartości azjatyckie a prawa człowieka*, [in:] J. Jaskiernia, K. Spryszak (eds), *Azjatyckie systemy ochrony praw człowieka*, Wydawnictwo Adam Marszałek, Toruń 2016, pp. 44–48.

2. SUSTAINABLE DEVELOPMENT AS A SEMI-NORMATIVE CONCEPT

The UN agreement on SDGs is a remarkable achievement.[13] Admittedly sustainable development and human rights have universal and global nature. Sustainable development, as a semi-normative concept, provides a framework for the integration of environment policies and development strategies.[14] This principle was acknowledged at the 1972 Stockholm Conference on the Human Environment.[15] The concept was extended further at the 1992 Rio de Janeiro Earth Summit when it was determined that man should be put at the heart of sustainable development and that an individual has the right to a healthy and creative life in harmony with the environment.[16] More specific goals were set in the Millennium Project. It was then that the Millennium Development Goals (MDGs) were presented.[17] These goals obliged developed countries to improve living conditions by helping developing countries. Many specific quantitative goals were set in the Millennium Project and they were supposed to be achieved by 2015.

In 2015, MDGs were replaced by SDGs which are characterised by a much broader scope of planned actions and are supposed to be achieved by 2030. After consultations, 17 main goals were chosen and then divided into 169 more detailed tasks.[18] The Open Working Group on Sustainable Development Goals, established at the 2012 Rio de Janeiro Earth Summit, worked on the goals. The Group comprised 30 representatives of five UN regions, including those located in Europe and Asia. Business representatives from both regions also participated in setting goals and tasks.[19] In the end, it was established that Sustainable Development Goals would be implemented within the next 15 years, starting on 1 January 2016. However, in contrast to MDGs, the 2015 Agenda stated that SDGs could not be achieved without the involvement of business. The transition from MDGs to SDGs is now ongoing on a global and regional scale.[20]

Sustainable development is now a leading part of regional international law. The principle of sustainable development has now been recognized by European

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[13] F. Stewart, *The Sustainable Development Goals: A Comment*, Journal of Global Ethics No. 11(3), 2015, pp. 288–293.

[14] UN Session, A/42/427, 4 August 1987.

[15] A/CONF.48/14/REV.1, 5–16 June 1972; L. Björn-Ola, H. Selin, *The United Nations Conference on Sustainable Development: Forty Years in the Making*, Environment and Planning C: Politics and Space No. 31(6), 2013, pp. 971–987.

[16] A/CONF.151/26 (Vol. I) – Rio Declaration, 3–14 June 1992.

[17] S. Giorgetta, *The Right to a Healthy Environment, Human Rights and Sustainable Development*, International Environmental Agreements: Politics, Law and Economics No. 2, 2002, pp. 173–194.

[18] A/RES/69/313; 12FCCC/CP/2015//1.9, 12 December 2015 – Adoption of the Paris Agreement (Proposal by the President).

[19] A/RES/68/309 – 12 September 2014.

[20] A. Haileamlak, *Millennium Development Goals: Lessons Learnt and the Way Forward*, Ethiopian Journal of Health Sciences No. 24(4), 2014, p. 284; S. Kumar et al., *Millennium Development Goals (MDGs) to Sustainable Development Goals (SDGs): Addressing Unfinished Agenda and Strengthening Sustainable Development and Partnership*, Indian Journal of Community Medicine No. 41(1), 2016, pp. 1–4; United Nations Millennium Development Goals Report, New York, United Nations 2015, p. 3.

and Asian international organizations.[21] That is because sustainable development objectives are currently of cross-border nature, since they require joint reactions to global threats which directly endanger life and public health. In Europe, after 1948, the concept of sustainable development has been developed by the following European international organizations: the Council of Europe, the European Union and the Organization for Security and Co-operation in Europe.[22] The SDGs concept has been at the heart of European policies for a long time, firmly anchored in the European Treaties and mainstreamed in key projects, sectoral policies and initiatives. Twenty years after the Maastricht Treaty, sustainable development, including healthy life and wellness, became the explicit subject matter of the EU and its member states.[23] At the Gothenburg Summit in June 2001, the EU launched the first sustainable development strategy, which was revised in 2006.[24]

After the Lisbon Treaty sustainable development has remained a fundamental objective of the EU. The idea of sustainable development covers not only people who are on the territory of a given country, but also becomes a part the foreign policy of the EU countries in the globalizing world. In November 2016, the EU Commission released a Communication "Next steps for sustainable European future: European Action for Sustainability", which is a response to the 2030 Agenda for Sustainable Development.[25] According to the report, over the last five years, the EU has made significant progress towards overall achievement of several SDGs.

The most important thing is to achieve SDG 3: "good health and well-being", with the exception of SDG 7: "affordable and clean energy"; SDG 12: "responsible consumption and production"; SDG 15 "life on land" and SDG 11 "sustainable cities and communities". However, making progress towards achieving a given goal does not necessarily mean that that goal's status is satisfactory for the EU. When it comes to SDG 3, which focuses on health and the quality of life, the fact that most indicators show progress is not enough to conclude that the EU has significantly reduced the factors which negatively affect its residents' lives.[26] For example, even though the number of tobacco smokers has been reduced successfully, the number of people addicted to other abusive substances has remained stable.[27]

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[21] M. Fehling Brett et al., *Limitations of the Millennium Development Goals: A Literature Review*, Global Public Health No. 8(10), 2013, pp. 1109–1122.

[22] M. Bitadze, *Reducing Environmental Risks and Strengthening Good Environmental Governance*, paper presented at the 25th OSCE Economic and Environmental Forum: Greening the Economy and Building Partnerships for Security in the OSCE Regional Concluding Meeting, Prague, 6–8 September 2017, pp. 1–5.

[23] R. Abbing, *Health Law and the European Union*, European Journal of Health Law No. 1, 1994, pp. 123–126.

[24] E. Bomerg, *Adapting Form to Function? From Economic to Sustainable Development Governance in the European Union*, [in:] W.M. Lafferty (ed.), *Governance for Sustainable Development: The Challenge of Adapting Form to Function*, Cheltenham, Northampton 2004, p. 66.

[25] Eurostat, Sustainable Development in European Union. Monitoring report on progress towards SDGs in an EU context, European Union, Luxembourg 2017, p. 5.

[26] European Commission, Communication from the Commission on effective, accessible and resilient health systems, COM(2014) 215 final; European Commission, Summary, State of Health in the EU, Brussels 2017.

[27] World Health Organization, World Health Statistics 2016, *Monitoring Health for the SDGs*, Geneva 2016, p. 37.

The organization implementing SDGs in Asia is the ASEAN. There are direct references to sustainable development in the ASEAN Charter which underscores the need for "sustainable development for the benefit of present and future generations to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process". The ASEAN regards sustainable development as a semi-normative concept, similarly to the EU, its main counterpart in Europe[28]. However, the ASEAN does not hold with the UN's view that the SDGs should be implemented as a principle complementary to the principle of respect for human rights.

In contrast to Europe, Asian values are not based on ideas of liberalism and individualism, but on respect for labour, discipline and community ties.[29] In light of this view, the concept of sustainable development, as an economic idea, is superior to the idea of human rights.

The primacy of sustainable development was confirmed in the preamble to the Bangkok Declaration of 1967. The ASEAN member states declared that "countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development". Thus, ever since the adoption of the UN Charter, and then the passing of the UDHR,[30] the concept of sustainable development has been treated in East Asian countries as an attempt to westernize the East.[31]

3. GDS 3.5 AS AN OVERARCHING EU AND ASEAN OBJECTIVE

In the previous millennium strategy, MDG 3 (Improvement of maternal health) and MDG4 (Combating HIV/AIDS, malaria and other diseases) were determined to be the priority goals of the UN, but European and Asian countries managed to achieve

[28] See K. Arts, *Inclusive Sustainable Development: A Human Rights Perspective*, Current Opinion in Environmental Sustainability No. 14, 2017, pp. 58–62.

[29] A. Sen, *Human Rights and Asian Values*, Carnegie Council on Ethics and International Affairs, New York, 1997, pp. 13–16.

[30] H. Hannum, *The UDHR in National and International Law*, Health and Human Rights No. 2, 1998, p. 147; B. Toebes, *The Right to Health as a Human Right in International Law*, Intersentia-Hart, Antwerpen 1999, pp. 36–40.

[31] Mao Zedong strongly objected to this westernization attempt, saying that "the East wind must prevail over the West wind". See A. Halimarski, *Trzy kręgi polityki zagranicznej Chin,* Książka i Wiedza, Warsaw 1982, pp. 78, 213. As late as in the 1990s, the Prime Minister of Singapore, Lee Kuan Yew, had the opinion that a development and "a well-organized society is more important than human rights, so that anyone can enjoy their freedoms". That is why, Asian countries are by far more effective in ensuring national development of all their citizens than in implementing the SDGs, as in the European countries. See F. Zakaria, L. Kuan Yew, *Culture is Destiny: A Conversation with Lee Kuan Yew*, Foreign Affairs No. 73(2), 1994, pp. 109–126; C. Ning Yang, Y. Ying-Shih, G. Wang, *Lee Kuan Yew Through the Eyes of Chinese Scholars*, S. Rajaratnam School of International Studies, Singapore 2017, pp. 139–143; S. Djiwandono, *Europe and Southeast Asia*, [in:] H. Maull, G. Segal, J. Wanandi (eds), *Europe and the Asia Pacific*, Routledge, London 1998, p. 203; J. Servaes, *Conclusion. Are the SDGs "Sustainable?"*, [in:] J. Servaes (ed.), *Sustainable Development Goals in the Asian Context,* Springer, Singapore 2017, pp. 163–171.

them only partially.[32] Now, they have been replaced by SDG 3 which obliges the UN member states to ensure healthy lives and promote the well-being for all and at all ages. It follows directly from the ASD text that the organizations are supposed to achieve this goal by way of gradually fulfilling nine more specific tasks: reducing the global maternal mortality ratio; ending preventable deaths of newborns and children; ending the epidemics of AIDS and other communicable diseases; reducing non-communicable diseases; strengthening the prevention and treatment of substance abuse; halving the number of global deaths and injuries from road traffic accidents; ensuring universal access to sexual and reproductive healthcare services, achieving universal health coverage; reducing the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.[33]

When we take into account the genetic criterion, it is clear that SDG 3 was derived from the human right to health pursuant to Article 25.1 of the UDHR. According to this article: everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Subsequent UN documents, including 12 of the ICESCR, established basic criteria which the EU and ASEAN member states can use to determine the extent to which healthy lives and well-being have been implemented. These standards were also determined in regional acts,[34] including 35 of the Charter of Fundamental Rights. However, at the regional level, it can be problematic to implement SDG 3 fully, especially when it comes to improving healthcare for women.[35]

The problem with implementing SDG 3 in the EU and ASEAN systems lies not only in the complexity of this goal, but most importantly in the significant differences in the understanding of health as an important quality: it can be perceived either as an individual human right (in the EU system) or as the health of the whole population (in the ASEAN system).[36] In the latter case, an individual's health can be subjected to additional restrictions because of the necessity to protect the health of the whole society. Additionally, also the idea of human right to health is understood slightly differently on the European land than in specific ASEAN countries.[37]

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[32] A. Cassels, *Health, Development and the Millennium Development Goals*, Pathogens and Global Health No. 5–6, 2006, pp. 379–87; M. Lomazzi et al., *MDGs – A Public Health Professional's Perspective from 71 Countries*, Journal of Public Health Policy No. 34, 2013, pp. 1–22.

[33] UN Factsheets "Why it Matters" and World Bank Group, Atlas of Sustainable Development Goals, World Development Indicators, UN, New York 2017.

[34] R. Tabaszewski, *Human Rights and Freedoms in Systems of Human Rights Protection*, [in:] K. Kozioł (ed.), *Wolność człowieka i jej granice*, Wydawnictwo Regis, Lublin 2017, pp. 10–31.

[35] EU (2000) Charter of Fundamental Rights of the European Union (2000/C 364/01).

[36] See D. Camroux, *The European Union and ASEAN: Two to Tango?*, Dépôt legal, Notre Europe 2008.

[37] N. Maier-Knapp, *The EU and Non-traditional Security in Southeast Asia*, [in:] D. Novotny, C. Portela (eds), *EU-ASEAN Relations in the 21st Century: Strategic Partnership in the Making*, Macmillan, Houndmills-Basingstoke 2012, pp. 26–42; AFET, ASEAN: Integration, Internal Dynamics and External Relations, European Parliament, Brussels 2012, pp. 6–8.

In the light of Article 17 of the Bangkok Declaration, 34 Asian countries stated that they "reaffirm the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right".[38] The document confirms the superiority of development over human rights.[39]

This conception of sustainable development in the ASEAN countries was later included in the ASEAN Community Blueprints. MDGs used to be implemented by various ASEAN bodies. The full implementation of goals concerning the protection of human health (particularly goals 4, 5, and 6) was tackled at the Ministers' Meeting on Health Development, as well as at the Meeting on Social Welfare and Development. Jakarta Statement on the ASEAN Sustainable Development Goals in the context of the Post-2015 Development Agenda contained a summary of how advanced the implementation of MDGs was and voiced support for new SDGs.[40] The Post-2015 Development Agenda also acknowledged the importance of access to healthcare and health services for all.

In the light of the ASEAN Human Rights Declaration of 18 November 2012, human rights were considered a prerequisite for enabling the ASEAN member states to modify sustainable development concept for health reasons.[41] According to the Declaration, every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable healthcare services, and to have access to medical facilities. The ASEAN member states will create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases, including HIV/AIDS.[42] Hence, in view of the above factors, the health of single man can be restricted due to the necessity to ensure the well-being of the whole population.[43]

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[38] Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights adopted on 2 April 1993, Bangkok, Singapore; Y. Ghai, *Human Rights and Governance: The Asia Debate*, Asia-Pacific Journal on Human Rights and the Law No. 1, 2000, pp. 9–52; G. Wiessala, *Catalysts and Inhibitors – The Role and Meaning of Human Rights in EU-Asia Relations*, CERC Working Papers Series No. 1, 2007, University of Melbourne, Melbourne; E. Fitriani, *The Impact of the EU Crisis on EU-ASEAN Relations*, Geopolitics, History, and International Relations No. 6(11), 2014, p. 82.

[39] A. Follesdal, *Human Rights and Relativism*, [in:] A. Follesdal, T. Pogge (eds), *Real World Justice: Grounds, Principles, Human Rights, and Social Institution*, Springer, Dordrecht 2005, pp. 265–283.

