ISSN 1897-5577

Ius Novum

Vol. 13
Number 4
2019

october–december

DOI: 10.26399/iusnovum.v13.4.2019

English edition

quarterly of the faculty of law and administration
of lazarski university

Warsaw 2019

Pełne teksty artykułów w języku polskim wraz ze spisem treści i streszczeniami w językach polskim i angielskim są zamieszczone na stronie internetowej:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/
oraz w serwisie The Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

The texts of articles in the Polish language with contents and summaries in Polish and English are available on:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/
and the service of the Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

The journal is included in The European Reference Index for the Humanities and the Social Sciences (ERIH PLUS)

ISSN 1897-5577

Zadania:
1. Kontynuacja wydawania anglojęzycznej wersji kwartalnika Ius Novum
2. Stworzenie abstraktu każdego artykułu publikowanego w Ius Novum w językach: niemieckim, francuskim, hiszpańskim, włoskim i rosyjskim

są finansowane w ramach umowy nr 886/P-DUN/2019 z dnia 2 sierpnia 2019 r., ze środków Ministra Nauki i Szkolnictwa Wyższego przeznaczonych na działalność upowszechniającą naukę.

Ministerstwo Nauki
i Szkolnictwa Wyższego

DOM WYDAWNICZY ELIPSA

Desktop publishing, print and cover:
ELIPSA Publishing House
ul. Inflancka 15/198, 00-189 Warsaw
tel. +48 22 635 03 01,
e-mail: elipsa@elipsa.pl, www.elipsa.pl

LAZARSKI UNIVERSITY PRESS
02-662 Warsaw, ul. Świeradowska 43
tel. +48 22 54 35 450
www.lazarski.pl
wydawnictwo@lazarski.edu.pl

CONTENTS

ARTICLES

COMMENTS

SPIS TREŚCI

ARTYKUŁY

KOMENTARZE

ÍNDICE

ARTÍCULOS

COMENTARIOS

СОДЕРЖАНИЕ

СТАТЬИ

КОММЕНТАРИИ

INHALTSVERZEICHNIS

ARTIKEL

KOMMENTARE

TABLE DES MATIÈRES

ARTICLES

COMMENTAIRES

INDICE

ARTICOLI

COMMENTI

FOOD FRAUD: CRIMINOLOGICAL PERSPECTIVE AND LIMITS OF PENAL RESPONSE IN POLAND

MICHAŁ LECIAK*
NATALIA DAŚKO**

DOI: 10.26399/iusnovum.v13.4.2019.41/m.leciak/n.dasko

1. FOOD FRAUD PHENOMENON

Agricultural and food production is one of the biggest economic sectors in the European Union, which provides over 44 million work places and is worth 715 billion euros annually.[1] Because of that, it is one of the areas that are most vulnerable to fraud, i.e. forfeiture of food products and beverages as well as other fraudulent practices. The problem of counterfeit food afflicts the European Union to a greater and greater extent, despite high standards of the EU regulations that are in force in the field of food and nutrition. There are no statistical data that make it possible to precisely determine the scale of actual fraud in the sector, however, according to all the available data, the phenomenon is escalating.[2]

Fraud in the food sector often remains undetected, especially if it does not inflict direct threat to health or life and does not result in incidents drawing the public attention. On average, consumers do not devote much attention to food products they buy, they do not analyse their characteristics and do not use them for a long period as in case of clothes or electronic equipment. Most often, they only decide whether a given product is tasty or not, and only detailed examination may confirm the product contents and its potential counterfeiting. Due to that, detection of fraudulent practices in this industry, like in the pharmaceutical industry, is much more difficult than in other sectors.

* PhD, Assistant Professor at the Faculty of Law and Administration of Nicolaus Copernicus University in Toruń; e-mail: leciak@umk.pl; ORCID: 0000-0002-2462-5545
** PhD, Assistant Professor at the Faculty of Law and Administration of Nicolaus Copernicus University in Toruń; e-mail: ndasko@umk.pl; ORCID: 0000-0001-9122-4883

1 European Parliament, *Report on the food crisis, fraud in the food chain and the control thereof (2013/2091(INI))*, 2013, p. 4.

2 *Ibid.*, pp. 5 and 7.

The phenomenon referred to as food fraud covers a series of different practices. The most important ones include: counterfeiting of food, i.e. branding food of poorer quality (most often its packaging) with a forged or original trademark that a seller is not authorised to use or unauthorised branding of products with a geographical indication; using cheaper or poorer substitutes, or even dangerous substances, for the right ingredients (often the key ones); inappropriate labelling consisting in misinformation about the ingredients by skipping information about the use of some of them; inappropriate labelling of animal species used in meat and seafood products; inappropriate information about weight; selling standard food as organic; unauthorised use of a quality symbol specifying, e.g. the animal origin or well-being; labelling fish as originating from their natural environment or selling a worse type of fish species as a higher category or a more expensive species as well as providing a false "best before" or expiry date and selling food fraudulently labelled, often after its expiry date.[3]

2. COUNTERFEITING OF FOOD IN THE EU CUSTOMS AUTHORITIES' STATISTICS

It is estimated that global turnover of counterfeit foodstuff and beverages that infringe intellectual property rights, including first of all the protection of the rights to trademarks and geographical indications, is worth 49 billion dollars annually.[4] However, there is a lack of data determining the scale of the phenomenon in the European Union. However, the European Commission reports on the customs authorities' operations in the field of exercising intellectual property rights at the EU borders that make it possible to analyse current regional trends concerning the phenomenon.

In 2017, the EU countries' customs authorities arrested over eight million counterfeit food products and beverages at their borders. This means that foodstuff constituted the biggest group (24%) of all arrested counterfeit products. Other products fell behind: toys (11%), cigarettes (9%) and clothes (7%). The figures show a new alarming trend because earlier, the most abundant categories of counterfeit goods arrested at the EU borders included clothes, footwear and accessories, while since 2016 a dynamic growth in counterfeit foodstuff and beverages, and cigarettes has been observed.[5]

---

[3] *Ibid.*, p. 7. Compare N. Martín, L. Quackelbeen, M. Simonato, *Food Regulation and Criminal Justice*, Maklu Publ. 2016, p. 120 et seq.; M.R. McGuire, T.J. Holt, *The Routledge Handbook of Technology, Crime and Justice*, London 2017, p. 295 et seq.

[4] European Union Intellectual Property Office (EUIPO), *Counterfeiting of foodstuff, beverages and agricultural products*, 2016, p. 3.

[5] European Commission, *Report on the EU customs enforcement of intellectual property rights: results at the EU border 2017*, Luxembourg 2018, p. 6.

Table 1. Food products and beverages arrested by customs authorities at the EU borders in 2017 by their number and market value

Category	Number of arrested goods	Market value of original counterparts (in euro)
Food products	7,519,574	2,274,866
Alcohol	415,670	237,654
Other beverages	97,171	90,572

Source: European Commission, *Report on the EU customs enforcement of intellectual property rights: results at the EU border 2017*, Luxembourg 2018, p. 20.

China is the main country of origin of counterfeit foodstuff (as in case of other categories of counterfeit products), which accounts for 88% of all products arrested at the EU borders annually.[6] However, a surprisingly big amount of counterfeit foodstuff arrested at the EU borders in 2017 originated from Syria (these were mostly sweets).[7] It is hard to unambiguously determine whether Syria is really the place of production, which might seem to be difficult due to the political and economic situation in this country, or it served as a transit country for the transportation of counterfeit products with forged trade documents.

Table 2. Food products and beverages arrested by customs authorities at the EU borders in 2017 by countries of origin

Category	Number of products that were not released, in %, by country of origin		
Food products	China 79.87%	Hong Kong 8.19%	Syria 7.02%
Alcohol	Moldova 90.40%	Ukraine 6.29%	unknown 2%
Other beverages	US 100%		

Source: European Commission, *Report on the EU customs enforcement of intellectual property rights: results at the EU border 2017*, Luxembourg 2018, p. 23.

The big amount of counterfeit food arrested at the EU borders in 2017 shows what changes took place in the procedure of counterfeiting products in the food industry. Small-scale activities, mainly consisting in illegal manufacturing of alcohol, changed into a sophisticated large-scale industry.

Most of the counterfeit food is produced outside the European Union, mainly in China. However, arrests of illegal food products and beverages exported from Africa or South America show that the problem is not limited to one geographical region. Depending on the country of origin, various methods of transporting counterfeit goods to the EU are used. For example, China exports big amounts of goods divided

[6] Due to its special status, Hong Kong is listed as separate from China in the EU statistics.
[7] European Commission, *supra* n. 5, p. 15.

into consignments of small unit value. On the other hand, Panama exports relatively small amount of goods in consignments of big unit value. However, the analysis of arrests shows that an absolute majority of mass consignments of counterfeit food are shipped by sea or land.[8]

Counterfeiters often change transport routes from Asia and Middle East to Europe in order to limit the risk. For that purpose, counterfeit food is transported via a few states and entry points to Europe are often selected in countries where customs control is easier to go through, e.g. Italy or Central and Eastern Europe, including Poland. In addition, goods are most often provided with falsified trade documents. In many cases, the same shipping companies are used to transport legal and illegal goods. International criminal groups provide them with permanent and high income and, at the same time, influence the standards those companies meet, e.g. in the field of product control and documents connected with them.[9]

In recent years, the production of counterfeit foodstuff has also increased in Europe. It results from the fact that, regardless of higher risk at the stage of production, the costs of its transport, distribution and risk are much lower. Production sites are usually small factories hidden, e.g. in forests, and illegal immigrants are often the workforce employed in them.[10]

3. COUNTERFEIT FOOD DISTRIBUTION

Counterfeit food distribution is possible on the primary and secondary markets. In case of the primary market, consumers are misinformed in such a way that they are convinced that they buy original, high-quality products of full value, etc.[11] To achieve that, counterfeit food must resemble the original to the greatest extent possible and be distributed through such distribution channels that do not raise potential buyers' doubts concerning their nature, i.e. for example in shops (traditional and online ones). However, online trade is one of the main reasons for dynamic growth in the phenomenon of food counterfeiting. Buying a product online, a consumer cannot assess the features of the product. On the other hand, the sites of online shops (or other Internet points of sale) often look very professional and do not raise any suspicions of a potential buyer.[12]

On the secondary market, on the other hand, counterfeiters do not cheat customers on originality or quality of products and do not hide their nature.[13] However, foodstuff and alcohol are not very popular on such a market. It is hard to imagine reasons why consumers would voluntarily and consciously buy counterfeit food. As a result, most of such foodstuff and beverages must at some stage get to the legal

---

8 European Union Intellectual Property Office (EUIPO), *supra* n. 4, p. 3.
9 *Ibid.* p. 11.
10 *Ibid.* p. 4.
11 N. Daśko, *Prawnokarna ochrona znaków towarowych*, Warszawa 2017, p. 37.
12 *Ibid*., pp. 60–62.
13 *Ibid*., p. 37.

supply chain.[14] For the purpose of that, counterfeit food has high quality labels and packaging, often identical to original products because these are the elements that first of all can raise suspicions of a potential buyer. It is less often the taste and quality of the product. Moreover, buying everyday products such as food and alcohol, consumers do not pay so much attention to the assessment of a product as, e.g. in the case of luxury goods, which a client, because of their price, checks many times and does it carefully.

In addition, counterfeiters choose such places of distribution that are more vulnerable to counterfeit food penetration, which are characterised especially by multilevel structure of the supply chain facilitating infiltration. In the case of food and beverages, restaurants, bars, street-food stands and night clubs are such points of sale because consumers do not have access to product packaging there and have a prepared dish or a drink served and cannot assess their originality or the quality of particular ingredients.[15]

4. INVOLVEMENT OF ORGANISED CRIME

The production and distribution of counterfeit foodstuff is mainly the activity in which organised criminal groups are involved. They form strong hierarchical structures, such as e.g. the mafia and loose criminal networks that often cooperate. Due to the nature of the business, the cooperation is international. Law enforcement agencies and organisations involved in the fight against food counterfeiting identify a series of links between criminal groups from various countries. Chinese, Italian and Turkish criminal groups that cooperate with local criminal structures in the territory of particular states play a major role in the operations.[16]

Huge profit is the reason behind criminal groups' great interest in counterfeiting food. The analysis of various areas of their operations shows that profits obtained by criminal organisations from counterfeiting food products (of all categories) exceed those from drug trafficking.[17]

Due to criminal groups' strong position in Italy, counterfeiting food is a special problem there. According to Coldiretti (farmers' union) report, based on the findings of the investigations conducted by specialist agencies for the fight against crime committed in the field of production and sale of food, the number of detected crimes connected with counterfeiting food increased by 59% in 2018. Total counterfeit food turnover of organised criminal groups is estimated to be 24 billion euros annually.[18]

---

[14] European Union Intellectual Property Office (EUIPO), *supra* n. 4, p. 3.

[15] *Ibid*., p. 7.

[16] *Ibid*., p. 19.

[17] N. Daśko, *supra* n. 11, pp. 85–86; European Union Intellectual Property Office (EUIPO), *supra* n. 4, p. 19.

[18] A. Mandel, *We Włoszech żywność fałszowana jest na potęgę*, https://www.rp.pl/Przemysl-spozywczy/190219560-We-Wloszech-zywnosc-falszowana-jest-na-potege.html?fbclid=IwAR09_NiVG7SKZqoyBhViMLb1Mpx7Mhq1fBUj5d-OfJVCpPjbV-X5NHqRAKs (accessed 18.02.2019).

According to another report prepared by the Ansa agency, Cosa Nostra alone earns 14 billion euros annually on counterfeiting food.[19]

Criminal groups' involvement in the food counterfeiting operations does not result only from the opportunity to obtain huge profits but also from the fact that the operations are connected with much lower risk because criminality connected with counterfeiting products, including counterfeiting foodstuff, attracts less attention of law enforcement agencies in comparison with other areas of organised crime groups' activity. What is more, the business provides organised crime groups with an opportunity of money laundering, which is next reinvested in legal business activities.[20]

The criminal groups' *modus operandi* in recent years concerns, in particular, the process of decreasing the risk of actual operations and making it possible to freely reinvest money in other illegal operations. Such food processing businesses controlled by organised crime may compete with legal businesses, and other entities, e.g. supermarkets, buy food products from them as they are convinced that the goods are legal, originating from legal companies. The case of the Mozzarella King, G. Mandara, is an example of the pattern of the operations. According to the law enforcement agencies, the Mandara Group, the biggest Italian producer of *mozzarelli di bufala* has been controlled by the Camorra mafia since 1983. The case of a milk producer, Euromilk, which was purchased by the mafia for the purpose of creating a distribution chain, i.e. in order to supply counterfeit milk to supermarkets, received equally widespread media coverage.[21]

5. MOST FREQUENTLY COUNTERFEITED FOODSTUFF CATEGORIES

The food that is most frequently subject to counterfeiting practices include: olive oil, fish, organic products, cereals, honey, coffee, tea, spices, wine, some fruit juices, milk and meat.[22]

The first famous case that drew the attention of public opinion as well as the EU law enforcement agencies to the scale of the phenomenon of food counterfeiting was the horse meat scandal in Europe in 2013. Beef counterfeiting was revealed when horse meat was found in hamburgers in Ireland and the United Kingdom. The investigation conducted on a large scale revealed that horse meat was added to beef in other European countries, including Poland. Most often these were intermediaries that counterfeited the foodstuff. Companies that bought meat from slaughterhouses counterfeited it and sold it to manufacturers of various meat products.[23] It is worth highlighting that horse meat quite often appears in cases concerning food counterfe-

---

19 N. Daśko, *supra* n. 11, p. 101.

20 *Ibid*., pp. 90–93.

21 European Union Intellectual Property Office (EUIPO), *supra* n. 4, p. 19.

22 European Parliament, *supra* n. 1, p. 7.

23 *Afera z koniną: poważne kłopoty przedsiębiorców*, https://www.polskieradio.pl/7/1691/Artykul/792304,Afera-z-konina-powazne-klopoty-przedsiebiorcow (accessed 11.02.2019).

iting because one of the fraudulent practices in this area is the introduction of horse meat treated with phenylbutazone to sale as edible horse meat.[24]

The Fipronil contamination was another famous case in the field of food counterfeiting. In 2017, Fipronil contamination of eggs and poultry caused by the use of the chemical to combat feather mites among chicken was detected in 15 European Union countries, Switzerland and Hong Kong.[25]

Fraudulent practices on a big scale were also reported in fish industry in 2016. Due to the scale of the phenomenon, the European Commission also monitored the case. One of the commonly used illegal practices in this industry consists in the sale of tuna as fresh, while it should be sold as processed. Only tuna that was caught by ships capable of freezing it in the temperature of -18°C and maintaining that temperature until arrival at the destination, may be sold as fresh. On the other hand, tuna that is kept in brine (-9°C) should be canned. Another common illegal practice consists in the change of tuna colour with the use of additives (legal substances such as, e.g. vegetable extract and salt, or illegal ones such as carbon monoxide). Those additives change the fish colour so that it can be sold as fresh. The EU Directorate-General for Health and Food Safety estimates that the profit generated thanks to those practices amounts to 200 million euros annually.[26]

The problem of large-scale counterfeiting also concerns honey, which is one of the most often counterfeited products. In 2017, after numerous reports of the detection of honey counterfeited with the use of paraffin and stearin, and allergies and health complications resulting from that, the European Commission dealt with the phenomenon.[27]

Fraud connected with the trend to maintain healthy eating habits based on organic food is developing dynamically. Since 2015, a fast growth has been observed in unauthorised labelling of products as "eco", "bio" and "organic", and selling them at higher retail prices while, in fact, they do not meet the standards for such products.[28] It concerns, inter alia, vegetables, fruit, oil, flour, and especially eggs sold as organic ones.[29]

Other examples of fraud that is popular include selling road salt as table salt, using dioxin-contaminated fats in the production of animal fodder, and erroneous labelling of fish and seafood products.[30]

The alcohol market is a large field of fraud in food processing industry. One of the common and most dangerous types of fraud in this area consists in the use of methyl alcohol in spirit. The use of original alcohol producers' bottles and filling them with alcohol of lower quality is another example. Illegal production of alcohol based on this method in three illegal factories counterfeiting well-known alcohol

---

[24] European Parliament, *supra* n. 1, p. 4.

[25] European Commission, *The EU Food Fraud Network and the System for Administrative Assistance & Food Fraud, Annual Report 2017*, p. 15.

[26] *Ibid*.

[27] *Ibid*., p. 16.

[28] *2017 Situation Report on Counterfeiting and Piracy in the European Union. A joint project between Europol and the European Union Intellectual Property Office*, p. 49.

[29] European Parliament, *supra* n. 1, p. 4.

[30] *Ibid*.

brands was detected in Greece in 2016. The alcohol was produced in Greece and original empty bottles were smuggled from Bulgaria. Law enforcement agencies arrested 7,439 bottles and 4,000 labels. The criminal group involved in the operations cooperated with another criminal network managed by a deputy director of an off-licence shop chain. The alcohol, mainly whisky and vodka, was sold in bars and nightclubs in the region of Attica.[31]

Since 2011, Europol in cooperation with Interpol has been regularly conducting the OPSON operations, which aim to combat products that are counterfeit and do not meet the requirements for foodstuff. 65 countries (22 EU member states and 43 non-EU countries) and 20 private partners took part in the latest edition of the operation, OPSON VI, conducted from December 2016 to March 2017. In the course of OPSON VI, 13,407.60 tonnes, 26,336,305.3 litres and 11,118,832 items of food and beverages counterfeit or not matching norms were arrested. The total value of illegal products reached ca. 236 million euros. Activities within OPSON VI resulted in the elimination of seven organised crime groups involved in illegal production of food and smuggling. Alcohol was the number one product arrested during the operation (in the former edition, OPSON V, these were additives such as oil, spices and sauces). Law enforcement agencies closed at least 183 illegal distilleries and arrested production materials from special filling machines to manufacture excise stamps, bottle tops and labels. The second most abundant category of arrested products was meat (over 5 tonnes).[32]

6. CONSEQUENCES FOR CONSUMERS

Counterfeit foodstuff does not meet any quality criteria and poses a risk to customers' health and safety. Counterfeit food is produced and distributed in conditions that do not meet adequate norms; they are often places that do not meet any sanitary norms, have no necessary equipment for the production of food, do not ensure adequate storage temperature, etc.

Counterfeit food may be sold after the expiry date, may contain toxic ingredients, contaminants or other substances that are not edible. Counterfeit foodstuff may cause death, poisoning, irreversible damage to health, allergies and other complications.

7. NEED OF PENAL RESPONSE

The above-presented picture of the functioning of counterfeit food market and the phenomena accompanying it result in the need to consider a potential penal response to them. Thus, an analysis of national normative solutions seems to be necessary in order to establish whether they can constitute a sufficient and efficient

---

[31] *2017 Situation Report*, *supra* n. 28, p. 50.

[32] Europol&Interpol, *Operation OPSON VI. Targeting counterfeit and substandard foodstuff and beverage. December 2016–March 2017*, p. 3.

mechanism of preventing and combating the discussed phenomenon. First of all, it may be signalled that the repressive legal response towards perpetrators of food fraud in Poland is based on the constructs of the types of offences, misdemeanours and administrative torts.

Among many categories of the discussed conduct, the most common are those consisting in labelling particular products with a forged or original trademark. Perpetrators are not authorised to use such trademarks. Unauthorised labelling of products with a geographical indication is similar in nature. In Polish legislation, there is a certain group of regulations mainly laid down in the Act of 30 June 2000: Industrial Property Law.[33]

From the point of view of the presented issues, Article 305 paras 1–3 IPL should be recognised as the most important provision. In accordance with it, it is forbidden to label a product with a forged trademark, including the European Union forged trademark, registered trademark or the European Union registered trademark by a perpetrator that is not authorised to use it or the one that is involved in the trade in products labelled with such trademarks. What is important, such a perpetrator must each time act to introduce such a product to the market. Such activities carry a penalty of a fine, limitation of liberty or deprivation of liberty for up to two years (Article 305 para. 1 IPL). If a perpetrator treats the commission of this crime as a permanent source of income or commits it against a product of big value, he/she is subject to a penalty of deprivation of liberty for a period of six months to five years (Article 305 para. 3 IPL). A case of lesser significance carrying a penalty of a fine was also introduced (Article 305 para. 2 IPL). If a perpetrator of an act under Article 305 para. 3 is convicted, a court adjudicates the forfeiture of materials and tools as well as technical measures that served or were designed to commit the crime. If such materials, tools or technical measures were not a perpetrator's property, a court can adjudicate their forfeiture. The measure is also optional in the case of conviction under Article 305 paras 1 and 2 IPL. In such a case, materials, tools and technical measures used or designed to commit crime are subject to forfeiture even if they were not a perpetrator's property (Article 306 paras 1 and 2 IPL).

However, an analysis of the practice of the administration of justice in cases concerning offences under Article 305 of the above-mentioned Act shows that the business of counterfeiting products in Poland is getting out of control of law enforcement agencies.[34] Indeed, they focus on combating trafficking in counterfeit products and their production is of no interest to them. In addition, symbolic fines ruled by national courts do not deter perpetrators from committing those offences, especially as organised crime groups are often involved in them. What is also important, the above-mentioned offence is subject to prosecution at the request of the aggrieved (Article 310 IPL).[35]

The legislator recognises the above-discussed categories of conduct as offences also based on the provisions of the Criminal Code (henceforth CC). Article 306 CC

---

[33] Consolidated text, Dz.U. 2017, item 776; henceforth IPL.

[34] See N. Daśko, *supra* n. 11, p. 227 et seq.

[35] *Ibid*., pp. 193–195.

draws most attention in this respect. In accordance with it, acts connected with counterfeiting or altering identification marks are subject to punishment. Such acts carry a penalty of deprivation of liberty for up to three years. It should be explained that identification marks include trademarks. Thus, the classification of such cases can be cumulative under Article 306 CC and Article 305 IPL.[36]

The conduct connected with counterfeiting foodstuff by means of labelling it with a forged trademark can be also classified as selected types of misdemeanour. First of all, it concerns the regulation expressed in Article 24 of the Act of 16 April 1993 on combating unfair competition.[37] In accordance with this provision, it is forbidden to use technical reproduction measures to copy external forms of a product or introduce such a copied product to the market, and this way deceive customers about the identity of the producer or product, which causes serious harm to the entrepreneur concerned. Thus, the essence of such an act consists in copying other producers' foodstuff and using their reputation, market position, effects of work, etc. Such conduct carries a penalty of a fine, limitation of liberty or deprivation of liberty for up to two years. It is subject to prosecution at the request of the aggrieved.

Thus, the above-presented situation shows that the national legislator's penal response to labelling foodstuff with forged trademarks is relatively extensive. It covers various types of offences as well as misdemeanours. However, if the scale of the illegal business and the nature of entities involved (i.e. the fact that these are much more often organised crime groups than individual perpetrators) are taken into account, one can be critical of not only the efficiency of prosecution but also the penalties and the mode of prosecution for some types of such conduct.[38]

Another extensive group of acts connected with food fraud consists mainly in deceiving about products' origin, their quality, amount and substitution of cheaper or poorer alternatives for food ingredients, inappropriate labelling with respect to contents, etc. The Polish legislator's penal response to this conduct is quite complex.

As far as penal response to the types of offences in this field is concerned, the legislator specified a wide range of prohibited acts in the provisions of the Act of 25 August 2006 on the safety of food and nutrition (ASFN).[39] Conduct connected with the production or sale of consumption substances harmful to human health or life as well as substances for special consumption purposes, diet supplements or new foodstuff is subject to punishment. Such acts constitute offences (Article 96 paras 1–4). A perpetrator that produces or sells foodstuff which is spoilt or counterfeit is subject to a penalty of a fine, limitation of liberty or deprivation of liberty. A perpetrator who commits the above-mentioned offence in relation to foodstuff of big value is subject to a penalty of deprivation of liberty for six months to three

---

[36] See M. Gałązka, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warszawa 2019, p. 1428 et seq.

[37] Consolidated text, Dz.U. 2018, item 419; henceforth ACUC.

[38] For more, see W. Pływaczewski, R. Płocki (eds), *Nielegalny rynek żywności. Skala zjawiska i możliwości przeciwdziałania*, Szczytno 2013.

[39] Consolidated text, Dz.U. 2018, item 1541; for more, see M. Szwejkowska, E. Zębek, M. Kurzyński, *Uwarunkowania unijne oraz karnoprawne produkcji lub wprowadzania do obrotu żywności niebezpiecznej: część pierwsza*, Studia Prawnoustrojowe No. 29, 2015, p. 19 et seq.

years (Article 97 paras 1–2). A wide catalogue of misdemeanours is also laid down in Article 100 paras 1–2 ASFN, where the use of foodstuff in production or selling it after the "best before" date expires is prohibited.[40]

One can realise now what matches the features of the offence under the above-mentioned Article 306 CC. It penalises deleting, counterfeiting or altering the date of food production and food expiry date. As it has been mentioned above, the offence carries a penalty of deprivation of liberty for up to three years. It is hard to fail to notice that this type of a perpetrator's conduct may pose danger to human life and health so their criminal liability can be revised based on, inter alia, Article 160 §§ 1–3 CC, Article 165 § 1(2) CC, Articles 156–157 CC.

If the above-described conduct can be fraudulent in nature, it can in addition match the features of the offence of fraud under Article 286 § 1 CC. However, if a perpetrator selling goods or providing services deceives a buyer of food with respect of amount, weight, measure, class, sort or price and a buyer has incurred or could have incurred loss exceeding PLN 100, the act will be subject to liability for misdemeanour under Article 134 § 1 of the Misdemeanour Code (henceforth MC). Such an act carries a penalty of detention, limitation of liberty or a fine. The legislator also stipulated liability for an attempt, inciting, and aiding and abetting (Article 134 § 3 MC).

In addition, the response to the above-discussed forms of conduct concerns misdemeanours specified in the above-mentioned Act on combating unfair competition. As far as this is concerned, a type of misdemeanour consisting in deceptive labelling of products draws special attention (Article 25 para. 1 ACUC). Such an error may be connected with foodstuff origin (e.g. the country of production), its quantity (e.g. the number of items), ingredients (e.g. the amount of vegetable fat), etc. In accordance with Article 25 ACUC, a perpetrator that, labelling or not labelling products or services regardless of the obligation to do so, misinforms customers about the country of origin, quantity, quality, ingredients, the method of production, expiry date, the possibility of application, repairs, maintenance or other important product or service features or does not inform about the risk connected with the use of them, and this way exposes customers to loss, is subject to a penalty of a fine or detention. However, the usefulness of this normative construct seems to be unsatisfactory in the field of combating food fraud efficiently, in particular, if it is taken into account that penalties are not severe and do not play a preventive role, and those offences are prosecuted at the request of the aggrieved (Article 27 ACUC).

What draws attention in the light of the above is the fact that those types of prohibited acts, the features of which clearly indicate food fraud, are classified as misdemeanours. For obvious reasons, such penal response seems to be insufficient.

Finally, apart from the two above-mentioned types of conduct connected with food fraud, penal response focuses on the regulations of special statutes. It is indeed varied.

In accordance with the Act of 18 October 2006 on the production of alcoholic beverages and registering and protecting geographical indications of alcoholic

---

[40] See C. Kąkol, *Prawnokarne aspekty ustawy o bezpieczeństwie żywności i żywienia*, Prokuratura i Prawo No. 7–8, 2010, p. 304 et seq.

beverages,[41] three types of offences that can be fraudulent in nature were specified. These are, inter alia, connected with:
– selling alcoholic beverages with geographical indications that a perpetrator is not authorised to use (Article 41 paras 1–4);
– producing alcoholic beverages in the conditions that are not in conformity with production methods, technological requirements and quality parameters (Article 42 paras 1–3);
– labelling alcoholic beverages in the way that does not meet the requirements concerning their definition or description, or presentation, or introduction to the market (Article 43 paras 1–3).

On the other hand, the Act of 21 December 2000 on the trade quality of agricultural products and foodstuff[42] stipulates penalisation of an extremely complex types of conduct that can sometimes be fraudulent in nature (Article 40 paras 1–5). However, they constitute misdemeanours that carry a penalty of a fine. The same can be said about penal regulations of the Act of 12 May 2011 on the manufacturing and bottling of wine, selling wine and organising wine market,[43] where some types of fraudulent conduct connected with wine industry are treated as misdemeanours.

Thus, it is difficult to find the legislator's concept concerning the scope of the mode and form of penal response to the above-discussed conduct. It seems that the adopted model has strikingly accidental solutions to what should be recognised as offences and misdemeanours, what penalties they should carry or what mode of prosecution should be applied. What can also confirm this is the fact that the legislator recognises a series of other, but quite similar in nature, types of conduct as administrative torts. It can be exemplified by conduct stipulated in Article 25 paras 1–2 of the Act of 25 June 2009 on organic agriculture[44] and Article 58b paras 1–5 of the Act of 17 December 2004 on the registration and protection of agricultural products and foodstuff names and indications, and on traditional products.[45]

Finally, it should be clearly emphasised that the above-presented national penal system in general does not take into account the construct of prohibited acts directly connected with import of counterfeit foodstuff to the Republic of Poland. However, as it has been indicated above, the scale of this illegal business, inter alia in relation to products originating from the Asian market, is enormous.

8. CONCLUSIONS

In the light of the above considerations, it should not be surprising that there is a need of penal response to the phenomenon of food fraud. Penal solutions that are binding in Poland and can be tools in combating it are indeed complex in nature, but they are strikingly selective and lack a well-thought-over conception. The legi-

41 Consolidated text, Dz.U. 2019, item 268.
42 Consolidated text, Dz.U. 2018, item 2164.
43 Consolidated text, Dz.U. 2018, item 1159.
44 Consolidated text, Dz.U. 2017, item 1054.
45 Consolidated text, Dz.U. 2017, item 1168.

slator's decision to recognise particular conduct connected with counterfeiting food as offences, misdemeanours or administrative torts seems to be absolutely accidental. The classification of this type of conduct as misdemeanour in order to combat it is undoubtedly an insufficient solution. The fact that businesses and organised crime groups are involved in food fraud fully supports such a statement. A perpetrator of the above-described acts faces penalties that are so symbolic that it is hard to speak about their preventive effect. Practices used by law enforcement agencies are also an obstacle to efficiently combat the phenomenon.

The fact that at present it is also hard to speak about efficient fight against food fraud in other European countries is little consolation. The scale of fraud on the food market in Europe continues to grow.[46] National legislators are not able to develop an adequate system of legal response measures, including penal ones, and an efficiently operating law enforcement system.[47]

BIBLIOGRAPHY

2017 Situation Report on Counterfeiting and Piracy in the European Union. A joint project between Europol and the European Union Intellectual Property Office.

Daśko N., *Prawnokarna ochrona znaków towarowych*, Warszawa 2017.

European Commission, *The EU Food Fraud Network and the System for Administrative Assistance & Food Fraud, Annual Report 2017.*

European Commission, *Report on the EU customs enforcement of intellectual property rights: results at the EU border 2017*, Luxembourg 2018.

European Parliament, *Report on the food crisis, fraud in the food chain and the control thereof (2013/2091(INI))*, 2013.

European Union Intellectual Property Office (EUIPO), *Counterfeiting of foodstuff, beverages and agricultural products*, 2016.

Europol&Interpol, *Operation OPSON VI. Targeting counterfeit and substandard foodstuff and beverage. December 2016–March 2017.*

Gałązka M., [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warszawa 2019.

Kąkol C., *Prawnokarne aspekty ustawy o bezpieczeństwie żywności i żywienia*, Prokuratura i Prawo No. 7–8, 2010.

Martín N., Quackelbeen L., Simonato M., *Food Regulation and Criminal Justice*, Maklu Publ. 2016.

McGuire R., Holt T.J., *The Routledge Handbook of Technology, Crime and Justice*, London 2017.

Lord N., Flores Elizondo C.J., Spencer J., *The Dynamics of Food Fraud: The Interactions Between Criminal Opportunity and Market (Dys)functionality in Legitimate Business*, Criminology and Criminal Justice Vol. 17, Issue 5, 2017.

Pływaczewski W., Płocki R. (eds), *Nielegalny rynek żywności. Skala zjawiska i możliwości przeciwdziałania,* Szczytno 2013.

---

[46] https://www.foodnavigator.com/Article/2019/03/05/Food-fraud-It-takes-scandals-higher-penalties-and-greater-surveillance-to-catch-cheats?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright (accessed 28.03.2019).

[47] See European Commission, *The EU Food Fraud*, *supra* n. 28; compare N. Lord, C.J. Flores Elizondo, J. Spencer, *The Dynamics of Food Fraud: The Interactions Between Criminal Opportunity and Market (Dys)functionality in Legitimate Business*, Criminology and Criminal Justice Vol. 17, Issue 5, 2017, pp. 605–623.

Szwejkowska M., Zębek E., Kurzyński M., *Uwarunkowania unijne oraz karnoprawne produkcji lub wprowadzania do obrotu żywności niebezpiecznej: część pierwsza*, Studia Prawnoustrojowe No. 29, 2015.

Internet sources

Mandel A., *We Włoszech żywność fałszowana jest na potęgę*, https://www.rp.pl/Przemysl-spozywczy/190219560-We-Wloszech-zywnosc-falszowana-jest-na-potege.html?fbclid=IwAR09_NiVG7SKZqoyBhViMLb1Mpx7Mhq1fBUj5d-OfJVCpPjbV-X5NHqRAKs (accessed 18.02.2019).

https://www.polskieradio.pl/7/1691/Artykul/792304,Afera-z-konina-powazne-klopoty-przedsiebiorcow (accessed 11.02.2019).

https://www.foodnavigator.com/Article/2019/03/05/Food-fraud-It-takes-scandals-higher-penalties-and-greater-surveillance-to-catch-cheats?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright (accessed 28.03.2019).

FOOD FRAUD: CRIMINOLOGICAL PERSPECTIVE AND LIMITS OF PENAL RESPONSE IN POLAND

Summary

The agriculture and food industry, which is one of the biggest sectors of the European Union economy, is extremely vulnerable to fraud connected with counterfeiting foodstuff and beverages as well as other fraudulent practices concerning nutrition. Regardless of the high EU standards of regulations in the field of food and nutrition safety, the scale of fraud in this area is constantly growing. The spectrum of potential fraudulent practices is very wide and at the same time covers, inter alia, labelling poorer quality products with a forged or original trademark, substituting cheaper ingredients and dangerous substances for the necessary ones, inappropriate labelling with respect to contents, e.g. by skipping some ingredients, inappropriate labelling of weight or types of animal meat used in meat products or seafood, or selling traditional food as organic. At present national legislators in the European Union member states still show little interest in combating those activities with the use of penal repression instruments. The analysis of Polish normative solutions confirms this observation. On the European scale, the problem also consists in law enforcement agencies' little interest in efficient prosecution of this type of crime.