[40] S.H. Olsen, S. Teoh, I. Miyazawa, *ASEAN Community and the Sustainable Development Goals: Positioning Sustainability at the Heart of Regional Integration*, [in:] *Greening Integration in Asia: How Regional Integration Can Benefit People and the Environment*, Institute for Global Environmental Strategies No. 7, 2015, pp. 55–77.

[41] G.J. Naldi, K.D. Magliveras, *The ASEAN Human Rights Declaration*, International Human Rights Law Review No. 3, 2014, pp. 183–208.

[42] J. Ling-Chien Neo, *Religious Freedom and the ASEAN Human Rights Declaration: Prospects and Challenges*, Review of Faith and International Affairs No. 14(4), 2016, pp. 4–15.

[43] See R. Canaway, *Integration of Traditional and Complementary Medicine in South-East Asia: Public Health, Safety and Management. A Report for WHO-SEARO*, World Health Organization – South-East Asia Regional Office, New Delhi 2015.

4. ASEAN-EU ENHANCED PARTNERSHIP AND SDG 3.5

According to the ASD, full implementation of SDG 3 is possible only if all entities participating in international relations cooperate effectively. In this context, the cooperation between the EU and the ASEAN seems to be crucial, especially in order to implement SDG 3.5. (strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol).[44] In the beginning, institutional cooperation on health protection against the effects of abusive substances was developing slowly and was affected by common cross-border threats. Presently, institutional grounds for cooperation on the joint implementation of SDGs are very strong.[45] The normative documents were: the ASEAN-EEC Cooperation Agreement, signed in March 1980,[46] the New Partnership with Southeast Asia of July 2003, and the Nuremberg Declaration on an EU-ASEAN Enhanced Partnership of March 2007 and its Plan of Action of November 2007.[47] In the light of the Nuremberg Declaration, the EU was committed to support the ASEAN in attaining the Drug Free ASEAN 2015 goals in identified areas through law enforcement cooperation and information dissemination.[48]

A breakthrough for the joint implementation of SDG 3, and SDG 3.5 in particular, was the inaugural High-Level ASEAN-EU Dialogue on Sustainable Development: Towards Achieving the Sustainable Development Goals (SDGs) held on 17 November in Bangkok.[49] During the meeting of Neven Mimica, European Commissioner for International Cooperation and Development, and Le Luong Minh, Secretary-General of the ASEAN, claimed that the ASEAN looked forward to enhancing cooperation with the EU in sustainable development, including through

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44 A. Diemer, M.E. Morales, G. Gladkykh, J. Torres, *European Union and Sustainable Development. Challenges and Prospects*, Editions Oeconomia, Clermont-Ferrand 2017, p. 8.

45 The European Parliament resolution of 15 January 2014 on the future of the EU-ASEAN relations, 2013/2148(INI); 2016/C 482/11; See: R. Wong, S. Brown, *Changing Waters: Towards a New EU Asia Strategy. Stepping up EU-ASEAN Cooperation in Non-traditional Security*, The London School of Economics & Political Science (LSE), London 2016, pp. 79–85; V. Rollet, *The EU as a Health Actor in Asia: EU-Asian Interregional Response to Highly Pathogenic and (Re)-emerging Diseases*, [in:] H. Su (ed.), *Asia's EU Policies*, National Taiwan University Press, Taipei 2015, pp. 323–346.

46 ASEAN-EEC Cooperation Agreement, signed in March 1980; P. de Lombaerde, G. Pietrangeli, M. Schulz, *The "Makability" of Regions. Towards an Evaluation of EU Support to Regional Integration Worldwide*, Conference on the European Union in International Affairs, Brussels, 24–26 April 2008.

47 2013/2148(INI); A.C. Robles, *An EU-ASEAN FTA: The EU's Failures as an International Actor*, European Foreign Affairs Review No. 13(4), 2008, p. 541.

48 Plan of Action to Implement the Nuremberg Declaration on an EU-ASEAN Enhanced Partnership endorsed on 15 March 2007; *Drug-Free ASEAN 2015: Status and Recommendation*, United Nations Office on Drugs and Crime Regional Centre for East Asia and the Pacific, ASEAN, 2008; *Joint Declaration for a Drug-Free ASEAN*, ASEAN, 12 October 2012; Opinion of the European Economic and Social Committee on EU-ASEAN Relations, OJC, 21 January 2011, pp. 21–25.

49 L. Sing Cheong, *ASEAN STI Direction for Achieving Sustainable Development Goals*, Regional Consultation on Achieving Sustainable Development Goals Through Science, Technology and Innovation, 20 March 2018.

promoting complementarities between the ASEAN Vision 2025 and SDGs.[50] As a result, ASEAN-EU Plan of Action was adopted. This document replaced the Bandar Seri Begawan Plan of Action to strengthen the ASEAN-EU Enhanced Partnership (2013–2017).[51] It is crucial for the two organizations and their cooperation on health security and cross-border threats to public health. The ASEAN and the EU have committed to enhance cooperation to address health matters, including pandemics. Both parties underlined it was important to strengthen coordination and cooperation in addressing the challenges of communicable diseases and emerging infectious diseases, including pandemics, and potential health threats or outbreak due to disasters, and to develop a network of existing agencies to enhance the effectiveness of regional surveillance and response towards Emerging Infectious Diseases (EID) for better preparedness for major disease outbreaks.[52] Eliminating these threats is crucial for the implementation of SDG 3.5.

5. SDG 3.5 AND THE PREVENTION AND TREATMENT OF NARCOTIC DRUG ABUSE

Illegal drug production and trade are visible symptoms of inequality which threaten SDG 3. This is why, both regional organizations agreed to fight these practices by any means necessary.[53] The ASEAN countries have always been committed to combating the drug menace in the region.[54] The strict drug policy of the President of the Philippines Rodrigo Duterte, followed since 2016, is one of the most well-known.[55] In spite of two resolutions of the European Parliament, he did not cease to call to fight against drug addicts and dealers of the Philippines.[56] An IHRA report divides

[50] *Complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development: A Framework for Action*, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), Bangkok 2017, pp. 18–22.

[51] EEAS, SEAE, *90 Joint Actions in the Period 2013–2017 in the Areas of Political-Security, Economic-Trade and Socio-Cultural*, adopted at the ASEAN-EU Ministerial Meeting in Bandar Seri Begawan (Brunei) on 27 April 2012.

[52] L. Alison, *The EU, ASEAN and Interregionalism: Regionalism Support and Norm Diffusion Between the EU and ASEAN*, Palgrave Macmillan, Robles, UK 2008, p. 190.

[53] European Union Statement on the occasion of the Intersessional Meeting on 16–17 November 2017, Commission on Narcotic Drugs 60th session, Vienna, 17 November 2017.

[54] L. Giommoni, *How do Illicit Drugs Move Across Countries? A Network Analysis of the Heroin Supply to Europe*, Journal of Drug Issues No. 47(2), 2016, p. 2; A. Talpur, T.P. George, *A Review of Drug Policy in the Golden Crescent: Towards the Development of More Effective Solutions*, Asian Journal of Psychiatry No. 12, 2014, pp. 31–35.

[55] See: P.N. Newton et al., *The Primacy of Public Health Considerations in Defining Poor Quality Medicines*, PLoS Medicine No. 8(12), 2012, p. 4; K. Hołdak, *Wpływ gospodarki opiatowej w Afganistanie na bezpieczeństwo tego państwa i rynek narkotykowy w Europie*, Bezpieczeństwo Narodowe No. 3–4, 2007, p. 256; D.R. Mares, *Institutions, the Illegal Drug Trade, and Participant Strategies: What Corrupt or Pariah States Have in Common with Liberal Democracy and the Rule of Law*, International Interactions No. 35, 2009, pp. 207–239; M.R. Thompson, *Bloodied Democracy: Duterte and the Death of Liberal Reformism in the Philippines*, Journal of Current Southeast Asian Affairs No. 35, 2017, pp. 39–68.

[56] European Parliament resolution of 15 September 2016 on the Philippines (2016/2880(RSP); European Parliament resolution of 16 March 2017 on the Philippines – the case of Senator Leila M. De Lima (2017/2597(RSP)).

Asian countries to three categories: countries which are only symbolically engaged in the "war against drugs", countries which are moderately engaged, and countries which are seriously engaged in fighting drug crime. The diversity discussed above impedes the joint implementation of SDG 3.5. That is why, the ASEAN countries decided to strengthen the prevention and treatment of substance abuse, including narcotic drug abuse. This goal was set in the ASEAN Political-Security Community Blueprint, in which the "Drug-free ASEAN" slogan was proclaimed. This idea was repeated in the ASEAN Socio-Cultural Community Blueprint 2025.[57]

In order to implement SDG 3.5, it is necessary to enhance cooperation on border control. Those who smuggle drugs and abusive substances are still prospering on the black marketing China.[58] This is because the biggest number of death penalties for the offences connected with narcotic business are imposed and executed in China, although the exact number of those judgments is secret. According to unofficial sources, in 2006 approximately 7,500 people were executed,[59] in 2007, according to various estimates – from 2,000 to 15,000, while in 2008 – 1,718. However, these data are considered understated. The Xinhua press agency has revealed that between January and May of 2009, courts heard 14,282 cases of drug-related offences, and in 6,679 cases penalties ranging from imprisonment to death punishment were imposed.[60] Despite the lack of official information, China is considered to be the world's top executioner, executing more people than all other countries combined in 2017. Only in June of 2018, a crowd of 300 people watched two alleged drug traffickers sentenced to death.[61]

Not only domestic legal regulations, including the EU decisions directed to its member states, but also legislative measures adopted by national authorities are to serve counteracting drug smuggling from Asian countries to Europe. Indonesia has one of the strictest anti-drug laws in the world. Possession and smuggling of drugs carry death penalty there. In Malaysia, between 2011 and 2016, over 15,000 people were arrested altogether for drug possession or dealing. Only in 2011, 83 death sentences were executed, including 22 on nationals of other countries, predominantly the EU citizens. Whereas in Vietnam, in 2011, at least 27 people were sentenced to death penalty in relation to drug policy.[62] Only in January 2015, the number of five nationals of the EU member states were executed in Indonesian prisons. In that light, the priority for the

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[57] The ASEAN Socio-Cultural Community Blueprint 2025 Jakarta: ASEAN Secretariat, March 2016.

[58] The ASEAN Work Plan on Securing Communities Against Illicit Drugs 2016–2025, Jakarta: ASEAN Secretariat, June 2017.

[59] D.J. Michalski, *The Death Penalty in the Criminal Law of China – an Outline of the Institution*, Gdansk Journal of East Asian Studies No. 2, 2012, pp. 150–157.

[60] H. Lu, L. Zhang, *Death Penalty in China: The Law and the Practice*, Journal of Criminal Justice No. 33(4), 2005, pp. 367–376; H. Lu, T. Miethe, B. Liang, *China's Drug Practices and Policies Regulating Controlled Substances in a Global Context*, [in:] H. Lu, T. Miethe, B. Liang (eds), *China's Drug Practices and Policies*, Ashgate, Routledge 2009.

[61] *Death Sentences and Executions 2017*, London, Amnesty International, 2018, p. 20.

[62] See: H. Thanh Luong, *Transnational Drugs Trafficking from West Africa to Southeast Asia: A Case Study of Vietnam*, Journal of Law and Criminal Justice No. 3(2), 2015, pp. 37–54; R. Emmers, *ASEAN and the Securitization of Transnational Crime in Southeast Asia*, The Pacific Review No. 16(3), 2003, pp. 419–438.

ASEAN and the EU is to work together with a view of facilitating the implementation of the ASEAN Work Plan on Securing Communities Against Illicit Drugs (2016–2025).[63] An internal review of this Work Plan will be undertaken in 2018 and 2022 by the ASEAN Senior Officials on Drug Matters, which is now the main ASEAN body responsible for handling drug-related matters.[64] It follows from the above that the efforts to achieve the Sustainable Development Goals and to effectively address and counteract the world drug problem are complementary and mutually reinforcing.

6. FINAL REMARKS

Despite closer cooperation between the EU and ASEAN member states, due to which these countries make regulations that prevent smuggling and their public authorities implement plans and strategies directed against drugs, the supply of abusive substances responds to the Europeans' growing demand for drugs. Hence, a goal which was expressed in the EU documents and in the ASEAN Political-Security Community Blueprint. The only way to completely eradicate drug trafficking is to enhance cooperation between law officials from the EU and ASEAN member states. On the global level, they ought not to fight only poverty which aids drug production. Only then will the implementation of SDG 3 be fully possible.

For the fight against drug trade and smuggling to be effective, it is necessary to cooperate with other countries from the region which are not the ASEAN member states. The chances of achieving SDG 3.5 are getting slimmer as well. Far too many people still risk their health and cannot resist the urge to use drugs. Because of that, it is not realistic to expect that drug trade and the smuggling of drugs to Europe will be completely eradicated or that the ASEAN Drug-Free zone will be established by 2030. Technical measures available to smugglers are becoming more and more advanced and the demand for abusive substances in Europe does not fall.

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[63] ASEAN Work Plan on Securing Communities Against Illicit Drugs (2016–2025), adopted by the 5th ASEAN Ministerial Meeting on Drug Matters (AMMD) held in Singapore on 19–20 October 2016; N. Nazar, *ASEAN's Role in Conflict Management: Active and Effective?*, IAPS Dialogue, 14 November 2017.

[64] Z. Othman, *Human Security in Southeast Asia: A Case Study of Illicit Drug Trafficking as a Transnational Threat in Myanmar (Burma)*, 4th Community East Asian Scholars Workshop at Thammasat University, Thailand 8–10 January 2014.

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ACHIEVING SUSTAINABLE DEVELOPMENT GOALS IN EUROPE AND ASIA: THE ROLE OF REGIONAL ORGANIZATIONS IN MONITORING HUMAN RIGHT TO HEALTH AND WELL-BEING

Summary

The purpose of this paper is to investigate the role of European and Asian regional organizations in monitoring of progress towards SDG 3 and to scrutinize similarities and differences in the previous approach of European and Asian countries to sustainable development goals. In 2015, the UN Agenda for Sustainable Development was adopted. Since then, regional international organizations, including the EU and the ASEAN, have been obliged to include 17 Sustainable Development Goals in their policies. The article focuses on SDG 3, which concerns protecting health and well-being. The article was prepared on the basis of the following research methods: legal dogmatic, systematic and comparative. Attention has been drawn to different approaches towards human health adopted by the EU and the ASEAN, according to which it can be perceived as a human right or a quality important for the whole society and nation. Potential grounds for cooperation in SDG and SDG 3 are also presented. The normative and institutional efforts to achieve the Sustainable Development Goals and to effectively address them are complementary and mutually reinforcing.