Keywords: food, food industry, customer, fraud, criminal liability

FOOD FRAUD – PERSPEKTYWA KRYMINOLOGICZNA I GRANICE REAKCJI KARNEJ W POLSCE

Streszczenie

Sektor rolno-spożywczy – jako jeden z największych sektorów gospodarczych w Unii Europejskiej – należy do niezwykle podatnych na nadużycia związane z fałszowaniem produktów spożywczych i napojów oraz inne oszukańcze praktyki żywnościowe. Pomimo wysokich stan-

dardów unijnych regulacji w obszarze bezpieczeństwa żywności i żywienia, skala nadużyć w tym obszarze systematycznie rośnie. Spektrum możliwych oszukańczych praktyk w tym zakresie jest zarazem niezwykle szerokie i obejmuje między innymi oznaczanie gorszej jakości produktów podrobionym lub oryginalnym znakiem towarowym, zastępowanie składników tańszymi lub substancjami niebezpiecznymi, niewłaściwe etykietowanie w zakresie składu, np. poprzez pominięcie jakichś składników, niewłaściwe etykietowanie wagi lub gatunków zwierząt wykorzystywanych w produktach mięsnych lub owocach morza czy też sprzedaż zwykłej żywności jako ekologicznej. Zainteresowanie ustawodawców krajowych w państwach Europy zwalczaniem tego procederu przy zastosowaniu instrumentarium represji karnej jest jak dotąd niewielkie. Analiza polskich rozwiązań normatywnych istotnie potwierdza takie spostrzeżenie. W skali europejskiej problemem pozostaje także znikome zainteresowanie organów ścigania efektywnym zwalczaniem tego typu przestępczości.

Słowa kluczowe: żywność, branża spożywcza, konsument, fałszerstwo, odpowiedzialność karna

FOOD FRAUD – PERSPECTIVA CRIMINOLÓGICA Y LÍMITES DE REACCIÓN PENAL EN POLONIA

Resumen

El sector agrario y alimenticio – como uno de los más grandes sectores económicos en la Unión Europea – resulta muy susceptible de abusos relacionados con la falsificación de productos alimenticios y bebidas, así como de otras prácticas alimenticias fraudulentas. A pesar de alto estándar de regulaciones comunitarias sobre seguridad de alimentos y alimentación, la escala de abusos en esta área está creciendo sistemáticamente. El abánico de posibles prácticas fraudulentas en este ámbito es muy amplio e incluye, entre otras, etiquetar productos de peor calidad con marca registrada original o falsa, sustituir ingredientes por más baratos o por sustancias peligrosas, etiquetar indebidamente la composición, p. ej. mediante la eliminación de algunos ingredientes, etiquetar impropiamente el peso o clase de animales utilizados en productos cárnicos o marisco, o bien vender productos normales como ecológicos. El interés de legisladores nacionales en los países de Europa en luchar contra este fenómeno con el uso de herramientas de represión penal de momento no es elevado. El análisis de soluciones normativas polacas confirma tal conclusión. En la escala europea el problema interesa poco a los órganos de persecución para luchar contra este tipo de delincuencia.

Palabras claves: alimentos, sector alimenticio, consumidor, falsedad, responsabilidad penal

КОНТРАФАКЦИЯ ПРОДУКТОВ ПИТАНИЯ: УГОЛОВНО-ПРАВОВОЙ АСПЕКТ И ГРАНИЦЫ УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ В ПОЛЬШЕ

Резюме

Агропродовольственный сектор, являющийся одним из крупнейших секторов экономики Европейского союза, чрезвычайно уязвим для мошенничества, связанного с подделкой продуктов питания и напитков либо введением потребителя в заблуждение. Несмотря на высокие стандарты законодательства ЕС, касающегося безопасности питания и пищевых продуктов, масштабы

мошенничества в этой сфере неуклонно растут. При этом спектр возможных мошеннических действий чрезвычайно широк и включает в себя, в частности, маркировку менее качественной продукции поддельными или оригинальными товарными знаками, замену ингредиентов более дешевыми аналогами или опасными для здоровья веществами, указание состава, не соответствующего действительности (например, сознательный пропуск определенных ингредиентов), неправильная маркировка веса либо указание ложной информации о видах животных, используемых при производстве мясных продуктов или морепродуктов, либо продажа обычных продуктов питания как органических. К сожалению, интерес национальных законодателей европейских стран к борьбе с этим явлением с привлечением уголовно-правовых инструментов невысок. Анализ нормативных решений, существующих в Польше, в основном, подтверждает правильность этого наблюдения. В общеевропейском масштабе сохраняется также проблема незначительного интереса правоохранительных органов к обеспечению эффективной борьбы с этим видом преступности.

Ключевые слова: продукты питания, пищевая промышленность, потребитель, контрафакция, уголовная ответственность

FOOD FRAUD – EINE KRIMINOLOGISCHE PERSPEKTIVE UND DIE GRENZEN DER STRAFRECHTLICHEN REAKTION IN POLEN

Zusammenfassung

Der Agrar- und Ernährungssektor gehört – als einer der größten Wirtschaftszweige in der Europäischen Union – im Zusammenhang mit der Fälschung von Lebensmitteln und Getränken und anderen betrügerischen Lebensmittelpraktiken zu den betrugsanfälligsten Branchen. Trotz der strengen europäischen Standards der Lebensmittelsicherheit und Ernährung steigt das Ausmaß des Betrugs in diesem Sektor systematisch an. Das Spektrum der gängigen Betrugspraktiken in diesem Bereich ist gleichwohl äußerst breit und schließt unter anderem die Kennzeichnung von Produkten minderer Qualität mit gefälschten oder originale Marken, den Ersatz hochwertiger und hochpreisiger Inhaltsstoffe durch billigere Inhaltsstoffe oder gefährliche Stoffe, die falsche Kennzeichnung der Zusammensetzung, beispielsweise durch Auslassen von Inhaltsstoffen, eine falsche Angabe des Gewichts oder der in Fleisch oder Meeresfrüchten verwendeten tierischen Ausgangsstoffe oder auch den Verkauf konventionell erzeugter Nahrungsmittel als Bio-Lebensmittel aus ökologischer Landwirtschaft ein. Das Interesse der nationalen europäischen Gesetzgeber, diese Praxis mit Instrumenten der strafrechtlichen Verfolgung zu bekämpfen, ist bislang allerdings gering. Durch eine Analyse der polnischen gesetzgeberischen Entscheidungen wird dieser Eindruck noch bestätigt. Auf europäischer Ebene ist und bleibt das geringe Interesse der Strafverfolgungsbehörden an einer wirksamen Bekämpfung dieser Straftaten ein Problem.

Schlüsselwörter: Lebensmittel, Lebensmittelindustrie, Verbraucher, Betrug, strafrechtliche Verantwortlichkeit

FRAUDE ALIMENTAIRE – PERSPECTIVE CRIMINOLOGIQUE ET LIMITES DE LA RÉPONSE PÉNALE EN POLOGNE

Résumé

Le secteur agroalimentaire – en tant que l'un des plus importants secteurs économiques de l'Union européenne – est extrêmement vulnérable à la fraude liée à la falsification de produits alimentaires et de boissons et à d'autres pratiques alimentaires frauduleuses. Malgré les normes strictes de la réglementation européenne en matière de sécurité alimentaire et de nutrition, l'ampleur de la fraude dans ce domaine augmente systématiquement. L'éventail des pratiques frauduleuses possibles dans ce domaine est extrêmement vaste et comprend, entre autres, l'étiquetage de produits de qualité inférieure avec une marque contrefaite ou d'origine, le remplacement d'ingrédients par des substances moins chères ou dangereuses, un étiquetage incorrect en termes de composition, par exemple en omettant certains ingrédients, un étiquetage incorrect du poids ou de l'espèce d'animaux utilisés dans les produits à base de viande ou de fruits de mer, ou la vente d'aliments ordinaires en tant que produits biologiques. L'intérêt des législateurs nationaux des pays européens de lutter contre ces pratiques à l'aide d'instruments de répression pénale est jusqu'à présent insignifiant. L'analyse des solutions normatives polonaises confirme significativement cette observation. À l'échelle européenne, l'intérêt des services répressifs à lutter efficacement contre ce type de criminalité reste problématique.

Mots-clés: alimentation, industrie alimentaire, consommateur, contrefaçon, responsabilité pénale

FOOD FRAUD: PROSPETTIVA CRIMINOLOGICA E CONFINI DELLA REAZIONE PENALE IN POLONIA

Sintesi

Il settore agroalimentare, in quanto uno dei maggiori settori economici dell'Unione Europea, è estremamente soggetto ad abusi legati alla falsificazione di prodotti alimentari e bevande, nonché ad altre pratiche alimentari fraudolente. Nonostante gli standard elevati delle regolamentazioni comunitarie nel settore della sicurezza alimentare e nutrizionale, la scala degli abusi in questo settore cresce sistematicamente. Lo spettro delle possibili pratiche fraudolente in questo ambito è estremamente ampio e comprende tra l'altro l'etichettatura di prodotti di peggior qualità con marchi di qualità imitati o originali, la sostituzione con ingredienti più economici o con sostanze pericolose, la scorretta etichettatura sulla composizione, ad esempio omettendo qualche ingrediente, la scorretta indicazione del peso o del tipo di animale utilizzato in prodotti di carne o di frutti di mare oppure la vendita di alimenti normali come biologici. L'impegno dei legislatori nazionali negli stati dell'Europa nella lotta contro questi meccanismi utilizzando strumenti di repressione penale è finora molto ridotto. L'analisi delle soluzioni normative polacche conferma essenzialmente questa osservazione. Su scala europea rimane un problema il marginale impegno delle forze dell'ordine nella lotta efficace contro questo tipo di criminalità.

Parole chiave: alimenti, settore alimentare, consumatore, falsificazione, responsabilità penale

Cytuj jako:

Leciak M., Daśko N., Food fraud: criminological perspective and limits of penal response in Poland *[Food fraud – perspektywa kryminologiczna i granice reakcji karnej w Polsce]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 17–34. DOI: 10.26399/iusnovum.v13.4.2019.41/m.leciak/n.dasko

Cite as:

Leciak, M., Daśko, N. (2019) 'Food fraud: criminological perspective and limits of penal response in Poland'. *Ius Novum* (Vol. 13) 4, 17–34. DOI: 10.26399/iusnovum.v13.4.2019.41/m.leciak/n.dasko

LIABILITY FOR ILLEGAL TAMPERING WITH A MOTOR VEHICLE ODOMETER READING OR INTERFERENCE INTO ITS PROPER MILEAGE MEASUREMENT (ARTICLE 306A CC)

JACEK A. DĄBROWSKI*

DOI: 10.26399/iusnovum.v13.4.2019.42/j.a.dabrowski

1. DEVELOPMENT OF LIABILITY FOR ILLEGAL TAMPERING WITH THE READING ON A MOTOR VEHICLE ODOMETER

Article 306a CC was added to the Criminal Code by means of Article 2(2) of the Act of 15 March[1] and entered into force on 25 May 2019. Offences classified in Article 306a §§ 1 and 2 CC did not have an equivalent in the provisions of the former Criminal Code. The introduction of provisions penalising clocking (rolling back odometers or another practice of altering the reading on them) is one of the elements of the implementation of the provisions of Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers and repealing Directive 2009/40/EC.[2] What is especially important from the point of view of the measure in question is the declaration in subsection 25 of the Preamble to the Directive, in accordance with which "Odometer fraud should be regarded as an offence liable to a penalty, because manipulation of an odometer may lead to an incorrect evaluation of the roadworthiness of a vehicle. The recording of mileage in the roadworthiness certi-

* PhD, Assistant Professor at the Department of Criminal Law, Faculty of Law and Administration of Lazarski University in Warsaw, senior assistant to the judge at the Criminal Chamber of the Supreme Court; e-mail: jacek.dabrowski@lazarski.pl; ORCID: 0000-0002-4908-4167

1 Act of 15 March 2019 amending the Act: Road Traffic Law and the Act: Criminal Code, Dz.U., item 870; Road Traffic Law and Criminal Code henceforth referred to RTL and CC, respectively.

2 OJ L 127 of 2014, p. 51 et seq.

ficate and access for inspectors to that information should facilitate the detection of odometer tampering or manipulation." Article 8 para. 6 Directive stipulates that in cases where it is found that an odometer has been manipulated with for the purpose of reducing or misrepresenting the mileage of a vehicle, such manipulation shall be punishable by effective, proportionate, dissuasive and non-discriminatory penalties.

The introduction of provisions penalising conduct consisting in illegal interference into an odometer of a motor vehicle required correlation with administrative regulations concerning technical tests aimed to verify a vehicle's mileage. The content of the provisions of the Act of 15 March 2019 amending the Act: Road Traffic Law and the Act: Criminal Code indicates that the legislator decided to transpose the provisions of Directive 2014/45/EU to a large extent. Additional mechanisms unknown before were introduced, which made it possible to reveal the condition of an odometer (also of a vehicle not registered), or possibly, the fact of its replacement in the Central Vehicle Registry (Article 80a para. 2(3)(c), Article 80b para. 1(21)–(22) RTL) not only for roadworthiness test stations (Article 80ba para. 1(6) RTL) but also, which is a novelty, for bodies authorised to carry out roadside inspection, i.e. a competent organisational unit of the Police, the Border Guard, the Road Traffic Inspection, the Military Police or the Customs-Fiscal Service (Article 80ba para. 1(6a) RTL). In the course of roadside inspection, the services are authorised to check the reading on odometers of vehicles stopped, odometers of vehicles towed and odometers of vehicles transported on a trailer together with the unit of measurement, and drivers are obliged to enable the authorised bodies to perform those activities (Article 129 para. 2(4a), Article 129l paras 1 and 2 RTL). Formalisation of the replacement of an odometer was also intended to strengthen those solutions. It is admissible only in case an odometer does not measure mileage in a situation when it should do so or when it is necessary to replace an element of a vehicle to which the odometer is inextricably connected (Articles 81a and 81b RTL).

In practice, such a spectre of dispositions constitutes a complex solution making it possible to reveal cases of rolling back odometers or another practice of unauthorised altering the reading on them and penalisation of such conduct as offences. This solution should be undoubtedly approved of because the regulations should combat this formerly common, often within a formally organised business activity, practice of clocking, which is actually unacceptable from the social point of view. Such practices constitute a typical "goalmouth" for perpetrators of prohibited acts, e.g. under Article 286 § 1 CC.

2. OBJECT OF PROTECTION

Determining the object of protection of all types of the offence under Article 306a CC, it is necessary to take into account the change of the title of Chapter XXXVI, where Article 306a was placed, from "Offences against business transactions" into "Offences against business transactions and property interests in civil transactions". It is rightly highlighted in literature that the amendment is systemic in nature and the current wording of the title of the Chapter fully reflects the nature of protected

legal interests, i.e. business transactions as a whole and property interests in civil transactions.[3] This results in the fact that both the correctness of business transactions consisting in trading in second-hand vehicles and the property interests of the buyers of vehicles, which can be infringed by the fact of buying a vehicle with the mileage rolled back, i.e. a product with a fraudulently concealed feature, constitutes a direct object of protection. The provision also protects property interests of people obliged to pay the user of a vehicle consideration resulting from mileage, which has been mentioned above. And it does not matter whether the conduct took place within a business transaction between entrepreneurs or a civil transaction, i.e. one in which at least one party is not involved in business activities.[4]

The provision does not protect other legal interests. Both the Preamble and other provisions of Directive 2014/45/EU indicate that the elimination of worn-out vehicles with rolled back odometers that do not meet environmental requirements and do not ensure complete active and passive safety from transactions, thus also from road traffic, about which users most often do not know, has impact on road traffic safety. This circumstance does not mean, however, that this legal interest is currently recognised as a separate and autonomous legal interest connected with the growing role of road traffic in contemporary life and the necessity of emphasising the importance of this traffic safety,[5] and is also protected by the provisions under Article 306a CC.

Offences are grouped in chapters based on the same or similar interests protected,[6] and the type of object of protection is indicated in the title of a chapter where particular offences are placed. Moreover, the provisions of Chapter XXI CC together with the provision of Article 355 CC and the provisions of Chapter XI MC constitute the entire, complete and internally coherent regulation concerning penalisation of acts against the safety of road traffic. The norms are *lex specialis* in relation to other penal provisions.[7]

---

[3] D. Szeleszczuk, *Kryminalizacja „cofania liczników" w świetle projektowanej nowelizacji Kodeksu karnego z 5 lipca 2018 r.*, Prokuratura i Prawo No. 1, 2019, p. 84.

[4] *Ibid*.

[5] A. Bachrach, *Przestępstwa i wykroczenia drogowe w nowym prawie polskim*, Warszawa 1974, p. 288; A. Gubiński, *Prawo wykroczeń*, Warszawa 1985, p. 292; Z. Szmidt, *Administracyjnoprawna działalność MO w ochronie bezpieczeństwa i porządku publicznego*, Warszawa 1981, p. 12; K. Rajchel, *Porządek i bezpieczeństwo w ruchu drogowym*, Rzeszów 1997, p. 15; R.A. Stefański, *Wykroczenia drogowe. Komentarz*, Warszawa 2012, p. 63; R. Hałas, [in:] A. Grześkowiak (ed.), K. Wiak (ed.), F. Ciepły, M. Gałązka, R. Hałas, S. Hypś, D. Szeleszczuk, *Kodeks karny. Komentarz*, Warszawa 2012, p. 813; T. Razowski, *Uwagi wprowadzające do rozdziału XXI k.k.*, [in:] J. Giezek (ed.), D. Gruszecka, N. Kłączyńska, G. Łabuda, A. Muszyńska, T. Razowski, *Kodeks karny. Część szczególna. Komentarz*, LEX 2014.

[6] R.A. Stefański, *supra* n. 4, p. 62.

[7] K. Buchała, [in:] I. Andrejew, L. Kubicki, J. Waszczyński, *System prawa karnego*, Vol. IV, Part 1, Warszawa 1985, p. 268; *idem*, *Przestępstwa i wykroczenia przeciwko bezpieczeństwu w komunikacji drogowej*, Bydgoszcz 1997, pp. 132–133, 361; W. Mącior, *Problemy przestępstw nieumyślnych na tle aktualnych wymagań teorii i praktyki*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1968, No. 35, p. 22; W. Radecki, *Zagrożenie bezpieczeństwa ruchu drogowego przez nietrzeźwych kierowców*, Nowe Prawo No. 10–11, 1975, p. 1305; *idem*, *Przestępstwa narażenia życia i zdrowia człowieka na niebezpieczeństwo w kodeksie karnym PRL z 1969 r.*, Wrocław 1977, p. 77; J. Kochanowski, *Zagadnienia przestępstw drogowych i przeciwko bezpieczeństwu w komunikacji*, Warszawa 1990, p. 43; the Supreme

3. OFFENCE TYPES

There are four types of the offence under Article 306a CC: two basic ones (Article 306a §§ 1 and 2) and two less serious ones[8] (Article 306a § 3 CC), which results from their placement in a separate editorial unit of the provision and reference to the feature of "a case of lesser significance", which carries a mitigated sanction in relation to basic types.[9]

Article 306a § 1 CC specifies the basic type of the offence, which is connected with two types of executive actions: alteration of the reading on a vehicle odometer or interference into the correctness of its measurement of mileage.

Article 306a § 2 CC specifies the second basic type of the offence, criminalising conduct which can be called quasi-incitement, consisting in commissioning the act under § 1.

The less serious types are specified in Article 306a § 3 CC as executive actions with features of basic types but a changed constituting feature of "a case of lesser significance".[10] It is not a concept unknown to the Criminal Code; however, it has not been determined by a legal definition so far. In case law, an offence that is less serious than the basic type, but characterised by a dominance of mitigating subjective-objective elements, is traditionally recognised as a case of lesser significance.[11] It concerns cases in which the level of social harmfulness and a perpetrator's fault are lower than in the case of the basic type but they do not reach the level of insignificance. A case of lesser significance is halfway between the lack of material content of an offence and the state recognised as an offence of the basic type.[12] The case discussed constitutes an example of an indefinite less serious type. A more lenient sanction has not been normatively determined but it can depend on various features of an event to be assessed by a proceeding body. Thus, "an axiological factor" substitutes for the problem of the lack of the mitigating feature.[13]

Referring a relative approach of the above discussion to the features of acts specified in Article 306a §§ 1 and 2 CC, it is necessary to agree that a case of lesser significance may occur in circumstances that are subjective or objective in nature.

Court resolution of 15 February 1977, VII KZP 22/76, OSNKW 1977, No. 3, item 17; E. Szwedek, *Glosa do uchwały SN z dnia 25 lutego 1977 r., VII KZP 22/76*, OSPiKA No. 1, 1978, pp. 25–27; A. Bachrach, *supra* n. 5, pp. 257–258; *idem*, *Reglamentacja prawna bezpieczeństwa ruchu drogowego*, Państwo i Prawo No. 5, 1972, p. 78; the Supreme Court judgment of 20 February 2008, V KK 313/07, KZS 2009, No. 11, item 13 with a gloss by A. Ważny, Paragraf na Drodze No. 10, 2009, pp. 5–11.

[8] D. Szeleszczuk, *supra* n. 3, pp. 85–86.

[9] W. Wolter, *Uprzywilejowane typy przestępstw*, Państwo i Prawo No. 1–2, 1976, p. 110; T. Bojarski, *Odmiany podstawowych typów przestępstw w prawie polskim*, Warszawa 1982, p. 142; B.J. Stefańska, *Wypadek mniejszej wagi w polskim prawie karnym*, Ius Novum No. 1, 2017, pp. 49–51.

[10] I. Andrejew, *Podstawowe pojęcia nauki o przestępstwie*, Warszawa 1988, p. 214.

[11] The Supreme Court judgment of 9 October 1996, V KKN 79/96, OSNKW 1997, No. 3–4, item 27; the Supreme Court resolution of 22 December 1978, VII KZP 23/77, OSNKW 1979, No. 1–2, item 1; the Supreme Court resolution of 15 July 1971, VI KZP 42/70, OSNKW 1971, No. 11 item 163.

[12] Judgment of the Court of Appeal in Kraków of 5 June 2002, II AKa 128/02, KZS 2002, No. 6, item 16.

[13] W. Wolter, *supra* n. 9, p. 110.

In the former group, the conduct that gives grounds for more lenient treatment of a perpetrator (in both aspects of perpetration and "commissioning") can consist in:
– a slight modification of mileage, e.g. not exceeding 10% of the real measurement;
– an alteration exceeding the limits of common sense, especially in the context of the age and former use of the vehicle, e.g. rolling back the odometer of a ten-year old vehicle used as a taxi to the figure of 100,000 km;
– a change of the odometer reading regardless of the actual state registered in the publicly available records of the Central Vehicle Registry or in the documents of the vehicle itself, e.g. certificates of servicing or periodical roadworthiness tests;
– unsuccessful modification that enables even an inexperienced person to detect it "at first glance", e.g. because there are well seen signs of tempering with the reading on the odometer.

As far as the subjective aspect is concerned, a case of lesser significance may consist in the conduct that is not connected with organised business activities, is occasional, and is not motivated by the intention to sell a vehicle or perform other activities connected with the proper functioning of an odometer, thus not intended to deceive anybody about the actual mileage travelled.

4. OBJECTIVE ASPECT

An executive action under Article 306a § 1 CC incorporates: (a) altering the reading on a motor vehicle odometer or (b) interference into its proper measurement of mileage. The conjunction "or" expresses a joint alternative, i.e. it admits a possibility of co-occurrence of situations communicated by the two parts of the sentence joined by this conjunction. It is due to the fact that interference into the proper measurement of mileage by an odometer results in altering of the reading on it.

Only activities aimed at falsifying the reading on an odometer, i.e. leading to a situation in which the reading on an odometer is not the same as the actual mileage, are subject to penalisation. There is a doubt whether it results only from action, i.e. active conduct, or whether the offence in question can be committed by means of omission in particular consisting in intentionally driving a vehicle with a defective odometer, which, as a result of a mechanical or electronic defect, stopped measuring mileage (stopped working) at all or stopped measuring mileage properly. It seems that conscious acceptance of this state of things and using a vehicle (increasing mileage) knowing that an odometer does not register it, from the point of view of the consequence of an offence, does not differ from other methods of illegal altering of the reading on an odometer, possibly only with the exception of the duration of the process concerned. Thus, it seems that the conduct matches the feature laid down in Article 306a § 1 *in principio* CC. However, what needs consideration is the legal approach to this liability if, in accordance with Article 2 CC, only a person who has a legal obligation to prevent an effect is criminally liable for a consecutive offence committed by means of omission. Thus, criminal liability would depend on the position of an owner or a user of a motor vehicle as a guarantor of non--occurrence of an effect, which would be the altering of the reading on an odometer

in comparison with the actual mileage. On the one hand, the source of the legal obligation in this area can be found in the content of Article 66 para. 2 RTL, in accordance with which devices and equipment of a vehicle should be maintained in proper state and function properly and efficiently. The disposition of this provision is precisely determined, inter alia, in § 11(1.4) of the Regulation of the Minister of Infrastructure of 31 December 2002 on technical conditions of motor vehicles and the scope of their necessary equipment,[14] in accordance with which a motor vehicle is in particular equipped with an odometer. The fulfilment of the obligation to have a properly working odometer is subject to regular supervision within the periodical vehicle roadworthiness inspection, however, as it has been mentioned above, evident features of tampering with an odometer (fraud) or recognition that it does not work can be treated as a serious defect, i.e. a defect that can infringe the safety of road traffic and environment protection (§ 2(4.2) Regulation of the Minister of Transport, Construction and Maritime Economy of 26 June 2012 on the scope and method of carrying out vehicle roadworthiness inspection and specimen documents used for this purpose[15]). The above reasons are for the assumption that a motor vehicle user, as a rule, is obliged to drive a vehicle equipped, inter alia, with a properly working odometer. In such a situation, the use of the phrase "the replacement of an odometer is admissible" in Article 81a RTL should be interpreted as an obligation. In such a situation, and, as an additional argument, in the face of the introduction of the formalised procedure of checking the reading on an odometer also during the standard roadside inspection, it is hard to assume that an owner or a user of a vehicle is not obliged to ensure proper functioning of an odometer, thus is not responsible for its proper measurement of mileage. Also the purpose-related interpretation of mutually connected provisions of Article 81a and Article 81b RTL support this stand. This is because if it was assumed that the latest provision, under the threat of punishment for a misdemeanour under Article 97 Misdemeanour Code (henceforth MC), imposes an obligation to provide a newly replaced and properly working odometer suitable for a particular type of vehicle in the roadworthiness inspection station for the purpose of checking the reading, the disposition of this provision in relation to persons who did not decide to take those steps, accepting driving with a defective odometer, would constitute an empty norm. Such interpretation seems to negate the essence of the new regulations the role of which is to eliminate all and not selectively chosen cases of clocking.

That is why, it is difficult to *a priori* abandon the assumption of a possibility of committing an act under Article 306a § 1 CC by means of omission to meet the requirement of driving a roadworthy vehicle, including one with a properly working odometer, and this way causing illegal alteration of the reading on an odometer. Therefore, one must disagree with the opinion that it concerns only the conduct consisting in physical, real interference into the reading on an odometer.[16]

---

[14] Consolidated text, Dz.U. 2016, item 2022, as amended.
[15] Consolidated text, Dz.U. 2015, item 776, as amended.
[16] D. Szeleszczuk, *supra* n. 3, p. 86.

Both the replacement of a motor vehicle odometer and the interference into its proper measurement of mileage are consecutive in nature. In the former case, a perpetrator's action results in obtaining a state in which an odometer shows mileage that differs from the actual one. In the latter case, the result is a state in which an odometer tampered with stops working properly and playing its designed function both because it stops measuring mileage at all or because it measures mileage that is different from the real one, higher or lower than the actual one.

4.1. ALTERING THE READING ON AN ODOMETER

An odometer is an instrument measuring and designed to register the distance travelled by a vehicle in units of measurement such as kilometres or miles. As far as the mile is concerned, it is an international mile that is a non-metric (imperial) unit of distance used in the Anglo-Saxon countries[17] equivalent to ca. 1,609 km. The main role of an odometer is to make it possible to assess the roadworthiness of a vehicle, which decreases, inter alia, proportionally to the mileage. As a result, it is essential for safe participation in road traffic and the fulfilment of environmental requirements.

The provisions of Regulation on technical conditions of vehicles and the scope of their necessary equipment stipulate that only a motor vehicle must have an odometer (§ 11(1.4)). An odometer is not a piece of obligatory equipment of a tractor, a slow-movement vehicle, a moped or a rail vehicle (*argumentum ex* Article 2 paras 32–34, 44, 46 RTL and § 46 in conjunction with § 44 Regulation of technical conditions of vehicles and the scope of their necessary equipment).

The features defined in Article 306a § 1 CC indicate that its objective scope covers not only motor vehicles that must be equipped with an odometer. It is applicable to every motor vehicle with an odometer installed, regardless of whether it resulted from its design and construction or it is an additional instrument installed by the owner of a vehicle of their free will. Thus, it is necessary to agree with an opinion that the statutory features of an offence under Article 306a CC are matched when an executive action is undertaken against a motor vehicle which is not a standard road vehicle if it is equipped with an optional odometer.[18]

Altering the reading on an odometer concerns every activity consisting in the introduction of changes into the indications of the mileage travelled. In the case of contemporary vehicles with electronic systems implementing the OBDII (On-Board Diagnostic level 2)[19] standard, the change of the odometer reading can be perfor-

---

[17] Inter alia in the United States, the United Kingdom, Canada, Australia, New Zealand and the Republic of South Africa.

[18] D. Szeleszczuk, *supra* n. 3, p. 92; M. Kulik, [in:] M. Mozgawa (ed.), M. Budyn-Kulik, P. Kozłowska-Kalisz, *Kodeks karny. Komentarz*, Warszawa 2019, commentary on Article 306a CC, thesis 7.

[19] The electronic system giving access to the data concerning particular mechanisms of a vehicle constitutes obligatory equipment in vehicles sold in the US after 1 January 1996, in the European Union after 1 January 2001 and in Poland after 1 January 2002, and in those with a diesel engine sold in the European Union after 1 January 2003. Cars equipped with the OBDII system have a characteristic 16-pin diagnostic connection making it possible to use a computer

med with the use of a PC connected to a vehicle diagnostic device with a special interface.[20] At present, companies developing software to modify the reading on an odometer create their own devices with an integrated interface and a simplified computer. These instruments are designed to be used in different brands of cars, even the latest models,[21] and often offer additional functions, e.g. of programming additional keys.[22] The products are often counterfeit and one device with the same parameters can be produced under different brand names, which makes identification of the original producer impossible. However, this is not a problem for those who are interested in the purchase and use of the device. Instructions of use are available on the websites as well as dedicated motorists' forums. Retailers often state that they provide full after-sale assistance.

Due to the above-mentioned unlimited possibilities of interference into the computer record of mileage, just tampering with the liquid-crystal display of an odometer is of lesser significance.[23]

Illegal altering of the reading on an odometer can often take the form of mechanical interference. However, such a method of a perpetrator's action can only involve older vehicles, which are not equipped with electronic systems of recording mileage. The executive action consists in the connection of a clock with a meter to a small engine imitating a vehicle movement. A perpetrator intends to lead to a situation in which an odometer exceeds the reading of 999,999 km (in some older vehicles 99,999 km) and is turned to "zero" reading, and next waits to reach the desired figure. Another method consists in the disassembling of rolls with digits and reassembling them in a different way.[24] The method can be applied in antique or collector's cars. Their value rises dramatically in proportion to their low mileage. There is also a different opinion presented in literature, according to which the change of the reading on an odometer or interference in its proper measurement in historic vehicles is not illegal. It is argued that the specificity of those vehicles as well as their exploitation and the maintenance of their life and functionality require interference in mechanisms responsible for driving and its safety.[25] This stance is not understandable in the context of illegal altering of the reading on an odometer,

---

diagnostic program; see S. Wierzbicki, *Procedury diagnozowania pojazdów samochodowych zgodnych z normą OBD II*, Diagnostyka Vol. 28, 2003, pp. 47–52; Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC, OJ L 350, 28/12/1998, pp. 1–57.

[20] For instance, the program VAG K+CAN K Can Commander 1.4 serving, inter alia, to alter odometers in older models of vehicles within the group of Volkswagen AG together with an appropriate interface (cable) is offered in Polish and Chinese online shops at the price that does not often exceed $10.

[21] For instance, the device called Super DSP III DSP3 Odometer Correction Tool is, according to the producer's declaration, designed for the vehicles of the following brands: Audi, VW, Skoda, Seat, Bentley, Mercedes, Land Rover, Jaguar, Volvo and Porsche, and serves models of 2010–2017. The price of the device on dhgate.com is $455.

[22] For instance, the device called OBDSTAR X100 PROS Auto Key Programmer; the price of the device on aliexpress.com is $245.

[23] *Ibid.*

[24] D. Szeleszczuk, *supra* n. 3, pp. 86–87.

[25] *Ibid*., p. 92; M. Kulik, *supra* n. 18, commentary on Article 306a CC, thesis 7.

which is not the type of conduct that affects driving or the safety of traffic. It is erroneously assumed that in case of those vehicles, their mileage has little or no impact on their market value at all.[26] Obviously, this is not the only criterion that a buyer of such a vehicle takes into account. However, it should be noticed that old car lovers often look for and pay more for vehicles that have not been driven at all (called "young-timers") and it is not important whether they meet the criteria for an "antique vehicle" referred to in Article 2 para. 39 RTL. Moreover, an antique vehicle is subject to roadworthiness inspection before its registration in the Republic of Poland (Article 81 para. 11a RTL). Thus, there are no reasons for excluding whatever motor vehicle equipped with an odometer from the scope of conduct referred to in Article 306a § 1 or § 2.

Liability under Article 306a § 1 CC for conduct that consists in the replacement of an odometer in a situation when a newly installed odometer shows the reading appropriate for the vehicle from which it was taken and not the one in which it was installed raises doubts. There were arguments referring to the grammatical interpretation of the provision and stating that such conduct does not result in the change of the reading on an odometer itself.[27] On the other hand, as it seems, it was not accidentally raised in the legislative motives that it is possible to adjudicate the forfeiture of items not only used for unauthorised interference into the reading on an odometer but also for its unsubstantiated replacement.[28] Thus, if the legislator admits the adjudication of the forfeiture of such items as those that served to commit an offence, it is clear that an unsubstantiated replacement of an odometer is such.

In fact, the problem is more complicated in the light of both the object of protection, *ratio legis* of the complex of normative regulations obliging, inter alia, to report the fact of the replacement of an odometer and record its current reading in order to recognise the real mileage of a vehicle, and the basic rules of criminal liability.

On the one hand, the legislator intended to eliminate a fraudulent concealment of a vehicle feature, i.e. its real mileage, and not only the interference into an odometer. When a perpetrator installs another odometer (with a lower mileage figure) in a vehicle in circumstances different from those laid down in Article 81a RTL or does not meet the requirements laid down in Article 81b RTL, as it is explained in the motives for the amendment bill, the legislator seems to not exclude the matching of the features of a misdemeanour under Article 97 MC as well as an offence under Article 306a § 1 CC.[29] It was also raised in literature that the obligation to present a vehicle at a roadworthiness inspection station for the purpose of checking the reading on a newly replaced odometer (Article 81b para. 1 RTL) aims to eliminate fraud connected with a vehicle mileage committed in a basic form, i.e. by means of altering the reading on an original odometer (e.g. by rolling back the reading by a desired amount, ceasing its work or slowing down the measurement), via

---

[26] D. Szeleszczuk, *supra* n. 3, p. 92.

[27] M. Kulik, *supra* n. 18, commentary on Article 306a CC, thesis 3.

[28] Justification for the government bill amending the Road Traffic Law and the Criminal Code [Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Prawo o ruchu drogowym oraz ustawy – Kodeks karny], Sejm print No. 2878, p. 5.

[29] *Ibid*., p. 7.

installing another odometer with a smaller reading in a vehicle under the pretence of repairing a defect in the original odometer.[30]

It might seem that liability under Article 97 MC is limited to the failure to fulfil the above-mentioned obligation and not all the consequences of the replacement of an odometer into one that does not show the real mileage. Purely theoretically, in particular in relation to popular vehicle brands, one can imagine the development of the market of second-hand indicators with an integrated odometer, with a defined in general smaller mileage as an alternative to the currently criminalised procedure of rolling back odometers. From the point of view of property interests of e.g. a buyer of a motor vehicle, it is hard to agree that a person installing such an odometer in order to conceal the real mileage will be liable only for a misdemeanour, while the action in fact has the same results as the act criminalised in the provision of Article 306a § 1 CC. If we use the mileage of a vehicle to which a new odometer not showing the actual mileage was installed as the point of reference, without the fulfilment of the conditions under Article 81a RTL and the requirements under Article 81b RTL, the effect of a perpetrator's action is the same as the alteration of the reading on an odometer installed formerly and, as a result, creates a possibility of evoking another person's false conviction that the reading is real, thus endangering that person's property interests.

On the other hand, such interpretation seems to negate the basic principle of definiteness of criminal law provisions (*nullum crimen sine lege scripta* and *nullum crimen sine lege certa*) guaranteed not only in the Constitution and the Criminal Code but also in international legal acts (Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[31] Article 15 of the International Covenant on Civil and Political Rights[32]). It prescribes the application of an analogy and broadened interpretation in criminal law to a perpetrator's disadvantage.[33] It is rightly emphasised in the Supreme Court case law that criminal law plays the role of prevention, on the one hand, and is to protect an individual against interference into their rights by the authorities under the pretence of performing the protective function (a guarantee function), on the other hand. The basic instrument of fulfilling the guarantee function is the principle of definiteness of an act prohibited by statute.[34]

The arguments deserve full approval and do not allow for broadening approach to the features under Article 306a §§ 1 and 2 CC, regardless of the legislator's objectives. Thus, the replacement of an odometer of a motor vehicle that violates the statutory provisions in order to conceal the actual mileage of a vehicle should be criminalised separately. However, it was not done. Thus, the legislative assumptions in this area have not been fully implemented.

---

30 D. Szeleszczuk, *supra* n. 3, p. 88.
31 Dz.U. 1993, No. 61, item 284, as amended.
32 Dz.U. 1977, No. 38, item 167.
33 The Supreme Court judgment of 4 April 2000, II KKN 335/99, LEX No. 50896.
34 The Supreme Court ruling of 29 January 2009, I KZP 29/08, OSNKW 2009, No. 2, item 15.

4.2. INTERFERENCE INTO PROPER MEASUREMENT OF MILEAGE ON AN ODOMETER

Every type of conduct disrupting the proper measurement of mileage constitutes the interference into the proper measurement of an odometer. The concept should be analysed considering the legislator's intention interpreted as broadly as possible. It does not only takes into account the disruption of the proper functioning of an odometer. What is essential is not the interference into an odometer alone but into its proper measurement. Proper measurement means showing the number of kilometres or miles actually travelled. Thus, this is a feature of actual mileage. The provision of Article 306a CC, as it has been mentioned above, is intended to protect, inter alia, motor vehicle buyers' property interests, which can be infringed by the fact of purchasing a vehicle with the mileage reading rolled back, and not by a defective odometer that was illegally tampered with.

In such a case, an executive action consists in the use of various types of instruments that permanently or temporarily obstruct, slow down or accelerate the functioning of an odometer. It can consist in the disconnection of an odometer from a vehicle driveline or electronic interference. As far as the latter is concerned, the opportunities are unlimited. Thus, it is possible to program a driver or a group of drivers responsible for measurement or modification of parameters of their work, falsifying the indications on an odometer in relation to the actual mileage.

Interference into the proper measurement does not have to be targeted at the elements of an odometer alone. Falsifying the speed, thus also the reading on an odometer, takes place in case of installing wheels of a diameter that is different from the one designed and approved in the vehicle roadworthiness certification (vehicle homologation), providing of course that this was a perpetrator's intention. For example,[35] the change of wheels designed by the producer that are 205 (a tyre width)/55, a tyre profile calculated as a percentage of its width) in size on 16-inch diameter wheel rims into tyres that are 20 mm narrower (i.e. 185/55/R16) will result in a decrease in the measurement of speed, thus as a result also mileage because this value is calculated based on speed. The difference between the diameters of the wheels compared is 22 mm (-3.61%). It is a seemingly insignificant figure, however, the speedometer of a vehicle actually driving at a speed of 100 km/h will show the speed of 96.4 km/h. At the same time, an odometer will show the distance of 100 km travelled as shorter by 4 km. By analogy, an odometer of a vehicle that travelled 500,000 km (the mileage is nothing extraordinary in case of the company cars) will show the reading of 480,000 km, i.e. a figure reduced by 20,000 km.

For obvious reasons, apart from the scope of criminalisation there is interference resulting from the essence of the measurement, thus, consisting in standard movement of a vehicle, which increases the mileage.

The use of the portmanteau "odometer" as the name of the object of the executive action means that it refers only to an instrument for measuring the distance

[35] Kalkulator zamienników kół, https://www.oponeo.pl/narzedzia/zamienniki-opon#replacementsCalculator (accessed 12.11.2019).

(path) travelled. Penalisation of unlawful tampering with an instrument for measuring the time of work of an engine used, inter alia, in slow-movement vehicles, lift trucks and tractors is excluded. This instrument is a clock for measuring time (called motor-hours) and not distance (path). It does not matter that in such vehicles this instrument, not an odometer measuring mileage, is of major importance for the assessment of their technical condition.[36]

In relation to an offence specified in Article 306a § 2 CC, it is possible to commission another person to perform any of the above-mentioned activities, which is described in the section discussing the types of the offence.

The editorial form of this provision is disapproved of because it is considered that the specification of the causative feature disturbs the terminological cohesion of the Criminal Code.[37] It also decomposes the internal system of this code. It is rightly raised that it is hard to imagine that the commissioning of a prohibited act under Article 306a § 1 CC might, in any aspect, go beyond the framework of inducing a person to commit an offence (Article 18 § 2 CC), which carries a penalty within the limits prescribed for instigating, aiding and abetting (Article 19 § 1 CC).[38] The legislator assessed the issue differently. It was indicated in the justification for the amendment bill that instigating does not match all factual states that can take place in cases connected with interference into the reading on an odometer. In order to establish that instigating occurred, two conditions must be fulfilled: an instigator's direct intent (he/she wants another person to commit a prohibited act) and inducing a person to commit an offence. In such a configuration, the provision of Article 18 § 2 CC does not apply to a situation when an owner or a user of a vehicle only accepts a direct perpetrator's proposal to falsify the reading on an odometer, i.e. accepts an offer but does not induce a direct perpetrator to do this in any way. In such a case, the act of commissioning is not punished and an owner or a user of a vehicle is not criminally liable for their conduct, although they have consciously accepted unlawful interference into the reading on the odometer of their vehicle.[39]

These arguments are not convincing. "To commission" means "to impose an obligation on somebody to do something, to formally ask someone to do something for you, to order".[40] The term "commission" is a noun and a verb. It means: "to request someone to do something" [41] and "a demand, an order, a request"[42]. Therefore, the essence of commission consists in the activity of a person commissioning something and not in passive acceptance of someone's proposal. Thus, it refers to an action consisting in commissioning a task to perform, which results in the alteration of the reading on an odometer or disruption of its proper measurement. Therefore, a situation described by the legislator in which a proposal of altering the reading on

---

36 Justification, *supra* n. 28, p. 3.

37 M. Kulik, *supra* n. 18, commentary on Article 306a CC, thesis 8.

38 *Ibid*.

39 Justification, *supra* n. 28, p. 4.

40 S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Warszawa 2006, Vol. T–Ż, p. 1009; W. Doroszewski (ed.), *Słownik języka polskiego*, Warszawa 1958–1969, https://sjp.pwn.pl (accessed 11.11.2019).

41 S. Dubisz (ed.), *supra* n. 40, p.1009.

42 W. Doroszewski (ed.), *supra* n. 40 (accessed 11.11.2019).

an odometer is accepted can be analysed in terms of co-perpetration of an act under Article 306a § 1 CC but never as "commissioning with oblique intent".

"Commissioning" another person to commit an act under Article 306a § 1 CC should be recognised as one of the forms of instigation, in a way excluded from other forms of this non-causative offence carrying the same penalty as a causative form. It is hard to assume that this way the legislator excluded liability for "classic" instigation to commit a prohibited act under Article 306a § 1 CC, which is in a form different from commissioning to commit acts referred to therein. Thus, instigation to commit an offence under this provision can take any form of inciting with a direct intent but with the exception of commissioning. Therefore, it can be a proposal, encouragement, a suggestion, advice, a request, commission, an order or a threat,[43] sometimes in cumulative concurrence with other provisions of the statute.

A normative approach to Article 306a § 2 CC can raise practical interpretational doubts connected with non-causative forms of an offence commission and legal classification of such conduct, e.g. whether the head of a garage offering a "service" of illegal alteration of the reading on an odometer, ordering an employee to perform this act shall be liable for managerial instigation to commit an offence under Article 306a § 1 CC or an aggravated offence under Article 306a § 2 CC.

It is necessary to recognise liability of a perpetrator not only commissioning a direct perpetrator to alter the reading on an odometer but also commissioning an unknown one through an intermediary. It concerns requesting another person to incite a particular third person to commit an act under Article 306a § 1 CC. This is a situation analogous to "instigation to instigation", which is in general recognised as punishable in the doctrine and case law.[44]

If it is assumed that commissioning an activity is a specific form of instigation, and it should be recognised that it is causative in nature.[45] What it actually causes is evoking a perpetrator's intention (will, decision) to commit a prohibited act. However, it is not necessary for the person instigated to undertake whatever steps to fulfil the intention.[46]

---

[43] V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), A. Lach, J. Lachowski, T. Oczkowski, I. Zgoliński, A. Ziółkowska, *Kodeks karny*, Warszawa 2019, commentary on Article 18 CC, thesis 15.

[44] G. Rejman, [in:] G. Rejman (ed.), E. Bieńkowska, B. Kunicka-Michalska, J. Wojciechowska, *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999, p. 627; A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 1999, p. 262; L. Gardocki, *Prawo karne*, Warszawa 2008, p. 99; J. Giezek, [in:] J. Giezek, N. Kłączyńska, G. Łabuda, *Kodeks karny. Komentarz*, Warszawa 2012, pp. 167–168; P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*, Vol. 1, *Komentarz do art. 1–116*, Warszawa 2012, pp. 361–362; B.J. Stefańska, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2015, pp. 218–219; the Supreme Court judgment of 3 December 1964, VI KO 36/62, OSPiKA 1966, No. 10, item 12; the Supreme Court resolution of 21 October 2003, I KZP 11/03, OSNKW 2003, No. 11–12, item 89; the Constitutional Tribunal judgment of 17 July 2014, SK 35/12; judgment of the Court of Appeal in Warsaw of 31 March 2017, II AKa 450/16, LEX No. 2295317.

[45] Differently and inaccurately A. Zoll, [in:] K. Buchała, A. Zoll, *Kodeks karny. Komentarz*, Kraków 1998, p. 183; the Supreme Court judgment of 2 October 2002, IV KKN 109/00, Prokuratura i Prawo – supplement 2003, No. 3, item 2.

[46] V. Konarska-Wrzosek, *supra* n. 43, commentary on Article 18 CC, thesis 16; J. Giezek, [in:] J. Giezek (ed.), *supra* n. 44, pp. 164 and 166; P. Kardas, *supra* n. 44, p. 347; B.J. Stefańska, *supra* n. 44, p. 218; the Supreme Court judgments of 28 November 2006, III KK 156/06 and of 20 September 2007, III KK 149/07, LEX No. 420451.

Another issue that seems to be a problem is whether the provisions of Articles 22–23 CC are applicable to a person commissioning the prohibited act in question, especially if extraordinary mitigation of penalty or renouncement of the imposition of a penalty can be taken into account, which in cases determined in those provisions can be applicable to an instigator. A separate regulation of "commissioning" to commit an offence constitutes a special provision in relation to the provisions on instigation, and thus, as *lex specialis*, it excludes their application with respect to general provisions determining the rules of criminal liability, also including those mitigating an instigator's liability or even guaranteeing his/her impunity.[47]

5. SUBJECT

All types of the offence are common in nature (*delictum commune*). The legislator determined additional restrictions narrowing the circle of perpetrators of the offence under Article 306a CC or specifying special features of a subject. In practice, perpetrators of an act laid down in Article 306a § 1 CC are persons who alter the reading on an odometer within their organised, although not necessarily formalised, business activity. In the era of common and popular trade between Poland and China, especially via the platform aliexpress.com, instruments for altering the reading on an odometer of practically any modern car are available to anyone and not only those knowledgeable persons offering specialised services. This means that the circle of potential perpetrators of the discussed offence can be very broad. On the one hand, it is indicated by the rate of sales of those instruments and comments of Polish buyers that they place on motorists' forums to express their satisfaction with the effects obtained. On the other hand, lively discussions between the lovers of particular car brands on those forums provide instructions in the use of those devices and programs. Due to a moderate difficulty connected with the alteration of the reading on an odometer or interference into its proper measurement, it cannot be excluded that vehicle owners or users interested in the change of the reading will be perpetrators of that offence because, e.g. they may want to do this before selling their vehicle or returning a leased car (in case the lease contract determines the maximum mileage), or persons, as it has been stated earlier, whose income or other benefits, e.g. in the form of fuel cost refund, depend on mileage (company reps, persons involved in the transport of people and goods). It does not matter whether a perpetrator commits a criminalised act on their own or somebody else's behalf. It does not matter what the legal form of the business activity or the qualifications of the subject are.

A perpetrator of commissioning another person to alter the reading on an odometer or to interfere into its proper functioning (Article 306a § 2 CC) is a person on whose initiative the illegal clocking is to be committed. Most often, it will be the owner or user of a motor vehicle but it may be another person who is involved in selling, renting or importing second-hand cars.

---

[47] B.J. Stefańska, *Zagrożenie karne za podżeganie i pomocnictwo*, Prokuratura i Prawo No. 12, 2017, pp. 28–35.

6. SUBJECTIVE ASPECT

Both types of this offence, the basic one and the one of lesser significance, can only be committed intentionally.

Altering the reading on an odometer as well as illegal interference into its proper measurement can be committed with direct intent. A perpetrator wants to falsify the actual mileage and undertakes causative actions targeted at this conduct.

In relation to punishable interference into the proper measurement of an odometer (Article 306a § 1 *in fine* CC), it is not excluded that the offence can be also committed with oblique intent. This opinion is approved of in literature.[48] This intent also usually accompanies another, often non-criminal, desire of a man.[49] Thus, a perpetrator takes into account a possibility of committing this offence (gives consent to this), however, it does not constitute a major motive of his action. The requirement for liability is the establishment of real awareness of the possibility of matching the features of a prohibited act (predicting and accepting them). It is not sufficient to just imagine what the conduct may result in.[50]

The impulse can be, e.g. a desire to make some changes that, in the owner's opinion, are to update or modify a vehicle (called car tuning). For example, installing low-profile tyres that are different from the size approved in the homologation, a perpetrator may be aware that the modification will influence the measurement of mileage on an odometer; however, his direct aim is to change the visual image of his vehicle.

An act consisting in commissioning an activity referred to in Article 306a § 1 CC (Article 306a § 2 CC) can be committed only with a direct intent. If, as it has been mentioned, the initiative of a person commissioning something is the essence of the commissioning, it is hard to imagine that it can take a form of passive acceptance of an offer. The example provided in the legislative motives, according to which an owner or a user of a vehicle only accepts a proposal of a direct perpetrator of the falsification of the reading on an odometer, however, in no way inducing the direct perpetrator to its implementation, which was to match the features of commissioning with an oblique intent, is – as it has been indicated above – erroneous because such conduct does not match the feature of "commissioning" and, thus, only the perpetration of an act under Article 306a § 1 CC in an adequate factual form can be considered.

7. CONCURRENCE OF PROVISIONS

Tampering with the reading on an odometer of a motor vehicle or interference into its proper measurement in general constitutes the first stage of an offence of fraud, however, it is the mileage that is an object of deception or taking advantage of misin-

---

[48] D. Szeleszczuk, *supra* n. 3, p. 93.

[49] Judgment of the Court of Appeal in Lublin of 11 July 2002, II AKa 143/02, OSA 2003, No. 4, item 29.

[50] Judgment of the Court of Appeal in Katowice of 13 January 2011, II AKa 451/10, LEX No. 785464; judgment of the Court of Appeal in Lublin of 8 December 2008, II AKa 287/08, KZS 2009, No. 2, item 44.

terpretation. What is criminalised is the "goalmouth" of the infringement of a legal interest, which is similar in nature, regardless of the placement of Article 286 CC and Article 306a CC in separate chapters of the Criminal Code. Thus, we deal with what is called simplified criminalisation, the essence of which is to cover some types of substitute conduct hidden behind the criminalised one instead of those that are difficult to prove or in order to prevent acts that are of considerable social harmfulness.[51] Penalisation of conduct specified in Article 306a CC results from practical difficulties in proving the features of fraud consisting in, e.g. selling a motor vehicle with intentionally decreased, in relation to the actual, reading on an odometer and making a buyer dispose of their or someone else's property in a disadvantageous way by overpricing the vehicle. While the practice of altering the reading on an odometer in order to increase attractiveness of a vehicle for a potential buyer is obvious,[52] the consequence of causative actions referred to in Article 306a CC may also consist in the increase of mileage, especially in case of a company car in order to indicate bigger mileage and obtain profits (reps get bonuses and a refund of expenses incurred for the purchase of fuel, which in fact has not been bought, etc.). However, the normative content of the provision of Article 286 § 1 CC does not cover the conduct determined in Article 306a CC and does not reflect the whole burden of social harmfulness of an act. It also cannot be assumed that the infringement of another provision, in this case Article 306a §§ 1–3, is taken into account in the commission of an aggravated act under an incorporating provision (Article 286 § 1 CC).[53] Thus, in spite of the fact that falsification of the reading on an odometer in general constitutes a means of committing the offence of fraud, it is rightly concluded that there is no *lex consumens derogat legi consumptae* relation between those provisions.[54] As Article 306a CC is not incorporated by Article 286 § 1 CC, its infringement should be taken into account in the legal classification of the above-discussed conduct.

Thus, all types of acts determined in Article 306a CC can be in cumulative concurrence (Article 11 § 2 CC) with the provision of Article 286 § 1 CC, and in the case of vehicles of high value, the classification should also take into account Article 294 § 1 CC.

8. PENAL CONSEQUENCES

Both basic types (Article 306a § 1 and § 2 CC) carry a penalty of deprivation of liberty for a term from three months to five years. Such penalty is prescribed in § 1 of the provision and in § 2 there is a phrase "The same penalty is applied to", which refers to the offence classified in § 1.

---

[51] L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990, p. 67; *idem*, *Typizacja uproszczona*, Studia Iuridica No. 10, 1982, p. 75; *idem*, *Uproszczone formy penalizacji*, Państwo i Prawo No. 8–9, 1975, p. 75.

[52] Justification, *supra* n. 28, pp. 1–3; D. Szeleszczuk, *supra* n. 3, pp. 82–83.

[53] W. Wolter, *Nauka o przestępstwie*, Warszawa 1973, p. 336.

[54] D. Szeleszczuk, *supra* n. 3, p. 93; M. Kulik, *supra* n. 18, commentary on Article 306a CC, thesis 12.

The types carrying mitigated penalty in cases of lesser significance carry alternative penalties: a fine, limitation of liberty or deprivation of liberty for up to two years.

Defining of a penal sanction for an act under Article 306a CC should be recognised as adequate to the level of social harmfulness of the conduct, although there is also an opposite opinion presented in literature.[55] It was right to recognise the penalty for an offence of falsifying a document (Article 270 § 1 CC) as a starting point to determine sanctions in the justification for the bill. An odometer is not only an instrument recording mileage but also for doing this in a special form targeting user-friendly, unambiguous reading, which is available to everybody.

The sanction for an offence under Article 306a § 2 CC is also adequate. Regardless of the doubts presented above, it should be consistently assumed that commissioning as a special form of instigation should, in accordance with the general clause, carry a penalty within the scope prescribed for perpetration. The prescribed penalty is also adequate to the penalty for the offence of forging or counterfeiting, or altering documents in cases of lesser significance (Article 270 § 2a CC).

A statutory penalty of deprivation of liberty (from three months to five years) for basic types of the offence as well as defining the types carrying a mitigated penalty (Article 306a § 3 CC), which is a fine, limitation of liberty or deprivation of liberty up to two years, give a court the possibility of taking a flexible normative choice of adequate and just penalty comprehensively considering subjective-objective circumstances without unsubstantiated limitations (Article 53 CC).

Penal sanctions can also be adjudicated in relation to a perpetrator who commits an offence within organised business activity: a ban on the exercise of a particular profession (Article 41 § 1 CC) or a ban on doing a particular business (Article 41 § 2 CC).

It is rightly emphasised in the amendment bill that conviction for an offence should result in ruling the forfeiture of items that served or were designed to commit an offence (Article 44 § 2 CC), i.e. inter alia all devices, instruments, including computers, diagnostic testers, interfaces, diagnostic cables, adapters and electronic modules and software that served unauthorised interference into the reading on an odometer.[56] The above-discussed doubts should be referred to items serving or designed to its unauthorised replacement. By analogy, it should be assumed that an odometer showing false mileage should be subject to forfeiture because it matches the criterion of an item originating from an offence.

A company that was entirely or only partially involved in the described offence can also be subject to forfeiture in the case the perpetrator has obtained, even indirectly, financial benefits of considerable value (Article 44a CC). The financial benefits gained or their equivalent can also be subject to forfeiture.

However, the forfeiture of a vehicle is not possible because it does not match any of the statutorily determined forfeiture criteria.

---

[55] D. Szeleszczuk, *supra* n. 3, pp. 94–95.

[56] Justification, *supra* n. 28, p. 5.

BIBLIOGRAPHY

Andrejew I., Kubicki L., Waszczyński J., *System prawa karnego*, Vol. IV, Part 1, Warszawa 1985.
Andrejew I., *Podstawowe pojęcia nauki o przestępstwie*, Warszawa 1988.
Bachrach A., *Reglamentacja prawna bezpieczeństwa ruchu drogowego*, Państwo i Prawo No. 5, 1972.
Bachrach A., *Przestępstwa i wykroczenia drogowe w nowym prawie polskim*, Warszawa 1974.
Bojarski T., *Odmiany podstawowych typów przestępstw w prawie polskim*, Warszawa 1982.
Buchała K., *Przestępstwa i wykroczenia przeciwko bezpieczeństwu w komunikacji drogowej*, Bydgoszcz 1997.
Buchała K., Zoll A., *Kodeks karny. Komentarz*, Kraków 1998.
Doroszewski W. (ed.), *Słownik języka polskiego*, Warszawa 1958–1969.
Dubisz S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. T-Ż, Warszawa 2006.
Gardocki L., *Uproszczone formy penalizacji*, Państwo i Prawo No. 8–9, 1975.
Gardocki L., *Typizacja uproszczona*, Studia Iuridica No. 10, 1982.
Gardocki L., *Zagadnienia teorii kryminalizacji*, Warszawa 1990.
Gardocki L., *Prawo karne*, Warszawa 2008.
Giezek J. (ed.), Gruszecka D., Kłączyńska N., Łabuda G., Muszyńska A., Razowski T., *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2012, 2014.
Grześkowiak A. (ed.), Wiak K. (ed.), Ciepły F., Gałązka M., Hałas R., Hypś S., Szeleszczuk D., *Kodeks karny. Komentarz*, Warszawa 2012.
Gubiński A., *Prawo wykroczeń*, Warszawa 1985.
Kochanowski J., *Zagadnienia przestępstw drogowych i przeciwko bezpieczeństwu w komunikacji*, Warszawa 1990.
Konarska-Wrzosek V. (ed.), Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., *Kodeks karny. Komentarz*, Warszawa 2019.
Mącior W., *Problemy przestępstw nieumyślnych na tle aktualnych wymagań teorii i praktyki*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego No. 35, 1968.
Mozgawa M. (ed.), Budyn-Kulik M., Kozłowska-Kalisz P., *Kodeks karny. Komentarz*, Warszawa 2019.
Radecki W., *Zagrożenie bezpieczeństwa ruchu drogowego przez nietrzeźwych kierowców*, Nowe Prawo No. 10–11, 1975.
Radecki W., *Przestępstwa narażenia życia i zdrowia człowieka na niebezpieczeństwo w kodeksie karnym PRL z 1969 r.*, Wrocław 1977.
Rajchel K., *Porządek i bezpieczeństwo w ruchu drogowym*, Rzeszów 1997.
Rejman G. (ed.), Bieńkowska E., Kunicka-Michalska B., Wojciechowska J., *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999.
Stefańska B.J., *Wypadek mniejszej wagi w polskim prawie karnym*, Ius Novum No. 1, 2017.
Stefańska B.J., *Zagrożenie karne za podżeganie i pomocnictwo*, Prokuratura i Prawo No. 12, 2017.
Stefański R.A., *Wykroczenia drogowe. Komentarz*, Warszawa 2012.
Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa 2015.
Szeleszczuk D., *Kryminalizacja „cofania liczników" w świetle projektowanej nowelizacji Kodeksu karnego z 5 lipca 2018 r.*, Prokuratura i Prawo No. 1, 2019.
Szmidt Z., *Administracyjnoprawna działalność MO w ochronie bezpieczeństwa i porządku publicznego*, Warszawa 1981.
Szwedek E., *Glosa do uchwały SN z dnia 25 lutego 1977 r., VII KZP 22/76*, OSPiKA No. 1, 1978.
Ważny A., *Glosa do wyroku SN z dnia 20 lutego 2008 r., V KK 313/07*, Paragraf na Drodze No. 10, 2009.
Wąsek A., *Kodeks karny. Komentarz*, Vol. I, Gdańsk 1999.

Wierzbicki S., *Procedury diagnozowania pojazdów samochodowych zgodnych z normą OBD II*. Diagnostyka Vol. 28, 2003.
Wolter W., *Nauka o przestępstwie*, Warszawa 1973.
Wolter W., *Uprzywilejowane typy przestępstw*, Państwo i Prawo No. 1–2, 1976.
Zoll A. (ed.), *Kodeks karny. Część ogólna*, Vol. 1, *Komentarz do art. 1–116*, Warszawa 2012.

LIABILITY FOR ILLEGAL TAMPERING WITH A MOTOR VEHICLE ODOMETER READING OR INTERFERENCE INTO ITS PROPER MILEAGE MEASUREMENT (ARTICLE 306A CC)

Summary

The article presents the characteristics of a new type of offence consisting in the alteration of the reading on an odometer of a motor vehicle or interference into its proper measurement of mileage (Article 306a CC). Following a traditional pattern, it describes the development of this institution, the object of protection, types of the offence and its subjective aspect. The article determines the subject and features of the subjective aspect. It also discusses possible concurrence of provisions and penalties involved. The introduction of criminal liability for conduct consisting in illegal tampering with the reading on an odometer is well-grounded, however, the normative approach to the institution is not perfect and does not cover all types of conduct aimed at concealment of actual mileage of a motor vehicle, which can hamper efficient combating the "clocking". It is in particular noticed that there is a lack of statutory grounds for penalising the replacement of an odometer in order to conceal the actual mileage, which violates the statutory provisions. The separate classification of "commissioning" the activities specified in Article 306a § 1 CC is criticised because it destructs the terminological coherence and the systematic organisation of the Criminal Code.

Keywords: substantive criminal law, altering the reading on an odometer, interference into proper measurement of an odometer, replacement of an odometer

ODPOWIEDZIALNOŚĆ ZA PRZESTĘPNĄ ZMIANĘ WSKAZANIA DROGOMIERZA POJAZDU MECHANICZNEGO LUB INGERENCJĘ W PRAWIDŁOWOŚĆ JEGO POMIARU (ART. 306A K.K.)

Streszczenie

W artykule dokonano charakterystyki nowego przestępstwa, polegającego na zmianie wskazania drogomierza pojazdu mechanicznego lub dokonaniu ingerencji w prawidłowość jego pomiaru (art. 306a k.k.). Według tradycyjnie przyjętego schematu opisano kształtowanie się tej instytucji, przedmiot ochrony przepisu, typy przestępstwa i jego stronę przedmiotową. Określono podmiot oraz znamiona strony podmiotowej. Omówiono także możliwy zbieg przepisów oraz zagrożenie karne. Wprowadzenie odpowiedzialności karnej za zachowania polegające na bezprawnej manipulacji stanem drogomierza jest uzasadnione, jednak ujęcie normatywne instytucji nie jest doskonałe i nie obejmuje wszystkich zachowań ukierunkowanych na ukrycie rzeczywistego przebiegu pojazdu mechanicznego, co może utrudnić

skuteczną walkę z procederem „cofania liczników". Dostrzeżono w szczególności brak ustawowych podstaw do ukarania za dokonanie, wbrew przepisom ustawy, wymiany drogomierza w celu ukrycia rzeczywistego przebiegu pojazdu mechanicznego. Krytycznie oceniono także odrębne stypizowanie „zlecenia" czynności wymienionych w art. 306a § 1 k.k. jako zaburzające spójność terminologiczną i systematykę kodeksu karnego.

Słowa kluczowe: prawo karne materialne, zmiana wskazania drogomierza, ingerencja w prawidłowość pomiaru drogomierza, wymiana drogomierza

RESPONSABILIDAD POR LA MODIFICACIÓN DELICTIVA DE KILOMETRAJE DE UN VEHÍCULO MECÁNICO O INTERFERENCIA EN MEDICIÓN CORRECTA DE CUENTAKILÓMETROS (ART. 306A DEL CÓDIGO PENAL)

Resumen

El artículo describe el nuevo delito que consiste en trucar cuentakilómetros de un vehículo mecánico o en intervenir en su medición correcta (art. 306a del código penal). Según el esquema tradicional, se analizan los antecedentes de esta institución, bien jurídico protegido por el precepto, tipos de delitos, y su parte objetiva. Se determina el sujeto activo y elementos de la parte subjetiva, así como los posibles concursos de normas y la sanción. La introducción de la responsabilidad penal por la conducta que consiste en manipulación antijurídica de cuentakilómetros es fundada, sin embargo la regulación normativa de la institución no es ideal y no incluye todas posibles conductas que tiendan a ocultar el kilometraje real de un vehículo mecánico, lo que puede dificultar la lucha contra la falsificación de cuentakilómetros. En particular, faltan las bases legales para sancionar el cambio ilegal de cuentakilómetros con el fin de ocultar el kilometraje real de un vehículo mecánico. Se valora críticamente la tipificación por separado del hecho de encargar la ejecución de acciones enumeradas en el art. 306a § 1 del código penal, dado que trastorna la cohesión terminológica y sistemática del código penal.

Palabras claves: derecho penal, modificación de cuentakilómetros, interferencia en la medición correcta de cuentakilómetros, cambio de cuentakilómetros

ОТВЕТСТВЕННОСТЬ ЗА ПРЕСТУПНОЕ ИЗМЕНЕНИЕ ПОКАЗАНИЙ СЧЕТЧИКА ПРОБЕГА АВТОТРАНСПОРТНОГО СРЕДСТВА ИЛИ НАРУШЕНИЕ ПРАВИЛЬНОСТИ ЕГО ИЗМЕРЕНИЙ (СТ. 306А УК)

Резюме

В статье описывается новый состав преступления, состоящий в изменении показаний счетчика пробега транспортного средства (одометра) или нарушении правильности его измерения (ст. 306а УК). В соответствии с принятой схемой, описывается формирование данного института, предмет правовой охраны, виды данного преступления, а также его объективная сторона. Уточнены субъект и характеристики субъективной стороны преступления. Обсуждается также возможность совпадения норм права, а также уголовные санкции за преступление. Введение уголовной ответственности за действия, заключающиеся в незаконном воздействии на состояние счетчика пробега, представляется обоснованным. Однако, то, как институт ответственности

за это преступление отражен в нормах права, оставляет желать лучшего. Существующее законодательство не охватывает всех видов действий, направленных на сокрытие фактического пробега транспортного средства, что может препятствовать эффективной борьбе с преступной практикой «скручивания пробега». В частности, автор отмечает, что не существует законных оснований для применения санкций за замену (в нарушение положений закона) счетчика пробега с целью сокрытия фактического пробега транспортного средства. Автор также критикует отдельную классификацию «заказа» на выполнение действий, предусмотренных в ст. 306a § 1 УК, на том основании, что она нарушает терминологическую последовательность и систематику уголовного кодекса.

Ключевые слова: материальное уголовное право, изменение показаний счетчика пробега, нарушение правильной работы счетчика пробега, замена счетчика пробега

DIE HAFTUNG FÜR DIE GESETZESWIDRIGE MANIPULATION VON KILOMETERZÄHLERN, D.H. DIE ÄNDERUNG DER TATSÄCHLICHEN KILOMETERLEISTUNG VON KRAFTFAHRZEUGEN UND DEN EINGRIFF IN DIE KORREKTE, VORSCHRIFTSMÄSSIGE MESSUNG DER KILOMETERLEISTUNG (ARTIKEL 306A DES POLNISCHEN STRAFGESETZBUCHES)

Zusammenfassung

In dem Artikel werden die Merkmale einer neuen Straftat gekennzeichnet, die darin besteht, dass der Kilometerzähler eines Kraftfahrzeugs manipuliert und die tatsächliche Kilometerleistung geändert wird oder in die korrekte, vorschriftsmäßige Messung der Kilometerleistung Eingriff genommen wird (Artikel 306a des polnischen Strafgesetzbuches). Nach dem herkömmlichen Schema werden die Gestaltung dieses Rechtsinstituts (Instruments), der Schutzgegenstand im Sinne der Vorschrift, die Kategorien der Straftat und ihre objektiven Tatbestände beschrieben. Bezeichnet werden außerdem der Gegenstand und die Merkmale des objektiven Tatbestands. Ebenfalls erörtert werden das mögliche Zusammentreffen verschiedener Rechtsvorschriften und die drohenden strafrechtlichen Sanktionen. Die Einführung der strafrechtlichen Verantwortlichkeit für rechtswidriges Verhalten in Form der widerrechtlichen Manipulation eines Kilometerzählers ist gerechtfertigt. Der normative Rahmen des Rechtsinstituts ist dabei jedoch alles andere als perfekt und deckt nicht das gesamte Verhaltensspektrum ab, das darauf abzielt, die tatsächliche Laufleistung eines Kraftfahrzeugs zu verschleiern, wodurch eine wirksame Bekämpfung des „Tacho-Zurückstellens" erschwert wird. Insbesondere wird auf das Fehlen gesetzlicher Strafgründe für den gesetzeswidrigen Austausch eines Kilometerzählers zur Verschleierung der tatsächlichen Kilometerlaufleistung eines Kraftfahrzeugs hingewiesen. Kritisch bewertet wird auch die separate Kategorisierung der „Beauftragung" mit den in Artikel 306a § 1 des polnischen Strafgesetzbuches aufgeführten Handlungen, die als Verstoß gegen die terminologische Kohärenz und die Systematik des Strafgesetzbuches betrachtet wird.

Schlüsselwörter: materielles Strafrecht, Manipulation des Kilometerzählers, Änderung der tatsächlichen Kilometerleistung, Eingriff in die korrekte, vorschriftsmäßige Messung der Kilometerleistung, Austausch des Kilometerzählers

RESPONSABILITÉ DE LA MODIFICATION CRIMINELLE DE LA LECTURE DE L'ODOMÈTRE D'UN VÉHICULE AUTOMOBILE OU DE L'INGÉRENCE DANS L'EXACTITUDE DE SON MESURE (ART. 306A DU CODE PÉNAL)

Résumé

L'article caractérise un nouveau infraction consistant à modifier la lecture de l'odomètre d'un véhicule automobile ou à interférer avec l'exactitude de sa mesure (article 306a du code pénal). Selon le schéma traditionnellement adopté, la formation de cette institution, le sujet de la protection de la disposition, les types de crime et son sujet ont été décrits. Le sujet et les éléments constitutifs subjectifs ont été précisés. Un concours éventuel de dispositions légales et une menace pénale ont également été discutés. L'introduction de la responsabilité pénale pour le comportement impliquant la manipulation illégale du compteur kilométrique est justifiée, cependant, l'approche normative de l'institution n'est pas parfaite et ne couvre pas tous les comportements visant à masquer le kilométrage réel d'un véhicule automobile, ce qui peut entraver la lutte efficace contre le «renversement de compteur». En particulier, l'absence de motif légal de punition pour avoir effectué, contrairement aux dispositions de la loi, le remplacement d'un compteur kilométrique afin de masquer le kilométrage réel d'un véhicule automobile a été constatée. La stipulation séparée de «l'ordre» des activités énumérées à l'art. 306a § 1 du code pénal, comme perturbant la cohérence terminologique et la systématique du code pénal, a également fait l'objet d'une évaluation critique.

Mots-clés: droit pénal matériel, modification de la lecture de l'odomètre, ingérence dans l'exactitude de la mesure de l'odomètre, remplacement de l'odomètre

RESPONSABILITÀ PER IL REATO DI MODIFICA DELL'INDICAZIONE DEL CONTACHILOMETRI DI UN AUTOVEICOLO O INGERENZA NELLA CORRETTEZZA DELLA SUA MISURA (ART. 306A DEL CODICE PENALE)

Sintesi

Nell'articolo si è analizzato il nuovo reato consistente nella modifica dell'indicazione del contachilometri di un autoveicolo o nell'ingerenza nella correttezza della sua misura (art. 306a del Codice penale). Secondo lo schema tradizionalmente assunto si è descritta la formazione di tale istituzione, l'oggetto di tutela della norma, il tipo di reato e la sua sostanza. È stato definito il soggetto e gli elementi soggettivi. È stato anche descritto un possibile concorso di norme e un rischio penale. L'introduzione della responsabilità penale per comportamenti consistenti nella manipolazione illecita dello stato del contachilometri è motivata, tuttavia l'aspetto normativo dell'istituzione non è perfetto e non comprende tutti i comportamenti mirati a nascondere l'effettivo chilometraggio dell'autoveicolo, il che può ostacolare una lotta efficace alla pratica della manomissione del contachilometri. È stata notata in particolare l'assenza di basi giuridiche per punire la sostituzione del contachilometri, in contrasto alle norme della legge, al fine di nascondere l'effettivo chilometraggio dell'autoveicolo. È stata valutata criticamente anche la classificazione distinta di "affidamento" delle azioni indicate nel art. 306a § 1 del Codice penale, in quanto turbativa della coerenza terminologica e della sistematicità del codice penale.