Keywords: Sustainable Development Goals, United Nations Organization, Agenda for Sustainable Development, international human rights law, ASEAN, European Union

REALIZACJA CELÓW ZRÓWNOWAŻONEGO ROZWOJU W EUROPIE I AZJI: ROLA ORGANIZACJI REGIONALNYCH W MONITOROWANIU PRAWA DO OCHRONY ZDROWIA I DOBROSTANU

Streszczenie

Przedmiotem niniejszego artykułu jest rola międzynarodowych organizacji regionalnych w monitorowaniu realizacji celów zrównoważonego rozwoju oraz podejście normatywne krajów europejskich i azjatyckich do tych celów. W 2015 r. przyjęto Agendę ONZ na rzecz Zrównoważonego Rozwoju. W związku z tym instrumentem regionalne organizacje międzynarodowe, w tym Unia Europejska i ASEAN, zostały zobowiązane do uwzględnienia w swoich politykach 17 celów zrównoważonego rozwoju. W artykule skoncentrowano się na SDG 3, który dotyczy ochrony zdrowia i dobrostanu (*well-being*). Artykuł został przygotowany na podstawie następujących metod badawczych: metody dogmatycznej, metody komparatystycznej oraz analizy systemowej. Zwrócono uwagę na różne podejścia do zdrowia ludzi przyjęte przez UE i ASEAN. Przedstawiono również potencjalne podstawy normatywne wzajemnej współpracy organizacji regionalnych w zakresie realizacji SDG i SDG 3. Uznano, że wspólne wysiłki normatywne i instytucjonalne regionalnych organizacji międzynarodowych, zmierzające do osiągnięcia celów zrównoważonego rozwoju, mają charakter komplementarny w stosunku do istniejących instrumentów prawnych w systemie uniwersalnym ochrony praw człowieka, stąd też w artykule uznano, że częściowo te instrumenty prawne wzajemnie się uzupełniają.

Słowa kluczowe: cele zrównoważonego rozwoju, Organizacja Narodów Zjednoczonych, Agenda na rzecz zrównoważonego rozwoju, prawo międzynarodowe dotyczące praw człowieka, ASEAN, Unia Europejska

EJECUCIÓN DE FINES DEL DESARROLLO SOSTENIBLE EN EUROPA Y ASIA: PAPEL DE ORGANIZACIONES REGIONALES EN LA SUPERVISIÓN DE DERECHO A LA PROTECCIÓN DE SALUD Y BIENESTAR

Resumen

El presente artículo tarta de papel de las organizaciones internacionales regionales que consiste en supervisar la ejecución de fines del desarrollo sostenible y actitud normativa de países europeos y asiáticos hacia estos fines. En el 2015 fue adoptada la agenda de la ONU para el Desarrollo Sostenible. En relación con esta herramienta, las organizaciones internacionales regionales, incluyendo la Unión Europea y ASEAN, quedaron obligadas a incluir en su política los 17 fines del desarrollo sostenible. El artículo se centra en SDG3, relativo a la protección de salud y de bienestar (*well-being*). El articulo ha sido preparado en virtud de los siguientes métodos de investigación: dogmático, comparativo, y análisis sistemática. Destaca la diferente actitud hacia la salud de seres humanos adoptada por la UE y ASEAN. El artículo presenta también potenciales bases normativas de cooperación entre organizaciones internacionales regionales en cuanto a la ejecución de SDG y SDG3. Se considera que los esfuerzos normativos e institucionales conjuntos de las organizaciones internacionales regionales para conseguir fines del desarrollo sostenible tienen carácter complementario a las herramientas jurídicas existentes en el sistema universal de protección de derechos humanos, por lo tanto en el artículo se admite que parcialmente dichas herramientas jurídicas se complementan.

Palabras claves: fines del desarrollo sostenible, Organización de Naciones Unidas, Agenda para el desarrollo sostenible, derecho internacional de derechos humanos, AEAN, Unión Europea

РЕАЛИЗАЦИЯ ЦЕЛЕЙ УСТОЙЧИВОГО РАЗВИТИЯ В ЕВРОПЕ И АЗИИ: РОЛЬ РЕГИОНАЛЬНЫХ ОРГАНИЗАЦИЙ В НАБЛЮДЕНИИ ЗА ПРАВОМ НА ЗДРАВООХРАНЕНИЕ И БЛАГОПОЛУЧИЕ

Резюме

Предметом настоящей статьи является роль международных региональных организаций в мониторинге реализации целей устойчивого развития, а также нормативный подход европейских и азиатских государств к этим целям. В 2015 году была принята Повестка дня ООН в области устойчивого развития, в связи с которой региональные международные организации, включая Европейский Союз и АСЕАН, должны были включить в свою политику реализацию 17 целей в области устойчивого развития. В статье особое внимание обращено на ЦУР3, которая касается обеспечения здорового образа жизни и содействия благополучию (*well-being*). В статье использованы следующие методы исследования: догматический метод, сравнительный метод и метод системного анализа. Обращено внимание на различные подходы к здоровью человека, принятые в ЕС и АСЕАН. Представлены также потенциальные нормативные основы взаимного сотрудничества между региональными организациями в рамках реализации ЦУР и ЦУР3. Было признано, что совместные нормативные и институциональные усилия региональных международных организаций, направленные на достижение целей устойчивого развития, дополняют существующие правовые инструменты в универсальной системе защиты прав человека, поэтому в статье подчеркивается, что эти правовые инструменты частично дополняют друг друга.

Ключевые слова: цели устойчивого развития, Организация Объединённых Наций, Повестка дня ООН в области устойчивого развития, международное прааво в области прав человека, АСЕАН, Европейский союз

ABWICKLUNG VON ZIELEN AUSGEGLICHENER ENTWICKLUNG IN EUROPA UND IN ASIEN: ROLLE DER REGIONALEN ORGANISATIONEN IN DER NACHVERFOLGUNG DES GESUNDHEITS- UND WOHLSTANDSRECHTES

Zusammenfassung

Gegenstand dieses Artikels ist die Rolle der regionalen internationalen Organisationen in der Nachverfolgung der Zielabwicklung einer ausgeglichenen Entwicklung und die normative Herangehensweise europäischer und asiatischer Länder zu diesen Zielen. Es wurde eine Vereinter Nationen-Agenda (VN) zugunsten ausgeglichener Entwicklung angenommen, in diesem Zusammenhang wurden gemäß dieses Instrumentes regionale internationale Organisationen, darunter die Europäische Union (EU) und ASEAN verpflichtet, die 17 Ziele der ausgeglichenen Entwicklung in ihrer Politik zu berücksichtigen. In diesem Artikel fokussierte sich man auf SDG3 (Sustainable Development 3), welcher den Gesundheitsschutz und Wohlstand (*well-being*) betrifft. Der Artikel wurde anhand folgender Untersuchungsmethoden vorbereitet: dogmatische Methode, komparatistische Methode und Systemanalyse. Er wurde auf verschiedene Herangehensweisen zur menschlichen Gesundheit hingewiesen, was seitens der EU und ASEAN angenommen worden ist. Potenzielle normative Grundlagen gegenseitiger, reziproken Zusammenarbeit der regionalen Organisationen in Abwicklungsbereichen von SDG und SDG3 wurden vorgeführt. Es wurde beschlossen, dass gemeinsame normative und institutionelle Bemühungen von regionalen internationalen Organisationen, die nach Erreichung der Ziele einer regionalen internationalen Organisationen streben, einen komplementären Charakter entgegen der vorhandenen Rechtsinstrumente im universellen System des Menschenrechtsschutzes haben, deswegen stellte man auch in diesem Artikel fest, dass sich diese Instrumente teilweise gegenseitig ergänzen.

Schlüsselwörter: Ziele der ausgeglichenen Entwicklung, Vereinte Nationen (VN), Agenda zugunsten der ausgeglichenen Entwicklung, internationales Recht, Menschenrechte, ASEAN, Europäische Union (EU)

MISE EN ŒUVRE DES OBJECTIFS DE DÉVELOPPEMENT DURABLE EN EUROPE ET EN ASIE: LE RÔLE DES ORGANISATIONS RÉGIONALES DANS LA SURVEILLANCE DU DROIT À LA PROTECTION DE LA SANTÉ ET AU BIEN-ÊTRE

Résumé

Le sujet de cet article est le rôle des organisations internationales régionales dans le suivi de la mise en œuvre des objectifs de développement durable et l'approche normative des pays européens et asiatiques à ces fins. En 2015, l'agenda des Nations Unies pour le développement durable a été adopté. Dans le cadre de cet instrument, les organisations internationales

régionales, notamment l'Union européenne et l'ANASE, ont été obligées d'inclure 17 objectifs de développement durable dans leurs politiques. L'article se concentre sur l'ODD 3, qui traite de la protection de la santé et du bien-être. L'article a été préparé sur la base des méthodes de recherche suivantes : la méthode dogmatique, la méthode comparative et l'analyse systémique. Une attention particulière a été accordée aux différentes approches de la santé humaine adoptées par l'UE et l'ANASE. La base normative potentielle pour la coopération mutuelle entre les organisations régionales dans la mise en œuvre des ODD et de l'ODD 3 a également été présentée. Il a été reconnu que les efforts normatifs et institutionnels conjoints des organisations internationales régionales visant à atteindre les objectifs de développement durable complètent les instruments juridiques existants dans le système universel de protection des droits de l'homme. Cet article reconnaît donc que ces instruments juridiques se complètent en partie.

Mots-clés: objectifs de développement durable, Nations Unies, Agenda pour le développement durable, Droit international des droits de l'homme, ANASE, Union européenne

ATTUAZIONE DEGLI OBIETTIVI DI SVILUPPO SOSTENIBILE IN EUROPA E IN ASIA: IL RUOLO DELLE ORGANIZZAZIONI REGIONALI NEL MONITORAGGIO DEL DIRITTO ALLA SALUTE E AL BENESSERE

Sintesi

L'oggetto di questo articolo è il ruolo delle organizzazioni internazionali a carattere regionale nel monitorare l'attuazione degli obiettivi di sviluppo sostenibile e l'approccio normativo dei paesi europei e asiatici a tali obiettivi. Nel 2015 è stata adottata l'Agenda delle Nazioni Unite per lo sviluppo sostenibile. In relazione con questo strumento, le organizzazioni internazionali a carattere regionale, comprese l'Unione europea e l'ASEAN, hanno dovuto includere nelle loro politiche 17 obiettivi dello sviluppo sostenibile. L'articolo si concentra su SDG 3, che riguarda la salute e il benessere (*well-being*). L'articolo è stato preparato sulla base dei seguenti metodi di ricerca: metodo dogmatico, metodo comparativo e analisi sistemica. È stata richiamata l'attenzione sui diversi approcci alla salute umana adottati dall'UE e dall'ASEAN. Viene inoltre presentata la potenziale base normativa per la cooperazione reciproca delle organizzazioni regionali nell'attuazione di SDG e SDG3. È stato riconosciuto che gli sforzi normativi e istituzionali congiunti delle organizzazioni internazionali a carattere regionale, volti a raggiungere gli obiettivi dello sviluppo sostenibile, sono complementari agli strumenti giuridici esistenti nel sistema universale di tutela dei diritti umani, pertanto l'articolo riconosce che tali strumenti giuridici sono in parte complementari.

Parole chiave: obiettivi di sviluppo sostenibile, Nazioni Unite, Agenda per lo sviluppo sostenibile, Diritto internazionale dei diritti umani, ASEAN, Unione europea

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PROTECTING CONSCIENTIOUS OBJECTION AS THE "HARD CORE" OF HUMAN DIGNITY

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1. INTRODUCTION

The aim of this article is to present the results of research on the source of conscientious objection, i.e. human dignity. It seems that the system of human rights has the task to provide a normative expression of human dignity. The essence of the protection of these rights is based precisely on anchoring in dignity. If, therefore, it is proved that conscientious objection should be protected in the system of human rights, then a natural problem arises of indicating what element of dignity it applies to.

This is a matter of a specific, effective and current interaction of soft law, hard law and *ius cogens* of international law related with conscientious objection. The problem of conscientious objection is currently the subject of the analysis of the doctrine in connection with the judgment of the Polish Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause.[1]

Of course, these considerations cannot include the whole analysis of the essence of *ius cogens* or soft law in international law. It is clear that in international law the catalogue of *ius cogens* is not closed and there are views that it also includes the obligation to respect human rights. This has some justification in the jurisprudence of international courts, as well as in the fact that the position of human rights is so

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[1] The conscience clause is recognized as "the right to act in accordance with one's conscience, and consequently also freedom from compulsion to act against one's conscience", cf.: P. Stanisz, *Klauzula sumienia*, [in:] A. Mezglewski, H. Misztal, P. Stanisz (eds), *Prawo wyznaniowe*, Warsaw 2011, p. 104, point 111.

strong that they lead to non-application of state immunity.[2] In the author's opinion, it seems that human rights are *ius cogens*, because their source lies directly in human dignity.[3]

Since human rights have the task to provide a normative expression, more or less successful, of the inherent human dignity, consequently it is a normative system closest to dignity, which is the source of all individual rights. Undoubtedly, normative sources of human rights in the system of international law are hard law, and the principle of interaction between soft law and hard law is noticeable here. It also translates into analogous interaction between soft law and *ius cogens*. A multi-source international placement of conscientious objection, as well as the constitutional perspective, allows one to show the role of protection of conscientious objection as an element protecting the basic core of human dignity.

2. CONCEPT OF CONSCIENTIOUS OBJECTION AS A STATUTORY RIGHT, NOT BASED ON THE HUMAN RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION

The analysis of the doctor's right to conscientious objection after the judgment of the Polish Constitutional Tribunal of 7 October 2015, case K 12/14, is, of course, the right voice in the scientific discourse.

It should be noted that the above judgment received the greatest criticism from W. Brzozowski.[4] Certainly, I see the Tribunal's failure to mention the legal argumentation presented so far by the author in the doctrine, but the Tribunal's practice in this area is known and it is not an isolated case.

Referring to the kind, nearly two-hour discussion on the judge's conscientious objection that I had with Professor Brzozowski during the XIV National Symposium

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[2] For more, see: C. Mik, *Ius cogens we współczesnym prawie międzynarodowym*, [in:] A. Wnukiewicz-Kozłowska (ed.), *Aksjologia współczesnego prawa międzynarodowego*, Wrocław 2011, pp. 179–210, 222–224; M. Pazdan (ed.), *Prawo prywatne międzynarodowe*, [in:] *System Prawa Prywatnego,* Vol. 20A, Warsaw 2014, p. 153, point 380; A. Wyrozumska, *Umowa międzynarodowa. Teoria i praktyka*, Warsaw 2006, p. 287; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warsaw 1994, p. 91 ff.; S. Janczarek, *Immunitet jurysdykcyjny państwa a bezwzględnie obowiązujące normy prawa międzynarodowego*, Państwo i Prawo No. 12, 2009, pp. 57–68; W. Czapliński, *Interwencja w Iraku z punktu widzenia prawa międzynarodowego*, Państwo i Prawo No. 1, 2004, pp. 18–34.