Parole chiave: diritto penale sostanziale, modifica dell'indicazione del contachilometri, ingerenza nella correttezza della misura del contachilometri, sostituzione del contachilometri

Cytuj jako:

Dąbrowski J.A., Liability for illegal tampering with a motor vehicle odometer reading or interference into its proper mileage measurement (Article 306a CC) *[Odpowiedzialność za przestępną zmianę wskazania drogomierza pojazdu mechanicznego lub ingerencję w prawidłowość jego pomiaru (art. 306a k.k.)]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 35–57. DOI: 10.26399/iusnovum.v13.4.2019.42/j.a.dabrowski

Cite as:

Dąbrowski, J.A. (2019) 'Liability for illegal tampering with a motor vehicle odometer reading or interference into its proper mileage measurement (Article 306a CC)'. *Ius Novum* (Vol. 13) 4, 35–57. DOI: 10.26399/iusnovum.v13.4.2019.42/j.a.dabrowski

Ius Novum
4/2019

USE OF INDECENT WORDS IN A PUBLIC PLACE AS A MISDEMEANOUR

MARIA GOŁDA-SOBCZAK*

DOI: 10.26399/iusnovum.v13.4.2019.43/m.golda-sobczak

1. INDECENT CONDUCT

In Article 141 Misdemeanour Code (hereinafter MC) the legislator stipulates the protection of public decency and penalises the placement of indecent announcements, inscriptions or drawings as well as the use of indecent words in a public place. This type of acts undoubtedly affect public decency that is protected in Chapter XVI MC as well as (what is often forgotten) in Chapter XXV Criminal Code, where offences against sexual freedom and decency are classified, although the representatives of the legal doctrine as well as the judicature (for understandable reasons) pay most attention to the former, i.e. acts that violate sexual freedom. In the light of that, still based on the Criminal Code of 1969 (henceforth CC), the Supreme Court stated that decency means fundamental moral principles of social coexistence in the field of sexual contacts and relations.[1] In the doctrine, the concept of decency is interpreted more broadly, namely as a type of conduct in a particular social group, which is acceptable in it and the violation of which results in the group's negative response.[2] Some doubts must immediately arise as a particular type of conduct may be accepted by one group and disapproved of by another one. It is sometimes emphasised in the doctrine that indecent conduct means such behaviour that can objectively cause indignation.[3] The problem is that, as we know, assessment is never objective

* PhD hab., Associate Professor at the Institute of European Culture of Adam Mickiewicz University in Poznań; e-mail: mgolsob@amu.edu.pl; ORCID: 0000-0002-3854-7007

1 Resolution of the Supreme Court of 13 April 1977, VII KZP 30/76, OSNKW 1977, No. 6, item 58.

2 M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń. Komentarz*, 2nd edn, Warszawa 2013, p. 648.

3 D. Egierska-Miłoszewska, *Nieobyczajny wybryk (art. 140 k.w. w teorii i praktyce)*, Zagadnienia Wykroczeń No. 4–5, 1979, p. 70; M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warszawa 2006, p. 723; A. Gubiński, *Prawo wykroczeń*, 4th edn, Warszawa 1980, pp. 336–337.

but subjective in nature. One can try to rationalise it, recognise that the majority of society or a certain social group shares the same opinion, but naturally there is clear relativity. Refraining from analysing the issue of public decency, which is subject to protection in Chapter XVI MC, more thoroughly, we should agree with the opinion of Leszek Falandysz who stated that Chapter XVI MC "is unearthing theological indignation of the little ones and noble outrage of the middle class, teaching virtue under threat of punishment".[4]

It is emphasised in the doctrine that an indecent act should be identified with an immoral act. It is indicated that an indecent act is one that is in conflict with the feeling of public morality and embarrassment.[5] However, it should be noticed that the term "morality" has many meanings and "moral norms" are general, directive in nature and are not precisely determined or codified. Thus, one must agree with the statement that, although the spheres of legal norms and moral norms application to a large extent correspond, there are some fields that are regulated by law in a general way but thoroughly by moral norms.[6] However, it is indicated that decency protected in Chapter XVI MC does not concern moral assessment of conduct in terms of good and evil, but the principles of coexistence in society.[7] As a matter of fact, the concept of "public decency" covers norms connected with manners that change over time. In the past, provided we trust memoirs, indecent conduct included a kiss in public, smoking cigarettes by women and even a solitary woman's walk in the park or an unaccompanied entry into a cafe, then wearing trousers by women, which has become a norm today and does not shock anybody in the same way as meagre bikini swimwear. Of course, the purists guarding morality or decency interpreted in a specific way still believe that sunbathing topless is a misdemeanour under Article 140 MC. It is stated that acts determined in Article 140 MC do not require the occurrence of outrage or disgust. But if they do, who should determine that a given act is indecent and where the criteria for decency should be looked for?[8] Who decides that a given conduct is indecent? Although it is emphasised in

---

[4] L. Falandysz, *Mała, natarczywa obyczajność*, Gazeta Sądowa i Penitencjarna No. 17, 1970, p. 10. Also see J. Kulesza, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 914.

[5] M. Kulczycki, J. Zduńczyk, *Kodeks wykroczeń. Popularny komentarz*, Warszawa 1982, p. 170.

[6] M. Ossowska, *Normy moralne. Próba systematyzacji*, Warszawa 1970, pp. 230–236; W. Lang, *Prawo i moralność*, Warszawa 1989, pp. 8–15; Z. Ziembiński, *Etyczne problemy prawoznawstwa*, Wrocław 1972, pp. 12–16; R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 1998, 2nd edn, pp. 173–187. Also compare J. Stelmach, *Die hermeneutische Auffassung der Rechtsphilosophie*, Ebelsbach 1991; J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1995.

[7] J. Kulesza, *supra* n. 4, p. 914.

[8] Following the broadly commented case concerning some women sunbathing topless who were finally absolved from liability, there were arguments presented that the women's conduct did not offend anybody and did not evoke any negative commentaries. However, the police officers intervening could not accept their behaviour. See R. Krajewski, *Oceny prawne topless*, Ius Novum No. 4, 2013, p. 112. Also compare M. Derlatka, *Czy opalanie topless to nieobyczajny wybryk?* Jurysta No. 10, 2008, p. 36; M. Zbrojewska, *supra* n. 2, p. 648. Bolesław Kurzępa's opinion is that every case of public presentation of nudity matches the features of misdemeanour and demonstrates obscurantist penal populism; B. Kurzępa, *Kodeks wykroczeń. Komentarz*, Warszawa 2008, p. 475. What should be the interpretation of the term "nudity"? Does it mean showing the breasts and the back, even reaching the buttocks, by a woman wearing a long dress with

literature that a misdemeanour under Article 140 MC is a formal misdemeanour, an opinion is usually quoted that indecent excesses include coarse, rude and bawdy acts as indecent acts that are in flagrant conflict with good manners, disrespect the surrounding and cause outrage and disapproval of those who condemn them.[9] Thus, some authors are ready to assume that an indecent act is to result in outrage.[10]

The concept of indecent conduct is quite broadly discussed in the doctrine, however, the difference between indecent conduct, indecent excesses referred to in Article 140 MC and indecent acts in the form of placing indecent words, announcements, inscriptions or drawings in a public place or using indecent words referred to in Article 141 MC is not noticed. It is necessary to agree with the opinion that indecent conduct means behaviour that is in conflict with good manners, immoral, obscene and unacceptable. An ill-mannered person is an immoral, obscene person for whom good habits are alien.[11] In colloquial language, indecent conduct means immodest, shameless and improper behaviour. Indecency means immorality, immodesty and non-conformity with binding norms and principles, and breaking binding norms concerning manners, principles and etiquette.[12] According to Monika Zbrojewska, indecent conduct is the behaviour that is in conflict with ethical and moral principles that are binding in society.[13]According to Joanna Piórkowska-Flieger, recognition of something as indecent depends on the evaluator's sensitivity to a greater extent than in case of other unclear phenomena referred to in the Misdemeanour Code.[14] It is also indicated, however, that the assessment of the features of indecency should be based on objective criteria and refer to dominating social opinions. It should depend on changeable attitudes that exist in society, first of all aesthetic and not ethical ones.[15]

2. PUBLIC INDECENCY

The above statements aim to present the relativity of the concept of public indecency and indecent conduct related to it, i.e. assumed to be in conflict with the principles of social coexistence, causing outrage or condemnation as well as negative assessment.

---

a décolletage in front and at the back? Or does it mean showing whole thighs by wearing a short skirt revealing stocking clips? Does a man wearing briefs tightly fitting over his genitals instead of boxer shorts and walking on a public beach present nudity?

[9] W. Radecki, *Oceny publicznego pijaństwa w sprawie wykroczeń*, Zagadnienia Wykroczeń No. 2, 1984, p. 52.

[10] J. Kulesza, *supra* n. 4, p. 917. Similarly, J. Piórkowska-Flieger, [in:] T. Bojarski, *Kodeks wykroczeń. Komentarz*, Warszawa 2015, p. 573.

[11] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 2, Warszawa 2003, pp. 935–936. It is worth mentioning that the former *Słownik języka polskiego* by M. Szymczak does not have an entry of "ill-mannered" (*nieobyczajny*) and does not provide its definition.

[12] M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 2, Warszawa 1988, p. 354. S. Dubisz (ed.), *supra* n. 11, Vol. 2, p. 956.

[13] M. Zbrojewska, *supra* n. 2, p. 648.

[14] J. Piórkowska-Flieger, *supra* n. 10, p. 573.

[15] J. Kulesza, *supra* n. 4, p. 323, approving of the former stand of W. Radecki. See W. Radecki, *Wykroczenia przeciwko obyczajności publicznej*, Służba MO No. 3, 1976, p. 321.

Further considerations concern, in accordance with the title of Article 141 MC, in particular the concept of "indecency" and "indecent words". Certainly, the above-mentioned provision does not only deal with the use of indecent words but also the placement of indecent announcements, inscriptions or drawings. The evaluation whether a drawing or a painting is indecent, and thus causes outrage, indignation is relative. Today nobody thinks, at least for the time being, of recognising paintings such as *Szał* (presenting a naked woman on a raging horse) by Władysław Podkowiński, *The Nude Maia* by Fracisco Goya, *Danae* by Jacopo Tintorentto, *Heracles and Omphale* by François Boucher, *The Nightmare* by Johann Heinrich Füssli, *Grande Odalisque* by Jean Auguste Dominique Ingres, *White Slave* by Jean Lecomte du Noüy, *The Luncheon on the Grass* or *Olympia* by Édouard Manet, *Woman in the Bath* by Edgar Degas, or *Salon de la rue des Moulins* by Henri de Toulouse-Lautrec and *Rolla* by Henri Gervex as indecent. However, when they were painted, they were recognised as indecent, caused indignation and some people categorically demanded that they be removed from the places where they were displayed.

3. PORNOGRAPHY VERSUS INDECENCY

There is a problem with differentiating a situation that the legislator recognises as a misdemeanour under Article 141 MC from pornography criminalised under Article 202 §§ 1, 3 and 4b CC. Undoubtedly, a pornographic message can be treated as indecent. If such a message is in the form of a drawing and is placed in a public place both by its author and any other person, it should be recognised as an act matching the features stipulated under Article 141 MC. However, it also means public presentation of a pornographic content, and thus matches the features under Article 202 § 1 CC, and in a situation when such a presentation concerns minors or is connected with showing violence or the use of an animal, it matches the features under Article 202 § 3 CC.

It should be noted, however, that the legislator skilfully avoided the use of the concept of pornography in Article 141 MC by indicating only that this misdemeanour consists in placing an indecent drawing in a public place. However, the use of the word "drawing" must raise doubts. Although it seems to be a clear term, the word "drawing" is not unambiguous. In everyday use, a drawing is something someone draws with the use of a pencil, pen, coal, chalk or pastels. According to the Polish language dictionaries, the concept of "drawing" should be understood as "a contour, outline and shape of something".[16] "To draw" means "to depict contours, an image of something or somebody with the use of lines".[17] Thus, a question must be asked whether an oil or watercolour painting and graphic art, regardless of the technique, should be recognised as drawings. Every art historian would undoubtedly reject the identification of a drawing with those forms. Would a person

[16] M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 3, Warszawa 1989, p. 154; S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 1106.

[17] M. Szymczak (ed.), *supra* n. 16, p. 154, S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 1105.

hanging copies of the above-mentioned pictures, artists' drawings presenting, e.g. women in poses recognised as indecent by prudish audience, match the features of a misdemeanour under Article 141 MC? Or perhaps such an act should be recognised as one matching the features of dissemination of pornography. Finally, is the activity of displaying and selling pictures presenting nude models, e.g. near St. Florian's Gate in Kraków, a misdemeanour under Article 141 MC? Such pictures often evoke some viewers' aggression. They express their dissatisfaction by flinging insults at them, threatening them with hell's fire and even spitting at the pictures. This conduct indicates that they recognise the pictures as indecent, breaking the canons of good manners, shameless and demoralising. Thus, they raise objections.

Therefore, law enforcement agencies and then courts must face a problem of penal assessment of such a presentation and of answering the question whether such activities mean dissemination of pornography or just a misdemeanour under Article 141 MC. Or possibly, there is a concurrence of the provisions of Article 141 MC and Article 202 §§ 1, 3 or 4b CC with respect to an act of presenting pornographic content. In case of Article 202 § 1 CC, it is enough that pornographic content is presented to people who do not wish to see it. In case of Article 202 § 3 or § 4b CC, just presenting this content matches the features of the offence. As a result, the issue to be solved is a question whether every pornographic drawing within the meaning of Article 202 CC is indecent and whether it is possible that an indecent drawing within the meaning of Article 141 MC is not pornographic.

Although obscene pictures have accompanied human civilisation since the dawn of time, pornography as an act matching the features of crime appeared in modern times. The term "pornography" refers to "writing, print, theatre plays, films, photographs, drawings and other objects with indecent content, aimed at evoking sexual excitement".[18] *Uniwersalny słownik języka polskiego*, edited Stanisław Dubisz, explains the term a little differently indicating that pornography means "papers, films, photographs, etc. presenting a nude body (often with uncovered genitals) and sexual intercourse in the way that infringes social norms of conduct". In the doctrine, pornography is usually classified as "hard" and "soft". According to the above-mentioned dictionary, soft pornography is "mild pornography, without aggression and pathology". On the other hand, hard pornography is "pornography full of aggression, often presenting pathological sexual intercourse".[19] Sometimes, child (paedophile) pornography is distinguished in literature. It is often indicated that "pornography" is derived from a Greek word *porno* used to describe prostitu-

[18] See M. Szymczak (ed.), *supra* n. 12, Vol. 2, Warszawa 1988, p. 823.

[19] See S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 387. Jerry R. Kirk defines hard pornography as one the content of which shows atrocities, tortures, urinating, incest, subjugation, rape, pseudo-child pornography and sadomasochism. He classifies vaginal sexual intercourse between a man and a woman as soft pornography; see J.R. Kirk, *Szkodliwość pornografii*, Gdańsk 1998, p. 3. Jarosław Warylewski draws attention to the fact that this approach lacks child pornography; see J. Warylewski, *Pornografia – próba definicji*, [in:] M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 23. Zbigniew Lew-Starowicz defines soft pornography as exposition of genitals, masturbation, sexual intercourse in different positions and sexual behaviour typical of a particular culture. He treats content with scenes of violence, paedophilia and zoophilia as hard pornography; Z. Lew-Starowicz, *Seksuologia sądowa*, Warszawa 2000, pp. 408–409.

tion and a word *graphos* meaning "to write". However, the term was not known in classical Greek.[20] In the middle of the 19th century, the term "pornography" started to be used in a bit different meaning than it is nowadays and it referred to literature and scientific works dealing with prostitution. The term was also applied in relation to theatre plays and opera performances the plot of which concerned courtesans.[21] It is indicated in literature that the term was probably first used at the beginning of the 19th century in relation to a novel by Donatien Alphonse François, Marquis de Sade entitled *Justine, or The Misfortunes of Virtue*. It should be mentioned that Marquis de Sade wrote three versions of *Justine*. The first one was entitled *The Misfortunes of Virtue* written in 1787 and published as late as in 1930; the second version entitled *Justine, or The Misfortunes of Virtue* was published in 1791; and the third version, the broadest one, was published under the title *The New Justine* in 1797.[22] According to Brian McNair, pornography in the present-day meaning started to be used in Europe in 1530 when an Italian poet, Aretino, published a series of sonnets with pornographic content, which were disseminated together with sixteen daring pictures by Giulio Romano, Raphael's pupil.[23]

It is worth noticing that a human being seeks erotic, obscene and even pornographic content. The reasons for that search are interpreted in varied ways, based on sexology, psychology as well as the history of art. Nobody denies the fact that there is a "need" for such messages.[24] Differentiation of art and eroticism is therefore very difficult.[25] One cannot deny that pornographic content in the same way as what we call "erotic" is based on nudity, a picture of a nude human body, especially a woman at the time of sexual intercourse. It is emphasised in literature that nudity alone brings a viewer closer to the disgusting centre of eroticism, although it is not always associated and does not have to be associated with indecency of sexual intercourse.[26]

---

[20] See F.S.P. Dufour, *Historia prostytucji od czasów najdawniejszych do XX w.*, Vol. 1, *Czasy przedchrześcijańskie*, Gdynia 1997, pp. 63–131 et seq.; C. Reinsberg, *Obyczaje seksualne starożytnych Greków*, Gdynia 1998, pp. 68–107.

[21] H.N. Parker, *Love's Body Anatomized: the Ancient Erotic Handbooks and the Rhetoric of Sexuality*, [in:] A. Richlin (ed.), *Pornography and Representation in Greece and Rome*, New York 1992, p. 90; A. Krawulska-Ptaszyńska, *Społeczne skutki upowszechnienia pornografii*, Ruch Prawniczy, Ekonomiczny i Socjologiczny issue 1, 1997, p. 145.

[22] See M. Bratuń, *Posłowie*, [in:] *Justyna czyli nieszczęścia cnoty*, Łódź 1987, pp. 238–239. Also compare K. Matuszewski, *Sade. Msza okrucieństwa*, Gdańsk 2008, pp. 42–45. Also see M. Praz, *Zmysły, śmierć i diabeł w literaturze romantycznej*, Gdańsk 2010, pp. 106–111; R. Shattuck, *Zakazana wiedza. Od Prometeusza do pornografii*, Kraków 1999, p. 277 et seq.

[23] See B. McNair, *Mediated Sex. Pornography & Postmodern Culture*, London–New York–Sydney–Auckland 1996, pp. 42–43. Also see J. Warylewski, comments on Article 202 CC, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna: Komentarz do art. 117–221*, Vol. I, 4th edn, Warszawa 2010, pp. 1100–1101; also compare J. Warylewski, *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warszawa 2001, pp. 189–191.

[24] See G. Bataille, *Historia erotyzmu*, Warszawa 2008, p. 227 et seq.

[25] See *ibid*., *Erotyzm*, Gdańsk 1999, p. 140.

[26] B. McNair, *Seks, demokratyzacja pożądania i media, czyli kultura obnażania*, Warszawa 2004, p. 41 et seq.; G. Bataille, *supra* n. 24, p. 199 et seq. It is even stated that: "From the male point of view, the motif of a woman dressing up and undressing is the most pleasant one throughout the history of mankind. Covering and uncovering a body is one of the simplest and the most exciting human activities. What is erotic is not only what you can see but first of all what we think we can see", see G. Sieczkowski, *Cały ten seks. Kroniki podkasane*, Warszawa 2008, p. 1.

The invention of photography influenced its dissemination to a great extent by, as it is stated in literature, naive realism accompanying photographs, which referred to situations that could not be viewed everyday and were not realistically depicted in paintings and drawings.[27] Photographs of nude silhouettes drew attention to the necessity of determining borderlines between eroticism and pornography.[28] Film impacted the development of the phenomenon of pornography even more because it involved much less imagination than photography. However, the basic difference consisted in the fact that photographs were viewed in privacy and a film was shown to a bigger audience. That is why, as Lech Michał Nijakowski claims, the level of legal system liberalism in a given country and moral freedom had key importance for the development of film pornography.[29] With the development of film industry, a system of film censorship, also related to morality, started to develop.[30] It is also noticed that erotic messages, especially those pornographic ones, focus on the presentation of a woman at the moment of excitement, and pornography is not aimed at understanding the source and nature of this excitement or experiencing it, but getting acquainted with it.[31]

4. SEXUALISATION OF CULTURE

Sexualisation of culture is connected with a broad social change that, as it is raised in literature, is a derivative of crucial technological inventions and commercial pressure, and leads inter alia to availability of sex in the media, obscene interest in nudity and exhibitionism. Social media create a culture in which public nudity and voyeurism are allowed. They shock with nudity not only in papers known as pornographic but also in those believed to deal with serious and even popular-science issues.[32] It is emphasised that in the 1990s, "keeping pace with postmodern-

---

[27] S. Sikora, *Fotografia. Między dokumentem a symbolem*, Izabelin 2004, *passim*; L.M. Nijakowski, *Pornografia. Historia, znaczenie, gatunki*, Warszawa 2010, pp. 161–164.

[28] M. Filar, *Pornografia a sztuka*, Nowe Prawo No. 10, 1978. Also see B. Kunicka-Michalska, *Pornografia i wykorzystywanie nieletnich w Internecie. Regulacje polskiego kodeksu karnego*, Studia Prawnicze No. 4(166), 2005, pp. 77–108.

[29] As early as in the German Empire, the presentation of a naked human body was totally prohibited. L.M. Nijakowski, *supra* n. 27, p. 170.

[30] In 1915, the US Supreme Court decided that filmmaking is a commercial activity so the provisions that safeguard the freedom of speech are not applicable to it. This allowed numerous censorship committees to enact codes aimed at protecting morality. No sooner than based on the case of *Burstyn v. Wilson* in 1952, motion picture was given protection and the idea of preventive censorship was abandoned. However, it finally took place in 1965. Since then, opponents of a film distribution must prove that it is "obscene". However, the system of film classification is used and it is similar to the one known in Poland under the Act on radio broadcasting and television. See D.B. Sova, *125 zakazanych filmów. Historia cenzury w kinie*, Warszawa 2006, p. 15.

[31] See A. Giddens, *Przemiany intymności. Seksualność, miłość i erotyzm we współczesnych społeczeństwach*, Warszawa 2006, p. 146. Also compare A. Moye, *Pornography*, [in:] A. Metcalf, M. Humphries (eds), *The Sexuality of Men*, London 1985, p. 68 et seq.

[32] The issue of the "Playboy" magazine in 1953 was a landmark in the history of pornography. J.R. Petersen, *Stulecie seksu. Historia rewolucji seksualnej 1900–1999 według „Playboya"*, Poznań 2002, passim; also see B. McNair, *supra* n. 26, pp. 5 and 21.

ist atmosphere of the decade, pornographic iconography presented a lot of pleasant erotic pictures as representation of fashion and not pornography".[33] It turned out at the time that photographs of half-naked models on magazine covers and "promising" titles accompanying them announcing articles saturated with eroticism efficiently increased sales. It should be added that, by some means accidentally, it was recognised that reference to nudity and sex, sometimes connected with irony and humour, was a good method of advertising various products. The development of photography, digital photography that allows far-reaching manipulation, resulted in deep social changes, especially at the moment when the internet, which is seemingly anonymous or at least it is believed to be such, facilitated mass dissemination of such photographs.[34] It is worth noticing that perception of nudity is not independent of cultural norms. Interpretation of an image of a naked human being depends on the point of view or framework adopted by the audience. It is indicated in literature that these may be the frameworks of art, pornography, information and advertising. What seems to be the essence is sexualisation of shame.[35]

It is emphasised in literature that aesthetic emotions that people have when they deal with art, looking at a painting or reading a book, do not eliminate other emotions, including erotic ones. Undoubtedly, sex inspires artists, both great writers and painters or sculptors. It is easy to find not only eroticism and obscenity but, if someone feels ill will, also pornography in the verses written by Ovid or Rabelais, in *Romeo and Juliet* by Shakespeare, *Tristan and Iseult*, *Madame Bovary* by Gustav Flaubert, some epigrams by Jan Kochanowski, Ignacy Krasicki and Kacper Twardowski, in *Dzieje grzechu* and *Walka z szatanem* by Stefan Żeromski, in the paintings by Rubens, Botticelli and Titian, in *Frenzy* by Władysław Podkowiński and in *The Nude Maia* by Francesco Goya. Someone might also state that the above-mentioned paintings are indecent drawings, provided we recognise an oil painting as a drawing.

It is worth considering whether a state should really use penal measures to combat visual messages based only on the criterion that they present a nude human being, most often a woman. Is it necessary to involve law enforcement agencies and courts for the only purpose of satisfying a handful of politicians, clergymen and social activists most often motivated by religion and recognising all the evil in a nude human silhouette?

---

[33] B. McNair, *supra* n. 26, p. 159.

[34] K. Olechnicki, *Fotoblogi, pamiętniki z opcją przekazu. Fotografia i fotoblogerzy w kulturze konsumpcyjnej*, Warszawa 2009, pp. 83–102; L. Manovich, *Język nowych mediów*, Warszawa 2006, pp. 124–127; B. Kunicka-Michalska, *Przestępstwa przeciwko wolności seksualnej i obyczajności popełniane za pośrednictwem systemu informacyjnego*, Warszawa 2004, p. 89; Z. Lew-Starowicz, *Seks w sieci i nie tylko*, Kraków 2003, p. 58 et seq.

[35] L.M. Nijakowski, *supra* n. 27, p. 328; B.A. Eck, *Nudity and Framing: Classifying Art, Pornography, Information and Ambiguity*, Sociological Forum Vol. 16, No. 4, 2001, p. 604.

5. PROFANITY

Profanity, as it is indicated in the doctrine, means using offensive, vulgar words.[36] A dispute can be noted in the doctrine over grounds for assessing a word as offensive. According to Radosław Krajewski, the recognition of a word as offensive depends on the assessor's stand. He indicates that younger people often do not treat words used by the youth as offensive, however, older people may recognise them as such. The author also notices that words used in a certain circle do not cause indignation, they are not perceived as offensive, but in other circles of people they are vulgar. He emphasises that all assessments of profanity should be done *in concreto*, and not *in abstracto*.[37] In such a situation, it would be necessary to analyse who the perpetrator is, how old they are and what social circle they come from as well as to whom they address their message that can be recognised as indecent in the meaning of Article 141 MC. Jan Kulesza is of a different opinion and indicates that the assessment by younger people does not matter when words recognised by the majority as profanity are said in a public place. In his opinion, the fact that such words are used in public places is decisive and individual evaluation and habits, and linguistic norms are not important because of a potential conflict with the freedom from other people's indecent messages. Next, he states that the content of Article 141 MC aims to protect public decency "targeted at protecting values important for society as a whole as well as its individual members". At the same time, he sees the need to adopt an objective criterion, although he admits that it may be difficult to achieve.[38] On the other hand, Mariusz Czyżak's opinion seems to be doubtful as he tries to prove that the assessment of vulgar or insulting words as profanity is unambiguous because they offend other people's feelings.[39] This stand seems controversial because not all words used in public space offend other people's feelings.

It is worth noticing that the issue of protecting the Polish language was finally regulated by statute, namely the Act on the Polish language of 7 October 1999.[40] Article 3 para. 1 of the Act stipulates that the protection of the Polish language consists, inter alia, in caring for its proper use, improving language skills, creating conditions for its proper development as a tool of interpersonal communication and, what is important from the point of view of the topic discussed, preventing its vulgarisation. "Preventing" should be understood as opposing something, in

---

[36] M. Zbrojewska, *supra* n. 2, p. 649.

[37] R. Krajewski, *Karnoprawna ochrona języka polskiego*, Ius Novum No. 4, 2013, p. 14.

[38] J. Kulesza, *supra* n. 4, p. 925.

[39] M. Czyżak, *Kilka uwag o odpowiedzialności wykroczeniowej za nieobyczajne zachowanie się w eterze,* Przegląd Sądowy No. 7–8, 2011, p. 101.

[40] Consolidated text, Dz.U. 2011, No. 43, item 224, as amended. It is pointed out in literature that the legislator recognised a native language as worth protecting by law and taking special care of in public life. Determining the Polish language as a basic element of the national identity and the good of national culture, the legislator referred to historical experience and globalisation processes, and emphasised the significance of this language protection for the maintenance and development of cultural diversity of Europe. The legislator also decided that the protection of the language is the obligation of all public authorities, thus also courts.

this case vulgarisation, preventing some activities.[41] Vulgarisation means making something vulgar, coarse, rude, ordinary, deprived of gentleness, good taste and decency.[42] Vulgarities mean words or collocations recognised by language users as indecent, rude, ordinary and morally and aesthetically offensive. Vulgarities are perceived as a lack of culture and respect for an addressee.[43]

The enactment of the statute resulted in an amendment to the Act of 26 January 1984: Press Law,[44] which imposed an obligation on editors-in-chief of newspapers and magazines to care for the linguistic correctness of press materials and to prevent vulgarisation, which is laid down in Article 25 para. 4, and on journalists to care for linguistic correctness and to avoid vulgarities, which is laid down in Article 12 para. 1(3) Press Law.[45]

It is noticed in the doctrine that the contemporary Polish language seems to accept phrases that used to be recognised as trivial and vulgar not very long ago. However, a reverse process should also be noted. Words quite often recognised as vulgar nowadays did not use to have this meaning. *Fraszki* by Jan Kochanowski can be an example but not only because in the past many outstanding poets and writers did not refrain from using words that are vulgar today.[46]

Using vulgar and indecent words seems to reflect a type of fashion. The conclusion that it is a type of fashion seems to be true, although it is not based on any research. In youth circles, there is a desire to show oneself as easy-going, free from social conventions and not looking down on others. A cursory glance over a student community and youth in public transport proves that the above-discussed words are treated as the "interval" between or an element linking successive sentences or nominal sentences used by men as well as, unfortunately, women. What is interesting is the fact that also older people and older generations use them to gain social approval and be perceived as communicative and friendly. This does not justify the use of such words at all. However, it should be emphasised that perpetrators of misdemeanours under Article 141 MC cannot be selectively prosecuted. It seems that the practice of ignoring vulgarities, indecent and rude words used by young people who pay no attention to others, mothers with children, passers-by, the elderly, police

---

41 S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 632.

42 S. Dubisz (ed.), *supra* n. 11, Vol. 4, p. 547; M. Szymczak (ed.), *supra* n. 16, p. 779. Also see P. Czarnecki, *Komentarz do art. 3 ustawy o języku polskim,* Warszawa 2014.

43 J. Sobczak, *Prawo prasowe. Komentarz*, Warszawa 2008, p. 489.

44 Dz.U. 1984, No. 5, item 24, as amended.

45 For this issue, see J. Sobczak, *supra* n. 43, pp. 485–489.

46 J. Kochanowski, *O łaziebnikach*; *Na matematyka*; J.A. Morsztyn, *Małżeństwo*, [in:] *Fraszki to wszystko. Mała antologia dawnej fraszki polskiej*, selected and provided with the preface by A. Pomorski, Warszawa 2004, pp. 11, 21 and 57. Aleksander Fredro did not refrain from using vulgarities, either, in a longer text found in the Jagiellonian Library in 2016. Even the title contains a vulgar word the citation of which met with this article reviewers' rejection, although the existence of the vulgar word is recognised in *Słownik polszczyzny XVI wieku*. For this issue, see M. Grochowski, *Słownik polskich przekleństw i wulgaryzmów,* Warszawa 2017; J. Lewinson, *Słownik seksualizmów polskich*, Warszawa 2017. The case of the book entitled *Memoria de mis putas tristes [Memories of My Melancholy Whores]* by Gabriel García Márquez shows the hypocrisy and sanctimoniousness of some guardians of the Polish language purity. The Polish title of the book is *Rzecz o mych smutnych dziwkach*, which ignores the Spanish wording and uses a softer word than the Polish literal equivalent of "whores" just in order to avoid its use.

officers on patrol or railroad guards is inadmissible. Such selective application of law seems to prove certain helplessness of law enforcement bodies and a wish to apply the provisions of Misdemeanour Code in relation to groups unaccepted by another social or political group.

Undoubtedly, the use of vulgar and offensive words as insults addressed to a particular person should be recognised as inadmissible. In such a situation, there is no doubt that a perpetrator matches the features of the offence under Article 216 § 1 Criminal Code. However, the use of such words as a typical linguistic linking tool is completely different. They are also treated as interludes making it possible to focus on the successive part of the message.

Prosecution of the use of vulgar words, in fact, does not make sense. Law enforcement institutions will never be able to prosecute all the users of indecent words in public places. Selective charging some of them, e.g. those who hold senior position in the social hierarchy, will be recognised as unjust. The sole fact of using indecent words meets with very limited public disapproval.

BIBLIOGRAPHY

Bataille G., *Erotyzm*, Gdańsk 1999.
Bataille G., *Historia erotyzmu*, Warszawa 2008.
Bojarski M., Radecki W., *Kodeks wykroczeń. Komentarz*, Warszawa 2006.
Bratuń M., *Posłowie*, [in:] *Justyna czyli nieszczęścia cnoty*, Łódź 1987.
Czarnecki P., *Komentarz do art. 3 ustawy o języku polskim*, Warszawa 2014.
Czyżak M., *Kilka uwag o odpowiedzialności wykroczeniowej za nieobyczajne zachowanie się w eterze,* Przegląd Sądowy No. 7–8, 2011.
Derlatka M., *Czy opalanie topless to nieobyczajny wybryk?* Jurysta No. 10, 2008.
Dubisz S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. 2–4, Warszawa 2003.
Dufour F.S.P., *Historia prostytucji od czasów najdawniejszych do XX w.*, Vol. 1, *Czasy przedchrześcijańskie*, Gdynia 1997.
Eck B.A., *Nudity and Framing: Classifying Art, Pornography, Information and Ambiguity*, Sociological Forum Vol. 16, No. 4, 2001.
Egierska-Miłoszewska D., *Nieobyczajny wybryk (art. 140 k.w. w teorii i praktyce)*, Zagadnienia Wykroczeń No. 4–5, 1979.
Falandysz L., *Mała, natarczywa obyczajność,* Gazeta Sądowa i Penitencjarna No. 17, 1970.
Filar M., *Pornografia a sztuka*, Nowe Prawo No. 10, 1978.
Fraszki to wszystko. Mała antologia dawnej fraszki polskiej, selected and provided with the preface by A. Pomorski, Warszawa 2004.
Giddens A., *Przemiany intymności. Seksualność, miłość i erotyzm we współczesnych społeczeństwach*, Warszawa 2006.
Grochowski M., *Słownik polskich przekleństw i wulgaryzmów,* Warszawa 2017.
Gubiński A., *Prawo wykroczeń,* 4th edn, Warszawa 1980.
Kirk J.R., *Szkodliwość pornografii*, Gdańsk 1998.
Krajewski R., *Karnoprawna ochrona języka polskiego*, Ius Novum No. 4, 2013.
Krajewski R., *Oceny prawne topless*, Ius Novum No. 4, 2013.
Krawulska-Ptaszyńska A., *Społeczne skutki upowszechnienia pornografii*, Ruch Prawniczy, Ekonomiczny i Socjologiczny issue 1, 1997.

Kulczycki M., Zduńczyk J., *Kodeks wykroczeń. Popularny komentarz*, Warszawa 1982.
Kulesza J., [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016.
Kunicka-Michalska B., *Przestępstwa przeciwko wolności seksualnej i obyczajności popełniane za pośrednictwem systemu informacyjnego*, Warszawa 2004.
Kunicka-Michalska B., *Pornografia i wykorzystywanie nieletnich w Internecie. Regulacje polskiego kodeksu karnego*, Studia Prawnicze No. 4(166), 2005.
Kurzępa B., *Kodeks wykroczeń. Komentarz*, Warszawa 2008.
Lang W., *Prawo i moralność*, Warszawa 1989.
Lew-Starowicz Z., *Seksuologia sądowa*, Warszawa 2000.
Lew-Starowicz Z., *Seks w sieci i nie tylko*, Kraków 2003.
Lewinson J., *Słownik seksualizmów polskich*, Warszawa 2017.
Manovich L., *Język nowych mediów*, Warszawa 2006.
Matuszewski K., *Sade. Msza okrucieństwa*, Gdańsk 2008.
McNair B., *Mediated Sex. Pornography & Postmodern Culture*, London–New York–Sydney–Auckland 1996.
McNair B., *Seks, demokratyzacja pożądania i media, czyli kultura obnażania*, Warszawa 2004.
Moye A., *Pornography*, [in:] A. Metcalf, M. Humphries (eds), *The Sexuality of Men*, London 1985.
Nijakowski L.M., *Pornografia. Historia, znaczenie, gatunki*, Warszawa 2010.
Olechnicki K., *Fotoblogi, pamiętniki z opcją przekazu. Fotografia i fotoblogerzy w kulturze konsumpcyjnej*, Warszawa 2009.
Ossowska M., *Normy moralne. Próba systematyzacji*, Warszawa 1970.
Parker H.N., *Love's Body Anatomized: the Ancient Erotic Handbooks and the Rhetoric of Sexuality*, [in:] A. Richlin (ed.), *Pornography and Representation in Greece and Rome*, New York 1992.
Petersen J.R., *Stulecie seksu. Historia rewolucji seksualnej 1900–1999 według „Playboya"*, Poznań 2002.
Piórkowska-Flieger J., [in:] T. Bojarski, *Kodeks wykroczeń. Komentarz*, Warszawa 2015.
Praz M., *Zmysły, śmierć i diabeł w literaturze romantycznej*, Gdańsk 2010.
Radecki W., *Wykroczenia przeciwko obyczajności publicznej*, Służba MO No. 3, 1976.
Radecki W., *Oceny publicznego pijaństwa w sprawie wykroczeń*, Zagadnienia Wykroczeń No. 2, 1984.
Reinsberg C., *Obyczaje seksualne starożytnych Greków*, Gdynia 1998.
Sarkowicz R., Stelmach J., *Teoria prawa*, 2nd edn, Kraków 1998.
Shattuck R., *Zakazana wiedza. Od Prometeusza do pornografii*, Kraków 1999.
Sieczkowski G., *Cały ten seks. Kroniki podkasane*, Warszawa 2008.
Sikora S., *Fotografia. Między dokumentem a symbolem*, Izabelin 2004.
Sobczak J., *Prawo prasowe. Komentarz*, Warszawa 2008.
Sova D.B., *125 zakazanych filmów. Historia cenzury w kinie*, Warszawa 2006.
Stelmach J., *Die hermeneutische Auffassung der Rechtsphilosophie*, Ebelsbach 1991.
Stelmach J., *Współczesna filozofia interpretacji prawniczej*, Kraków 1995.
Szymczak M. (ed.), *Słownik języka polskiego*, Vol. 2, Warszawa 1988; Vol. 3, Warszawa 1989.
Warylewski J., *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warszawa 2001.
Warylewski J., *Pornografia – próba definicji*, [in:] M. Mozgawa (ed.), *Pornografia*, Warszawa 2011.
Wąsek A., Zawłocki R. (eds), *Kodeks karny. Część szczególna: Komentarz do art. 117–221*, Vol. I, 4th edn, Warszawa 2010.
Zbrojewska M., [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń. Komentarz*, 2nd edn, Warszawa 2013.
Ziembiński Z., *Etyczne problemy prawoznawstwa*, Wrocław 1972.

USE OF INDECENT WORDS IN A PUBLIC PLACE AS A MISDEMEANOUR

Summary

An offence involving in the use of indecent words in a public place is one of the acts classified in Chapter XVI Misdemeanour Code that violates public decency. Its subject matter consists in placing an obscene announcement, inscription or drawing or using obscene words in a public place. Both the notion of public morality and the sign of indecency are indeterminate in nature. Similarly, the concept of an "obscene word" is not very precise. Both public morality and obscenity are highly relative, perceived differently by different social groups and considered more or less acceptable depending on the age of the audience. The pursuit of offences involving the use of indecent words cannot, however, be selective. One should distinguish between the use of vulgar words as an insult and a specific "interlude".

Keywords: misdemeanour, public decency, indecent words, pornography, profanity

UŻYWANIE SŁÓW NIEPRZYZWOITYCH W MIEJSCU PUBLICZNYM JAKO WYKROCZENIE

Streszczenie

Wykroczenie polegające na używaniu w miejscu publicznym słów nieprzyzwoitych jest jednym z czynów stypizowanych w rozdziale XVI Kodeksu wykroczeń godzących w obyczajność publiczną. Jego strona przedmiotowa polega na umieszczeniu nieprzyzwoitego ogłoszenia, napisu lub rysunku, albo używaniu słów nieprzyzwoitych. Zarówno pojęcie obyczajności publicznej, jak i znamię nieprzyzwoitości mają charakter niedookreślony. Podobnie mało precyzyjne jest pojęcie „słowa nieprzyzwoitego". Zarówno obyczajność publiczna, jak i nieprzyzwoitość są wysoce relatywne, postrzegane są różnie przez różne grupy społeczne i uznawane za mniej lub bardziej dopuszczalne w zależności od wieku odbiorcy. Ściganie wykroczeń polegających na używaniu słów nieprzyzwoitych nie może być jednak selektywne. Odróżnić należy posługiwanie się słowem wulgarnym jako wyzwiskiem od traktowania go jako swoisty „przerywnik".

Słowa kluczowe: wykroczenie, obyczajność publiczna, słowa nieprzyzwoite, pornografia, wulgaryzmy

USO DE PALABRAS INDECENTES EN LUGAR PÚBLICO COMO FALTA

Resumen

La falta que consiste en el uso de palabras indecentes en lugar público es uno de los hechos tipificado en el capítulo XVI y viola la decencia pública. Consiste en colocar un anuncio, inscripción o dibujo obsceno o en el uso de palabras indecentes. Tanto el concepto de la decencia pública como el elemento de indecencia no son precisos. También acontece esto con el concepto de "la palabra indecente". Tanto la decencia pública como la indecencia son muy relativos, pueden entenderse de diferente manera por diferentes grupos sociales y considerarse más o menos aceptables dependiendo de la edad del interlocutor. La persecución de

faltas consistentes en el uso de palabras indecentes no puede ser sin embrago selectiva. Hay que diferenciar entre usar una palabrota como invectiva y entre usarla como de cierto modo "la palabra pausa".

Palabras claves: falta, decencia pública, palabra indecente, pornografía, palabrotas

ИСПОЛЬЗОВАНИЕ НЕПРИСТОЙНЫХ СЛОВ В ОБЩЕСТВЕННОМ МЕСТЕ КАК ПРАВОНАРУШЕНИЕ

Резюме

Правонарушение, состоящее в использовании непристойных слов в общественном месте, является одним из деяний против общественной нравственности, предусмотренных в главе XVI. Его предметная сторона заключается в размещении непристойного объявления, надписи или рисунка, а также в использовании непристойных выражений в устной речи. При этом понятия общественной нравственности и непристойности имеют недостаточно определенный характер. Расплывчатым является и понятие «непристойное слово». Как общественная нравственность, так и непристойность являются весьма относительными понятиями, которые по-разному воспринимаются различными социальными и возрастными группами. Однако, преследование правонарушений, состоящих в использовании непристойных выражений, не может быть избирательным. Следует также различать использование ненормативной лексики в качестве оскорбления от её использования в качестве своеобразной «связки».

Ключевые слова: правонарушение, общественная нравственность, непристойные слова, порнография, ненормативная лексика

VERWENDUNG VON OBSZÖNITÄTEN IN DER ÖFFENTLICHKEIT ALS ORDNUNGSWIDRIGKEIT

Zusammenfassung

Die Ordnungswidrigkeit von massiv gegen geltende Normen verstoßenden sprachlichen Äußerungen in der Öffentlichkeit ist eine der in Kapitel XVI typisierten strafbaren Handlungen gegen die öffentliche Sittlichkeit. Der sachliche Geltungsbereich schließt anstößige Veröffentlichungen, Schriftzüge oder bildliche Darstellungen sowie obszöne sprachliche Äußerungen ein. Sowohl der Begriff der öffentlichen Sittlichkeit, als auch das Merkmal der Anstößigkeit sind dabei nicht näher bestimmt. Ebenso ist der Begriff „Obszönität" eher unscharf. Sowohl die öffentliche Sittlichkeit, als auch die Anstößigkeit sind in hohem Maße relativ und werden von verschiedenen sozialen Gruppen unterschiedlich wahrgenommen und je nach Alter des Empfängers als mehr oder weniger akzeptabel betrachtet. Die Verfolgung von Delikten in Form der Verwendung von Obszönitäten darf jedoch nicht selektiv erfolgen. Es sollte zwischen der Verwendung vulgärer Ausdrücke als Beleidigung und Obszönitäten unterschieden werden, die als eine Art „Füllwort" behandelt werden

Schlüsselwörter: Vergehen, Ordnungswidrigkeit, öffentliche Sittlichkeit, Obszönitäten, Pornographie, Vulgärsprache

UTILISER DES MOTS INDÉCENTS DANS UN LIEU PUBLIC COMME UNE INFRACTION

Résumé

Une infraction impliquant l'utilisation de mots indécents dans un lieu public est l'un des actes envisagés au chapitre XVI et constitue une violation de la moralité publique. Son objet consiste à placer une annonce, une inscription ou un dessin indécent, ou à utiliser des mots indécents. Le concept de morale publique et la marque d'indécence sont indéterminés. De même, la notion de «mot indécent» n'est pas très précise. La moralité publique et l'indécence sont très relatives, perçues différemment par différents groupes sociaux et considérées plus ou moins acceptables en fonction de l'âge du destinataire. La poursuite d'infractions impliquant l'utilisation de mots indécents ne peut toutefois être sélective. Une distinction doit être faite entre utiliser un mot vulgaire comme une insulte et le traiter comme une sorte «d'un intermède»

Mots-clés: infraction, moralité publique, mots indécentes, pornographie, vulgarités

UTILIZZO DI PAROLE INDECENTI IN UN LUOGO PUBBLICO COME CONTRAVVENZIONE

Sintesi

La contravvenzione consistente nell'utilizzo di parole indecenti in un luogo pubblico è una delle azioni tipizzate nel capitolo XVI lesive del buon costume. Il suo elemento sostanziale consiste nella pubblicazione di un annuncio, di una scritta o di un disegno indecente o nell'utilizzo di parole indecenti. Sia il concetto di buon costume che quello di indecenza hanno un carattere non completamente definito. Analogamente è poco preciso il concetto di "parola indecente". Sia il buon costume che l'indecenza sono qualcosa di estremamente relativo e vengono percepiti diversamente da diversi gruppi sociali e considerati più o meno ammissibili a seconda dell'età del destinatario. La repressione delle contravvenzioni consistenti nell'utilizzo di parole indecenti non può tuttavia essere selettiva. Bisogna distinguere l'utilizzo di una parola volgare come insulto dal trattarla come uno specifico "intercalare".

Parole chiave: contravvenzione, buon costume, parole indecenti, pornografia, volgarità

Cytuj jako:

Gołda-Sobczak M., Use of indecent words in a public place as a misdemeanour *[Używanie słów nieprzyzwoitych w miejscu publicznym jako wykroczenie]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 58–72. DOI: 10.26399/iusnovum.v13.4.2019.43/m.golda-sobczak

Cite as:

Gołda-Sobczak, M. (2019) 'Use of indecent words in a public place as a misdemeanour'. *Ius Novum* (Vol. 13) 4, 58–72. DOI: 10.26399/iusnovum.v13.4.2019.43/m.golda-sobczak

BURGLARY IN THE CONTEXT OF CONTACTLESS TRANSACTIONS: COMMENTS ON THE SUPREME COURT JUDGMENT OF 22 MARCH 2017, III KK 349/16

MACIEJ KRUK*

DOI: 10.26399/iusnovum.v13.4.2019.44/m.kruk

It is not uncommon for a legal act, clear as it may seem to a layman, to receive a significantly different interpretation due to the specific construal of a given term in legal practice. This is especially true for concepts that have received an autonomous meaning in legal jargon and for fuzzy concepts which, by their very nature, are "fleshed out" in judicial practice and in academic commentaries on the legal doctrine.

The reasons for this are multiple. There are, of course, the inherent attributes of any human language, such as polysemy or homonymy. An important role is also played by the nature of legal jargon as a special language.[1] Nor can one ignore the influence that pragmatics has on semantics and, correspondingly, the dependence of the meaning of a word on the context in which it is used and on other extralinguistic factors.[2] Legal doctrines often operate sets of concepts that are suited to their specific needs but are all but incomprehensible to average language users.

This last fact is of the most relevance to what follows. In this paper, I have taken the judgment of the Supreme Court of 22 March 2017 as the starting point and the basis for the analysis. The Supreme Court states in its judgment that a contactless

* Master of Laws, Department of Legal Philosophy and the Study of the State, Faculty of Law and Administration of the University of Warsaw; e-mail: m.kruk@wpia.uw.edu.pl; ORCID: 0000-0002-9980-5364

1 J. Pieńkos, *Podstawy juryslingwistyki. Język w prawie – prawo w języku*, Warszawa 1999, pp. 64–77; S. Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego*, Warszawa 2017, p. 129 et seq. On the relation between legal language and natural language, see also T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej*, Warszawa/Kraków 1986, pp. 35–42.

2 Cf. A. Malinowski, *Polski język prawny. Wybrane zagadnienia*, Warszawa 2006, p. 21.

transaction conducted using a stolen payment card contains the constituent elements of the crime under Article 279 §1 of the Criminal Code, i.e. burglary.[3]

The paper is basically divided into two parts. First, I present an outline of the evolution of the term "burglary" as construed in the criminal law. Special consideration is given to an analysis of the constituent elements of burglary as developed in judicial decisions and in the criminal law doctrine. The second part of the paper is directly concerned with the judgment of the Supreme Court referred to in the title. The commentary on the interpretative conclusions reached by the court are based on the observations made in the first part in combination with an expounding on the statement of reasons for the judgment. While approving of the general line towards developing an autonomous construal of the concept of burglary in judicial practice, I express reservations as to the correctness of the Court's assessment of the mechanisms involved in contactless payment transactions.

1. CONSTRUAL OF BURGLARY IN CRIMINAL LAW

Before discussing how the concept of burglary has evolved in legal practice over the years, I will consider the meaning of the word in common language. This will allow me to identify differences between the common usage and legal usage. Besides, one has to agree with the opinion that the dictionary meaning of a word cannot be totally ignored when interpreting the provisions of the criminal law.[4]

As it has been pointed out in literature, the distinguishing feature of the term "burglary" as used in everyday language is the element of applying physical force of varying intensity in order to remove a barrier preventing access to property.[5] Another related element is the requirement that the removal of the barrier should result in gaining access to locked premises. This is reflected in the definitions contained in dictionaries of the Polish language. Thus, *Słownik języka polskiego PWN* offers the following definition of the verb *włamać się* (to break in, to burglarise): "to force access to locked premises by breaking through security devices; also: to open by force a drawer, a strongbox, etc. in order to steal property."[6] This definition

---

[3] Supreme Court judgment of 22 March 2017, III KK 349/16, OSNKW 2017, No. 9, item 50. The judgment was commented on by the representatives of the legal doctrine, who expressed both approving opinions: D. Krakowiak, *Płatność zbliżeniowa a kradzież z włamaniem. Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, LEX/el. 2017; S. Łagodziński, *Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, Palestra No. 9, 2018, pp. 95–103; and critical ones: Z. Kukuła, *Dokonanie płatności skradzioną kartą bankomatową. Glosa do wyroku Sądu Najwyższego z 22.03.2017 r., III KK 349/1*, Przegląd Sądowy No. 7–8, 2018, pp. 174–179; A. Lach, *Glosa do wyroku Sądu Najwyższego z dnia 22 marca 2017 r., sygn. III KK 349/161*, Prokuratura i Prawo No. 5, 2018, pp. 170–175; R. Sosik, *Wykorzystanie skradzionej karty płatniczej do wykonania płatności zbliżeniowych. Glosa do wyroku SN z dnia 22 marca 2017 r., III KK 349/16*, Glosa No. 2, 2018, pp. 121–127.

[4] Z. Bożyczko, *Kradzież z włamaniem w świetle doktryny i orzecznictwa sądów polskich*, Nowe Prawo No. 7–8, 1967, p. 902.

[5] L. Wilk, *Komentarz do art. 279*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017, p. 635.

[6] *Słownik języka polskiego PWN*, online version, www.sjp.pwn.pl/sjp/wlamac-sie;2536858 (accessed 19.10.2019).

is in agreement with the results of surveys conducted by Jerzy Wróblewski in 1966, according to which a burglary, as used in common language, necessarily involves two elements: the use of physical force and the breaking of a security measure.[7] As one can see, the meaning of the word "burglary" in common language has not undergone any significant changes in the decades that have since elapsed.

It is worth noting that, by contrast to the post-war decades, when the term "burglary" first entered the substantive criminal law,[8] the word has acquired a second meaning in common language as a result of the need to describe phenomena related to technological development. Namely, the aforementioned *Słownik języka polskiego PWN* provides the following definition of the verb *włamać się* at the second entry: "to unlawfully read or write data stored on a computer or a computer network after overriding security safeguard."[9] I shall elaborate on this issue further on; at this point, suffice it to say that this novel meaning of the verb is of crucial significance to the court judgment discussed in this paper. At the same time, one has to make it clear that references to the dictionary definitions of a word should by no means determine whether a given legal interpretation is correct or not. One cannot but agree with voices warning against the instrumental treatment of dictionaries in legal interpretation, derogatorily referred to as "dictionary shopping".[10] Nevertheless, the use of dictionaries to determine the meaning of a given expression may be helpful in the searching for possible lines of interpretation. It is precisely with this intention that I have quoted the dictionary definitions above. They provide comparative material for the ensuing examination of the legal usage of the discussed term.

Before proceeding with the analysis, I would like to note that, in literature, the attribution of autonomous meanings to linguistic units in legal practice and the subsequent extension of such meanings is known under the terms "technicalisation" or "terminologisation".[11] This is also apparent in the case under consideration; indeed, it is a common and acceptable practice in the judicial practice the Supreme Court.[12] In the criminal jurisprudence, discussion around the constituent elements of the crime of burglary has always been focused on two elements: breaking by the

---

[7] J. Wróblewski, *Kradzież z włamaniem. Z zagadnień rozumienia tekstów prawnych*, Ruch Prawniczy Ekonomiczny i Społeczny No. 2, 1966, p. 235.

[8] The term first appeared in Article 1 §3c of the Decree of 4 March 1953 on strengthening the protection of public property (Dz.U. No. 17, item 68), which reads: "A person who unlawfully appropriates public property (…) by committing burglary shall be punished by imprisonment of 2 up to 10 years."

[9] *Słownik języka polskiego PWN*. Here it should be pointed out that there is a significant similarity between this definition and the constituent elements of the crime envisaged by Article 287 §1 of the Criminal Code (computer fraud). This is one of the factors contributing to the lack of consistency in judicial practice with respect to the qualification of prohibited acts involving payment-card transactions. Cf. P. Opitek, *Kwalifikacja prawna przestępstw związanych z transakcjami kartą płatniczą*, Prokuratura i Prawo No. 2, 2017, pp. 77–105. For a detailed discussion of the offence under Article 287 of the Criminal Code, see P. Kardas, *Oszustwo komputerowe w kodeksie karnym*, Przegląd Sądowy No. 11–12, 2000, pp. 43–75.

[10] M. Matczak, *Why Judicial Formalism is Incompatible with the Rule of Law*, Jurisprudence and Legal Philosophy eJournal, Vol. 8, No. 66, August 2016, p. 24.

[11] S. Żółtek, *supra* n. 1, p. 145.

[12] P. Nasuszny, *Treść i zakres pojęcia włamania jako okoliczności kwalifikującej przestępstwo kradzieży podstawowej w ujęciu doktryny i orzecznictwa sądowego*, [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa*

perpetrator of a security measure preventing access to the object of theft and the requirement that the object be located in locked premises.[13] Correspondingly, in what follows, I am going to focus on these two constituent elements due to their key role for the analysis.

The first of the above elements raises relatively few controversies. First of all, nowadays it is accepted without doubt that the perpetrator does not necessarily have to apply physical force in order to override the security measure that prevents access to the property in question.[14] As it has been aptly pointed out in literature, the requirement would unjustifiably reward perpetrators acting in a more sophisticated manner.[15] The uniform acceptance of this position is a result of the evolution in judicial practice that started in the late 1950s and continued into the 1960s. It is also a consequence of the academic dispute between the adherents of what is called "physical force theory" and the proponents of the "protection theory", in which the latter prevailed.[16] Within the currently accepted theory, the key element of burglary is that the perpetrator acts contrary to the will of the lawful possessor rather than the fact that physical barriers to accessing the premises are removed.[17] One should be aware, however, that the theory may well prove overly broad. Indeed, it is difficult to conceive of a situation, except where the owner disposes of an object with the intention of abandoning it, in which the owner does not manifest, at least by implication, that the object belongs to them.[18]

With respect to the element of breaking a security measure that prevents unauthorised access to property, it is irrelevant whether the security is physical, electronic or digital.[19] This stands to reason since advanced security devices have come into common use with the development of technology. It would not be appropriate to propose different legal classifications of a prohibited act depending, for example, on whether the perpetrator has broken into a hotel room secured with an electromagnetic card or one secured with a regular key-operated lock. Consequently, an electronic security safeguard requiring an access code is considered equivalent to a physical access lock.[20] Crucially, only a special obstacle designed to prevent unrestricted access to property can be considered a security measure. This excludes closures that do not block access to property.[21]

---

karnego, Vol. XIII, Wrocław 2003, p. 137. Cf. the Supreme Court ruling of 6 December 2006, III KK 358/06, OSNKW 2007, No. 2, item 17.

[13] A. Marek, T. Oczkowski, *Kradzież z włamaniem*, [in:] R. Zawłocki (ed.), *System Prawa Karnego*, Vol. 9: *Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa 2015, p. 86.

[14] T. Dukiet-Nagórska, *Kradzież z włamaniem*, Nowe Prawo No. 10–12, 1981, pp. 80–81.

[15] P. Nowak, *Wykładnia znamienia „włamanie" na gruncie art. 279 § 1 Kodeksu karnego*, Palestra No. 7–8, 2013, p. 97.

[16] A. Marek, T. Oczkowski, *supra* n. 13, pp. 88–92.

[17] D. Pleńska, *Glosa do uchwały SN z 3.12.1966 r., VI KZP 42/66*, OSPiKA 1968, No. 2, p. 83.

[18] P. Nowak, *supra* n. 15, p. 97.

[19] T. Oczkowski, *Komentarz do art. 279*, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 3rd edn, Warszawa 2017, p. 1663. Cf. Supreme Court judgment of 9 September 2004, V KK 144/04, OSNK 2004, No. 1, item 1533.

[20] L. Wilk, *supra* n. 5, p. 644.

[21] P. Kardas, J. Satko, *Przestępstwa przeciwko mieniu. Przegląd problematyki. Orzecznictwo (SN 1918–2000). Piśmiennictwo*, Kraków 2002, p. 48.

In view of the above, one would venture a suggestion that the second constituent element of burglary, namely, the location access to which is blocked by a physical, electronic or digital security device, can cause more controversy when determining if burglary has been committed. This is largely due to the overly broad nature of the "protection theory", currently accepted in judicial practice and jurisprudence. As a result of the rejection of the "physical force theory", which emphasises the presence of a real and effective obstacle, in favour of the view defining a security device as any obstacle which gives an unambiguous indication of the owner's will to prevent unauthorised persons from accessing their property,[22] the distinction between burglary and common theft has been blurred. Given this interpretation of a security device, one can easily classify as burglary the stealing of a wallet from a pocket secured with a zip fastener. Indeed, the fact that the pocket is zipped up constitutes an unequivocal manifestation of the owner's will to limit access to their pocket to unauthorised persons. Naturally, this interpretation is intentionally exaggerated, and therefore certainly incorrect. However, the example highlights the need for a precise definition of the space access to which is protected.

In the traditional approach, one of the essential elements of burglary is the requirement that the object of larceny be located in an enclosed room, that is a space enclosed by structural elements.[23] In addition, it is generally agreed that the enclosed room in question must be a product of intentional human activity.[24] The term "enclosed room" arguably excludes open-air space from consideration, even if access to such spaces is restricted by structures like fences, barriers, hedges or other enclosures, although this interpretation has not remained unopposed.[25] This is by far not the only controversial issue with respect to the classification of burglary. For instance, there has been significant disagreement as to "other enclosed space", e.g. containers (packaging), tanks, or transporting facilities (pipelines), the common feature of which is that their main function is to store or transport property.[26]

While controversies around the correct classification of an "enclosed room" are of considerable significance for judicial practice, they are not the matter of my concern here. I will focus on the postulated need for an updated interpretation of the term "burglary" that would cover actions consisting in the "hacking" of security safeguards in a computer, computer network or an automatic teller machine (ATM) that results in the larceny of money, so that prohibited acts of this kind would be qualified under Article 279 §1 of the Criminal Code rather than Article 288 §1

---

[22] A. Marek, T. Oczkowski, *supra* n. 13, p. 89.

[23] W. Gutekunst, *O położeniu przedmiotu wykonawczego kradzieży z włamaniem*, Nowe Prawo No. 11–12, 1956, p. 54.

[24] Here human involvement may also consist in the appropriate adaptation of natural structures or structures created by animals. Cf. Z. Bożyczko, *Kradzież z włamaniem i jej sprawca*, Warszawa 1970, pp. 22–23.

[25] M. Dąbrowska-Kardas, P. Kardas, *Komentarz do art. 279*, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. III: *Komentarz do art. 278–363*, 4th edn, Warszawa 2016, p. 84. This controversy has a very long history in the Polish legal literature, cf. T. Dukiet-Nagórska, *supra* n. 14, pp. 75–77.

[26] In literature, this category was first distinguished by Z. Bożyczko. See Z. Bożyczko, *supra* n. 24, pp. 25–26.

(computer fraud).[27] Here one should refer to the position expressed by the Supreme Court in its judgment of 9 September 2004 in the case V KK 144/04, according to which an electronic security safeguard involving the use of an access code constitutes a *sui generis* lock of access for any person (including the authorised person) who intends to take possession of an object and, therefore, constitutes an equivalent of the object being physically locked in a room. Thus, burglary may involve not only breaking through a physical obstacle but also overriding electric, electronic, or computer-based security safeguards.[28]

It seems that this position stems from the confusion of two different elements: the security measures preventing unauthorised access to property and the location of the property access to which is prevented. As I have argued above, the view that a physical security device is equivalent to an electronic or digital security measure is fairly uncontroversial, at least, with respect to property located in a closed room. In this case, however, the location of objects is different. The larceny of funds by gaining access to a computer system or an electronic database cannot be treated in the same way as gaining access to a closed room or another enclosed space.[29] The locations of objects are quite different in nature: the former, being a string of numerical data operated by means of the respective programming languages, exists only in the virtual space, whereas the latter exists physically and occupies a specific position in space. It does not mean that this line of reasoning is wrong as such; however, it does require additional justification. It is not enough to cite the equation of physical security devices to electronic and digital ones, since this argument concerns a separate issue, namely, the means of preventing access to property rather than the nature of the location of the property.

In search for a rationale for extending the semantic scope of the term "burglary" so that it would also cover acts that involve gaining access to computer data stored in bank accounts, etc., one may refer to a more recent meaning of the noun *włamanie* in everyday language. In common usage, the word can refer to the unauthorised reading or writing of data on a computer or computer network, preceded by the breaking (hacking) of security safeguards. From my point of view, an acknowledgment that legal language follows common language in this respect is a sufficient argument in favour of extending the interpretation of this element of burglary and adopting the new meaning of the word *włamanie*. In this way, the admissible location of an object of burglary for the purposes of legal qualification would include, apart from a closed room or so-called enclosed space, data stored on a computer or computer network. The other fundamental element of burglary, i.e. breaking of a security safeguard against access to property, remains unchanged. Obviously, in

---

[27] A. Marek, T. Oczkowski, *supra* n. 13, p. 98.

[28] Supreme Court judgment of 9 September 2004, V KK 144/04, OSNK 2004, No. 1, item 1533.

[29] This is also pointed out by M. Wiśniewski and M. Żukowska, who note that in judicial decisions where the execution of an unauthorised contactless transaction using a payment card has been classified as burglary the courts have avoided answering the question whether a bank account can be considered closed premises. M. Wiśniewski, M. Żukowska, *Współczesne problemy rozumienia pojęcia „włamania" na gruncie przepisu art. 279 § 1 k.k.*, Studia Prawnicze i Administracyjne No. 19 (1), 2017, p. 73.

the new context, the security safeguard will always be of an electronic or digital nature.

Approaching the subject matter of the case handled by the Supreme Court, I wish to consider whether larceny of money committed using a payment card can be qualified as burglary.[30] A payment-card transaction usually involves four parties (the issuing bank, the merchant, clearing institutions, and the cardholder) and is a multi-stage process.[31] The problem of the location of the object of larceny is fairly straightforward. As a result of a completed payment-card transaction, the customer can access funds accumulated in the bank account linked to the respective card.[32] A bank account, on the other hand, is nothing else than data stored in the computer system of a given bank. Changes in the account are made according to the rules specified in the agreement concluded between the account holder and the account operator as well as in the general terms and conditions of the respective bank that apply to account operation and maintenance. Everything considered, there is no doubt that the larceny of funds through an unauthorised change in data records meets the location criterion for burglary as discussed above.

One is left with the question whether the second constituent element of burglary, i.e. breaking of a security device that prevents access to property, is present. In terms of ICT processes involved in a payment-card transaction, one can reasonably assume that the role of a security safeguard is performed by the access code. Authentication is carried out by the microprocessor built into the card and requires two pieces of information: one is the PIN code, known to the cardholder, and the other is the unique security key stored in the chip.[33] Being an integral part of the card, the security key is used automatically and can hardly be seen as an independent security device. The same is not true for the personal access code. If a transaction requires the access code,[34] it cannot be completed without the payer entering the respective sequence of digits on the terminal keyboard. Besides, the cardholder has an obligation not to disclose the code to third parties. Gross negligence in this regard may result in the payer's unlimited liability for unauthorised payment transactions.[35]

---

[30] On the issue of the legal status of a payment card in the criminal law, see R. Kędziora, *Charakter prawny kart płatniczych w prawie karnym*, Prokuratura i Prawo No. 12, 2011, pp. 59–69.

[31] P. Opitek, *supra* n. 9, pp. 82–83. Due to the complexity of the respective sequence of operations, I make references to the technical aspects of card transactions only to the extent necessary for developing the argument. A detailed analysis of the transaction process and a discussion of the related technical issues can be found in the work by P. Opitek cited above.

[32] The card is linked to the bank account in the case of debit cards. The situation is different for credit or prepaid cards. Still, the difference between those types of cards is insignificant considering the subject matter of this article. Therefore, in the case of the unauthorised use of a credit card or a prepaid card, the information and communications data are changed and the microprocessor is no longer a security safeguard.

[33] P. Opitek, *supra* n. 9, p. 87.

[34] This will take place in most cases of direct payments, excluding contactless transactions of up to 50 zlotys or those that require authorisation by signature, where the signature put by the payer is compared to the specimen signature on the payment card (nowadays, however, the latter method is rarely used).

[35] Cf. Article 46 para. 3 of the Act on payment services of 19 August 2011, Dz.U. 2011, No. 199, item 1175 (and related acts of law in the Journal of Laws of 2016, items 1572, 1997; Journal of Laws of 2017, item 1089).

In view of the above, one has every reason to assert that the larceny of funds perpetrated as a result of an unauthorised use of a payment card contains the constituent elements of the crime under Article 279 §1 of the Criminal Code as long as the action involved breaking of protection in the form of an access code.

2. COMMENTS ON THE SUPREME COURT JUDGMENT III KK 349/16

Now I shall discuss the issue which the Supreme Court had to resolve in the judgment referred to in the title of this paper, namely, the legal qualification of a larcenous contactless transaction conducted directly,[36] by means of a payment card and without entering an access code. In its judgment, the Supreme Court states that transactions of this kind contain the constituent elements of the crime of burglary. One should take a closer look at the arguments presented in the statement of reasons for the judgment.

First, the Supreme Court expresses its approval for the line of reasoning under which, when interpreting the term "burglary", emphasis is placed on the very fact of breaking through the security measures that bar access to property and, at the same time, unequivocally manifest the possessor's will not to allow unauthorised persons to access the said property.[37]

After providing an outline of how the concept of burglary has been treated in judicial practice, the Supreme Court turns to the issue that is of most interest in this case, namely, the legal qualification of a payment transaction effected using another person's payment card. According to the Court, the view under which unlawful banking transactions requiring a PIN code must be qualified as burglary is "well established in judicial practice and undisputed in the literature".[38] Next, the judges consider the nature of the function performed by an access code, concluding that the PIN code "while being, undoubtedly, an important means of protection against unauthorised access to the funds accumulated by the cardholder, is but an additional protection. The primary means of protection is the design of a payment card, which includes a microprocessor; without the microprocessor, no transaction can be effected, including contactless transactions that do not require a PIN code." Therefore, according to the Court, by merely bringing the payment card into the proximity with the terminal, the perpetrator intrudes into the cardholder's bank account, which is tantamount to breaking through the electronic safeguards of the cashless banking payment system. In its turn, this conduct contains the constituent elements of burglary by way of breaking through electronic security safeguards and committing larceny of property in the form of funds recorded in the bank's computer system.

This position calls for a comment. The key element of the above reasoning is the assumption that the primary means of protection of funds accumulated in a bank

---

36 That is without the use of online payment systems, etc.

37 The judges clearly subscribe to the "protection theory" mentioned above.

38 As mentioned in an earlier passage; I share this view.

account is the very design of a payment card, and more precisely, the microprocessor built into it. In my opinion, this assumption is debatable. In fact, an analysis of the technical aspects of a monetary transaction effected using a payment card gives no indication that the microprocessor functions as a security safeguard. The easiest way to demonstrate this is by comparing the process of a card transaction requiring an access code with a contactless transaction that does not require a PIN code. The microprocessor acts as a kind of "brain" that controls the whole process, since it is responsible for the exchange of data between the payment card and the payment terminal thanks to the software that enables the reading and writing of data in the electronic memory.[39] As to the authorisation process, it is conducted by means of a unique security key stored in the chip and requires entering of the correct PIN code on the terminal keyboard.[40] If authorisation fails, the transaction is aborted. Authorisation failures can be caused by entering a wrong access code or, which is increasingly rare, by placing a signature that does not coincide with the specimen signature on the card.[41] As a rule, contactless transactions of up to 50 zlotys do not require authorisation with an access code or a signature. In effect, it is the authorisation requirement that plays the role of an obstacle to accessing funds accumulated in the cardholder's bank account.[42] The microprocessor itself, although it does control the technical side of the process, cannot be said to be a protection device[43] since, in the case of transactions that do not require authorisation, it – or rather the card it is built into – is but a defenceless tool in the hands of the person currently handling the card.[44] The person can tap the card near a point-of-sale terminal without encountering any real obstacle, provided that the payment amount does not exceed 50 zlotys and that the daily limit for contactless transactions set by the bank has not been exceeded.[45]

---

[39] Cf. P. Opitek, *supra* n. 9, pp. 87–88.

[40] *Ibid.*, p. 87.

[41] Another possibility is for the merchant to establish that the payer is not entitled to use a given payment instrument – when the respective transaction involves a human factor. Checking the payer's identity lies within the rights of the merchant as set forth in Section VI of the Act on payment services. However, everyday practice shows that this rarely happens; as a rule, the card never leaves the payer's hand.

[42] The problem of no barrier being broken in contactless transactions is discussed by the commentators in their critical glosses concerning the Supreme Court judgment, listed in footnote 3 *supra*, as well as by the Court of Appeal in Gdańsk in its judgment of 27 November 2018, II AKa 307/18, published in Kwartalnik Sądowy Apelacji Gdańskiej No. 1, 2019, pp. 197–213.

[43] This is a standpoint of the Court of Appeal in Gdańsk, which in the above-quoted judgment II Aka 307/18 stated that "a microprocessor built into the card is only an indifferent, considering the features stipulated in Article 279 § 1 Criminal Code, mechanism which enables one to communicate with the information system of the bank that has issued the card and to make payments using the payment card."

[44] This is true, at any rate, with respect to contactless transactions of up to 50 zlotys carried out at self-service vending machines, etc. In transactions involving a human factor, there is always a possibility of intervention by the merchant.

[45] Cf. J. Blikowska, *Zadłużenie offline kartą płatniczą. Na koncie może powstać debet*, http://www.rp.pl/Jak-zarzadzac-wydatkami/310029982-Zadluzenie-offline-karta-platnicza-Na-koncie-moze-powstac-debet.html (accessed 19.10.2019).

It seems that the lack of security safeguards was one of the reasons why the Payment System Council issued a recommendation to limit payer's liability for unauthorised contactless transactions to the equivalent of 50 euros.[46] This is a noticeable reduction in comparison to the statutory limit initially established for chip-card transactions.[47] A survey of internal regulations that were in force in the Polish banking sector at the beginning of 2015 showed that, by that time, banks had already adjusted their bylaws to the recommendations issued by the Payment System Council.[48]

Opponents of the above view may argue, citing the tenets of the "protection theory", that the essence of burglary does not consist in the actual breaking of a protection preventing unauthorised access to an object but rather in a conduct whose basic characteristic is the perpetrator's disregard for the will of the possessor to protect the object from other persons.[49] Under this interpretation, it is sufficient that there is an external barrier clearly indicating that the purpose of its installation was to prevent access to the object by unauthorised persons.[50] However, the application of this interpretation to contactless transactions that do not require an access code is problematic for at least two reasons. Firstly, as demonstrated above, in the case of contactless transactions, one can hardly discern any actual protection or obstacle. The microchip installed in the card cannot possibly be seen as a protective device, since its function in the course of a transaction is entirely different; in itself, it does not constitute an obstacle to conducting a transaction, unless this requires authorisation by means of a PIN code. What draws attention is the lack of the two-stage behaviour type characteristic of burglary, i.e. breaking of the security and taking the possession in order to keep it.[51] From the judicial practice and commentaries on the legal doctrine, it also follows that there can be no question of burglary when gaining access to an object does not require any actual physical effort.[52] Secondly, again as argued above, treating every manifestation of disregard for the will of the possessor of an object as significant for the qualification of a conduct as burglary would lead to an overly broad construal of the concept of burglary, since, in principle, the only case when the owner of an object does not manifest their will to exclude unauthorised persons from accessing the object is when they abandon the said object.[53] To

---

[46] See the press release of 30 September 2013 concerning the recommendations of the Payment System Council on the security of proximity cards, https://www.nbp.pl/systemplatniczy/rada/20130930_rsp_rekomendacje.pdf (accessed 19.10.2019).