[3] For more on personal dignity and dignity of personality, see: K. Orzeszyna, *Godność ludzka podstawą praw człowieka*, [in:] R. Tabaszewski (ed.), *Człowiek i jego prawa i odpowiedzialność*, Lublin 2013, p. 23 ff; J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warsaw 1997, pp. 39–42; W. Jedlecka, J. Policiewicz, *Pojęcie godności na tle Konstytucji RP*, [in:] A. Bator (ed.), *Z zagadnień teorii i filozofii prawa. Konstytucja*, Wrocław 1999, p. 146; J. Zajadło, *Godność jednostki w aktach międzynarodowej ochrony praw człowieka*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 2, 1989, p. 111; K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej konstytucji*, Przegląd Sejmowy No. 5, 1998, p. 42 ff.

[4] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)*, Państwo i Prawo No. 1, 2017, pp. 23–30.

on Religious Law on 9 May 2017,[5] and to the encouragement from the author to the debate on conscientious objection expressed in the text covered by the polemic,[6] I would like to speak, this time in writing, in opposition to the author's theses contained in the article mentioned above.

I cannot agree with the main theses of the author who focused on undermining[7] the source of conscientious objection adopted by the Constitutional Tribunal, i.e. the freedom of conscience and religion in international law on human rights[8] and the adopted standard of control under Article 53 of the Constitution[9] of the Republic of Poland of 2 April 1997[10]. This is where the basic problem materialises: what is conscientious objection, what is its normative purpose and what is the legal meaning of such an institution? W. Brzozowski's analysis of these issues seems to be insufficient. In my opinion, the sources of conscientious objection in the system of human rights, their nature and multiplicity, as well as the evolution of the jurisprudence of international bodies indicate that conscientious objection protects human dignity at its basic and most important level.

Of course, the Constitutional Tribunal, in fact, emphatically rejects the view seeking a source of conscientious objection elsewhere than the human right to freedom of conscience and religion. The Constitutional Tribunal estimates that it is "in clear contradiction" with international standards and the constitutional status of freedom of conscience and religion.[11] It seems that the Tribunal could present its arguments more broadly or refer to the existing literature in this regard.

Therefore, the author's thesis that "the categorical tone of this assessment is surprising, because if the right to conscientious objection really resulted from the very idea of freedom of conscience and religion, it would be difficult to understand what the dispute is about"[12] is too far-reaching. The author ignores well-known views of the doctrine as well as elements of international jurisprudence, and thus duplicates the practice of the Constitutional Tribunal. The justification for the latter is that it does not invoke the majority of doctrinal views, perhaps because of the fear of "standardising" the views of other authors.

W. Brzozowski's argument that the Constitutional Tribunal established an international standard in a manner that deviates from the criteria listed in the judgment of the European Court of Human Rights in Strasbourg in the *Eweida*[13] case is a valid one, yet it is a minor deviation, determined by the axiology of the

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[5] XIV Ogólnopolskie Sympozjum Prawa Wyznaniowego: *Prawo wyznaniowe formalne*, Zielona Góra–Kęszyca Leśna, 8–10 May 2017.

[6] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 23.

[7] *Ibid.*, pp. 25–33.

[8] Judgment of the Constitutional Tribunal of 7 October 2015, case K 12/14, OTK ZU 9A/2015, item 143, points 3.2.3, 3.2.4, 4.4.1, 4.4.5.

[9] *Ibid.*, points 4.4.5, 4.5.

[10] Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended; hereinafter the Polish Constitution.

[11] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 25.

[12] *Ibid.*

[13] *Ibid.*, p. 30.

Polish Constitution, and the Tribunal had no obligation to apply the Strasbourg standard in full but could establish a higher standard.

However, W. Brzozowski totally ignores the research in the doctrine concerning international sources of conscientious objection. The author conducted a thorough, but not complete, analysis of normative sources of conscientious objection in international law yet omitted uncomfortable elements from the Strasbourg jurisprudence.

Nevertheless, in many places the author's analyses are accurate and legitimately raise objections against the judgment of the Constitutional Tribunal. The author is right to accuse the Tribunal of restricting its comments on the International Covenant on Civil and Political Rights[14] to the normative content of the provision,[15] but it is possible to find broader sources that contradict the theses adopted by the author and confirm the Tribunal's argumentation, which will be discussed below.

W. Brzozowski rightly indicates that in the judgment of the ECtHR in the case of *Bayatyan v. Armenia*, "there was not a single claim that would allow one to assume that on the basis of Article 9 ECHR protection is granted to conscientious objection in the scope unrelated to refusal of military service" and the author assesses a different doctrinal view as premature.[16] However, the author perfectly knows the results of research in this matter and omits both them and the key element of the ECtHR judgment in the *Eweida* case.[17] W. Brzozowski, referring to my article, claims that the author's assessment is accurate and says that "the author – being an advocate of finding the right to conscientious objection in Article 9 ECHR – admits that the ECtHR 'avoids (...) issuing a clear decision stating that conscientious objection results from the essence of the right to freedom of conscience and religion'".[18] However, in that Article I criticized the ECtHR for statements essentially concerning conscientious objection in cases other than refusal of military service, where the ECtHR used replacement expressions.

At the same time, W. Brzozowski's assessment is right. He – being an opponent of finding the right to conscientious objection in Article 9 ECHR – all the same admits that "the only mentioned (...) act of international law that really supports the reasoning of the Tribunal is Resolution 1763 of the Parliamentary Assembly of the Council of Europe on the right to conscientious objection in lawful medical care".[19] The author, however, omits the remaining soft law documents and depreciates the

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[14] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, annex to Journal of Laws [Dz.U.] of 1977, No. 38, item 167; hereinafter ICCPR.

[15] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 25.

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

[17] ECtHR judgment of 15 January 2013, *Eweida and Others v. the United Kingdom*, applications no. 48420/10, 59842/10, 51671/10 and 36516/10, points 105, 106, 107.

[18] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia…*, p. 27, and M. Skwarzyński cited therein; M. Skwarzyński, *Orzecznictwo Europejskiego Trybunału Praw Człowieka w zakresie klauzuli sumienia*, [in:] P. Stanisz, A.M. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak (eds), *Aktualne problemy wolności myśli, sumienia i religii*, Lublin 2015, p. 292.

[19] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 29.

impact of this type of instrument on international law and the case law of the ECtHR.[20]

One cannot agree with W. Brzozowski's analysis regarding the Charter of Fundamental Rights of the European Union (CFR),[21] where the author omits the Explanations to the CFR as well as problems with various language versions of Article 10 para. 2 CFR. This is related to the concretisation of human rights and the concept of the margin of appreciation.[22]

It is also important to consider W. Brzozowski's fears that recognising conscientious objection as a personal right stemming directly from the Constitution and international law should not automatically mean that: other professions are also entitled to it;[23] the provision specifying conscience clause has no normative meaning;[24] the doctor's conscience can become an absolute category in opposition to the patient's rights;[25] therefore conscientious objection, understood as a personal right having its source in the freedom of conscience and religion, requires detailed statutory regulation in order to counteract abuse.[26]

However, these fears arise from the lack of distinction between conscientious objection and conscience clause, inconsistent analysis of the role of the state in the implementation of patient's rights and human rights, inconsistent application of the prohibition of discrimination, and lack of willingness to indicate a framework for conscientious objection, which can be reconstructed on the basis of the case law of the ECtHR and the Polish Constitutional Tribunal.

3. NORMATIVE SOURCES OF CONSCIENTIOUS OBJECTION IN INTERNATIONAL LAW

It should be indicated that the human right to freedom of conscience and religion seems to be the normative source of conscientious objection. In the universal system it is Article 18 ICCPR.

One cannot agree with W. Brzozowski's claim that "the necessity for the state to respect the right to conscientious objection was obviously based on Article 18 ICCPR, because neither its editorial form nor the practice of its application give grounds for such a statement".[27] Well, it results from the General Comment No. 22, where the need to protect conscientious objection against compulsory military

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[20] *Ibid.*

[21] *Ibid.*, p. 27.

[22] L. Garlicki, *Komentarz do art. 9 EKPCz*, [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds), *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do artykułów 1–18*, Vol. 1, Warsaw 2010, p. 552, point 4; *idem*, as cited in A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie ETPCz*, Gdańsk 2008, pp. 130–131, pp. 136, 187.

[23] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia...*, p. 31.

[24] *Ibid.*, p. 31 *in fine*.

[25] *Ibid.*, p. 32.

[26] *Ibid.*, p. 30 *in fine*.

[27] *Ibid.*, p. 25.

service was indicated.[28] Of course, there was some evolution, but the conclusion is right: the state must recognize the right to conscientious objection if military service is compulsory, and currently, the right to conscientious objection is therefore recognized by the United Nations Human Rights Committee and seems to be widely accepted by states.[29] What is more, the Committee states that the framework of protection under Article 18 ICCPR includes protection of refusal to pay taxes for military purposes, although this is not evident.[30] There are no statements from the Committee regarding the rights of medical staff.[31] However, Article 18 ICCPR also treats the jurisprudence of the European Court of Human Rights as a source of conscientious objection, presenting the whole evolution of the Committee's position.[32] This allows the assumption that the scope of Article 18 ICCPR includes protection of conscientious objection, and it is for the states to provide a detailed regulation of mutual interactions between conscientious objection and the rights of other individuals, especially in the sensitive matter of conflicts between the rights

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[28] General Comment 22, para. 11: "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under Article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under Article 18 and on the nature and length of alternative national service"; for more, see: C. de la Hougue, *Article 18*, [in:] E. Decaux (ed.), *Le Pacte International relatif aux droits civils et politiques. Commentaire Article par article*, Paris 2011, p. 432; F. Sudre, *Droit européen et international des droits de l'homme*, Paris 2008, pp. 517–519.

[29] For more, cf. K. Orzeszyna, *Klauzula sumienia jako gwarancja realizacji prawa do wolności sumienia*, Medyczna Wokanda, Naczelna Izba Lekarska No. 9, 2017, pp. 20–21 and references cited therein.

[30] UN Human Rights Committee, case *JP v. Canada*, conclusion of 8 November 1991, Communications, nº 446/1991, para. 2.1: "The author is a member of the Society of Friends (Quakers). Because of her religious convictions, she has refused to participate in any way in Canada's military efforts. Accordingly, she has refused to pay a certain percentage of her assessed taxes, equal to the amount of the Canadian federal budget earmarked for military appropriations. Taxes thus withheld have instead been deposited with the Peace Tax Fund of Conscience Canada, Inc., a non-governmental organisation"; para. 4.2: "Although Article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article"; O. Nawrot, *Sprzeciw sumienia a prawa człowieka i ich filozofia*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Sopot 2015, p. 20; S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford 2013, p. 584.

[31] For more, cf. K. Orzeszyna, *Klauzula sumienia jako gwarancja...*, p. 22.

[32] ECtHR judgment of 7 June 2016, *Enver Aydemir v. Turkey*, application no. 26012/11, points 44, 47, 48; ECtHR judgment of 23 March 2016, *F.G. v. Sweden*, application no. 43611/11, points 60–64.

of patients and of medical staff.[33] However, this does not depreciate the rights of doctors, nurses or members of technical staff.

The relevant regulations in the European-continental system are Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[34] and Article 10 para. 2 of the Charter of Fundamental Rights of 7 December 2000[35].

Moreover, in the international soft law, the right to conscientious objection was verbalised in Resolution No. 337, Recommendation No. 478 and Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe. It should be noted that it is not possible to discuss the entire soft law concerning the right to refuse military service or the right to use conscience clause in other cases.[36] The three above-mentioned documents will be discussed because they had a real impact on the national law and the jurisprudence of the Polish Constitutional Tribunal.

Chronologically, the first was Resolution No. 337 of the Parliamentary Assembly of the Council of Europe of 26 January 1967 on the right to conscientious objection to military service in the Member States of the Council of Europe,[37] followed by Recommendation No. 478 of the Parliamentary Assembly of the Council of Europe of 26 January 1967 on the right to conscientious objection,[38] and the third document is Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 on the right to conscientious objection in lawful medical care[39].

In its introduction Resolution 337 indicates that it concerns the interpretation of Article 9 ECHR, which obliges states to respect the freedom of individual conscience, and the substantive part of this Resolution concerns the refusal of military service. What is important, Resolution 337 specifies in point 1.1. that the refusal of military service due to beliefs of conscience is personal, while in point 2.3. it speaks directly about the right to conscientious objection. A similar content may be found in point a. of the Recommendation, which indicates the right to conscientious objection.[40] The most detailed analysis of the issue of the right to conscientious objection may

[33] For more, see C. de la Hougue, *Article 18…*, p. 433.

[34] Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended; hereinafter ECHR.

[35] OJ EU C 83/02 of 2010, p. 389.

[36] For more, cf. H. Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Berlin, Heidelberg 2009, pp. 90–96.

[37] Assembly debate on 26 January 1967 (22nd sitting), the text adopted by the Assembly on 26 January 1967 (22nd sitting), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en (accessed on 1/09/2016); hereinafter Resolution 337.

[38] Assembly debate on 26 January 1967 (22nd sitting), the text adopted by the Assembly on 26 January 1967 (22nd sitting), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14515&lang=en (accessed on 1/09/2016); hereinafter Recommendation 478.

[39] Assembly debate on 7 October 2010 (35th sitting), the text adopted by the Assembly on 7 October 2010 (35th sitting), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909&lang=en (accessed on 1/09/2016); hereinafter Resolution 1763.

[40] The documents that also refer to earlier regulations are: Recommendation No. 816 of 7 October 1977 on the right to conscientious objection to military service, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14850&lang=en (accessed on 1/09/2016), as well as Recommendation No. 1518 of 26 May 2001 on exercise of the right of conscientious objection to military service in Council of Europe Member States, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16909&lang=en (accessed on 1/09/2016).

be found in Resolution 1763, which is why it has been broadly discussed in the doctrine.[41] One should agree with the statement of J. Pawlikowski that, despite various arguments during the work on Resolution 1763, it ultimately confirms the existence of a fundamental right to conscientious objection.[42] The resolution itself specifies in point 1 that no person, hospital or institution may be forced, held liable or discriminated in any way because of refusing to perform an abortion or euthanasia. Point 2 emphasizes the need to confirm the right to conscientious objection, and points 3 and 4 also refer to it.

4. ISSUE OF CONSCIENTIOUS OBJECTION IN THE CHARTER OF FUNDAMENTAL RIGHTS

Article 10 CFR contains a similar standard to that provided in Article 9 ECHR defining freedom of thought, conscience and religion. As assumed by the European legislator, the scope of Article 10 para. 1 CFR was to correspond to the content of the entire Article 9 ECHR, aince in the explanations to the CFR it was indicated that "The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention".[43]

However, the key regulation for this analysis is Article 10 para. 2 CFR, which in the official Polish translation of the official language version specifies "uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa"[44] ("the right to refuse acting against one's conscience is recognized in accordance with national regulations concerning the exercise of this right"). Compared with the previous protection, this is a new guarantee[45] given *expressis verbis* in the European system of human rights, indicating the process of specifying the rights and freedoms of the individual.

It seems that the wording of Article 10 para. 2 CFR in both English: "the right to conscientious objection is recognised, in accordance with the national laws governing

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[41] For more, cf. J. Pawlikowski, *Prawo do sprzeciwu sumienia w ramach legalnej opieki medycznej. Rezolucja nr 1763 Zgromadzenia Parlamentarnego Rady Europy z dnia 7 października 2010 r*., Studia z Prawa Wyznaniowego No. 14, 2011, p. 313 ff, pp. 333–337; L. Bosek, *Komentarz do art. 53 Konstytucji RP*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP,* Vol. 1: *Komentarz do art. 1–86*, C.H. Beck 2016, pp. 1249–1251, 1250 ff, point 7.

[42] J. Pawlikowski, *Prawo do sprzeciwu*..., pp. 316–333, 336.

[43] Explanations relating to the Charter of Fundamental Rights, OJ C 303/2007, p. 21, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:PL:PDF (accessed on 30/09/2018).

[44] Translation into Polish provided in the Official Journal of the European Union of 2010, C. 83, p. 389, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:PL:PDF (accessed on 30/09/2018).

[45] Similar to J. Duffar, *Commentaire art. II–70*, [in:] L. Burgorgue-Larsen, A. Levade, F. Picod (eds), *Traité établissant une Constitution pour l'Europe. Commentaire Article par article. Partie II, La Charte des droits fondamentaux de l'Union,* Brussels 2005, p. 167.

the exercise of this right",[46] and French: "le droit à l'objection de conscience est reconnu selon les lois nationales qui en régissent l'exercice"[47] allows claiming that the correct translation should be "the right to conscientious objection is recognised (...)". However, the official Polish version does not use this term directly, it contains an equivalent expression. Therefore, the Charter of Fundamental Rights protects the right to conscientious objection within the limits provided for by national law.

However, it should be borne in mind that the German version of CFR has the following content "das Recht auf Wehrdienstverweigerung aus Gewissensgründen wird nach den einzelstaatlichen Gesetzen anerkannt, welche die Ausübung dieses Rechts regeln",[48] which should be literally translated as "the right to refuse military service on the grounds of conscience is recognized by the laws of individual states[49] regulating the exercise of this right". This is due to the fact that the phrase *Wehrdienstverweigerung* has obvious military connotations, because *wehrdienst* means military service. Therefore, there is a difference in the content of CFR in different language versions. Nevertheless, it is obvious from the content of CFR in Polish, English and French that there is a provision to protect conscientious objection, which is not guaranteed explicitly in the content of the ECHR, but is protected in some European constitutions. One can see here the phenomenon of concretisation of human rights, which, as a living instrument, give the basis for the interpretation that defines new rights resulting from a specific human right. Therefore, since the new document on human rights, i.e. the Charter of Fundamental Rights, defines the protection of conscientious objection, it is an expression of acknowledgement of the existence of a partial power in the form of conscientious objection, the source of which is the freedom of conscience and religion. However, in accordance with Article 10 para. 2 CFR, the scope of conscientious objection is defined by national laws, and in the Polish legal system the key regulation in this regard is Article 53 of the Polish Constitution specifying the right to freedom of conscience and religion.

5. IMPACT OF SOFT LAW ON THE ECTHR JURISPRUDENCE CONCERNING CONSCIENTIOUS OBJECTION

In the case of conscientious objection, the ECtHR case law can be divided into three groups of cases: military service, medical professions and other professions. In view of the case law, one can observe the development of the Court's jurisprudence and a certain normative, logical and semantic inconsistency is noticeable. It should be

[46] Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF (accessed on 24/09/2012).

[47] Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:FR:PDF (accessed on 24/09/2012).

[48] Translation provided in the Official Journal of the European Union of 2010, C. 83, p. 389, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:DE:PDF (accessed on 24/09/2012).

[49] In the meaning of the High Contracting Parties.

stated that the right to refuse military service is the most common case of protection of conscience clause by the ECtHR.[50] The most important is the ECtHR judgment of 7 July 2011 in the case of *Bayatyan v. Armenia*, where the ECtHR indicated that the regulation provided for in Article 9 para. 1 ECHR "does not explicitly refer to a right to conscientious objection", although it is the source of protection against obligatory military service.[51] This view, in my opinion, is contradictory, and it was articulated by the ECtHR in spite of the fact that Article 10 para. 2 CFR determines the right to invoke one's conscience and conscience clause in accordance with national law.[52] What is more, in this judgment the ECtHR refers to the content of Resolution 337 and Recommendation 478[53], nevertheless it argues that conscientious objection does not fall within the scope of Article 9 ECHR.

It should also be indicated that the ECtHR jurisprudence has accepted the need to protect conscience in the case of medical personnel. The Court held that "States are obliged to organise the health services system in such a way as to ensure an effective exercise of the freedom of conscience of health professionals",[54] and this view was expressed on the basis of the case law that concerned performing the abortion procedure.

Another ruling is the case of a civil registrar and psychotherapist and the *Eweida* case.[55] In this judgment the ECtHR often refers to the conscience clause. Unfortunately, the ECtHR's avoidance of making explicit reference to the phrase conscience clause or conscientious objection was also evident in this case. The ECtHR dismissed the question of conscientious objection, even though one of the applications directly referred to its violation.[56]

It seems clear that the Court is trying to avoid stating that the scope of Article 9 para. 1 ECHR, so the right to freedom of conscience and religion, does not include the conscience clause. However, it indicates cases that fall within the scope of protection under Article 9 ECHR, and it is undoubtedly the right to refuse military service due to conscientious objection. Unfortunately, the inconsistencies in the ECtHR case law, especially at the terminological level, make it difficult to establish the Court's

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[50] In the following ECtHR cases: *Tsaturyan v. Armenia*, application no. 37821/03, judgment of 10 January 2012; *Bukharatyan v. Armenia*, application no. 37819/03, judgment of 10 January 2012; *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000; *Ülke v. Turkey*, application no. 39437/98, judgment of 24 January 2006; *Jehovah's Witnesses in Moscow and Others v. Russia*, application no. 302/02, judgment of 10 June 2010, amended on 18 August 2010, *TAGANROG LRO and others v. Russia*, application no. 32401/10; *Bayatyan v. Armenia*, application no. 23459/03, judgment of 7 July 2011.

[51] *Bayatyan v. Armenia*, ECtHR judgment of 7 July 2011, point 110, as well as points 46, 49, 128; for more, cf. J-F. Renucci, *Droit européenn des droits de l'homme. Droits et libertés fondamentaux garantis par CEDH*, Paris 2013, pp. 161–162; P. Cumper, *Article 9: Freedom of Thought, Conscience, and Religion*, [in:] D. Harris, M. O'Boyle, C. Warbrick (eds), *Law of the European Convention on Human Rights*, Oxford 2014, pp. 601–602; M. Amos, *Human Rights Law*, Oxford and Portland, Oregon 2014, pp. 535–536.

[52] For more, cf. M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, Przegląd Sejmowy No. 6, 2013, p. 12 ff.

[53] *Bayatyan v. Armenia*, ECtHR judgment of 7 July 2011, points 51, 52.

[54] *R.R. v. Poland*, application no. 27617/04, ECtHR judgment of 26 May 2011, point 206.

[55] *Eweida and Others v. the United Kingdom*, ECtHR judgment of 15 January 2013.

[56] *Ibid.*, point 70.

position. In the end, it decided that the refusal to fulfil the legal obligation due to the conflict with religious beliefs falls within the scope of protection under Article 9 ECHR, also in cases other than the duty of military service.[57] Nevertheless, the view that the *Eweida* judgment on conscientious objection is ambiguous and not clear is valid.[58]

6. INFLUENCE OF INTERNATIONAL LAW CONCERNING CONSCIENTIOUS OBJECTION ON NATIONAL LAW

The scope of the influence of the international hard law and soft law on the Polish law on conscientious objection is evident in the jurisprudence of the Polish Constitutional Tribunal. The judgment of the Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause,[59] as well as earlier[60] and later scientific research,[61] showed that the source of conscientious objection is the human right to freedom of conscience and religion. The main direction of scientific research on conscientious objection concerns the rights of the doctor and nurse,[62] possibly axiological issues concerning conscience[63] or axiological normative context[64] are indicated, and less frequently conscience clause is connected with legal professions.[65]

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[57] *Ibid.*, point 105.

[58] As in: W. Brzozowski, *Orzeczenie: Eweida i inni v. Wielka Brytania*, http://prawaczlowieka.edu.pl/index.php?orzeczenie=8d8ebea7b076c177ecd21e2d0d7e52fa74c48f3c-b0 (accessed on 1/09/2016).

[59] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, points 3.2.3, 3.2.4, 4.4.1, 4.4.5.

[60] M. Skwarzyński, *Sprzeciw sumienia w europejskim...*, pp. 9–26.

[61] L. Bosek, *Komentarz do art. 53 Konstytucji RP...*, pp. 1249–1251, 1257–1258, 1263–1264, points 5, 33, 50, 51.

[62] P. Stanisz, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014, *passim*; A. Zoll, *Prawo lekarza do odmowy udzielenia świadczeń zdrowotnych i jego granice*, Prawo i Medycyna No. 13, 2003, p. 18; L. Bosek, *Prawo osobiste do odmowy działania sprzecznego z własnym sumieniem na przykładzie lekarza*, Forum Prawnicze No. 1, 2014, p. 17; L. Bosek, *Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentysty*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce medycznej…*, pp. 96–100; O. Nawrot, *Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy*, Zeszyty Prawnicze Biura Analiz Sejmu No. 3, 2012, pp. 12–16.

[63] A. Szostek, *Kategoria sumienia w etyce*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 15–25.

[64] A. Zoll, *Klauzula sumienia*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 77–85; M. Skwarzyński, *Sprzeciw sumienia w europejskim…*, pp. 17–21; L. Bosek, *Prawo osobiste...*, pp. 87–89, 92–95; L. Bosek, *Problem zakresowej...*, pp. 87–90, 100–103; O. Nawrot, *Prawa człowieka, sprzeciw sumienia i państwo prawa*, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds), *Sprzeciw sumienia w praktyce...*, pp. 107–109.

[65] For more, cf. A. Machnikowska, *Klauzula sumienia w zawodzie prawnika*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie…*, pp. 127–142; J. Zajadło, *Sędzia pomiędzy moralnym przekonaniem a wiernością prawu (na przykładzie orzecznictw sądów amerykańskich w sprawach niewolnictwa)*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie...*, pp. 143–161; Z. Cichoń, *Klauzula sumienia w różnych zawodach*, [in:] *Prawnik katolicki a wartość prawa*, Kraków 1999, pp. 44–51.

Of course, the author is familiar with Professor J. Pawlikowski's view, expressed at many scientific conferences, that conscience clause is included in a specific provision of the Act, which gives the right of invoking conscientious objection, whose source is hierarchically higher. The postulate of terminological ordering is obviously correct, nevertheless, these concepts function interchangeably both in the doctrine and in jurisprudence. What is more, it seems that there is a requirement that the conscience clause be understood as a statutory provision; a statutory clause is understandable in the case of a doctor or a nurse, where such a provision is included in corporate law. In the case of a normative analysis based on the system of human rights and one's profession, where the clause is not explicitly specified in corporate regulations, this differentiation does not matter that much. However, they must be distinguished in order not to invoke the lack of conscience clause as binding for the non-existence or sources of conscientious objection.

In its ruling, the Constitutional Tribunal rightly stated that freedom of conscience "being a fundamental human right is also a source of many other rights and freedoms, it is a specific 'right of rights'"[66] and its essence "is sometimes considered to be over-positive, axiologically related to human nature, an important element of his dignity. Hence, a legal system that would not guarantee it would be '*ab initio* incomplete, ineffective and inefficient, and consequently also undemocratic, because it would deviate from the model of the state respecting the necessary *minimum minimorum* in the field of protection of human rights' (J. Szymanek, *Wolność sumienia i wyznania...*, p. 39). The need to respect it is closely linked to respect for and protection of human dignity, which is the responsibility of public authorities".[67]

The Constitutional Tribunal's conclusions resulted from the correct analysis of international law on human rights, both in the universal[68] and in the European system. In the latter case, the Constitutional Tribunal referred to the analysis of the ECHR and six ECtHR judgments,[69] i.e.: judgment of 13 December 2001, *Église métropolitaine de Bessarabie and others v. Moldova*, application no. 45701/99; judgment of 25 May 1993, *Kokkinakis v. Greece*, application no. 14307/88; judgment of 6 November 2008, *Förderkreis e.V. and Others v. Germany*, application no. 58911/00; decision of 6 December 1991, *Tomi Autio v. Finland*, application no. 17086/90; judgment of 7 July 2011, *Bayatyan v. Armenia*, application no. 23459/03; judgment of 10 January 2012, *Bukharatyan v. Armenia*, application no. 37819/03.

It is also important that the Constitutional Tribunal referred directly to the international soft law, i.e. Resolution 337, Recommendation 478 and Resolution 1763, and for obvious reasons paid greatest attention to the last one.[70] The Constitutional Tribunal found that "although the Council of Europe Resolution of 7 October 2010 is not binding, it could not have been irrelevant to the considerations in this case, because it establishes a universal standard of protection for persons performing medical professions (see O. Nawrot, *Klauzula sumienia w zawodach medycznych...*,

[66] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14, point 4.1.1.

[67] *Ibid.*, point 4.1.2.

[68] *Ibid.*, point 3.2.2.

[69] *Ibid.*, point 3.2.3.