[47] See Article 46 para. 2 of the initial version of the Act on payment services.

[48] W. Boczoń, *Złodziej nie wyczyści już konta kartą zbliżeniową*, https://prnews.pl/zlodziej-nie-wyczysci-juz-konta-karta-zblizeniowa-4208 (accessed 19.10.2019).

[49] M. Dąbrowska-Kardas, P. Kardas, *supra* n. 25, p. 80.

[50] Cf. judgment of the Court of Appeal in Białystok of 8 October 2002, VIII AKa 505/02, Prokuratura i Prawo, No. 10, item 21, insert 2004.

[51] A. Lach, *supra* n. 3, p. 172.

[52] For example, burglary is not committed if the perpetrator enters the premises by opening the door with a key left in the lock or if the door is closed using a device that can be opened by anyone. Also, no burglary takes place if the perpetrator enters the premises through an unprotected opening that allows free access to a room. Cf. A. Marek, T. Oczkowski, *supra* n. 13, p. 92 and the literature and judicial decisions referred to therein.

[53] Cf. L. Hochberg, *Rzecz o włamaniu*, Nowe Prawo No. 9, 1956, p. 78.

give an example, the presence of the cardholder's name on a payment card cannot be reasonably considered as a manifestation of their will to set up a protection against the card being interfered with by unauthorised persons. One should agree with the standpoint that deciding on use of the card with the option of contactless payments, the holder is aware of a risk related to lack of protection of contactless transactions up to a defined amount.[54]

When discussing the concept of burglary, one cannot overlook the proposals recently put forward in an article by Tomasz Buchaniec,[55] especially considering that the Supreme Courts makes specific references to this paper in the statement of reasons for its judgment. In the paper, the author points out that, in the doctrine and judicial practice of civil law, the prevailing opinion is that funds held in a bank account are not owned by the account holder but by the bank itself. The account holder only has a claim against the bank for the return of the funds at their first request.[56] As a consequence, from the point of view of civil law, the perpetrator disposes of funds owned by the bank rather than the account holder. The perpetrator's actions result in a change in the amount of claim against the bank to which the account holder is entitled.[57]

The adoption of the civil-law approach to the issue would have some important consequences. Firstly, the object of theft is "a moveable object belonging to another person". The scope of this term is narrower than that of the term "property" and does not include property rights, including claims.[58] Crucially, the damage caused to the cardholder consists precisely in the reduction of the amount of their claim against the bank. Under this approach, one can argue that, in the case at hand, the object of theft is money belonging to the bank, but this means that the identity of the victim must be changed in the description of the prohibited act.[59] In this connection, it has been postulated that two aggrieved parties should be recognised: the respective natural person and the bank.[60] Secondly, when conducting a card transaction, the perpetrator does not take possession of the respective amount. Instead, they cause it to be transferred between bank accounts, which is much closer to the concept of unlawful disposition of property as envisaged in Article 286 § 1 of the Criminal Code than to the larceny of a moveable object.[61]

The central problem raised by Tomasz Buchaniec is how a legal concept should be interpreted in a situation when different branches of law are involved.[62] In such cases, the usual order in which the semantic directives for interpretation are applied

---

[54] See the judgment of the Court of Appeal in Gdańsk, II AKa 307/18; R. Sosik, *supra* n. 3, p. 125.

[55] T. Buchaniec, *Nieuprawnione posłużenie się cudzą kartą płatniczą w celu realizacji płatności w technologii zbliżeniowej – problematyka subsumpcji zachowania sprawcy pod właściwy przepis ustawy karnej*, Przegląd Naukowo-Metodyczny No. 2 (31), 2016, pp. 51–62.

[56] A. Kawulski, *Prawo bankowe – komentarz*, Warszawa 2013, pp. 263–268.

[57] T. Buchaniec, *supra* n. 51, p. 54.

[58] *Ibid.*, p. 55.

[59] *Ibid*.

[60] M. Wiśniewski, M. Żukowska, *supra* n. 29, p. 73.

[61] T. Buchaniec, *supra* n. 51, p. 56.

[62] This happens when a concept developed within the doctrine of a different branch of law is used for the purposes of the criminal law. Cf. S. Żółtek, *supra* n. 1, p. 394 et seq.

is modified.[63] As rightly pointed out in literature, from the perspective of criminal law, the key task in this situation is to determine the protected legal interest and to choose the interpretation that would result in its best possible protection.[64]

With reference to the above arguments, the Supreme Court does not consider it appropriate to adopt the civil-law approach to the institution of a bank account, under which an unauthorised contactless transaction conducted with another person's payment card constitutes a cashless settlement that results in a change in the amount of the account holder's claim against their bank.[65] The position taken by the Supreme Court is expressed in the following passage: "for, irrespective of who it is who ultimately suffers a loss as a result of an unauthorised use of a payment card – which matter is resolved by separate regulations and over which the perpetrator has no influence and, presumably, of which he is not aware – it is indisputable that, by making a payment with a stolen card, the perpetrator causes a reduction of assets in the cardholder's account. What essentially happens is that the perpetrator breaks through electronic security safeguards and commits a larceny of property in the form of funds stored in the bank's computer system; even though the perpetrator does not take physical possession of the funds, he receives their equivalent in the form of goods or services."

The standpoint taken by the Supreme Court is quite uncontroversial. The transplantation of the institution of a bank account as developed for the purposes of transactions conducted under civil law would be of little use for the purposes of criminal law. What is relevant to criminal law is that an illicit transaction is conducted with a payment card to which the perpetrator has gained unauthorised access, resulting in the reduction of funds in the cardholder's bank account. Treating this situation as an unauthorised disposition of the cardholder's claim against their bank would only entail unnecessary complications. The relations between an account holder and the respective financial institution are governed by separate regulations, and in particular, by the contract concluded between these parties. As such, these relations lie outside the domain of criminal law. While it is advisable that legal concepts should be treated identically in all the branches of law,[66] in this particular case, the discrepancy between civil and criminal law seems well justified.

3. CONCLUSIONS

When considering how the construal of the offence under Article 279 §1 of the Criminal Code has evolved in judicial practice over the years, one cannot resist the impression that the meaning of the term "burglary" has been expanding in a way

---

[63] Cf. P. Wiatrowski, *Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013, pp. 59–94.

[64] S. Żółtek, *supra* n. 1, p. 395. Compare also comments of the Supreme Court in the judgment of 29 August 2012, V KK 419/11, OSNKW 2012, No. 12, item 133.

[65] Cf. M. Porzycki, *Komentarz do art. 63*, [in:] F. Zoll (ed.), *Prawo bankowe. Komentarz*, Vol. I, Kraków 2005, p. 554.

[66] S. Żółtek, *supra* n. 1, pp. 394–397.

comparable to the snowball effect. With each passing decade, the initially narrow term has been broadened to cover an increasing variety of factual situations. Of course, this does not in itself mean that judicial practice has taken a wrong track. In fact, this strategy can often be seen as desirable and necessary in view of the unceasing effort of the law to keep pace with the changing reality. It would seem that the only rational recommendation that can be made in this respect is for the judicature to avoid unwarranted generalisations and to treat matters on an *ad casum* basis. This was indeed the intended purpose of the discussion presented in this paper.

Beyond doubt, the issue of the legal classification of crimes related to the use of payment cards is very challenging. This is evidenced by the fact that, in the current legal framework, depending on the circumstances of an offence (e.g. the involvement of a merchant, the way in which a transaction is authenticated, the type of electronic security used), it may contain the components of three or, if one includes common theft, even four legally defined crimes.[67] Moreover, reliable assessment of the perpetrator's behaviour requires technical knowledge pertaining to the functioning of payment cards. It is indisputable that there is a need for legislation that would specifically target crimes committed with the use of payments cards. This postulate has been repeatedly voiced in the doctrine[68] and would probably also find support from the Supreme Court, given the arguments presented in the statement of reasons for its judgment. The Supreme Court, faced with the difficult task of adapting the text of the law to the current social practice, decided to continue the gradual broadening of the meaning of the term "burglary" as used in the criminal law by judgment that the constituent elements of the crime under Article 279 §1 of the Criminal Code are present in an unlawful performance of a contactless transaction that does not require a PIN code.

However, as follows from the analysis conducted in the previous sections, the fact that an access code is not required for a contactless transaction means that the offence does not exhibit one of the two constituent elements of the concept of burglary as defined in the criminal law doctrine: namely, the requirement that a security device be breached in order to gain access to property. The Supreme Court, assuming that the function of a security device is performed by the microprocessor, focuses on the identity of the perpetrator's purpose and mode of operation in unlawful card transactions executed with and without the use of a PIN code, and concludes that the difference between the two situations does not affect the legal qualification of the offence.[69] I believe that this reasoning is erroneous. It stems from a misapprehension of the function performed by the microprocessor in the

---

[67] Namely, the crimes provided for in Articles 278 §1, 279 §1, 286 §1, and 287 §1 of the Criminal Code. Cf. P. Opitek, *supra* n. 9, pp. 88–105; M. Wiśniewski, M. Żukowska, *supra* n. 29, pp. 72–74. The discrepancies in the legal classification of unauthorised use of payment cards for contactless transactions in the case law are indicated by R. Sosik, *supra* n. 3, p. 124.

[68] Thus also in Z. Kukuła, *supra* n. 3, p. 159. For an opposing opinion, see M. Wiśniewski, M. Żukowska, *supra* n. 29, p. 75. It is worth pointing out, however, that their conclusions concern the provisions of Article 279 §1 of the Criminal Code; the authors suggest that an unauthorised contactless transaction performed using a payment card should be qualified as a crime under Article 278 §1 of the Criminal Code.

[69] Thus in the approving gloss by S. Łagodziński, *supra* n. 3.

process of a card transaction and from the failure to recognise that an access code is the only actual security feature protecting the card holder from theft as a result of an unauthorised use of their payment card. As it can be seen, an apparently insignificant technical point can be of great importance for the legal qualification of prohibited acts involving new technologies. This is particularly relevant in criminal law, which by its very nature requires that similar but not identical situations be carefully differentiated.

In the case handled by the Supreme Court, a particular interpretative conclusion led to the qualification of a prohibited act as a qualified criminal offence. When discussing why the punishment for burglary should be harsher than that for common theft, a number of factors are usually cited, such as: fragrant disrespect for another person's property, intensified manifestation of ill will on the part of the perpetrator, and greater audacity of the crime.[70] If these arguments are considered in the context of a contactless transaction, it becomes clear why, in the course of decades, the legal doctrine and judicial practice have developed an interpretation of the concept of burglary which requires that the perpetrator break at least a minimum security measure that can be considered as a manifestation of the possessor's will to protect their property from being accessed by third parties.[71]

Another issue to be considered in this connection is whether the adopted solution is compatible with the principle *nullum crimen sine lege certa*. It is especially doubtful whether, from the point of view of a potential perpetrator, the statutory set of constituent elements of the prohibited act can be unambiguously inferred. That is to say, it is not clear whether the perpetrator of an unauthorised contactless payment can unambiguously determine whether their conduct bears the constituent elements of burglary. The problem, therefore, lies with the differentiating function of the principle of legal certainty that makes it possible to distinguish between different types of prohibited acts.[72] The existing divergence in how cases of this kind are handled in the judicial practice of lower-instance courts may serve as proof of the existence of uncertainties in this regard.

Finally, it should be pointed out that the rejection of the view that a security safeguard is overridden in the course of an illicit contactless transaction necessarily means that the matter must be governed by the legislation on minor offences. The material value of damage resulting from a contactless transaction cannot possibly run to an amount that would allow the offence to be classified as theft and, therefore, as a crime (Article 278 §1 of the Criminal Code), unless the act is of a continuous nature.[73]

---

[70] Cf. P. Nowak, *supra* n. 15, p. 95 and references therein.

[71] As regards the consequences of treating burglary as a qualified crime, see also the apt remarks by T. Dukiet-Nagórska in: T. Dukiet-Nagórska, *supra* n. 14, pp. 83–85.

[72] Cf. T. Sroka, *Komentarz do art. 42 ust. 1*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86*, Warszawa 2016, pp. 1033–1034.

[73] Compare, however, the discussion by Arkadiusz Lach, who argues that after the Act of 23 March 2017 amending the Act: Criminal Code and some other acts, Dz.U. 2017, item 768, was adopted one can assume that the provision applicable to classify the larceny of financial means stored on a bank account is Article 278 § 1 Criminal Code, irrespective of the amount of damage caused; see A. Lach, *supra* n. 3, pp. 172–174.

The uncertainties revealed by the above analysis are so considerable that there is clearly an urgent need for a legislative intervention in this area of law. The existing state of law, especially in the face of the case law discrepancies, creates a highly undesirable situation of legal uncertainty. An additional argument for this need may be the fact that already after the said judgment was issued, the Court of Appeal in Gdańsk in the quoted judgment of 27 November 2018, II AKa 307/18, adopted a different stand that the Supreme Court with respect to the classification of the contactless payment as burglary.

BIBLIOGRAPHY

Blikowska J., *Zadłużenie offline kartą płatniczą. Na koncie może powstać debet*, http://www.rp.pl/Jak-zarzadzac-wydatkami/310029982-Zadluzenie-offline-karta-platnicza-Na-koncie-moze-powstac-debet.html (accessed 23.10.2017).

Boczoń W., *Złodziej nie wyczyści już konta kartą zbliżeniową*, http://prnews.pl/zlodziej-nie-wyczysci-juz-konta-karta-zblizeniowa-4208 (accessed 23.10.2017).

Bożyczko Z., *Kradzież z włamaniem w świetle doktryny i orzecznictwa sądów polskich*, Nowe Prawo No. 7–8, 1967.

Bożyczko Z., *Kradzież z włamaniem i jej sprawca*, Warszawa 1970.

Buchaniec T., *Nieuprawnione posłużenie się cudzą kartą płatniczą w celu realizacji płatności w technologii zbliżeniowej – problematyka subsumpcji zachowania sprawcy pod właściwy przepis ustawy karnej*, Przegląd Naukowo-Metodyczny No. 2 (31) 2016.

Dąbrowska-Kardas M., Kardas P., *Komentarz do art. 279*, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. III: *Komentarz do art. 278–363*, 4th edn, Warszawa 2016.

Dukiet-Nagórska T., *Kradzież z włamaniem*, Nowe Prawo No. 10–12, 1981.

Gizbert-Studnicki T., *Język prawny z perspektywy socjolingwistycznej*, Warszawa/Kraków 1986.

Gutekunst W., *O położeniu przedmiotu wykonawczego kradzieży z włamaniem*, Nowe Prawo No. 11–12, 1956.

Hochberg L., *Rzecz o włamaniu*, Nowe Prawo No. 9, 1956.

Kardas P., *Oszustwo komputerowe w kodeksie karnym*, Przegląd Sądowy No. 11–12, 2000.

Kardas P., Satko J., *Przestępstwa przeciwko mieniu. Przegląd problematyki. Orzecznictwo (SN 1918–2000). Piśmiennictwo*, Kraków 2002.

Kawulski A., *Prawo bankowe – komentarz*, Warszawa 2013.

Kędziora R., *Charakter prawny kart płatniczych w prawie karnym*, Prokuratura i Prawo No. 12, 2011.

Komunikat prasowy dotyczący rekomendacji Rady ds. Systemu Płatniczego w zakresie bezpieczeństwa kart zbliżeniowych z dnia 30 września 2013 r., https://www.nbp.pl/systemplatniczy/rada/20130930_rsp_rekomendacje.pdf (accessed 23.10.2017).

Krakowiak D., *Płatność zbliżeniowa a kradzież z włamaniem. Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, LEX/el. 2017.

Kukuła Z., *Dokonanie płatności skradzioną kartą bankomatową. Glosa do wyroku Sądu Najwyższego z 22.03.2017 r., III KK 349/1*, Przegląd Sądowy No. 7–8, 2018.

Lach A., *Glosa do wyroku Sądu Najwyższego z dnia 22 marca 2017 r., sygn. III KK 349/161*, Prokuratura i Prawo No. 5, 2018.

Łagodziński S., *Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, Palestra No. 9, 2018.

Malinowski A., *Polski język prawny. Wybrane zagadnienia*, Warszawa 2006.

Marek A., Oczkowski T., *Kradzież z włamaniem*, [in:] R. Zawłocki (ed.), *System Prawa Karnego*, Vol. 9: *Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa 2015.

Matczak M., *Why Judicial Formalism is Incompatible with the Rule of Law*, Jurisprudence and Legal Philosophy eJournal, Vol. 8, Issue 66, August 2016.

Nasuszny P., *Treść i zakres pojęcia włamania jako okoliczności kwalifikującej przestępstwo kradzieży podstawowej w ujęciu doktryny i orzecznictwa sądowego*, [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego*, Vol. XIII, Wrocław 2003.

Nowak P., *Wykładnia znamienia „włamanie" na gruncie art. 279 § 1 Kodeksu karnego*, Palestra No. 7–8, 2013.

Oczkowski T., *Komentarz do art. 279*, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 3rd edn, Warszawa 2017.

Opitek P., *Kwalifikacja prawna przestępstw związanych z transakcjami kartą płatniczą*, Prokuratura i Prawo No. 2, 2017.

Pieńkos J., *Podstawy juryslingwistyki. Język w prawie – prawo w języku*, Warszawa 1999.

Pleńska D., *Glosa do uchwały SN z 3.12.1966 r., VI KZP 42/66*, OSPiKA 1968, No. 2.

Porzycki M., *Komentarz do art. 63*, [in:] F. Zoll (ed.), *Prawo bankowe. Komentarz*, Vol. I, Kraków 2005.

Słownik języka polskiego PWN, online version, www.sjp.pwn.pl (accessed 23.10.2017).

Sosik R., *Wykorzystanie skradzionej karty płatniczej do wykonania płatności zbliżeniowych. Glosa do wyroku SN z dnia 22 marca 2017 r., III KK 349/16*, Glosa No. 2, 2018.

Sroka T., *Komentarz do art. 42 ust. 1*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86*, Warszawa 2016.

Wiatrowski P., *Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013.

Wilk L., *Komentarz do art. 279*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017.

Wiśniewski M., Żukowska M., *Współczesne problemy rozumienia pojęcia „włamania" na gruncie przepisu art. 279 § 1 k.k.*, Studia Prawnicze i Administracyjne No. 19 (1), 2017.

Wróblewski J., *Kradzież z włamaniem. Z zagadnień rozumienia tekstów prawnych*, Ruch Prawniczy Ekonomiczny i Społeczny No. 2, 1966.

Żółtek S., *Znaczenie normatywne ustawowych znamion typu czynu zabronionego*, Warszawa 2017.

BURGLARY IN THE CONTEXT OF CONTACTLESS TRANSACTIONS: COMMENTS ON THE SUPREME COURT JUDGMENT OF 22 MARCH 2017, III KK 349/16

Summary

The aim of this paper is to provide an analysis of the concept of burglary in the Polish criminal law, with a particular emphasis on the legal qualification of illicit contactless transactions performed using another person's payment card. The judgment of the Polish Supreme Court of 22 March 2017, III KK 349/16, has been the starting point and the basis for the analysis. According to the judgment, a payment card transaction performed by an unauthorised person using contactless technology, which does not require an access code, constitutes the crime of burglary. In the first part of this paper, the author outlines the evolution of the term "burglary" in the Polish criminal law, with an emphasis on the constituent elements of burglary

as developed in judicial practice and in the criminal law doctrine. The second part is directly concerned with the court case mentioned in the title. It contains commentaries on the Supreme Court judgment based on the conclusions reached in the first part of the paper. In the final remarks, the author makes an assessment of the legal qualification adopted by the Supreme Court in its judgment. The importance of the element of burglary that consists in breaking at least a minimum protection when committing the crime is emphasized. A juxtaposition of the solution adopted by the Court with the requirements of the *nullum crimen sine lege certa* principle leads to postulating a need for legislative intervention in the matter.

Keywords: burglary, contactless payment, another person's payment card, minimum protection

POJĘCIE „WŁAMANIE" W ŚWIETLE TRANSAKCJI ZBLIŻENIOWEJ – UWAGI NA TLE WYROKU SĄDU NAJWYŻSZEGO Z 22 MARCA 2017 R., III KK 349/16

Streszczenie

Artykuł ma na celu analizę pojęcia „włamanie" w polskim prawie karnym, ze szczególnym uwzględnieniem kwalifikacji prawnej nieuprawnionych transakcji zbliżeniowych cudzą kartą płatniczą. Bezpośrednią inspiracją i zarazem osią niniejszego tekstu jest wyrok Sądu Najwyższego z dnia 22 marca 2017 r., sygn. akt. III KK 349/16. Stwierdzono w nim, że zapłata kartą płatniczą przez nieuprawnionego dokonana w sposób zbliżeniowy, niewymagający podania kodu dostępu, wypełnia znamiona przestępstwa kradzieży z włamaniem. Pierwsza część artykułu zarysowuje ewolucję pojęcia „włamanie" w polskim prawie karnym, z naciskiem położonym na wypracowane przez orzecznictwo i doktrynę karnistyczną elementy konstytutywne kradzieży z włamaniem. Druga część pracy odnosi się bezpośrednio do powołanego wyroku, stanowiąc jego komentarz w świetle wniosków wyciągniętych z części pierwszej. Uwagi końcowe poddają ocenie kwalifikację prawną dokonaną przez Sąd Najwyższy w analizowanej sprawie, akcentując wagę elementu przełamania co najmniej minimalnego zabezpieczenia. Zestawienie rozwiązania przyjętego przez Sąd z wymogami zasady *nullum crimen sine lege certa* prowadzi do wyrażenia potrzeby prawnego uregulowania omawianej kwestii.

Słowa kluczowe: kradzież z włamaniem, transakcja zbliżeniowa, cudza karta płatnicza, minimalne zabezpieczenie

EL CONCEPTO DE "FRACTURA" EN LOS PAGOS SIN CONTACTO – COMENTARIO DE LA SENTENCIA DEL TRIBUNAL SUPREMO DE 22 MARZO DE 2017, III KK 349/16

Resumen

El artículo tiene por objetivo el análisis del concepto "fractura" en derecho penal polaco, teniendo en cuenta la calificación legal de pagos sin contacto no autorizados, con tarjeta ajena. La sentencia del Tribunal Supremo de 22.03.2017, III KK 349/16, es inspiración directa y eje del presente artículo. En dicha sentencia se considera que el pago sin contacto con tarjeta por una persona no autorizada, que no requiera el código, cumple con los elementos del tipo de

robo con fractura. La primera parte del artículo presenta la evolución del concepto "fractura" en derecho penal polaco, enfocándose en los elementos constitutivos de robo con fractura considerados por la jurisprudencia y doctrina penal. La segunda parte se refiere directamente a la sentencia citada, siendo un comentario a la luz de conclusiones de la primera parte. Las consideraciones finales valoran la calificación legal efectuada por el Tribunal Supremo en el caso analizado, acentuando la importancia del elemento que consiste en romper al menos protección mínima. La comparación de la solución adoptada con los requisitos resultantes del principio *nullum crimen sine lege* en su aspecto *certa* resalta la necesidad de intervención del legislador.

Palabras claves: robo con fractura, pago sin contacto, tarjeta ajena, protección mínima

ПОНЯТИЕ «КРАЖА СО ВЗЛОМОМ» В КОНТЕКСТЕ БЕСКОНТАКТНОЙ ТРАНЗАКЦИИ: КОММЕНТАРИИ В СВЯЗИ С ПРИГОВОРОМ ВЕРХОВНОГО СУДА ОТ 22 МАРТА 2017 ГОДА, III KK 349/16

Резюме

Целью статьи является анализ понятия «кража со взломом» в польском уголовном праве с учетом юридической квалификации несанкционированных бесконтактных транзакций с использованием чужой платежной карты. Непосредственным поводом для написания статьи и ее отправным пунктом стал приговор Верховного суда от 22 марта 2017 г., номер дела III KK 349/16. В нем утверждается, что оплата платежной картой, осуществленная неправомочным лицом бесконтактным способом, для которого не требуется код доступа, соответствует составу преступления «кража со взломом». В первой части статьи описывается эволюция понятия «кража со взломом» в польском уголовном праве. Особое внимание уделено конститутивным элементам кражи со взломом в соответствии с судебными прецедентами и доктриной уголовного права. Вторая часть работы относится непосредственно к вышеупомянутому приговору. В ней содержатся комментарии к приговору, учитывающие выводы, сделанные в первой части. В заключение автор дает оценку юридической классификации, принятой Верховным судом по рассматриваемому делу, подчеркивая важность присутствия элемента взлома хотя бы минимального уровня защиты. Сопоставление принятого решения с требованиями, вытекающими из принципа *nullum crimen sine lege* в аспекте *certa*, приводит к выводу о необходимости законодательного урегулирования обсуждаемой проблемы.

Ключевые слова: кража со взломом, бесконтактная транзакция, чужая платежная карта, минимальный уровень защиты

DAS KONZEPT DES „EINBRUCHS" IN BEZUG AUF KONTAKTLOSE ZAHLUNGSVORGÄNGE – ANMERKUNGEN VOR DEM HINTERGRUND DES URTEILS DES OBERSTEN GERICHTSHOFS DER REPUBLIK POLEN VOM 22. MÄRZ 2017, AKTENZEICHEN III KK 349/16

Zusammenfassung

Ziel dieses Artikels ist es, das Konzept des „Einbruchs" im polnischen Strafrecht, mit besonderem Augenmerk auf die rechtliche Qualifizierung unbefugter kontaktloser Zahlungsvorgänge mit einer fremden Geldkarte, einer Analyse zu unterziehen. Als direkte Anregung und Achse

des Texts diente das Urteil Sąd Najwyższy (Oberster Gerichtshof), der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen vom 22.03.2017 mit dem Aktenzeichen III KK 349/16. In diesem wird festgestellt, dass die kontaktlose Kartenzahlung durch eine nicht dazu befugte Person, bei der keine Eingabe eines Zugangscodes/PIN erforderlich ist, den Tatbestand eines Diebstahls mit Einbruch erfüllt. Im ersten Teil des Artikels wird ein Überblick über die Evolution des Konzepts des „Einbruchs" im polnischen Strafrecht geliefert, wobei den von der Rechtsprechung und Strafrechtsdoktrin entwickelten konstitutiven Elemente des Diebstahls mit Einbruch besondere Beachtung geschenkt wird. Der zweite Teil der Arbeit nimmt dann direkt auf das angeführte Gerichtsurteil Bezug und kommentiert die gerichtliche Entscheidung vor dem Hintergrund der im ersten Teil gezogenen Schlüsse. In den abschließenden Bemerkungen erfolgt eine Bewertung der rechtlichen Qualifikation durch das Oberster Gerichtshof in der analysierten Strafsache, wobei das Gewicht des Elements der Überwindung von wenigstens minimalen Schutzvorkehrungen betont wird. Die Gegenüberstellung der gewählten Vorgehensweise mit den Erfordernissen des Grundsatzes *Nullum crimen sine lege* in Bezug auf den strafrechtlichen Bestimmtheitsgrundsatz *certa* (Notwendigkeit einer hinreichenden Bestimmtheit des Gesetzes) unterstreicht die Notwendigkeit, dass der Gesetzgeber in dieser Hinsicht tätig wird.

Schlüsselwörter: Diebstahl mit Einbruch, kontaktlose Zahlungsvorgang, fremde Geldkarte, Mindestschutzvorkehrung

LA NOTION DE «L'EFFRACTION» À LA LUMIÈRE D'UNE TRANSACTION SANS CONTACT – COMMENTAIRES DANS LE CONTEXTE DE L'ARRÊT DE LA COUR SUPRÊME DU 22 MARS 2017, III KK 349/16

Résumé

Cet l'article vise à analyser le concept de «l'effraction» en droit pénal polonais, en mettant l'accent sur la qualification juridique des transactions sans contact non autorisées avec des cartes de paiement d'autrui. L'inspiration directe et en même temps l'axe de ce texte a été l'arrêt de la Cour suprême du 22 mars 2017, réf. n° III KK 349/16. Il indique que le paiement au moyen d'une carte de paiement par une personne non autorisée, effectué sans contact et ne nécessitant pas de code d'accès, remplit les signes d'un vol avec effraction. La première partie de l'article décrit l'évolution de la notion de «l'effraction» en droit pénal polonais, en mettant l'accent sur les éléments constitutifs du vol avec effraction développés par la jurisprudence et la doctrine pénale. La deuxième partie de l'article se réfère directement à l'arrêt cité, constituant ainsi son commentaire à la lumière des conclusions tirées de la première partie. Les remarques finales évaluent la classification juridique faite par la Cour suprême dans le cas analysé, soulignant l'importance de l'élément de rupture d'au moins la sécurité minimale. La comparaison de la solution adoptée avec les exigences découlant du principe *de nullum crimen sine lege certa* souligne la nécessité d'une intervention du législateur dans le domaine traité.

Mots-clés: vol avec effraction, transaction sans contact, carte de paiement d'autrui, sécurité minimale

IL CONCETTO DI "EFFRAZIONE" ALLA LUCE DELLE TRANSAZIONI DI PROSSIMITÀ: OSSERVAZIONI SULLO SFONDO DELLA SENTENZA DELLA CORTE SUPREMA DEL 22 MARZO 2017, III KK 349/16

Sintesi

L'articolo ha lo scopo di analizzare il concetto di "effrazione" nel diritto penale polacco, con particolare attenzione alla classificazione giuridica delle transazioni di prossimità non autorizzate con una carta di pagamento altrui. Ispirazione diretta nonché asse portante del presente testo è la sentenza della Corte Suprema del 22 marzo 2017, protocollo del fascicolo III KK 349/16. In essa si è affermato che il pagamento con carta di pagamento da parte di persona non autorizzata, effettuato con modalità a prossimità, che non richiede la fornitura del codice di accesso, configura il reato di furto con effrazione. La prima parte dell'articolo tratteggia l'evoluzione del concetto di "effrazione" nel diritto penale polacco, concentrando l'attenzione sugli elementi costitutivi del furto con effrazione elaborati dalla giurisprudenza e della dottrina penalistica. La seconda parte del lavoro fa riferimento diretto alla sentenza richiamata, e costituisce un suo commento alla luce delle conclusioni derivanti dalla prima parte. Le osservazioni finali sottopongono a valutazione la classificazione giuridica effettuata dalla Corte Suprema nel procedimento analizzato, sottolineando il peso dell'elemento di forzatura di una quantomeno minima protezione. L'accostamento della soluzione assunta con i requisiti derivanti dal principio *nullum crimen sine lege certa* sottolinea la necessità di intervento del legislatore nell'ambito descritto.

Parole chiave: furto con effrazione, transazione di prossimità, carta di pagamento altrui, protezione minima

Cytuj jako:

Kruk M., Burglary in the context of contactless transactions: comments on the Supreme Court judgment of 22 March 2017, III KK 349/16 *[Pojęcie „włamanie" w* świetle *transakcji zbliżeniowej – uwagi na tle wyroku Sądu Najwyższego z 22 marca 2017 r., III KK 349/16]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 73–92. DOI: 10.26399/iusnovum.v13.4.2019.44/m.kruk

Cite as:

Kruk, M. (2019) 'Burglary in the context of contactless transactions: comments on the Supreme Court judgment of 22 March 2017, III KK 349/16'. *Ius Novum* (Vol. 13) 4, 73–92. DOI: 10.26399/iusnovum.v13.4.2019.44/m.kruk

ADOPTION BY HOMOSEXUALS IN THE LIGHT OF MODERN STANDARDS OF HUMAN RIGHTS PROTECTION

ADAM JAKUSZEWICZ*

DOI: 10.26399/iusnovum.v13.4.2019.45/a.jakuszewicz

1. INTRODUCTION

The issue of the legal family status of homosexually-oriented persons and relationships they enter into is one of the matters that raise numerous controversies in the Polish society. One of the problems that give rise to dispute is the issue of legal admissibility of adoption by this social group.[1] In the dominating opinion of both the entire Polish society and literature, it is not possible to reconcile adoption by homosexuals with the necessity to protect a child's interests. A belief that homosexuals will demand the right to adoption based on equal rights is sometimes quoted as a scare-argument against granting formal rights to same-sex couples.[2] It is assumed that if same-sex partnerships are introduced to the legal system, as other countries'

* PhD, Assistant Professor at the Institute of Law and Economics of Kazimierz Wielki University in Bydgoszcz; e-mail: jakuszewicz@ukw.edu.pl; ORCID: 0000-0002-7094-5822

1 M. Ukleja, *Rodziny z wyboru. Homoseksualny związek jako współczesna alternatywa rodziny – analiza zjawiska*, Acta Universitatis Lodziensis. Folia Sociologica No. 51, 2014, p. 124; Centrum Badania Opinii Społecznej, *Komunikat z badań nr 174/2017, Stosunek do osób o orientacji homoseksualnej i związków partnerskich*, December 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 18.12.2018).

2 See e.g. T. Królak, *Prof. Aandrzej Zoll: homoseksualiści zawalczą o prawo do adopcji*, interview, https://wiadomosci.onet.pl/kraj/prof-andrzej-zoll-homoseksualisci-zawalcza-o-prawo-do-adopcji/ks38h (accessed 7.05.2018). Bartosz Banaszkiewicz expressed a similar opinion in legal writings. He argues that the Polish legislator has the following alternative: "either to maintain the stance that the unmarried relationship of two people is their strictly private matter and is not subject to legal institutionalisation, or to take steps to establish some kind of 'miniparamarriage' at first and in the end, if there is a final stage of this route, to implement the idea of *mariage pour tous*, including the right to adopt children, but the Polish public opinion on the issue of adoption by homosexuals is very critical". See B. Banaszkiewicz, *Małżeństwo jako związek kobiety i mężczyzny. O niektórych implikacjach Artykułu 18 Konstytucji RP*, Kwartalnik Prawa Prywatnego issue 3, 2013, p. 640.

experience shows, it will be necessary to give those partnerships the right to adopt children. Moreover, there is an opinion expressed in literature that the recognition of the legal right to adoption by homosexuals or same-sex couples is in conflict with fundamental human rights. According to Leszek Wiśniewski, who expressed this opinion especially strongly, "The dominating heterosexuals and a small number of homosexuals constitute two different social groups playing opposite social roles in the process of safeguarding the most fundamental and natural human right: the right to preserving the human species and to upbringing children by parents, i.e. a mother and a father. Just this single argument sufficiently indicates that the call for legalising same-sex partnerships has nothing to do with the protection of human rights. Just the opposite, it undermines the essential human right to found a family of a man, a woman and children. Thus, it is not justified to demand equal treatment of same-sex couples and heterosexual marriages or similar rights to adoption. Those two types of human relationships are absolutely incomparable."[3]

The above-presented stance encourages an analysis of upbringing children by homosexuals from the perspective of modern standards of human rights protection. It is especially important to establish whether a refusal to give permission to adopt a child solely on the grounds of an applicant's sexual orientation in case the law admits adoption by a single person, as it is in Poland, can be reconciled with the principle of equal treatment. Indeed, both the supporters and opponents of adoption by homosexuals refer to this principle, however, as it has been noticed above, the differentiation of access to adoption is justified on the basis of the necessity to protect a child's best interests. For this reason, in order to solve the problem of compliance of refusal to grant the right to adoption by homosexuals with a ban on discrimination, it is essential to assess the influence of adoption by such persons on the appropriate development of a child. If it turned out that homosexuals do not sufficiently ensure appropriate child upbringing, the reference they make to the principle of equality would be groundless.

Solving the above issue with respect to Polish law becomes even more significant if we take into account that adoption by homosexuals and/or same-sex couples is admissible under the legislation of more and more states. At present, the legislation of 27 states in the world allows adoption by same-sex couples but, what is characteristic, mainly highly-developed countries of the European cultural region decided to pass such laws.[4] In addition, in some countries,[5] the legislator allows adoption of a partner's child by their same-sex partner but does not allow

---

[3] L. Wiśniewski, *Zdanie odrębne*, [in:] R. Wieruszewski, M. Wyrzykowski (eds), *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009, p. 160.

[4] Adoption by homosexual couples is possible in most Western European countries, the United States, Canada, Australia and New Zealand as well as in some South American countries, Israel and the Republic of South Africa, see A. Carroll, L.R. Mendos, *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2017, https://ilga.org/state-sponsored-homophobia-report, p. 72 et seq. (accessed 30.04.2018). The list in the quoted publication does not include Germany and the Northern Territory of Australia. Adoption by homosexuals was admitted there after the date of publication.

[5] Croatia, Estonia, Switzerland and Italy.

adoption by same-sex couples. The above-indicated tendency to increase the circle of persons who are given the right to apply for adoption by same-sex couples is reflected in international regulations developed by the Council of Europe. While in the European Convention on the Adoption of Children of 1967[6] the possibility of adoption was limited to married couples and single individuals,[7] the Revised Convention on the Adoption of Children of 2008 extends the scope of persons that can apply for adoption. In accordance with Article 7 of the Revised Convention, "The law shall permit a child to be adopted (a) by two persons of different sex (i) who are married to each other, or (ii) where such an institution exists, have entered into a registered partnership together; (b) by one person". Apart from that, State Parties are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together, and to different-sex couples and same-sex couples who live together in a stable relationship. The decision to introduce this regulation to the Revised Convention resulted from the fact that the limitation of the circle of persons entitled to apply for adoption to heterosexual married couples laid down in the Convention of 1967 was the reason for Sweden (partly followed by the United Kingdom and Norway) to withdraw from the Convention. Due to a threat that successive states may withdraw from the Convention, work was started to amend the Convention and eventually the above-mentioned provisions were added.[8]

2. LEGAL REGULATION OF ADOPTION BY HOMOSEXUALS IN POLAND

First of all, it should be highlighted that the establishment of a family relationship between an adopting parent and an adopted child is within the competence of a court that should follow the principle of a child's best interest. Thus, a person applying for adoption does not have any rights and cannot have any claims. Therefore, the possibility of adoption cannot be treated as an individual's right and potential establishment of such a right would mean depersonalising a child.[9] However, the possibility of applying for adoption may be compared to the right to "equal

---

[6] The Convention entered into force in Poland on 22 September 1996, Dz.U. 1999, No. 99, item 1157; hereinafter Convention.