[70] *Ibid.*, points 3.2.4., 6.2.3.

pp. 20–22). In its light, the right to conscientious objection is very broadly marked both subjectively and personally, as it also includes entities other than natural persons providing medical services".[71] It was after the analysis of the ECtHR jurisprudence and the development of soft law that the Constitutional Tribunal indicated that "the possibility to use conscience clause is one of human rights".[72]

In its argument the Constitutional Tribunal, having analysed hard law, the ECtHR jurisprudence and soft law in accordance with the concept of the margin of assessment, came to the right conclusions: "there is no basis for the formulation of a separate right to 'conscience clause' and, consequently, there is no doubt that the legislator cannot arbitrarily shape this 'privilege' or abolish it, but must respect the constitutional conditions of establishing restrictions on the freedoms and rights of human and citizen (Article 30 and Article 31 para. 3 of the Constitution). In the Tribunal's opinion, the doctor's, as well as any other person's, right to refrain from acting against his own conscience stems directly from the freedom guaranteed by the Constitution".[73]

This conclusion, on account of the order of the analyses conducted by the Constitutional Tribunal and the presented reasoning, was drawn by the Tribunal i.a. also due to the significance and influence of international law. This applies to both soft and hard law. This means that the source of conscientious objection is the freedom of conscience and religion, because of the subject of protection of this human right. The Tribunal's view met with the acceptance of the doctrine also internationally.[74]

7. SUMMARY

In my opinion, the position of the Constitutional Tribunal in case K 12/14 is also a manifestation of an interaction between international hard law and soft law and it is correct. Elaborating the Constitutional Tribunal's argumentation, one should try to assume that this human right to freedom of conscience and religion is not the one that would be

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[71] *Ibid.*, point 3.2.4.

[72] *Ibid.*, point 3.2.4. *in fine*.

[73] *Ibid.*, point 4.4.5.

[74] For more, cf.: P. Stanisz, J. Pawlikowski, *Il diritto dei medici all'obiezione di coscienza in Polonia: recenti sviluppi*, Quaderni di diritto e politica ecclesiastica No. 2, 2017, pp. 459–471; T. Koncewicz, M. Zubik, M. Konopacka, K. Staśkiewicz, *Developments in Polish Constitutional Law: The Year 2016 in Review*, [in:] R. Albert, D. Landau, P. Faraguna, S. Drugda (eds), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law,* Boston 2017, p. 165; *Women's Sexual and Reproductive Health and Rights in Europe*, Council of Europe 2017, p. 23; J. Pawlikowski, *Conscientious Objection of Health Care Workers in the Context of Genetic Testing*, [in:] *Philosophy and Medicine*, Vol. 128: M. Soniewska (ed.), *The Ethics of Reproductive Genetics: Between Utility, Principles, and Virtues*, 2018, pp. 103–113; G. Puppinck, *Conscientious Objection and Human Rights: A Systematic Analysis,* Brill Research Perspectives in Law and Religion Vol. 1, No. 1, 2017, pp. 13, 15, 16, 24; A. Ciucă, *The Right to Conscientious Objection*, Logos Universality Mentality Education Novelty, Section: Law Vol. 5, No. 1, 2017, pp. 17, 18, 23–25; M. Hill, *Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v. United Kingdom,* Ecclesiastical Law Journal Vol. 15, No. 2, 2013, pp. 199, 200, 203; D. Gamper, *Conscientious Objection to Same-Sex Marriage: Politics by Other Means*, [in:] F. Requejo, C. Ungureanu (eds), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-secularism,* London–New York 2014, pp. 165, 166.

the source of protection of conscience, and another axiological source should be found, which would be expressed in the normative standard of human rights. However, it is impossible to indicate another human right and avoid falling into logical contradictions, ignoring the human right to freedom of conscience and religion.

If one assumes that conscientious objection is a statutory right, detached from human dignity and the axiological order expressed in the system of human rights, it is only possible if one also assumes a positive system of law, which directly leads to effects similar to the genocide crime of the Third Reich due to religious denomination or racial origin.

Of course, the right to invoke conscientious objection is not an unlimited right. Firstly, objection should be a subsidiary right, i.e. one that can be implemented as the ultimate way to protect human rights to freedom of conscience and religion, and if it is impossible to resolve the conflict in any other way. Secondly, the use of the right to conscientious objection must be justified in each case, and the helpful criterion seems to be whether it is aimed at safeguarding protected goods in a positive or non-positive legal system, natural law. The Strasbourg Court has defined a reference to the criterion of views that have reached an adequate level of persuasion, seriousness, coherence or importance in society.[75] Thirdly, the good that the person invoking conscientious objection wants to protect should also be commensurate, i.e. proportional to the obligations imposed by the law, which the obligated person cannot perform due to the conflict of conscience.[76]

Therefore, it seems that the normative source, which is the human right to freedom of conscience and religion, is sufficient to protect conscientious objection of every human being, due to his inherent dignity. One's occupation cannot determine the possibility of exercising human rights. This means that the doctor, attorney, and nurse have the right to use conscience clause, despite the lack of a clear basis in the corporate act or professional ethics. The consequence of this is the state's positive obligations, because in this respect conscientious objection is protected as a human right, not as human freedom. Therefore, much wider obligations on the part of the state are required.

The human right to freedom of conscience and religion is one of the closest, if not the closest, to dignity of the human being. If the human right to conscientious objection did not exist as an element of human rights, it would not protect the individual, and, in fact, this element of a person's dignity would not be protected, because free will would not be protected. If conscientious objection did not have the nature of a human right, then the protection of this sphere of human dignity, expressed normatively in the right to freedom, would only be facade protection. After all, one cannot dehumanize the individual more than by forcing him to act against his own conscience. This indicates that conscientious objection protects the hard core of dignity and its essence. At the same time, it does not mean giving

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[75] ECtHR judgments: of 7 July 2011, *Bayatyan v. Armenia*, point 110; of 15 January 2013, *Eweida and Others v. the United Kingdom*, point 82; of 7 December 2010, *Jakóbski v. Poland*, application no. 18429/06, point 44; of 6 November 2008, *Leela Förderkreis e.V. and Others v. Germany*, application no. 58911/00, point 80.

[76] For more, cf. M. Skwarzyński, *Sprzeciw sumienia w europejskim...*, pp. 23–26.

consent to whims of conscience, that is why the above-mentioned conditions for invoking conscientious objection are necessary.

It should be borne in mind that conscience as a normative category or, more broadly, morality and values, as the imperative and determinant of behaviour, is reflected in the legal order. If conscientious objection was a statutory right, it would make no sense to refer to conscience in a series of oaths or vows, as a category to be followed by representatives of specific professions. Such references would only work if there was a specific statutory right to object, and it is reserved exclusively for the doctor and nurse, although the category of conscience is also referred to in many other professions. It would also raise obvious doubts about the prohibition of discrimination and equality before the law. It cannot be the case that a physician deciding in the same situation as a lawyer, such as a judge, will be able to protect his conscience through objection and others will not. Dignity, as a normative source for the system of human rights, enforces equal protection of the rights of all people.

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PROTECTING CONSCIENTIOUS OBJECTION AS THE "HARD CORE" OF HUMAN DIGNITY

Summary

The article is an analysis of legal and axiological source of conscientious objection. The study was based on the European and national system of human rights protection. Freedom of conscientious objection is recognized by both Article 9(1) of the European Convention on Human Rights and Article 10(2) of the Charter of Fundamental Rights of the European Union. The problem of conscientious objection is the subject of the analysis of the doctrine in connection with the judgment of the Polish Constitutional Tribunal of 7 October 2015 in case K 12/14, which concerned the doctor's conscience clause. The conscientious objection protects the hard core of dignity and its essence. The human right to freedom of conscience and religion is one of the closest, if not the closest, to dignity of the human being. The author also points out the scope of the human right to conscientious objection and claims that it should have a subsidiary character, be limited to justified cases, as well as seek to protect the interests stipulated in the systems of natural law or positive law.

Keywords: conscientious objection, human dignity, human right to freedom of conscience and religion

OCHRONA SPRZECIWU SUMIENIA JAKO „TWARDEGO RDZENIA" GODNOŚCI CZŁOWIEKA

Streszczenie

Artykuł jest analizą źródła normatywnego i aksjologicznego dla sprzeciwu sumienia. Badanie opierało się na europejskim i krajowym systemie ochrony praw człowieka. Prawo do sprzeciwu sumienia uznaje zarówno art. 9 ust. 1 Europejskiej Konwencji Praw, jak i art. 10 ust. 2 Karty Praw Podstawowych Unii Europejskiej. Problem sprzeciwu sumienia jest obecnie przedmiotem analizy doktryny w związku z wyrokiem Trybunału Konstytucyjnego z dnia 7 października 2015 r., w sprawie sygn. akt K 12/14, który dotyczył klauzuli sumienia lekarza. Sprzeciw sumienia chroni „rdzeń" godności człowieka i jej istotę. Prawo człowieka do wolności sumienia i wyznania jest jednym z najbliższych, jeśli nie najbliższym, istoty godności ludzkiej. Autor wskazuje również na zakres prawa człowieka do sprzeciwu sumienia i twierdzi, że powinien on mieć charakter pomocniczy, subsydiarny, ograniczony do uzasadnionych przypadków, a także dążyć do ochrony interesów określonych w systemach prawa naturalnego lub w prawie pozytywnym.

Słowa kluczowe: sprzeciw sumienia, godność człowieka, prawo człowieka do wolności sumienia i religii

PROTECCIÓN DE OBJECIÓN DE CONCIENCIA COMO "MÉDULA DURA" DE LA DIGNIDAD HUMANA

Resumen

El articulo analiza la fuente normativa y axiológica de la objeción de conciencia. El estudio se basa en el sistema europeo y nacional de protección de derechos humanos. El derecho a la objeción de conciencia está reconocido tanto en el art. 9 ap. 1 de la Convención Europea de Derechos Humanos (CEDH) como en el art. 10 ap. 2 de la Carta de Derechos Humanos de la Unión Europea. El problema de la objeción de conciencia en actualidad es un objeto de análisis en relación con la Sentencia del Tribunal Constitucional de 7 de octubre de 2015, causa núm. K 12/14 que se refiere a la cláusula de objeción de conciencia de los médicos. La objeción de conciencia protege la "médula dura" de la dignidad humana y su naturaleza. El derecho de ser humano a la libertad de conciencia y de religión es muy cercano, si no es el más cercano, a la naturaleza de la dignidad humana. El autor señala también que el ámbito de ser humano a la objeción de conciencia ha de tener carácter auxiliar – subsidiario, limitado a casos fundados y también encaminado a proteger intereses determinados en los sistemas de derecho natural o en el derecho positivo.

Palabras claves: objeción de conciencia, dignidad humana, derecho humano a la libertad de conciencia y religión

ПРАВО НА ВОЗРАЖЕНИЕ ПО СООБРАЖЕНИЯМ СОВЕСТИ В КАЧЕСТВЕ «ТВЁРДОГО ВНУТРЕННЕГО СТЕРЖНЯ» ЧЕЛОВЕЧЕСКОГО ДОСТОИНСТВА

Резюме

Статья представляет собой анализ нормативно-аксиологического источника возражения по соображениям совести. Исследование основывалось на европейской и отечественной системе защиты человеческих прав. Право на возражение по соображениям совести предусмотрено как ст. 9 п. 1 Европейской конвенции о правах человека (ЕКПЧ), так и ст. 10 п. 2 Хартии Европейского союза об Основных правах. Проблематика возражения по соображениям совести в настоящее время является предметом анализа доктрины в связи с решением Конституционного трибунала от 7 октября 2015 года, дело № К 12/14, касающегося положения о совести врача. Право на возражение по соображениям совести обеспечивает защиту «твердого стержня» человеческого достоинства и его сущности. Право человека на свободу совести и религии является одним из самых близких, если не самым близким, сущности человеческого достоинства. Автор также указывает на объем применения права человека на возражение по соображениям совести и утверждает, что он должен иметь вспомогательный характер, или субсидиарный, ограниченный подтверждёнными случаями, а также защищать интересы, определенные в системах естественного права или позитивного права.

Ключевые слова: возражение по соображениям совести, достоинство человека, право человека на свободу совести и религии

VERWEIGERUNG AUS GEWISSENSGRÜNDEN ALS „HARTER KERN" DER MENSCHENWÜRDE

Zusammenfassung

Der Artikel ist eine Analyse der normativen und axiologischen (wertlehrebezogenen) Verweigerung aus Gewissensgründen. Die Untersuchung stützte man auf europäischem und einheimischem Menschenrechtsschutzsystem. Das Recht zur Verweigerung aus Gewissensgründen wird sowohl unter Art. 9 Abschn. 1 der Europäischen Konvention zum Schutz der Menschenrechte (EKSM), als auch unter Art. 10 Abschn.2 der Grundrechtkarte der Europäischen Union anerkannt. Die Verweigerung aus Gewissensgründen ist Gegenstand gegenwärtiger Analyse der Doktrin aus Anlass des Verfassungsgerichtsspruches vom 07. Oktober 2015 bezüglich Aktenzeichen K12/14 betreffend der Gewissensklausel des Arztes. Die Verweigerung aus Gewissensgründen schützt den „harten Kern" der Menschenwürde und sein Kernstück. Das Recht des Menschen zur Gewissensfreiheit und Bekenntnisfreiheit ist eines der nächsten, wenn nicht das allernächste des Wesens einer Menschenwürde. Der Autor weist auch auf den Menschenrechtsbereich zur Verweigerung aus Gewissensgründen hin und meint ebenso, dass der Bereich einen behilflich-subsidiären Charakter haben sollte, begrenzt zu begründeten Fällen; weiterhin sollte der Bereich den Interessenschutz bestimmt in Systemen des Naturrechtes und des positiven Rechtes.

Schlüsselwörter: Verweigerung aus Gewissensgründen, Menschenwürde, Recht des Menschen zur Gewissensfreiheit und Bekenntnisfreiheit

PROTECTION DE L'OBJECTION DE CONSCIENCE EN TANT QUE «NOYAU DUR» DE LA DIGNITÉ HUMAINE

Résumé

L'article est une analyse d'une source normative et axiologique d'objection de conscience. L'étude était basée sur le système européen et national de protection des droits de l'homme. Le droit à l'objection de conscience est reconnu à la fois à l'article 9 paragraphe 1 de la Convention européenne des droits de l'homme (CEDH), ainsi qu'à l'article 10 paragraphe 2 de la Charte des droits fondamentaux de l'Union européenne. Le problème de l'objection de conscience fait actuellement l'objet d'une analyse de la doctrine dans le cadre de l'arrêt du Tribunal constitutionnel du 7 octobre 2015, affaire n° K 12/14, qui concernait la clause de conscience du médecin. L'objection de conscience protège le «noyau dur» de la dignité humaine et de son essence. Le droit humain à la liberté de conscience et de religion est l'un des plus proches, sinon le plus proche, de l'essence de la dignité humaine. L'auteur indique également la portée du droit de l'homme à l'objection de conscience et affirme qu'il devrait être accessoire, subsidiaire, limité aux cas justifiés, et s'efforcer de protéger les intérêts définis dans les systèmes de droit naturel ou dans le droit positif.