[7] Article 6 Convention has the following wording: "1. The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person. 2. The law shall not permit a child to be adopted save in one or more of the following circumstances: (a) where the child is adopted by the spouse of the adopter; (b) where the former adopter has died; (c) where the former adoption has been annulled; (d) where the former adoption has come to an end."

[8] A.N. Schulz, *O współczesnych dylematach tworzenia międzynarodowych standardów Rady Europy dotyczących relacji pomiędzy rodzicami i dziećmi*, Acta Iuris Stetiniensis, Zeszyty Naukowe Uniwersytetu Szczecińskiego No. 821, 2014, p. 490 et seq. At present, among the seven states that ratified the Revised Convention, Romania and Ukraine as well as the Netherlands with regard to the territory of Aruba and Curaçao had reservations about such a possibility.

[9] T. Sokołowski, *Dobro dziecka wobec rzekomego prawa do adopcji*, [in:] M. Andrzejewski, *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 105.

access". The right of access to public service laid down in Article 60 Constitution of the Republic of Poland can be an example of such a right. In accordance with it, one can only request for just assessment of candidates to public service, which does not mean, however, that they can claim the right to be accepted. Similarly, the establishment of a relation between an adoptive parent and an adopted child should result from a positive evaluation of potential adoptive parents' ability to fulfil their adoption-related obligations. Thus, the position of both homosexual and heterosexual applicants should be analysed in terms of the ability to be adoptive parents rather than in terms of legal categories.[10]

The Polish legislator allows adoption only by a married couple (Article 115 Family and Guardianship Code, hereinafter FGC). Thus, adoption by an unmarried couple, including a same-sex one, is inadmissible. Moreover, a single individual can adopt a child provided that "his/her personal competences justify the conviction that he/she will properly fulfil an adoptive parent's obligations" (Article 114[1] FGC).[11] *De iure* adoption by a single homosexual is possible; at least in case the person does not reveal his/her sexual orientation. Therefore, a question is raised whether the adoption authorities can refuse to give permission for adoption exclusively based on an applicant adoptive parent's homosexual orientation in case they know about it. In other words, it should be considered whether homosexual orientation *per se* constitutes a negative circumstance for adoption.

There is a stand expressed in literature that "due to a child's best interest, individuals with paedophilic inclinations and homosexual orientation cannot be adoptive parents. Adoption by such persons would be in conflict with the principle of a child's best interest"[12] (sic!). What is striking in this statement is the fact that individuals with paedophilic inclinations who can be objectively classified as people who can harm children are listed together with homosexuals as people disqualified from playing the role of adoptive parents. Such a comparison may suggest that the author listing paedophiles and homosexuals together recognises the phenomenon of homosexuality as a dangerous deviation.

Inter alia, Marta Prucnal-Wójcik is also of the opinion that adoption of a child by a homosexual is in conflict with the principle of a child's best interest.[13] However, the author admits that in the light of the lack of a clear provision banning adoption by homosexuals in Polish law, an opposite stance can also be recognised as justified.

---

[10] A. Śledzińska-Simon, *Adopcja dzieci przez osoby homoseksualne*, [in:] R. Wieruszewski, M. Wyrzykowski, *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009, p. 143.

[11] It should be taken into account that following the principle of a child's best interest, "complete families composed of both parents are sought for children that are qualified for adoption". Thus, adoption by a single person should be treated as an extraordinary situation. See *Odpowiedź podsekretarza stanu w Ministerstwie Pracy i Polityki Społecznej – z upoważnienia ministra – na interpelację nr 20167 w sprawie przysposobienia dziecka*, http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=32CD30D4 (accessed 4.05.2018).

[12] K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018 (5th edn), discussion of Article 114[1] (Legalis).

[13] M. Prucnal-Wójcik, Omówienie art. 114[1], [in:] K. Osajda (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz. Przepisy wprowadzające KRO*, Vol. 5, Warszawa 2017, paras 20–20.3 (Legalis).

Moreover, some authors argue that Polish constitutional reasons are legal arguments against adoption by homosexuals. Namely, there is a model of a family preferred by the Polish legislator,[14] which is expressed in Article 18 Constitution. According to Elżbieta Holewińska-Łapińska, based on the purposefulness-related interpretation of this provision, one can see in it a constitutional ban on adoption by homosexuals. The above-mentioned provision of the Constitution of the Republic of Poland guarantees the protection and care for marriage, being a union of a man and a woman, from which a conclusion can be drawn that partnerships of persons who are not married, including partnerships of same-sex persons, cannot enjoy similar protection and care.[15] Such interpretation of Article 18 Constitution implies the adoption of narrowing interpretation of the constitutional principle of equality and non-discrimination. If the possibility of applying for adoption by homosexuals resulted from the principle of equal treatment, it should be assumed that in the name of equality, from the point of view of the State, founding a family based on marriage and based on the relationship that does not have the status of marriage is equally desired. However, this results in "annulment of the fundamental systemic preference of marriage as a basis of parenthood and a 'family creation' factor: it is suggested that in our pattern of marriage-family-motherhood-parenthood, the first element may be replaced by another one provided that it is recognised as equivalent to marriage".[16]

On the other hand, without a negation of the functional and axiological relationship of marriage, family, motherhood and parenthood assumed by the quoted author,[17] one can assume that making adoption by homosexuals and same-sex couples possible actually departs from the constitutional vision of a family based on marriage but it is admissible, provided it is not in conflict with a child's best interest. This is the stand of the legislator because if Family and Guardianship Code lays down the possibility of adoption by a single individual, the argument that only adoption by a married couple is in a child's interest is not valid (based on the assumption that adoption by a couple of unmarried partners does not guarantee a stable family relationship and due to that is inadmissible). As Anna Śledzińska-Simon notices, in the legislator's opinion, adoption by a single individual is "another optimal situation in accordance with the principle that an untypical family is better than none".[18] Based on the above assumption, the quoted author states that the ability to care for a child's interests and not the sexual orientation is the decisive criterion for the evaluation whether a given person can qualify for an adoptive parent. From the point of view of the ban on discrimination, sexual orientation should not be treated *per se* as a condition excluding the ability to adopt a child.

---

[14] E. Holewińska-Łapińska, [in:] T. Smyczyński (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011, p. 528. Approval: M. Prucnal-Wójcik, *supra* n. 13, paras 20–20.3; J. Gajda, *„Adopcja" przez pary homoseksualne. Aspekty prawne*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 121.

[15] E. Holewińska-Łapińska, *supra* n. 14, p. 528, footnote 83.

[16] B. Banaszkiewicz, *supra* n. 2, p. 617.

[17] *Ibid*., p. 613.

[18] A. Śledzińska-Simon, *supra* n. 10, p. 145.

The considerations below aim to establish to what extent this stance can be justified based on modern standards of human rights protection, in particular with regard to the European Court of Human Rights case law.

3. ADOPTION BY HOMOSEXUALS VERSUS THE RIGHT TO FOUND A FAMILY

In the light of the European Court of Human Rights (ECtHR) case law, undoubtedly the right to pursue adoption cannot be derived from the right to respect for private life regardless of the fact that this right includes, inter alia, the right to found a family and develop relations with other people, especially in the emotional sphere. The possibility of applying for adoption does not result from the right to respect for family life guaranteed in Article 8 para. 1 Convention. The provision refers to the already existing family relations and does not cover a desire to found a family.[19]

However, a question arises whether the right to pursue adoption may be derived from the right to found a family, which, beside the right to marry, is guaranteed in Article 12 Convention. Such interpretation of the right to found a family was adopted by the authors of the Yogyakarta Principles;[20] in accordance with Principle 24, "everyone has the right to found a family, regardless of sexual orientation". In order to exercise the right, states should "take all necessary legal, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity."[21]

It seems that the above-quoted legal interpretation of the right to found a family guaranteed based on international conventions on human rights protection is too broad and constitutes a proposal *de lege ferenda* rather than the reconstruction of the existing standards of protection.[22] It should be assumed that the right to found

---

[19] ECtHR, Grand Chamber judgment of 22 January 2008, *E.B. v. France*, application no. 43546/02, para. 32.

[20] The Yogyakarta Principles constitute a set of 29 principles that are doctrinal interpretation of international provisions of human rights within the scope of regulations of the issues concerning sexual orientation and gender identity. The authors of the document aimed to reconstruct international standards of protection. The Yogyakarta Principles are the result of an international meeting of human rights experts organised on 6–9 November 2006 by the International Service for Human Rights and International Commission of Jurists at Gadjah Mada University in Yogyakarta (Indonesia). Every principle is accompanied by detailed recommendations concerning its implementation addressed to states. See R. Wieruszewski, *Zasady Yogyakarty – geneza i znaczenie*, [in:] K. Remin (ed.), *Zasady stosowania międzynarodowego prawa praw człowieka w stosunku do orientacji seksualnej oraz tożsamości płciowej*, Warszawa 2009, p. 17 et seq., http://docplayer.pl/403153-Zasady-yogyakarty-zasady-stosowania-miedzynarodowego-prawa-praw-czlowieka-w-stosunku-do-orientacji-seksualnej-oraz-tozsamosci-plciowej.html (accessed 5.05.2018).

[21] The text of the principles in accordance with the translation by A. Bodnar et al., [in:] K. Remin (ed.), *supra* n. 20, p. 48.

[22] Roman Wieruszewski formulates a similar opinion on the Yogyakarta Principles and states that "after reading some principles, one can have doubts whether it is really a reconstruction or perhaps rather a construction"; R. Wieruszewski, *supra* n. 20, p. 18.

a family in the meaning of Article 23 para. 2 of the International Covenant on Civil and Political Rights and Article 12 of the European Convention of Human Rights is a consequence of marriage entered into and is the right of spouses. The provisions referred to do not cover the right of single individuals or persons in partnerships that do not constitute marriage to found a family through procreation or adoption.[23]

In Polish literature, Tadeusz Smyczyński expresses the opinion opposite to the stance formulated by the authors of the Yogyakarta Principles. He believes that cohabitation of same-sex couples cannot be assessed in terms of family categories. It is due to the fact that "there is no feature of such cohabitation that might justify its family and legal regulation; in particular, sexual cohabitation of such a couple that indeed raises doubts concerning its natural character is not one".[24] In the author's opinion, the forms of family cohabitation cannot be subject to choice following the wish of people concerned. It is not a good or a normative model that can be extended or narrowed with respect to the scope of obligations, rights and their consequences in various legal fields. "For legal family relationships between a father and a mother that ensure the protection of a family, including children in particular, (...) the legislator cannot develop a few models for choice."[25]

On the other hand, the authors of the Charter of Fundamental Rights did not assume the existence of an independent (unrelated to the right to marry) right to found a family. In the Explanations relating to the Charter it is stated that the national legislator may recognise "arrangements other than marriage for founding a family".[26] In the light of the Charter, a family (founding it) is not perceived as a potential consequence of marriage only, but also as a result of being in another relationship recognised by law and following informal cohabitation that is stable in nature.[27] However, it should be taken into account that the intention of the authors of Article 9 Charter was not to establish a common international standard. The protection of the right to marry and found a family stipulated in the Charter is granted in such a scope in which the rights are ensured in national legislations.

---

[23] L. Garlicki, *Omówienie art. 12 Europejskiej Konwencji Praw Człowieka*, [in:] L. Garlicki, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, *Komentarz do art. 1–18*, Warszawa 2010, p. 722. It seems that also Marek Antoni Nowicki has a similar opinion. Making commentaries on Article 12 Convention concerning the right to found a family, he states that "a family founded as a result of marriage enjoys a special type of protection based on this article". See M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2010, p. 666. Christoph Grabenwarter presents a different opinion on the issue and believes that the right to found a family is closely connected with the right to marry but marriage should not be recognised as a requirement for the exercise of the right to found a family. The right is guaranteed so it is independent of the marital status of the parents concerned; Ch. Grabenwarter, *European Convention on Human Rights. Commentary*, München 2014, p. 321.

[24] T. Smyczyński, *Małżeństwo – konkubinat – związek partnerski*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 75.

[25] *Ibid*., p. 76.

[26] *Explanations relating to the Charter of Fundamental Rights*, OJ 2007/C 303/02.

[27] I.C. Kamiński, discussion of Article 9 Charter of Fundamental Rights of the European Union, [in:] A. Wróbel, *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warszawa 2013, p. 315.

4. ADOPTION BY HOMOSEXUALS IN THE LIGHT OF THE PRINCIPLE OF EQUAL TREATMENT

The most common argument for granting homosexuals legal possibility of adoption is the statement that refusal to do this constitutes the infringement of the ban on discrimination against them. However, many authors are of the opinion that different treatment of homosexuals with respect to access to adoption is justified by the protection of a child's interests. The European Court of Human Rights also expressed this stand in its judgment (which is invalid now) in the case of *Fretté v. France*.[28] According to ECtHR, "Even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted."[29]

Various arguments for harmful influence of upbringing by homosexuals on the interests of a child are provided in literature. The most important of them is one that states that a family composed of two heterosexual parents is the optimal environment for appropriate upbringing of children. This way a child can "fully" understand the essence of human sexuality, differences between a woman and a man and the complementary nature of the two genders in their mutual relations. As the values passed to children in the process of upbringing are immanently connected with each parent's gender, a child reared by same-sex couples will not have an opportunity to get the whole "set" of values necessary to function properly. Same-sex persons, despite all their efforts, are not able to pass all the necessary values to children.[30]

Anna Śledzińska-Simon challenges the view. In her opinion, homosexual couples can match a model of "mother-father-child", provided that we take into account the

---

[28] Judgment of 26 February 2002, application no. 36515/97: The applicant was a single homosexual man. He alleged that the decision to dismiss his application for authorisation to adopt was based on his sexual orientation and, thus, the authorities discriminated against him, which means they breached Article 14 (equal treatment obligation) in conjunction with Article 8 para. 1 (the right to respect for his private and family life) of the Convention. According to adoption authorities' findings, the applicant had psychical and intellectual qualities necessary to play the role of an adoptive parent. Moreover, the authorities did not recognise any other circumstances concerning the applicant's way of life that might be hazardous for the child's interests. Nevertheless, they decided that due to the applicant's "choice of lifestyle", he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view.

[29] *Ibid*., para. 36.

[30] J. Gajda, *supra* n. 14, p. 118. The quoted argument seems to be based on common sense and *prima facie* it is hard to deny that it is to some extent convincing. On the other hand, however, the argument is general in nature; the author does not indicate what particular skills and competences compose the *minimum minimorum* of values he assumes that a child should be provided in order to function properly. Determination of all the necessary requirements for "appropriate" development alone encounters difficulties. Moreover, the author does not indicate particular values a woman can and a man cannot provide (and vice versa), and first of all does not show the causal relationship between potential "deficit" of values passed to a child by same-sex guardians and a risk that his/her development will be "inappropriate".

category of social gender "determined by the life attitude, the type of character and the type of domestic chores and jobs done".[31]

On the other hand, Tomasz Pietrzykowski adopted an opposite stance. To tell the truth, he does not exclude a possibility of granting same-sex couples the right to apply for adoption, but he perceives it as less evil than the situation when a child must be placed in a youth detention centre. According to the author, the need to ensure that children with no family have possibly best conditions of upbringing is an argument for giving priority to a heterosexual couple when there is a choice between different and same-sex adoptive parents. This does not mean, however, that every particular heterosexual couple *ex definitione* constitutes a better choice than any other homosexual couple.[32]

The above-presented opinions concerning the legal possibility of applying for adoption of a child seem intuitive. It is so because supporters of particular solutions do not provide any scientific findings to substantiate their views. It is important because, as Anna Śledzińska-Simon indicates, a child's interest, which is a decisive condition when an adoption decision is taken, is an unclear term, which can depend on beliefs, prejudices or stereotypes of the authorities taking decisions on adoption.[33]

On the other hand, the European Court of Human Rights referred to the state of research into the issue discussed herein in the already mentioned case of *Fretté v. France*. The Court notices that adoption is aimed at providing a child with a family, and not a family with a child. That is why, the state should guarantee that persons chosen to adopt are only those who can offer the child "the most suitable home in every respect".[34] Next the Court states that the opinions of experts, in particular psychiatrists and psychologists, are divided over the possible influence of a child's upbringing by one or both homosexual parents on their development, and that there has been a limited number of scientific studies conducted on the subject to date. Moreover, national and international opinions vary. Therefore, the national authorities were entitled to consider that the applicant's right to apply for authorisation of adoption was limited by the interests of children. Taking into account the need to protect children's interests and that the broad margin of appreciation is left to states in this area, the Court decides that the authorities did not infringe the principle of proportionality. As a result, the different treatment of the applicant is recognised as objective and reasonable justification; thus, the ban on discrimination was not infringed.[35]

The argument referring to differences in scientists' opinions concerning the influence of raising children by homosexual couples on their development was not taken into consideration (actually, it was silently ignored) by the Court in the justification for the judgment in the case of *E.B. v. France*, which was heard six years later, regardless of the fact that the government had raised the argument.[36]

---

31 A. Śledzińska-Simon, *supra* n. 10, p. 148.
32 T. Pietrzykowski, *supra* n. 12, p. 321.
33 A. Śledzińska-Simon, *supra* n. 10, p. 145.
34 *Fretté v. France*, *supra* n. 28, para. 34.
35 *Ibid.*, para. 35 et seq.
36 *E.B. v. France*, *supra* n. 19, para. 66.

Referring to former case law, the Court stated that a difference in treatment because of sexual orientation may be justified only in case there are "particularly convincing and weighty reasons".[37] In the Court's opinion, there were no such reasons in the case. Thus, according to the judgment in the case of *E.B. v. France*, the Court had no doubts that upbringing by homosexuals was not harmful to children.

The Federal Constitutional Court for Germany also referred to scientists' opinions concerning the issue. In the justification for the judgment of 19 February 2014 in the case of adoption by homosexuals, the Court took into account the fact that ten out of eleven institutions, including organisations of psychologists and pedagogues, which presented their stance, believe that such adoption is advantageous to children. One of the opinions that judges quoted starts with the following sentence: "It should be assumed that adult homosexuals are competent parents".[38] Research into the influence of the circumstance of upbringing children by same-sex parents on them has also been conducted in many other countries, mainly in Europe and the United States.[39] For example, in 2005, the American Academy of Pediatrics founded a committee for the assessment of the research into legal, economic and psychological and social aspects of health and well-being of children raised in homosexual families. The committee concluded that research conducted throughout a period of 25 years demonstrate "a lack of links between parents' sexual orientation and the level of their emotional and psychosocial adaptation".[40] Moreover, it can be said at present there is a consensus among scientists that children raised by same-sex couples develop equally well as heterosexual parents' children.[41]

---

[37] *Ibid*., para. 91.

[38] 1 BvR 3247/09, justification paras 25–32, https://lexetius.com/2013,294 (accessed 26.11.2019).

[39] For example: World Association for Sexual Health, *Position Statement: Co-Adoption of Children by Same Sex Couples*, 2013, http://www.worldsexology.org/position-statement-co-adoption-of-children-by-same-sex-couples/ (accessed 18.12.2018); American Psychological Association, *Sexual Orientation, Parents, & Children*, 2004, https://www.apa.org/about/policy/parenting.aspx (accessed 18.12.2018); Psychological Society of Ireland, *Psychological Society of Ireland President Warns of the Detrimental Emotional Consequences the Marriage Equality Debate may Have*, 2015, http://archive.is/ck2xu (accessed 18.12.2018); Ordem dos Psicólogos Portugueses, *Relatório de Evidência Científica Psicológica sobre Relações Familiares e Desenvolvimento Infantil nas Famílias Homoparentais*, https://www.ordemdospsicologos.pt/ficheiros/documentos/relataorio_de_evidaancia_cientaifica_psicolaogica_sobre_as_relaa_aoes_familiares_e_o_desenvolvimento_infantil_nas_famailias.pdf (accessed 18.12.2018).

[40] D.E. Newton, *Same-Sex Marriages. A Reference Handbook*, Santa Barbara 2010, p. 60. The author also lists a series of other independent institutions that conducted such research and came to similar conclusions.

[41] J. Adams, R. Light, *Scientific Consensus, the Law, and Same Sex Parenting Outcomes*, Social Science Research 53 (2015), pp. 300–310. Bogdan Wojciszke also indicates there is consensus in scientific circles about the lack of harmfulness of adoption by homosexuals for the development of children: "There are no negative consequences of such a solution for children. To date, the findings of research comparing the development of children raised by same- and different-sex partners have unambiguously confirmed that. The research is not abundant (there have been dozens of studies so far), nevertheless it is methodologically correct so legitimate conclusions can be drawn from it. The findings are clear: with regard to psychological adaptation, i.e. psychical health understood as a lack of disorders, appropriate cognition development and sexual identity, children raised by homosexual couples are not in any way inferior to children raised by heterosexual families."; *Dzieci dla gejów*, interview of Tomasz Stawiszyński with Professor

Apart from that, it should be noticed that the requirement for a potential adoptive parent to provide a different gender role model cannot be reconciled with the legal possibility of applying for adoption by a single person. In the case of *E.B. v. France*, the Court took such a stance.[42] The case concerned the compliance of the refusal of an application for authorisation of adoption by the applicant who was in a stable homosexual relationship under Article 14 in conjunction with Article 8 para. 1 Convention. The applicant made an application for authorisation of adoption and mentioned that her female partner had not been involved in the plan to adopt. The application was rejected, inter alia, because of the lack of a male role model in the applicant's household. Referring to the argument indicated, the Court rightly noticed that the authorities' requirement for the applicant to establish the presence of a referent of the other sex might in fact annihilate the possibility of applying for authorisation of adoption by a single person, which is actually stipulated in national law. Moreover, in the Court's opinion, there is a risk that the authorities will use the requirement as a pretext for rejecting an application on grounds of an applicant's homosexual orientation and hide the real reason for that,[43] especially as, according to the applicant, the government on which the burden of proof lay that it was necessary to interfere into the rights stipulated in the Convention did not produce statistical information on the frequency of reliance on that ground towards women applying for adoption who were not in a relationship with a male partner.[44] Considering the above, the Court stated that the national authorities had discriminated against the applicant and thus violated Article 14 in conjunction with Article 8 para. 1 Convention. However, as Łukasz Kułaga rightly noticed, the Court failed to undertake a detailed analysis of the grounds for the requirement to provide an adopted child with both sex role models from the point of view of the necessity to protect the child's best interest. This way, the Court departed from the opinion adopted in the case of *Fretté v. France*.[45]

There is also an argument against admissibility of adoption by homosexual couples that refers to the negative attitudes of the majority of society towards the issue. According to Elżbieta Holewińska-Łapińska, "it seems that, in general,

---

Bogdan Wojciszke, Newsweek.pl, 21 June 2011, https://www.newsweek.pl/polska/dzieci-dla-gejow/6bnt5e4 (accessed 18.12.2018.)

[42] ECtHR, Grand Chamber judgment of 22 January 2008, application no. 43546/02.

[43] *Ibid*., para. 71.

[44] *Ibid*., para. 48. Another argument for refusing authorisation for adoption quoted by the authorities was the ambivalence of the commitment of the applicant's partner to her plans to adopt. When a potential adoptive parent lives with a partner, the attitude of this partner to adoption should be taken into consideration in order to assess whether the requirement to safeguard the child's best interest has been met. It also concerns a situation in which no legal relationship takes place between a child and an adoptive parent's partner. According to the Court, there is no evidence that the assessment of the partner's role in the child's life was based on the criteria connected with the applicant's sexual orientation. Thus, there was no violation of the ban on discrimination. However, the Court considered that two grounds for the refusal to grant authorisation contributed to the overall assessment of the applicant's situation. Therefore, the illegitimacy of one of the grounds has the effect of influencing the entire decision. The opinion should be recognised as very controversial and it is hard to approve of it. It was rightly criticised in dissenting opinions annexed to the judgment.

[45] Ł. Kułaga, *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 22 stycznia 2008 r. w sprawie E.B. przeciwko Francji (nr skargi 43546/02*), Przegląd Sejmowy 6(89), 2008, p. 255.

adoption of a child by a homosexual person would be recognised in Poland as being in conflict with a child's best interest because, according to a public opinion survey, only 6% of respondents accept such a possibility, while 90% reject it. In particular, such an opinion would also concern an applicant for adoption that lives in a stable same-sex partnership."[46] The opinion is based on the assumption that the term "a child's best interest' is a relative concept, which means that the opinions of the majority of society constitute one of the factors that determine its content. However, the author does not believe that the opinions must be based on rational grounds. Such a relative approach to the concept of a child's best interest is worrying because it cannot be excluded that a negative social attitude towards adoption by homosexuals is the expression of unreasonable fears or prejudices. On the other hand, the content of legal solutions should be based on rational grounds and, first of all, the present scientific knowledge of the field that is subject to legal regulation. As far as the discussed issue is concerned, as it has been indicated above, most research confirms that upbringing by homosexuals does not have a negative impact on a child's development.

In addition, authors who refer to the majority of society's attitudes towards adoption by homosexuals warn that children brought up by such persons would most probably become victims of intolerance, meet with an unfavourable reception, dislike and probably also aggression in peers, their parents and even teachers.[47] The threat cannot be ignored but it is hard to fail to notice that such reasoning might lead to unwanted social consequences. Based on this argument, it might be, e.g. stated that in society characterised by relative religious intolerance, upbringing children to practice minority religions and evoking dislike should be abolished in order to protect them from negative consequences of intolerance. Thus, it should be strongly emphasised that in case the opinions of the majority of society are not based on rational factors and moral assessment made by this majority does not result from universal values, *vox populi* cannot be awarded the rank of *vox Dei*. It concerns in particular democratic societies which are obliged to ensure the protection of the rights of minorities. On the other hand, taking into account the educational function of law, it is worth quoting Leon Petrażycki, who said that "rational law is a school of morality",[48] and "rational legal policy results in or accelerates moral progress".[49]

The above considerations indicate that, in the light of the lack of sufficient reasons for different treatment of homosexuals in their access to adoption, a denial of the possibility of applying for adoption by such people based only on their sexual orientation constitutes the breach of the ban on discrimination. It should be noticed, however, that the conclusion concerns only the situation when national law admits

---

[46] E. Holewińska-Łapińska, *supra* n. 14, p. 528. According to the latest CBOS survey, answering the question: "In your opinion, should gay and lesbian couples, i.e. same-sex couples being in an intimate relationship, have the right to adopt children?" the respondents stated as follows: Yes – 11%, No – 84%, It is hard to say – 5%. Centrum Badania Opinii Społecznej, *supra* n. 1, p. 4, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 30.04.2018).

[47] J. Gajda, *supra* n. 14, p. 120.

[48] L. Petrażycki, *Wstęp do nauki polityki prawa*, Warszawa 1968, p. 29.

[49] *Ibid*.

adoption by a single person. Still, there is no obligation to provide homosexuals with the same rights to adoption as only married couples have if the national legal system does not legalise same-sex marriages.

The case of *Gas and Debois v. France*[50] concerning the refusal of authorisation to adopt a child by the applicant's partner illustrates the issue. The authorities justified the refusal by stating that in this case adoption would have been in conflict with the child's best interest because it would have deprived the mother of her parental rights and transferred them to her female partner. In the light of national law, sharing parental authority as a result of adoption is only possible in case of adoption by the spouse of the child's biological mother or father. The applicants accused the authorities of unjustified discrimination against them because, although they were not married, their situation was similar to that of married couples. The Court did not share the opinion and noticed that marriage grants spouses a special legal status, which results in specific personal, social and legal effects. The state parties are not obliged to enable homosexuals to get married.[51] In addition, the Court noticed that homosexual couples who are not married are exposed to the risk of being refused the right to adoption for the same reasons as the applicants. Therefore, the Court decided that Article 14 in conjunction with Article 8 Convention was not breached in the case.[52]

On the other hand, in the case of *X and others v. Austria*, the Court came to a different conclusion.[53] Similarly to the case of *Gas and Debois v. France*, this case concerned the refusal of adoption by a biological mother's partner. In accordance with national law, in case of adoption by a single person, an adoptive parent substituted for a parent of the same sex. The approval of the applicant's application would result in breaking the legal bond between the biological mother and the child and, at the same time, the legal bond between the father and the child would be maintained. A national court hearing the case decided that there was no need to substitute for the natural father, especially as he was in regular contact with the child. At the same time, the court failed to examine whether, as the applicants claimed, there were extraordinary circumstances justifying not taking into account a father's refusal to give consent to adoption. The applicants claimed discrimination against them and stated there were no objective and rational grounds for the existence of legal regulations that laid down a possibility of adoption of a partner's child by the other partner in case of heterosexual couples, regardless of whether they were married or not, and there was no such a possibility in case of same-sex couples.

The Court decided that the relationship between the partners being in a stable relationship and the child with whom they shared a household should be classified as "family life" within the meaning of Article 8 para. 1 Convention; therefore, Article 14 in conjunction with Article 8 para. 1 Convention is applicable in the case. In addition, the Court indicated that the difference in treatment because of sexual orientation must be justified by especially convincing and weighty reasons, however,

---

50 ECtHR judgment of 15 March 2012, application no. 25951/07.

51 *Ibid*., para. 68.

52 *Ibid*., para. 69 et seq.

53 Grand Chamber judgment of 19 February 2013, application no. 19010/07.

the margin of appreciation by national authorities in such cases was narrow. The Court also noticed that, in accordance with the Convention, difference in treatment based solely on sexual orientation is unacceptable.[54]

In the Court's opinion, in cases concerning adoption of one homosexual partner's child by the other partner, homosexual couples are in a relatively similar situation to heterosexual couples that are not married.[55] Thus, the authorities treated the applicants in a different way than heterosexual couples. However, this does not concern the issue of adoption by homosexual couples *in abstracto* but a narrow problem of alleged discrimination against homosexual couples in a situation concerning adoption of the partner's child.[56] The present case differs from the case of *Gas and Debois v. France* because, under French law, second-parent adoption was open neither to unmarried different-sex couples nor same-sex couples.[57]

The government justified the difference in treatment of homosexuals by the necessity of protecting a traditional family. Although the Court recognised the reason as legitimate, it noticed that the Convention as "a living instrument" must be interpreted in present-day conditions. The state, in its choice of means designed to protect the family and secure respect for family life within the meaning of Article 8 para. 1 Convention, must take into account changes in contemporary society, including the fact that there is not one main way of leading private and family life.[58] In the Court's opinion, the government did not adduce any specific evidence and any scientific studies to show that a family with two same-sex parents could not adequately provide for a child's needs. As far as adoption is concerned, same-sex couples could be as suitable or unsuitable as different-sex couples.[59] Thus, the Court found that the difference in treatment of the applicants was a violation of Article 14 in conjunction with Article 8 Convention.

The Court's judgment confirms that if national authorities decide to extend the possibility of adoption and offer it to unmarried couples and single persons, national legislation should not lead to discrimination against people with homosexual orientation. However, the provisions of the Convention do not impose an obligation on national authorities to legalise homosexual marriages or to guarantee a possibility of adoption by unmarried couples.

5. ADOPTION BY HOMOSEXUALS VERSUS CHILDREN'S RIGHT TO PROTECTION OF THEIR IDENTITY

Finally, it is worth drawing attention to the implications of the issue of adoption by homosexual couples for children's right to the protection of their identity. The right should be taken into account among a wide catalogue of elements constituting a child's best interest. States are obliged to undertake to respect the right of the child

[54] *Ibid*., para. 99.
[55] *Ibid*., para. 112.
[56] *Ibid*., para. 127.
[57] *Ibid*., para. 131.
[58] *Ibid*., para. 138 et seq.
[59] *Ibid*., para. 142.

to preserve his or her identity in accordance with Article 8 para. 1 Convention on the Rights of the Child. However, the provision does not stipulate a definition of the term "identity". According to Jaap Egbert Doek, the development of a definition of identity for legal purposes seems to be impossible. At the same time, the author quotes the interpretation of the concept proposed by Erik Erikson, according to which identity is "an individual's subjective feeling that he or she is continuously the same person".[60]

On the other hand, according to Tadeusz Sokołowski, one of the elements of human identity is their gender identity within the meaning of awareness of their origin in parents, a woman and a man. "In other words, a child must have an opportunity to 'identify' with his or her adoptive parents",[61] who personify natural parents to some extent. The above-quoted author gives an example of non-fulfilment of the obligation to protect a child's identity and refers to the judgment based on which two school-age siblings were placed in a same-sex adoptive family after their natural parents had been killed in an accident. It is hard to disagree with the author's opinion that placing the children in a completely different upbringing environment flagrantly violated the principle of a child's upbringing continuity referred to in Article 20 para. 3 Convention on the Rights of the Child. Such a radical change of a child's upbringing environment undoubtedly leads to the disturbance and damage in the sphere of his or her identity.[62] However, the assessment of the influence of adoption on the development of a child's awareness should be made with reference to the circumstances of a particular case. The risk of breaking the undisturbed continuity of a child's awareness development is certainly not going to take place in case of adoption in their early age. Thus, the above-presented actual state is an extraordinary situation. As the European Court of Human Rights noticed, to tell the truth, upbringing by a homosexual has influence on moral and psychical development of a child, mainly on his or her identity but it cannot be definitely stated that the influence is negative.[63]

6. CONCLUSIONS

Adoption unquestionably aims to create an optimal upbringing environment for children in need. For this reason, it is not possible to develop the "right" to adoption from the right to found a family or the right to protect private and family life. Thus, determination of the circle of persons entitled to apply for adoption remains within national authorities' competence, however, regulations they enact cannot be discriminatory. The compliance with the ban on discrimination in access to adoption should also take place in the field of law application.

In the light of the present case law of the European Court of Human Rights, difference in treatment based on sexual orientation is justified only in a situation when there are especially weighty reasons. As far as admissibility of adoption by homosexuals

---

[60] J.E. Doek, *A Commentary on the United Nations Convention on the Rights of the Child. Articles 8–9*, Boston 2006, p. 10.

[61] T. Sokołowski, *supra* n. 9, p. 105.

[62] *Ibid*., p. 108. The author does not provide the reference number of the quoted judgment.

[63] *Fretté v. France*, *supra* n. 28, para. 42.

is concerned, a child's best interest can be such a reason provided that there is a risk that a child's upbringing by homosexuals might have negative influence on his or her development. Such an approach dominates Polish legal literature at present. On the other hand, the opinion that parents' sexual orientation does not constitute a threat for a child's appropriate functioning dominates the views of scientific circles. Refusal to give authorisation of adoption based solely on the prospective adoptive parent's homosexual orientation constitutes the infringement of the principle of equal treatment in a situation when national law admits the possibility of applying for adoption by a single person.

The exclusion of homosexuals from the persons entitled to apply for adoption would not constitute discriminatory treatment in case the national legislator, recognising only heterosexual marriages, limited the possibility of adoption to married couples. It is due to the fact that a marriage gives spouses a special status and the rights resulting from this status may be exclusive in nature, i.e. only spouses can have those rights. Therefore, as in the light of the present-day international legal standards the authorities are not obliged to legalise same-sex marriages, the situation of persons in a heterosexual marriage would be incomparable with that of persons in other relationships, regardless of their personal composition and legal recognition.

BIBLIOGRAPHY

Adams J., Light R., *Scientific Consensus, the Law, and Same Sex Parenting Outcomes*, Social Science Research 53 (2015).

American Psychological Association, *Sexual Orientation, Parents, & Children*, 2004, https://www.apa.org/about/policy/parenting.aspx (accessed 18.12.2018).

Banaszkiewicz B., *Małżeństwo jako związek kobiety i mężczyzny. O niektórych implikacjach Artykułu 18 Konstytucji RP*, Kwartalnik Prawa Prywatnego issue 3, 2013.

Carroll A., Mendos L.R., *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, https://ilga.org/state-sponsored-homophobia-report, (accessed 30.04.2018).

Centrum Badania Opinii Społecznej, *Komunikat z badań nr 174/2017, Stosunek do osób o orientacji homoseksualnej i związków partnerskich*, December 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 18.12.2018).

Doek J.E., *A Commentary on the United Nations Convention on the Rights of the Child. Articles 8–9*, Boston 2006.

Dzieci dla gejów, interview of Tomasz Stawiszyński with Professor Bogdan Wojciszke, Newsweek.pl, 21 June 2011, https://www.newsweek.pl/polska/dzieci-dla-gejow/6bnt5e4 (accessed 18.12.2018).

Gajda J., *„Adopcja" przez pary homoseksualne. Aspekty prawne*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013.

Garlicki L., *Omówienie art. 12 Europejskiej Konwencji Praw Człowieka*, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, *Komentarz do art. 1–18*, Warszawa 2010.