Mots-clés: objection de conscience, dignité humaine, droit humain à la liberté de conscience et de religion

PROTEZIONE DELL'OBIEZIONE DI COSCIENZA COME "NUCLEO DURO" DELLA DIGNITÀ UMANA

Sintesi

L'articolo è un'analisi della fonte normativa e assiologica per l'obiezione di coscienza. La ricerca si è basata sul sistema europeo e nazionale di tutela dei diritti umani. Il diritto all'obiezione di coscienza riconosce sia l'articolo 9. paragrafo 1 della Convenzione europea dei diritti dell'uomo (CEDU) che l'articolo 10. paragrafo 2 della Carta dei diritti fondamentali dell'Unione europea. Il problema dell'obiezione di coscienza è attualmente oggetto di un'analisi dottrinale in relazione alla sentenza della Corte Costituzionale del 7 ottobre 2015, causa n. K 12/14, che riguardava la clausola di coscienza del medico. L'obiezione di coscienza tutela il "nucleo duro" della dignità umana e il suo principio. Il diritto umano alla libertà di coscienza e di religione è uno dei più vicini, se non il più vicino al principio della dignità umana. L'autore indica anche la portata del diritto umano all'obiezione di coscienza e sostiene che esso dovrebbe avere un carattere sussidiario, limitato ai casi giustificati, e dovrebbe cercare di proteggere gli interessi definiti nei sistemi di diritto naturale o di diritto positivo.

Parole chiave: obiezione di coscienza, dignità umana, diritto umano alla libertà di coscienza e di religione

Cytuj jako:

Skwarzyński M., *Protecting conscientious objection as the "hard core" of human dignity [Ochrona sprzeciwu sumienia jako „twardego rdzenia" godności człowieka]*, „Ius Novum" 2019 (Vol. 13) nr 2, s. 270–291. DOI: 10.26399/iusnovum.v13.2.2019.26/m.skwarzynski

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GLOSS
On the judgment of the European Court of Human Rights of 25 October 2018 in case *E.S. v. Austria*, appl. no. 38450/12

"Criminal conviction and a fine for the applicant calling Muhammad and Aisha's marriage a pattern of paedophilia did not amount to violation of freedom of expression in the meaning of Article 10 of the European Convention on Human Rights"

BASIC FACTS OF THE CASE

Elisabeth Sabatitsch-Wolff (E.S.), an Austrian national and a professional in Islam,[1] in the period of January–November 2008 participated in several open seminars entitled "Basic Information on Islam"[2]. The presentations concerned different aspects of the religion at issue, and – consequently – took into account both public and private relations. Regarding the latter, the Islamic marriage model was analysed. Among others, the possibility of marriage between adult men and girls before puberty was discussed.

Two seminars which were held in October and November 2008 gathered around thirty participants, including an undercover journalist who asked for a preliminary investigation against E.S. As a result of the proceedings, on 18 January 2011 the Vienna Regional Court convicted E.S. of disparaging religious doctrines under Article 188 of the Criminal Code and ordered her to pay 480 euros in total (a fine and cost of the proceedings). As one of the most incriminating statements of E.S., the Regional Court found i.a. the following:

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[1] In fact, the applicant, having a diplomat family background, spent some years of her life in Arabic countries. Then, she started her professional studies on the Quran.

[2] All facts invoked in the present paper are published in the ECtHR judgment of 25 October 2018 in case of *E.S. v. Austria*, application no. 38450/12. In the Polish press the above case was presented by D. Bychawska-Siniarska, *Uczucia religijne nie zawsze ponad swobodą wypowiedzi*, Dziennik Gazeta Prawna No. 215(4965), 6 November 2018, p. E2.

"One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. (…) This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. (…) A 56-year-old and a six-year-old? What do you call that? Give me an example? What do you call it, if it is not paedophilia?"

According to the Regional Court the above statements together with other opinions conveyed "the message that Muhammad had paedophilic tendencies". Furthermore, the Regional Court considered that "the statements were not statements of fact, but derogatory value judgments which exceeded the permissible limits". And still continuing, the Austrian Court stated that "the child marriages were not the same as paedophilia, and were not only a phenomenon of Islam, but also used to be widespread among the European ruling dynasties"[3] (Sic!).

The E.S.'s case was unsuccessfully referred to all the domestic judicial levels. The main argument of the applicant was that of participation in the important public debate in a democratic society, connected with historical and present facts. Finally, the domestic courts stressed that in the present case the nature of such debate was to be rejected as unconvicting and unpersuasive. Finally, on 6 June 2012, E.S. lodged her application with the European Court of Human Rights (ECtHR) claiming violation of her right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). These proceedings ended on 25 October 2018 with the unanimous judgment of the seven-judge Chamber in which a non-violation of Article 10 ECHR was found.

In their argumentation the judges of the ECtHR referred to its previous case law, mainly on the margin of appreciation doctrine. They stressed that they had already decided that the scope of this margin in cases like that, i.e. concerning a matter with a possibility to offend personal convictions within the sphere of morals or religion, broadened respectively.[4] The basic reason of this interpretation is "the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions"[5].

Another point of the ECtHR reasoning, which seems worth recalling, is a traditional division of statements into those of facts and values. In the case of E.S. the latter category of statements was at stake. In this regard the ECtHR reminded that a value judgment "is not susceptible of proof (…) a value judgment is impossible to fulfil and infringes freedom of opinion itself (…). However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive"[6].

Consequently, the Strasbourg judges accepted the opinion of domestic courts that the applicant's statements were value judgments without sufficient factual basis. Moreover, the ECtHR reminded that the statements which are based on "manifestly"

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[3] See *E.S. v. Austria*, § 14–15.
[4] *Ibid.*, § 44.
[5] *Ibid.*
[6] *Ibid.*, § 48.

untrue facts do not enjoy the protection of Article 10 of the ECHR.[7] Moreover, the ECtHR judges concluded that the impugned statements of the applicant "were not phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages (…) as going beyond the permissible limits (…) classifying them as an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting at risk religious peace"[8].

At last, the ECtHR reminded that the impugned interference of the state authorities into individual freedom of expression should have been considered not only "in the light of the content of the statements at issue, but also the context in which they were made"[9]. It was obvious for the European judges that the case of E.S. was of "a particularly sensitive nature, and that the (potential) effects of the impugned statements, to a certain degree, depend on the situation in the respective country"[10] (emphasis added). Accordingly, the problem at issue in the present case was the preservation of religious peace in the Austrian society.

Additionally, in the opinion of the ECtHR, the sanction ordered was rather moderate, thus in the light of the circumstances of the case (especially the applicant's repeated infringement as an aggravating factor) it could not be considered disproportionate.

COMMENTARY

First of all, the presented judgment concerning the freedom of expression in the religious context is not the first under the ECtHR's review. As early as in 1994 the ECtHR stated that:

> "Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders."[11]

For sure, one can argue that there are "different times and different social context". I do not insist, like some other representatives of the human rights doctrine do,[12]

[7] Reference to *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, judgment of Grand Chamber of 27 June 2017, application no. 17224/11, § 117.

[8] *E.S. v. Austria*, § 57.

[9] *Ibid*., § 49.

[10] *Ibid*., § 50. Actually, the reference to the particularity of the social situation in a state appeared in the Strasbourg case law earlier, see e.g. case of *Leila Şahin v. Turkey*, judgment of 29 June 2004, application no. 44774/98, § 107–109; judgment of Grand Chamber of 10 November 2005, § 115.

[11] Case of *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, application no. 13470/87, § 47.

[12] See more in S. Smet, *E.S. v. Austria: Freedom of Expression versus Religious Feelings, the Sequel*, Strasbourg Observers, 7 November 2018.

that there is no human right not to be offended in one's religious beliefs. I am simply of the opinion that every religious belief should be protected on a non-discrimination basis which takes into account the "fair balance" test. Furthermore, I also agree that a special attention should be given to the beliefs of minorities' groups.[13]

Nonetheless, the above-presented judgment provokes some difficult questions and bears controversies, at least as far as I am concerned. Taking the problem seriously, these dilemmas could be covered by the principle of a true "neutrality" of the European judges, while facing the problems of extremely sensitive nature, whether political or religious ones. With full understanding of the gravity of my previous statement, I should present my views by referring to facts which provoked me to touch on such a controversial question.

Firstly, let us consider the courts' interpretation of the lack of a factual background for the value judgment presented by E.S. According to the available and rather reliable sources, there is a common knowledge concerning the details of Muhammad's family life. Nonetheless, some official Sunni Muslim sources admitted that 54 or 56-year-old Muhammad married Aisha when she was around the age of six or seven and consummated the marriage approximately four years later. He left her a childless widow at the age of eighteen.[14] It is also true that the problem of legality of marriages between adult men and prepubescent girls in the light of Quran is open to discussions.

Of course, maybe it is better for human rights lawyers to leave the discussion on the religious details to the professionals in the field (as for sure E.S. can be qualified as such), but some social phenomena, evidently influenced by religious factor, like e.g. forced marriages and child marriages, have already entered Europe and focused a strong attention of important European organs.[15] It would be really difficult to deny the solid factual basis of the sentences formulated in 2018 by the Parliamentary Assembly of the Council of Europe that "Every day throughout the world, 39,000 young girls are married before reaching the age of majority. More than one third of them are younger than 15. (…) All countries in Europe are affected by these harmful practices, whether in the form of forced marriages concluded in Europe (…) These human rights violations (…) ruined lives, much wasted potential and serious health risks lie behind these figures. For young girls, marrying often

[13] Actually, according to statistical data, the "religious" picture of Europe is changing in a very dynamic way (e.g. in Austria the Muslim community rose from 4.22% in 2001 to over 6% in 2010).

[14] This can be found in commonly available sources: Sahih al-Bukhari, Vol. 7, Book 62, No. 63–65, 88; the same author Vol. 5, Book 58, No. 234, 236; Vol. 9, Book 87, No. 139–140; Sahih Muslim, Book 008, No. 3309-3311; Sunan Abu Dawud, No. 2116, Book 41, No. 4915; the same author, Book 13, No. 2380.

[15] See Resolutions of the Parliamentary Assembly of the Council of Europe: Forced marriages and child marriages, RES 1468(2005), 5 October 2005; Forced marriage in Europe, RES 2233(2018), 28 June 2018. Actually, in both resolutions a similar attitude of the General Assembly of the UNO is invoked, according to which forced marriage can in no way be justified and declaring "certain customs, ancient laws and practices relating to marriage and the family to be inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights".

means (…) unprotected and forced sexual relations and unwanted pregnancies that endanger their health."[16] (emphasis added).

Consequently, the Parliamentary Assembly called on Member States of the Council of Europe to start the fight against forced marriages in their national policies, including criminalising such practices. Is it not a solid proof that in the present-day European societies a serious debate on the topic at stake is needed and can be classified as a very important one?

Moreover, in Part III of its judgment the ECtHR enlisted, e.g. such international material like the Recommendation 1805(2007) of the Parliamentary Assembly of the Council of Europe on blasphemy, religious insults and hate speech against persons on grounds of their religion and the Resolution of the European Parliament of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)). In both documents the decriminalisation of blasphemy is strongly recommended as an evident pattern of restriction of expression concerning religious or other beliefs.[17] Unfortunately, one could hardly find any further reference to the above-mentioned documents in the ECtHR judgment in the present case. Likewise, the arguments of the third-party intervener – the European Centre for Law and Justice[18] – which submitted the factual basis for the E.S.'s value judgments were not taken into account in the final decision of the European judges.

In the context of the above-cited available sources only, it could be difficult to accept that the applicant's statements were totally ungrounded as to the facts. In the case of the domestic courts, it seems that in order to justify their own interpretation (or to be honest "extra-interpretation"), they chose and separated some parts of E.S.'s speech. Accordingly, in my opinion, the careful reading of the whole E.S.'s presentation (relying on the version published in the judgment and taking this as an original) can lead to the conclusion that it was rather the criticism – from the present European standards perspective – of a certain custom sanctioned by Islam, important for a discussion in European democratic society, and not a direct "attack" on the Prophet as such. Moreover, one cannot forget that the whole event took place in the course of a "heated" discussion, full of emotional moments. Interestingly enough, the ECtHR quoted the arguments of the applicant that "the impugned statements had been made in the context of an objective and lively discussion, where they could not be revoked anymore", but – contrary to the previous case law – it found them unconvincing.[19]

Maybe the above attitude of the ECtHR should be viewed in the context of a tragic and painful "lecture" that Europe experienced after the publication in 2005 of the article entitled *Muhammeds ansight* in the Danish journal "Jyllands-Posten", which reprinted the Muslim cartoons by the French tabloid "Charlie Hebdo"?[20]

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[16] RES 2233(2018), paras. 1 and 2.

[17] *E.S. v. Austria*, § 26, 31.

[18] *Ibid.*, § 38.

[19] *Ibid.*, § 53. See also a reference to judgment in the case of *Gündüz v. Turkey* of 4 December 2003, application no. 35071/97.

[20] For more see: N. Cox, *The Freedom to Publish 'Irreligious' Cartoons*, Human Rights Law Review No. 16, 2016, pp. 195–221; K. Lemmens, *'Irreligious' Cartoons and Freedom of Expression: A Critical Reassessment*, Human Rights Law Review No. 18, 2018, pp. 89–109.

Bearing this in mind, however, one could risk a thesis that the European judges (like most of the Europeans nowadays) are simply afraid of provoking potential aggression on the part of some orthodox Muslim communities. If so, I dare say, Europe will be in trouble as its main human rights protectors appear to weaken.[21]

Secondly, there is also an additional side of the story, namely this connected with the equal protection of symbols of worship of another great religion, i.e. the Roman Catholicism. The ECtHR has already had several occasions to deal with cases which were "touching on" symbols considered sacred by Roman Catholics. This was the case of the Cross,[22] then the assumption that the Bible covers the "seeds of anti-Semitism"[23] and, lastly, using in the purely commercial context, such prominent religious figures as Jesus and Mary[24]. Let us stress that in all of those cases the state's intervention into the freedom of particular applicants' expression was found to be a violation of Article 10 ECHR. Thus, in all those cases the ECtHR accepted the special and crucial position of freedom of expression in a modern democratic society as it was found in earlier case law.[25]

Surely, it would be difficult to defend the thesis that the gravity or burden of each of the case is comparable. Dedications could, however, be a significant contribution to *ius commune europaeum* if they are justified by special reasons and provided with well-grounded *rationes decidendi*.[26]

Nonetheless, at least the problem of accusation and punishing of a professional researcher and journalist (*per analogiam* to the E.S. case) expressing an opinion that "the fulfilment of the Old Covenant in the New, and the superiority of the latter (…) led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed"[27] seems to be equally harmful to Catholics, even if this statement was published in the course of a historic and theological debate.[28]

Lastly, still another point is worth mentioning in the present paper which is connected with the test of proportionality of the state's reaction in the cases under analysis, i.e. the level of severity of punishments. Both in *Giniewski* and *E.S*. cases the

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[21] This can be easily expressed just by a question: Is Islamophobia knocking on Strasbourg's door? Actually, several years ago I expressed some worries about a true neutrality of the ECtHR judges in cases of sensitive political content, see B. Gronowska, *The European Court of Human Rights and Potential Dangers for its Independence. Some Controversies*, [in:] J. Jaskiernia (ed.), *Uniwersalny i regionalny wymiar ochrony praw człowieka. Nowe wyzwania – nowe rozwiązania*, Warsaw 2014, pp. 693–702. This element of "fear behind the scene" was also invoked by G. Puppinck, *The ECtHR Holds Anti-Blasphemy Law*, https://ecjl.org/free-speach/echr/blasphemy-crime-the-echr (accessed on 8/12/2018).

[22] Case of *Lautsi v. Italy*, judgment of 3 November 2009, application no. 308114/08. The ECtHR changed its view and contested the Grand Chamber on 18 March 2011 in which it found non-violation of Article 10 ECHR.

[23] Case of *Giniewski v. France*, judgment of 31 January 2006, application no. 64016/00.

[24] Case of *Sekmadienis Ltd. v. Lithuania*, judgment of 30 January 2018, application no. 69317/14.

[25] The most relevant in this regard was the reference to possibility of expressing the "information" or "ideas" that also can "offend, shock or disturb", see e.g. the case of *Handyside v. the United Kingdom*, judgment of 7 December 1976, application no. 5493/72, § 49.

[26] Compare with A. Paulus, *International Adjudication*, [in:] S. Besson, J. Tasioulas (eds), *The Philosophy of International Law*, Oxford 2010, p. 220.

[27] *Giniewski v. France*, § 14, p. 3.

[28] *Ibid*. § 51.

ECtHR faced quite similar situations but reached totally different final conclusions, the second of which was evidently to the detriment of E.S. It would be hard to find any additional arguments in the ECtHR reasoning included in the judgment.

Surely, I am able to express my apology and empathy to those who has felt hurt and abused by the whole situation caused by E.S.'s presentations.[29] Nonetheless, the European human rights justice system should be strong enough to eliminate any possible doubts concerning its impartiality and independence. Therefore, alike cases should be provided with alike justification. Otherwise, a very detrimental impression can be created that this system cannot defend itself against any sort of "blackmailing", depending on the pressure of extra-legal factors. Thus, it makes me wonder whether the strong foundations upon which the ECtHR was built are similarly strong in our present social realities.

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[29] The case met with an immediate reaction of other writers who deal with the problem, still with other arguments, connected with the classic case of *Otto-Preminger-Institute v. Austria*, see e.g. S. Smet, *E.S. v. Austria…*; G. Puppinck, *The ECtHR…*

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GLOSS ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 25 OCTOBER 2018 IN CASE *E.S. V. AUSTRIA*, APPL. NO. 38450/12

Summary

The gloss deals with the judgment issued by the ECtHR on 25 October 2018 concerning freedom of expression as provided for in Article 10 ECHR. In the case of *E.S. v. Austria* the ECtHR agreed with domestic courts that the applicant's statements concerning the marriage life style of Muhammad were "inciting hatred or religious intolerance" read in the light of Article 188 of the Austrian Criminal Code. During the public debate, the applicant made a reference to "paedophilia", while talking about 56-year-old Muhammad having sexual intercourse with his 9-year-old wife Aisha. The main thesis of the author of this gloss is contrary to the ECtHR judges' viewpoint, especially in the context of the facts of the case and the previous Strasbourg case law. Going further, the author presents her fears that the visible and ongoing Islamisation of Europe starts to have its potential impact on the judicial authorities and their attitudes in cases connected with some sensitive issues of Islam. The author's opinion concerns both the domestic and regional courts' attitudes.

Keywords: freedom of expression, margin of appreciation, religious tolerance, paedophilia, Muhammad

GLOSA DO WYROKU EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA Z DNIA 25 PAŹDZIERNIKA 2018 R. W SPRAWIE *E.S. PRZECIWKO AUSTRII*, SKARGA NR 38450/12

Streszczenie

Glosa dotyczy wyroku wydanego przez Europejski Trybunał Praw Człowieka (ETPCz) w dniu 25 października 2018 r., dotyczącego swobody wypowiedzi w rozumieniu art. 10 Europejskiej Konwencji Praw Człowieka. W sprawie *E.S. przeciwko Austrii* ETPCz zaakceptował stanowisko

sądów krajowych, które uznały stwierdzenia powódki dotyczące stylu pożycia małżeńskiego Mahometa jako „wzniecające nienawiść lub nietolerancję religijną” w rozumieniu art. 188 austriackiego kodeksu karnego. W trakcie debaty publicznej powódka nawiązała do „pedofilii”, rozważając fakt seksualnego współżycia 56-letniego Mahometa z jego 9-letnią żoną Aiszą. Główna teza autorki niniejszej glosy jest odmienna, szczególnie w kontekście okoliczności analizowanej sprawy oraz w świetle dotychczasowej strasburskiej linii orzeczniczej. W dalszej kolejności, autorka wyraża swoje obawy o to, że widoczna i postępująca islamizacja Europy zaczyna wywierać potencjalny wpływ na władze sądowe i ich postawy w sprawach dotyczących szczególnie drażliwych zagadnień Islamu. W opinii autorki zjawisko to dotyczy postaw zarówno sądów krajowych, jak i regionalnych.

Słowa kluczowe: swoboda wypowiedzi, margines swobody oceny, tolerancja religijna, pedofilia, Mahomet

COMENTARIO A LA SENTENCIA DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS DE 25 DE OCTUBRE DE 2018 EN LA CAUSA *E.S. CONTRA AUSTRIA*, CASO NÚM. 38450/12

Resumen

El comentario se refiere a la sentencia dictada por el Tribunal Europeo de Derechos Humanos (TEDH) el 15 de octubre de 2018 relativo a la libertad de expresión conforme con el art. 10 de la Convención Europea de Derechos Humanos. En el caso *E.S. contra Austria*, el TEDH aceptó la posición de tribunales nacionales que consideraron que afirmaciones de la demandante relativos al estilo de la vida matrimonial de Mahomet “suscitaron odio o intolerancia religiosa” de acuerdo con art. 188 del código penal austriaco. Durante el debate público la demandante hizo referencia a “pedofilia” refiriéndose a las relaciones sexuales de Mahomet (56 años) con su mujer Aisha (9 años). La principal tesis de la autora es diferente, en particular en el contexto de circunstancias del caso analizado y a la luz de la línea jurisprudencial de Estrasburgo. La autora demuestra su preocupación que la manifiesta y progresiva islamización de Europa empieza a tener influencia potencial a las autoridades judiciales y a su postura en casos que versan sobre cuestiones particularmente delicadas de islam. A juicio de autora, este fenómeno afecta tanto a los tribunales nacionales como a los regionales.

Palabras claves: libertad de expresión, margen de juicio libre, tolerancia religiosa, pedofilia, Mahomet

ГЛОССА К ПОСТАНОВЛЕНИЮ ЕВРОПЕЙСКОГО СУДА ПО ПРАВАМ ЧЕЛОВЕКА ОТ 25 ОКТЯБРЯ 2018 ГОДА ПО ДЕЛУ *Е.С. В ОТНОШЕНИИ АВСТРИИ*, ЖАЛОБА № 38450/12

Резюме

Глосса касается постановления, принятого в Европейском суде по правам человека от 25 октября 2018 года, в отношении свободы высказывания в толковании ст. 10 Европейской конвенции о правах человека. По делу *Е.С. в отношении Австрии* ЕСПЧ принял позицию национальных судов, которые признали утверждения истицы, касающиеся стиля семейных отношений Мухаммеда, как «разжигание ненависти или религиозной нетерпимости» в понимании ст. 188 Уголовного кодекса Австрии. Во время публичных дебатов истица упоминала о факте «педофилии», ссылаясь на сексуальную связь 56-летнего Мухаммеда с его 9-летней женой Аишей. Основной тезис автора настоящей глоссы имеет отличительный характер, в особенности в контексте обстоятельств рассматриваемого дела и в свете нынешней страсбургской прецедентной судебной практики. Далее автор выражает опасения, что заметная и прогрессирующая исламизация Европы начинает оказывать потенциальное воздействие на судебные органы и их отношение к вопросам, касающимся наиболее чувствительных вопросов ислама. По мнению автора, это явление касается позиций как национальных, так и региональных судов.

Ключевые слова: свобода высказывания, предел свободы оценки, религиозная терпимость, педофилия, Мухаммед

GLOSSE ZUM URTEIL DES EUROPÄISCHEN GERICHTSHOFES FÜR MENSCHENRECHTE VOM 25. OKTOBER 2018 IN ZIVILSACHE *E.S. GEGEN ÖSTERREICH*, KLAGE NR. 38450/12

Zusammenfassung

Die Glosse betrifft das am 25. Oktober 2018 seitens des Europäischen Gerichtshofes für Menschenrechte (EGM) veröffentlichten Urteils betreffend der Aussagefreiheit in Anbetracht des Art. 10 der Europäischen Konvention zum Schutz der Menschenrechte (EKSM). In Zivilsache *E.S. gegen Österreich* hat der EGM die Meinungen der Landesgerichte akzeptiert und anerkannt, welche die Feststellungen der Klägerin bezüglich des Ehelebensstils von Mahomet als „Hass- und Religionsintoleranz entfachendes" im Sinne von Art. 188 des österreichischen Strafgesetzbuches. Im Verlauf einer öffentlichen Debatte nahm die Klägerin Bezug auf „Pädophilie", die Tatsache des Geschlechtsverkehrs vom 56-jährigen Mahomet mit seiner 9-jährigen Frau Aisha erwogen zu haben. Die Hauptthese der Autorin dieser vorliegenden Glosse ist unterschiedlich, besonders im Zusammenhang der Gegenstände der erkundeten Zivilsache und angesichts der bisherigen Straßburger Rechtsprechungsgrundlinie. Im Nachhinein äußert die Autorin ihre Befürchtungen, dass die sichtbare und fortschreitende Islamisierung Europas potenziellen Einfluss auf die Gerichtsgewalt und deren Standpunkt in Sachen besonders empfindlicher Islamangelegenheiten einzuprägen gewinnt. Nach Meinung der Autorin betrifft dieses Phänomen sowohl Landes-, als auch Amtsgerichte.

Schlüsselwörter: Aussagefreiheit, Aussagefreiheitsspanne, Religionstoleranz, Pädophilie, Mahomet

GLOSE À L'ARRÊT DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME DU 25 OCTOBRE 2018 DANS L'AFFAIRE *E.S. C. AUTRICHE*, PLAINTE N° 38450/12

Résumé

La glose concerne l'arrêt rendu par la Cour européenne des droits de l'homme (CEDH) le 25 octobre 2018, concernant la liberté d'expression au sens de l'article 10 de la Convention européenne des droits de l'homme. Dans le cas de *E.S. contre l'Autriche*, la Cour européenne des droits de l'homme a accepté la position des tribunaux nationaux qui ont considéré les affirmations de la demanderesse concernant le style de mariage de Mohammed comme «incitant à la haine ou à l'intolérance religieuse» au sens de l'article 188 du code pénal autrichien. Au cours du débat public, la demanderesse s'est référé à «la pédophilie», en considérant le fait de la coexistence sexuelle de Mohammed, âgé de 56 ans, avec son épouse Aisha, âgée de 9 ans. La thèse principale de l'auteur de cette glose est différente, notamment dans le contexte des circonstances de l'affaire analisée et à la lumière de la jurisprudence actuelle de Strasbourg. Ensuite, l'auteur exprime ses craintes que l'islamisation visible et progressive de l'Europe commence à exercer une influence potentielle sur les autorités judiciaires et leur attitude dans les affaires concernant des questions particulièrement sensibles de l'islam. L'auteur est d'avis que ce phénomène concerne les attitudes des tribunaux nationaux et régionaux.

Mots-clés: liberté d'expression, marge de liberté d'évaluation, tolérance religieuse, pédophilie, Mohammed

GLOSSA ALLA SENTENZA DELLA CORTE EUROPEA DEI DIRITTI DELL'UOMO DEL 25 OTTOBRE 2018 NELLA CAUSA *E.S. CONTRO AUSTRIA*, RICORSO N. 38450/12

Sintesi

La glossa riguarda la sentenza della Corte europea dei diritti dell'uomo (CEDU) del 25 ottobre 2018 sulla libertà di espressione ai sensi dell'articolo 10 della Convenzione europea dei diritti dell'uomo. Nella sentenza *E.S. contro Austria*, la Corte europea dei diritti dell'uomo ha accettato la posizione dei tribunali nazionali, i quali hanno riconosciuto che le dichiarazioni della ricorrente relative allo stile di vita coniugale di Maometto che "incita all'odio religioso o all'intolleranza" ai sensi dell'articolo 188 del codice penale austriaco. Durante il dibattito pubblico, la ricorrente ha fatto riferimento alla "pedofilia" quando si considera il rapporto sessuale di Maometto di 56 anni con sua moglie Aisha di 9 anni. La tesi principale dell'Autrice di questa glossa è diversa, soprattutto nel contesto delle circostanze del caso di specie e alla luce dell'attuale linea giurisprudenziale di Strasburgo. Di seguito, l'Autrice esprime la sua preoccupazione per il fatto che l'islamizzazione visibile e progressiva dell'Europa comincia ad avere un impatto potenziale sulle autorità giudiziarie e sui loro atteggiamenti in questioni riguardanti argomenti particolarmente delicati dell'Islam. Secondo l'Autrice, questo fenomeno riguarda sia gli atteggiamenti dei tribunali nazionali che regionali.

Parole chiavi: libertà di espressione, margine di discrezionalità, tolleranza religiosa, pedofilia, Maometto

Cytuj jako:

Gronowska B., *Gloss on the judgment of the European Court of Human Rights of 25 October 2018 in case E.S. v. Austria, appl. no. 38450/12 [Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 25 października 2018 r. w sprawie E.S. przeciwko Austrii, skarga nr 38450/12]*, „Ius Novum" 2019 (Vol. 13) nr 2, s. 292–303. DOI: 10.26399/iusnovum.v13.2.2019.27/b.gronowska

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