Grabenwarter Ch., *European Convention on Human Rights. Commentary*, München 2014.

Holewińska-Łapińska E., [in:] T. Smyczyński (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011.

Kamiński I.C., *Omówienie artykułu 9 Karty Praw Podstawowych UE*, [in:] A. Wróbel, *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warszawa 2013.

Królak T., *Prof. Andrzej Zoll: homoseksualiści zawalczą o prawo do adopcji*, interview, https://wiadomosci.onet.pl/kraj/prof-andrzej-zoll-homoseksualisci-zawalcza-o-prawo-do-adopcji/ks38h (accessed 7.05.2018).

Kułaga Ł., *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 22 stycznia 2007 r. w sprawie E.B. przeciwko Francji (nr skargi 43546/02)*, Przegląd Sejmowy 6(89), 2008, p. 255.

Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2010.

Odpowiedź podsekretarza stanu w Ministerstwie Pracy i Polityki Społecznej – z upoważnienia ministra – na interpelację nr 20167 w sprawie przysposobienia dziecka, http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=32CD30D4 (accessed 4.05.2018).

Ordem dos Psicólogos Portugueses, *Relatório de Evidência Científica Psicológica sobre Relações Familiares e Desenvolvimento Infantil nas Famílias Homoparentais*, https://www.ordemdospsicologos.pt/ficheiros/documentos/relataorio_de_evidaancia_cientaifica_psicolaogica_sobre_as_relaa_aoes_familiares_e_o_desenvolvimento_infantil_nas_famailias.pdf (accessed 18.12.2018).

Osajda K. (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz. Przepisy wprowadzające KRO,* Vol. 5, Warszawa 2017 (Legalis).

Petrażycki L., *Wstęp do nauki polityki prawa*, Warszawa 1968.

Pietrzykowski K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018 (5th edn, Legalis).

Pietrzykowski T., *Etyczne problemy prawa. Zarys wykładu*, Katowice 2005.

Psychological Society of Ireland, *Psychological Society of Ireland President Warns of the Detrimental Emotional Cnsequences the Marriage Equality Debate may Have*, 2015, http://archive.is/ck2xu (accessed 18.12.2018).

Newton D.E., *Same-Sex Marriages. A Reference Handbook*, Santa Barbara 2010.

Schulz A.N., *O współczesnych dylematach tworzenia międzynarodowych standardów Rady Europy dotyczących relacji pomiędzy rodzicami i dziećmi*, Acta Iuris Stetiniensis, Zeszyty Naukowe Uniwersytetu Szczecińskiego No. 821, 2014.

Smyczyński T., *Małżeństwo – konkubinat – związek partnerski*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 75.

Sokołowski T., *Dobro dziecka wobec rzekomego prawa do adopcji*, [in:] M. Andrzejewski, *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013.

Śledzińska-Simon A., *Adopcja dzieci przez osoby homoseksualne*, [in:] R. Wieruszewski, M. Wyrzykowski, *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009.

Ukleja M., *Rodziny z wyboru. Homoseksualny związek jako współczesna alternatywa rodziny – analiza zjawiska*, Acta Universitatis Lodziensis. Folia Sociologica No. 51, 2014.

Wieruszewski R., *Zasady Yogyakarty – geneza i znaczenie*, [in:] K. Remin (ed.), *Zasady stosowania międzynarodowego prawa praw człowieka w stosunku do orientacji seksualnej oraz tożsamości płciowej*, Warszawa 2009, http://docplayer.pl/403153-Zasady-yogyakarty-zasady-stosowania-miedzynarodowego-prawa-praw-czlowieka-w-stosunku-do-orientacji-seksualnej-oraz-tozsamosci-plciowej.html (accessed 5.05.2018).

Wiśniewski L., *Zdanie odrębne*, [in:] R. Wieruszewski, M. Wyrzykowski (eds), *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009.

World Association for Sexual Health, *Position Statement: Co-Adoption of Children by Same Sex Couples*, 2013, http://www.worldsexology.org/position-statement-co-adoption-of-children-by-same-sex-couples/ (accessed 18.12.2018).

ADOPTION BY HOMOSEXUALS IN THE LIGHT OF MODERN STANDARDS OF HUMAN RIGHTS PROTECTION

Summary

The objective of the paper is to examine the issue of admissibility of adoption by homosexuals from the perspective of relevant human rights. In this context, it is crucial to establish whether a refusal to give permission to adopt a child solely on the grounds of an applicant's sexual orientation would constitute a breach of the principle of non-discrimination where the legal system provides for the possibility of applying for adoption by an unmarried individual. Different treatment of homosexual persons with regard to access to adoption is perceived by many scholars as justified considering the principle of the best interest of a child. It seems, however, that this justification lacks sufficient support in scientific research into the influence of upbringing by homosexual persons on the child's development. Taking into account the European Court of Human Rights case law, it must be recognised that homosexual orientation should not be regarded as a condition that by itself rules out the possibility of adoption, at least in case where a legal system admits such a possibility with regard to single individuals. On the other hand, the legal capacity to adopt a child can be derived neither from the right to respect for one's private and family life nor from the right to found a family.

Keywords: adoption, ban on discrimination on grounds of sexual orientation, child's best interest, right to found a family

ADOPCJA PRZEZ OSOBY O ORIENTACJI HOMOSEKSUALNEJ W ŚWIETLE WSPÓŁCZESNYCH STANDARDÓW OCHRONY PRAW CZŁOWIEKA

Streszczenie

Celem niniejszego opracowania jest analiza kwestii dopuszczalności adopcji dzieci przez osoby homoseksualne z perspektywy poszczególnych praw człowieka. W tym kontekście szczególnie istotną kwestią jest ustalenie, czy w sytuacji, gdy prawo przewiduje możliwość przysposobienia przez osobę samotną, odmowa zgody na adopcję wyłącznie ze względu na orientację homoseksualną stanowi naruszenie zakazu dyskryminacji. Odmienne traktowanie tej kategorii osób w dostępie do adopcji bywa uzasadniane ze względu na konieczność realizacji zasady dobra dziecka. Wydaje się jednak, że uzasadnienie to nie ma wystarczającego oparcia w wynikach badań na temat wpływu wychowania przez osoby homoseksualne na rozwój dziecka. Uwzględniając aktualne orzecznictwo Europejskiego Trybunału Praw Człowieka należy uznać, że orientacja homoseksualna osoby ubiegającej się o adopcję nie powinna być traktowana *per se* jako przesłanka wyłączająca możliwość adopcji przynajmniej w przypadku, gdy prawo krajowe dopuszcza możliwość przysposobienia przez osoby samotne. Nie jest natomiast możliwe wyprowadzenie prawa do adopcji z prawa do założenia rodziny, czy też z prawa do poszanowania życia prywatnego i rodzinnego.

Słowa kluczowe: adopcja, zakaz dyskryminacji ze względu na orientację seksualną, dobro dziecka, prawo do założenia rodziny

ADOPCIÓN POR PERSONAS HOMOSEXUALES A LA LUZ DE ESTÁNDARES ACTUALES DE PROTECCIÓN DE DERECHOS HUMANOS

Resumen

El artículo analiza la admisibilidad de adopción de niños por personas homosexuales desde la perspectiva de derechos humanos en concreto. En este marco es muy importante determinar si en el caso cuando la ley prevea la posibilidad de adoptar por una persona sin pareja, la denegación de adopción únicamente debido a la homosexualidad constituirá la infracción de prohibición de discriminación. El tratamiento diferente de esta categoría de personas para acceder a la adopción se justifica por la necesidad de ejecución del principio del bien de niño. Sin embargo, parece que este fundamento no tiene apoyo suficiente en los resultados de estudios sobre la influencia de educación por personas homosexuales al desarrollo del niño. Tomando en cuenta la jurisprudencia actual del Tribunal Europeo de Derechos Humanos hay que estimar que la homosexualidad de la persona que solicita adopción no debería considerarse *per se* como requisito que excluye la posibilidad de adoptar, por lo menos en caso cuando la legislación nacional admita la posibilidad de adoptar por las personas sin pareja. No es posible deducir el derecho a la adopción del derecho de constituir una familia, o bien del derecho a respetar la vida privada y familiar.

Palabras claves: adopción, prohibición de discriminación debido a orientación sexual, bien del niño, derecho a constituir una familia

УСЫНОВЛЕНИЕ ДЕТЕЙ ЛИЦАМИ ГОМОСЕКСУАЛЬНОЙ ОРИЕНТАЦИИ В СВЕТЕ СОВРЕМЕННЫХ НОРМ В ОБЛАСТИ ЗАЩИТЫ ПРАВ ЧЕЛОВЕКА

Резюме

Целью данной работы является анализ допустимости усыновления детей лицами гомосексуальной ориентации с точки зрения индивидуальных прав человека. В этом контексте особенно важно установить, является ли отказ в усыновлении ребенка одиноким лицом (при условии, что закон предусматривает возможность такого усыновления) исключительно по причине его гомосексуальной ориентации нарушением запрета на дискриминацию. Особый подход к этой категории лиц в вопросе усыновлении иногда обосновывают необходимостью соблюсти принцип наилучшего обеспечения интересов ребенка. Представляется, однако, что такое обоснование недостаточно подкреплено результатами исследований того, как воспитание лицами гомосексуальной ориентации влияет на развитие ребенка. С учетом существующих решений Европейского суда по правам человека следует признать, что гомосексуальная ориентация претендента на усыновление ребенка сама по себе не может рассматриваться в качестве причины для отказа в усыновлении, по крайней мере, в тех случаях, когда национальное законодательство допускает усыновление одинокими лицами. В то же самое время, право на усыновление не может следовать из права на создание семьи или из права на неприкосновенность частной и семейной жизни.

Ключевые слова: усыновление, запрет дискриминации по признаку сексуальной ориентации, интересы ребенка, право на создание семьи

ADOPTION DURCH HOMOSEXUELLE UNTER BERÜCKSICHTIGUNG DER AKTUELLEN STANDARDS FÜR DEN SCHUTZ DER MENSCHENRECHTE

Zusammenfassung

Ziel dieser Arbeit ist die Analyse der Zulässigkeit der Adoption von Kindern durch Homosexuelle unter dem Gesichtspunkt der individuellen Menschenrechte. In diesem Zusammenhang ist es insbesondere wichtig zu prüfen, ob die Verweigerung der Adoption allein aufgrund der homosexuellen Ausrichtung einer Person in der Situation, wenn die Möglichkeit der Annahme an Kindes statt durch eine alleinstehende Person gesetzlich vorgesehen ist, einen Verstoß gegen das Diskriminierungsverbot darstellt. Eine Ungleichbehandlung dieser Personengruppe beim Zugang zur Adoption kann, aufgrund der Notwendigkeit gerechtfertigt sein, dass dem Grundsatz des Kindeswohls Rechnung zu tragen ist. Es scheint jedoch, dass diese Rechtfertigung durch die Ergebnisse der Studien zu den Auswirkungen der Erziehung durch Homosexuelle auf die Entwicklung eines Kindes nicht hinreichend belegt ist. Unter Berücksichtigung der aktuellen einschlägigen Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte ist davon auszugehen, dass die homosexuelle Ausrichtung eines Adoptionsantragstellers nicht *per se* als Voraussetzung angesehen werden kann, die die Möglichkeit einer Annahme an Kindes statt ausschließt, zumindest dann nicht, wenn das nationale Recht eine Adoption durch alleinstehende Person zulässt. Aus dem Recht, eine Familie zu gründen oder dem Grundrecht auf Achtung des Privat- und Familienlebens lässt sich jedoch kein Recht auf Adoption ableiten.

Schlüsselwörter: Adoption, Verbot der Diskriminierung aus Gründen der sexuellen Ausrichtung, Kindeswohl, Recht, eine Familie zu gründen

ADOPTION PAR DES PERSONNES HOMOSEXUELLES À LA LUMIÈRE DES NORMES CONTEMPORAINES DES DROITS DE L'HOMME

Résumé

Le but de cette étude est d'analyser la question de l'admissibilité de l'adoption des enfants par des personnes homosexuelles du point de vue des droits de l'homme individuels. Dans ce contexte, il est particulièrement important de déterminer si, lorsque la loi prévoit la possibilité d'adoption par une seule personne, le refus d'admettre l'adoption uniquement sur la base de l'orientation homosexuelle constitue une violation de l'interdiction de la discrimination. Un traitement différent de cette catégorie de personnes lors de l'accès à l'adoption peut être justifié par la nécessité de mettre en œuvre le principe du bien de l'enfant. Cependant, il semble que cette justification ne soit pas suffisamment étayée par les résultats d'études sur l'impact de l'éducation de l'enfant par des personnes homosexuelles sur son développement. Compte tenu de la jurisprudence actuelle de la Cour européenne des droits de l'homme, il convient de considérer que l'orientation homosexuelle du demandeur d'adoption ne doit pas être considérée en soi comme une condition excluant la possibilité d'adoption, du moins lorsque la législation nationale autorise l'adoption par une seule personne. Cependant, le droit d'adopter ne peut pas découler du droit de fonder une famille ou du droit au respect de la vie privée et familiale.

Mots-clés: adoption, interdiction de discrimination fondée sur l'orientation sexuelle, bien de l'enfant, droit de fonder une famille

L'ADOZIONE DA PARTE DI PERSONE CON ORIENTAMENTO OMOSESSUALE ALLA LUCE DEGLI STANDARD CONTEMPORANEI DI TUTELA DEI DIRITTI DELL'UOMO

Sintesi

L'obiettivo del presente elaborato è l'analisi della questione dell'ammissibilità dell'adozione di bambini da parte di persone omosessuali, nella prospettiva dei singoli diritti dell'uomo. In tale contesto la questione particolarmente essenziale è stabilire se nelle situazioni in cui la legge permette la possibilità di adozione da parte di una persona sola, il diniego all'adozione esclusivamente a motivo dell'orientamento omosessuale costituisca una violazione del divieto di discriminazione. Un diverso trattamento di questa categoria di persone nell'accesso all'adozione viene talvolta giustificato a motivo della necessità di realizzare il principio del bene del bambino. Sembrerebbe tuttavia che tale giustificazione non trovi sufficiente sostegno nei risultati degli studi sull'effetto dell'educazione da parte di persone omosessuali sullo sviluppo del bambino. Considerando l'attuale giurisprudenza della Corte europea dei diritti dell'uomo bisogna riconoscere che l'orientamento omosessuale della persona che desidera adottare non deve essere considerato di per se come una condizione che escluda la possibilità di adozione, perlomeno nel caso in cui il diritto nazionale ammette la possibilità di adozione da parte di persone sole. Non è possibile estrapolare il diritto all'adozione dal diritto di creare una famiglia o dal diritto al rispetto alla vita privata e familiare.

Parole chiave: adozione, divieto di discriminazione a motivo dell'orientamento sessuale, bene del bambino, diritto a creare una famiglia

Cytuj jako:

Jakuszewicz A., Adoption by homosexuals in the light of modern standards of human rights protection *[Adopcja przez osoby o orientacji homoseksualnej w świetle współczesnych standardów ochrony praw człowieka]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 93–113. DOI:10.26399/iusnovum.v13.4.2019.45/a.jakuszewicz

Cite as:

Jakuszewicz, A. (2019) 'Adoption by homosexuals in the light of modern standards of human rights protection'. *Ius Novum* (Vol. 13) 4, 93–113. DOI:10.26399/iusnovum.v13.4.2019.45/a.jakuszewicz

Ius Novum
4/2019

LEGAL ASPECTS OF THE PROCEDURE FOR DETERMINING THE FEE FOR WATER SERVICES UNDER NEW WATER LAW

MARCIN SOBOTA*
BARTOSZ JAWECKI**

DOI: 10.26399/iusnovum.v13.4.2019.46/m.sobota/b.jawecki

1. INTRODUCTION

In the Water Management Act[1] of 20 July 2017 (hereinafter referred to as the new Water Law), lawmakers introduced some innovative regulations pertaining to the procedure for determining fees for water services. In this paper, we present an analysis of the relevant provisions of the law. The discussion mostly focuses on issues related to determining the starting moment of the applicable administrative procedure. In addition, we address interpretative ambiguities that arise with respect to the special form employed to impose an obligation to pay for water services (an "information slip") onto obliged entities and with respect to the form of appeal in case the amount of fee is challenged (a complaint). Another important research issue is the question to what extent the administrative procedure is applicable to proceedings aimed at determining the amount of water service fee; we also discuss the corresponding uncertainties as to whether the issuance of an administrative decision marks the substantive conclusion of the respective administrative procedure. We confront the statutory solutions adopted in the Water Law with regulations contained in the Constitution of the Republic of Poland of 2 April 1997[2] (hereinafter, Constitution of Poland) and other statutes.

* PhD, Assistant Professor at the Institute of Landscape Architecture, Faculty of Environmental Engineering and Geodesy of Wrocław University of Environmental and Life Sciences, attorney-at-law; e-mail: marcin.sobota@upwr.edu.pl; ORCID: 0000-0002-5126-7472

** PhD hab. Eng., Professor at the Faculty of Environmental Engineering and Geodesy of Wrocław University of Environmental and Life Sciences; e-mail: bartosz.jawecki@upwr.edu.pl; ORCID: 0000-0002-4277-0412

1 See Dz.U. 2018, item 2268, as amended.

2 Dz.U. 1997, No. 78, item 483, as amended.

The research method we adopted involves the use of primary data (first of all, legislative acts) and secondary data, i.e. rulings of the Constitutional Court and administrative courts, commentaries on the generally applicable legal regulations, and various studies on the broadly defined administrative law, and in particular, water law. Only after the appropriate amount of data has been collected, can it be aggregated, compared, and summarized. As part of the adopted research method, we collected and made a preliminary selection of legal regulations, court judgments, and views expressed in the doctrine (comparative method). Next, we analysed their contents and drew conclusions (analytical method). The views presented herein are based, primarily, on interpretations of the law from a literal and historical perspective and from a perspective based on the legislative intent. We hope that the polemical nature of this paper will stimulate a further discussion on its subject matter.

2. WATER SERVICES IN THE NEW WATER LAW

A legal definition of the term "water services" first appeared in the Polish legislation in an amended version of the Water Management Act of 18 July 2001.[3] One of the changes consisted in adding Article 113b para. 7 by way of the Act of 5 January 2011 on amending the Water Management Act and other laws,[4] which came into force on 18 March 2011. The article defined the term as follows: "water services" means activities that enable households, public institutions, and commercial entities to satisfy their need for water, by way of: 1) maintaining and managing water resources, primarily through the impoundment, abstraction, storage, conditioning, and distribution of water; 2) wastewater collection, treatment, and disposal. The above definition largely reproduces the contents of Article 2 para. 38 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy[5] (henceforth Water Framework Directive).

The new Water Law lacks a legal definition of "water services", although in the explanatory memorandum to the bill, the expression "water services" appears 74 times[6] and, in the adopted text of the Water Law, it occurs 120 times.

First of all, note should be taken of the provisions of Article 35 para. 1 of the new Water Law, according to which "water services consist in providing households, public institutions, and commercial entities with the possibility to use water in a scope that goes beyond the scope of universal use of water, ordinary use of water,

---

[3] Dz.U. 2001, No. 115, item 229, as amended.

[4] Dz.U. 2011, No. 32, item 59.

[5] OJ EU, series L, No. 327, p. 1; Article 2 para. 38: "Water services" means all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) wastewater collection and treatment facilities which subsequently discharge into surface water.

[6] Explanatory Memorandum to the Bill of the New Water Law, Sejm print No. 1529, 25 April 2017.

and special use of water." In its turn, Article 35 para. 3 of the new Water Law contains a list of water supply services, i.e.:

1) abstraction of groundwater or surface water;
2) impoundment, storage or retention of groundwater and surface water and the use of such water;
3) conditioning and distribution of groundwater and surface water;
4) wastewater collection and treatment;
5) discharge of wastewater into the water or ground, including the discharge of wastewater into water facilities;
6) use of water for the purposes of the energy sector, including hydroelectric power generation;
7) discharge into the water or water facilities of rainwater or meltwater from open or closed rainwater sewerage systems that serve for draining atmospheric precipitation or from collective sewerage systems within the administrative boundaries of cities;
8) permanent drainage of land, building structures or excavations and mines as well as discharge into the water of water coming from land drainage within the administrative boundaries of cities;
9) discharge of abstracted and not used water into the water or ground.

The above regulation should be confronted with the provisions of Article 268 para. 1 of the new Water Law, which specifies to which of the water services enumerated above (Article 35 para. 3) the obligation to pay fees for their rendering is applicable,[7] whereas in Article 269 para. 1 of the new Water Law, the legislator introduces an additional list of other activities to which the obligation to pay for water services also applies.[8] This kind of a "surplus" regulation of the scope of fees for water services gives rise to fundamental doubts from the point of view of the principles of proper legislation and coherence of a legislative act. In this case, we

---

[7] Article 268 para. 1 of the new Water Law: Charges for water services are paid for:

1) abstraction of groundwater or surface water;
2) introduction of wastewater into the water or ground;
3) discharge into the water:
   a) of rainwater or meltwater from open or closed rainwater sewerage systems used for draining atmospheric precipitation or from collective sewerage systems within the administrative boundaries of cities,
   b) water coming from land drainage within the administrative boundaries of cities;
4) abstraction of groundwater and surface water for the purposes of fish farming and other kinds of aquatic farming;
5) introduction into the water or ground of effluent from fish farming and other kinds of aquatic farming enterprises.

[8] Article 269 para. 1 of the new Water Law: charges for water services are also paid for:

1) reduction of natural water retention as a result of construction works performed on an area exceeding 3,500 m² or the construction of objects permanently located on the ground that are conducive to the reduction of natural water retention due to the exclusion of more than 70% of the real estate area from the biologically active surface in areas not included in open or closed sewage systems;
2) extraction from surface waters, including internal sea waters along with the internal waters of the Gulf of Gdańsk and the territorial sea waters, of stone, gravel, sand and other raw materials, and the cutting of plants from the water or the shore.

deal with charges called by the legislator "fees for water services," although in fact they have no relation to water services (enumerated in Article 35 para. 1 of the new Water Law), whereas activities that create an obligation to pay fees under Article 269 para. 1 of the new Water Law undoubtedly constitute examples of special water use, directly indicated in Article 34 paras 4 and 8 of the new Water Law.[9]

The water service fee for the abstraction of water consists of a fixed annual fee and a variable fee that depends on the amount of water abstracted,[10] with the exception that the fixed fee is not charged for the abstraction of water for the purposes of land and crop irrigation in agriculture and forestry and for the purposes of fish farming and hydroelectric power generation;[11] in its turn, the water service fee for the discharge into the water of water coming from land drainage within the administrative boundaries of cities is charged only in the form of a fixed fee.[12]

The amount of the fixed fee for the:

1) abstraction of groundwater,
2) abstraction of surface water,
3) discharge into the water:
   a) of rainwater or meltwater from open or closed rainwater sewerage systems used for draining atmospheric precipitation or from collective sewerage systems within the administrative boundaries of cities,
   b) water coming from land drainage within the administrative boundaries of cities,
4) introduction of waste water into the water or ground

– is determined by the Polish Water Management Enterprise (Wody Polskie) and is forwarded to entities obliged to pay for water services in the form of an annual information slip that also describes the method of calculating the fee.[13] An entity required to pay for water services pays the fixed (annual) fee to the bank account of the Polish Water Management Enterprise in four equal quarterly instalments by the end of the month following the end of each quarter.[14] If an entity required to pay for water services fails to fulfil the above obligation, the competent authority of the Polish Water Management Enterprise determines the amount of the fixed fee by way of a decision;[15] furthermore, an appeal launched against this decision does not suspend its execution.[16] If an entity required to pay the fee for water services disagrees with the amount of fee, it has the right to lodge a complaint within 14 days from the receipt of the annual information slip.[17] The complaint is submitted to the very same entity that has composed the annual information slip; it has 14 days to

---

[9] M. Białek, D. Chojnacki, T. Grabarczyk, *Opłaty za usługi wodne w nowym prawie wodnym*, C.H. Beck, Warszawa 2018, p. 26.

[10] Article 270 para. 1 of the new Water Law.

[11] Article 270 para. 2 of the new Water Law.

[12] *Ibid*.

[13] Article 271 para. 1 of the new Water Law.

[14] Article 271 para. 6 of the new Water Law.

[15] Article 271 para. 7 of the new Water Law.

[16] Article 271 para. 8 of the new Water Law.

[17] Article 273 para. 1 of the new Water Law.

examine the complaint.[18] In this case, two options are possible, i.e. the complaint is either accepted, which results in the Polish Water Management Enterprise or the head of the respective local executive authority forwarding to the entity required to pay for water services an amended annual information slip that also contains the method of calculating the water service fee[19] or, if the complaint is rejected or accepted in part only, the competent authority of the Polish Water Management Enterprise or the head of the respective local executive authority determines the amount of water service fee by way of issuing a decision[20] that can be appealed against directly with an administrative court (in what follows, we shall limit the discussion to decisions issued by the Polish Water Management Enterprise).

The amount of the variable fee depends on the amount of water abstracted, the amount and nature of sewage discharged, and the amount of water discharged into the water, with the proviso that the fee is charged on a quarterly basis. Just like in the case of the fixed fee, the amount of the variable fee is determined by the Polish Water Management Enterprise, which notifies each interested party of the amount to be paid in an information slip that also contains the method of fee calculation.[21] Considering the fact that, in this case, it is necessary to establish the actual use of water or the amount of sewage, the fee is calculated on the basis of readings of metering devices or data from metering systems. The legislator stipulated that an entity required to pay water service fees must make provisions for the separate measurement of the amount of groundwater and surface water abstracted, while the indications of metering devices are read by an employee of the Polish Water Management Enterprise.[22] The subsequent stages of the procedure for the collection of the variable water service fees are identical to the procedure for the collection of the fixed fee[23] described above, both in terms of lodging a complaint and in terms of the appeal procedure.

3. ADMINISTRATIVE PROCEDURE FOR DETERMINING THE FEE FOR WATER SERVICES

The above regulations clearly indicate that, under the new Water Law, an administrative decision is issued *expressis verbis* as part of the procedure for determining the fee for water services in the following cases:

1) if an obliged entity fails to pay the amount specified in the information slip within 14 days from its receipt[24] – subsequently, the decision can be appealed

[18] Article 273 para. 4 of the new Water Law.
[19] Article 273 para. 5 of the new Water Law.
[20] Article 273 para. 6 of the new Water Law.
[21] Article 272 para. 17 of the new Water Law.
[22] Article 272 paras 11–14 of the new Water Law.
[23] Article 272 paras 17–26 of the new Water Law.
[24] Article 271 para. 7 and Article 272 para. 19 of the new Water Law.

against with a higher-level authority[25] under the Code of Administrative Procedure of 14 June 1960[26] (hereinafter: CAP);

2) if the complaint lodged by an obliged entity[27] has been dismissed in full or in part – subsequently, the said entity has the right to file a complaint with an administrative court[28].

The conclusion of an administrative procedure with a decision on the substance of the case in a form provided for by the Code of Administrative Procedure, that is by an administrative decision, undoubtedly means that an administrative procedure has been initiated at an earlier point and that it must follow the rules for administrative procedures laid down in the Code of Administrative Procedure.[29] The provisions of the new Water Law do not set forth any different rules in this respect, which means, in particular, that a party to the procedure (an obliged entity) has the right to inspect the case files at every stage of the procedure and to submit motions for adducing evidence, with the exception of the provisions of Article 273a of the new Water Law.[30] In addition, an administrative body must undertake all the necessary steps in order to ascertain the facts of the case and to resolve it in the public interest and in the legitimate interest of citizens in accordance with the principle of objective truth, expressed in Article 7 CAP and reflected, in particular, in the provisions of the Code of Administrative Procedure concerning evidence-taking proceedings.[31] At the same time, one must not lose sight of the provisions of Article 12 CAP, which state that public administration bodies should act on any given case thoroughly and promptly, using the simplest possible means to resolve the case, while matters that do not require the collection of evidence, information or explanations should be resolved immediately. The apparent conflict between thoroughness and speed should be interpreted as the requirement that administrative bodies should act as quickly as possible but without detriment to the thoroughness of the proceedings, i.e. with no detriment to the implementation of the principle of material truth.[32] At the same time, as Magdalena Kotulska points out, "this principle requires public administration bodies to conduct proceedings in such a way that they could not be accused of undue delay or tardiness in performing their procedural activities. Promptness of action, however, does not mean haste at any cost; it is not an aim in itself, but a method of searching for objective truth. Proceedings should be conducted quickly but only as long as the promptness of action does not interfere

---

25 Article 271 para. 8 and Article 272 para. 26 of the new Water Law.

26 Dz.U. 2017, item 1257, as amended.

27 Article 273 para. 6 of the new Water Law.

28 Article 273 para. 8 of the new Water Law.

29 In particular, Articles 6–16 CAP.

30 Article 273a of the new Water Law: If a complaint is lodged, as provided for in Article 273 para. 1, the provisions of Article 10 § 1 and Article 61 § 4 CAP do not apply.

31 Among others, Articles 70, 73, 75, 77, 78, 80, 81, 95 § 1 CAP. See F. Elżanowski, [in:] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 27.08.2018).

32 J. Malanowski, [in:] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 27.08.2018).

with thoroughness, which requires the authority to establish all the circumstances of a given case."[33]

If one applies the above considerations to the provisions of the new Water Law, one has to conclude that, in the case of proceedings involving the issuance of an administrative decision, provisions of the Code of Administrative Procedure are applicable, including those determining the rights of a party to administrative proceedings. The validity of the above approach is evidenced, among other things, by the fact that the legislator, in Article 271 para. 8 and Article 272 para. 26 of the new Water Law, directly provides for the possibility of appealing against a decision without establishing a special procedure for this purpose, which can only mean that an appeal against the administrative decision in question is lodged in line with the procedure described in the Code of Administrative Procedure. In our opinion, there is no obvious reason why proceedings conducted in the first and second instance should be governed by some rules of procedure.

At the same time, in view of the particular nature of the proceedings aimed at establishing the amount of fee for water services, the legislator decided that these cases basically would not require the collection of evidence, since the calculation of water service fees is mostly based on data contained in generally binding regulations or documents (fixed fee) as well as on data collected by employees of the Polish Water Management Enterprise or on statements submitted by entities required to pay for water services on a quarterly basis[34] (variable fee). This pursuant to Article 12 para. 2 CAP, allows the application of a simplified procedure, ended with the issuance of an annual information slip. In this connection, special note should be taken of the reservations contained in the statement of reasons for the verdict issued by the Voivodeship Administrative Court in Szczecin on 2 July 2018,

---

[33] M. Kotulska, *Czas a postępowanie administracyjne*, [in:] J. Niczyporuk (Ed.), *Kodyfikacja postępowania administracyjnego na 50- lecie k.p.a.*, Lublin 2010, p. 424.

[34] Article 552 para. 2 of the new Water Law: In the period from the date on which the Act enters into force to 31 December 2020, the amount of water service fee is determined on the basis of:

1) the purpose and scope of water use specified in the water permit or the integrated permit;
2) measurements made by administrative bodies as part of water management inspections or findings from reviews of water permits;
3) measurements made by administrative bodies as part of integrated permit inspections.

para. 2a. In the period up to 31 December 2020, the amount of water service fee is determined also on the basis of:

1) readings of metering devices taken as part of water management inspections or
2) statements submitted by entities required to pay for water services on a quarterly basis.

para. 2b. Statements submitted pursuant to para. 2a(2) by entities required to pay for water services must be composed in accordance with the templates published in the Public Information Bulletin on the relevant website of the Polish Water Management Enterprise. The statements are submitted to:

1) the Polish Water Management Enterprise in order to determine the amount of fees stipulated in Article 272 paras 1–7 and 9 and Article 275 para. 8(2) and (4),
2) the head of local public administration in order to determine the amount of fee stipulated in Article272 para. 8

– within 30 days of the final day of each quarter, except that statements for the fourth quarter of the year 2020 must be submitted by entities using water services until 14 January 2021.

in which water service fees (introduced as part of a new system of financing water management) are classified as public levies, similarly to environmental fees before.[35]

The assumption that we deal with an administrative procedure initiated under Article 104 §§ 1 and 2 CAP means that a decision on the substance of the case must be taken in the form of an administrative decision. However, the legislator decided that, at the initial stage, the obligation to pay for water services would be imposed on the respective entity in the form of an information slip. The legislator chose not to specify that this stage of the proceedings is completed with the issue of an administrative decision. Despite the fact that, in our opinion, the procedure remains the same, both in subjective and objective terms, until the very end of the proceedings, an administrative decision is issued only after a number of statutory conditions have been met. It should be emphasised that, in our opinion, the procedure for the collection of payment for water services constitutes an individual administrative case. Correspondingly, the proper and competent authority for issuing a decision that applies the law and establishing an individual precept of law is a public administration body in the systemic or functional sense of the term.[36] We fully agree with Wacław Dawidowicz, who defines an individual case as "a combination of factual and legal circumstances with respect to which a government body applies a norm of administrative law in order to establish, with regard to a given entity (entities), a legal situation by way of granting (refusal to grant) a requested right or in the form of an *ex officio* imposition of an obligation."[37] Clearly, if the amount of the water service fee is not challenged by the obliged entity, then the annual information slip constitutes the final basis for establishing the amount of the fee, and thus determining an obligation of the respective party.

The question still remains how the form of an annual information slip stipulated by the legislator should be treated in the context of an ongoing administrative procedure. At this point, references should be made to the views expressed in the legal doctrine and in judicial practice, in which an administrative decision is uniformly defined as "a unilateral decision taken by a government administration body on the binding consequences of an existing legal regulation for a specific case

---

[35] Ruling of the Voivodeship Administrative Court in Szczecin of 2 July 2018, II SA/Sz 514/18, Legalis, No. 1807646: "The provisions of the Water Law Act, which shapes a new system of financing water management, allow one to conclude that water service fees should be classified as public levies, just like the environmental fee before. This payment depends not on the will of the subject but on the subjective and objective scope of the tax law. This classification is confirmed by the provisions of Article 300 of the Water Law, in which the legislator stipulates that payments for water services shall be governed as appropriate by the provisions of Section III of Tax Regulations of 29 August 1997 and specifies exceptions from this rule. If so, the imposition of a legal obligation to make payments of this kind constitutes an interference with the right of obliged entities to dispose freely of their monetary assets. Therefore, the rules governing public levies and their application must be consistent with all the constitutional norms and principles that are currently in force."

[36] B. Adamiak, [in] B. Adamiak, J. Borkowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2017, http://www.legalis.pl (accessed 28.08.2018).

[37] W. Dawidowicz, *Zarys procesu administracyjnego*, PWN, Warszawa 1989, pp. 7–8.

and an individually specified external entity"[38] or as "a unilateral and authoritative declaration of intent by a public administration body as defined by the Code of Administrative Procedure; based on the generally binding provisions of the law; issued with respect to a specific external entity; resolving an individual case of the said external entity; taken in accordance with the procedure defined in the Code of Administrative Procedure; having the form and structure established by the procedural law."[39] Also the judicial practice of the Supreme Administrative Court clearly indicates that a letter addressed by an administrative body to an external entity containing an authoritative decision concerning the legal rights and obligations of the entities (natural or legal persons) appearing in a particular case, even if not issued in the form of a decision, nonetheless constitutes an administrative decision, irrespective of whether there is a legal basis for such a decision.[40]

Given the above clarification, one must concede that a letter issued by a public administration body – irrespective of what it is called by the issuer – constitutes an administrative decision, provided that certain conditions are fulfilled; namely, if the case in question is specified with respect to two circumstances: the person (subject) and the situation (the pertinent rights or obligations under administrative law) and further, if the letter is addressed to an external entity and contains an authoritative decision as to the rights or obligations of the entity concerned.[41] In view of the above, we see no rational legislative premises that would justify the introduction by the legislator of the dual nomenclature of decisions issued as part of the proceedings in question. Certainly, the solution that has been adopted has important procedural consequences, since the issuance of an administrative decision results in a substantive resolution of the case and, consequently, in the closing of the proceedings in the first or second instance. Besides, considering that, under Article 110 CAP, an administrative body is bound by its own decisions, it may or must re-examine a given case only under the circumstances provided for in the law. In the light of these regulations, an authority that has issued a decision on a case, in principle, cannot further decide on the issue.[42] In addition, the guarantee of permanence of administrative decisions following from Article 110 in conjunction with Article 109 CAP means that an administrative body is bound by its own

---

[38] See ruling of the Supreme Administrative Court of 22 September 1983, SA/Wr 367/83, ONSA 1983 No. 2, item 75; P. Majczak, *Podstawa prawna decyzji administracyjnej*, Ius Novum No. 4, 2016, pp. 375–382.

[39] R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2017, http://www.legalis.pl (accessed 30.08.2018).

[40] See ruling of the Supreme Administrative Court of 21 February 1983, I SAB, published in Glosa No. 2, 1996, item 25, with an approving gloss by B. Adamiak, J. Borkowski, published in OSP 1995, No. 11, item 222; ruling of the Supreme Administrative Court of 24 July 2014, I OSK 898/13, Legalis, No. 1068530.

[41] See ruling of the Supreme Administrative Court of 9 January 1995, I SA 2257/93, ONSA 1997, No. 2, item 15; ruling of the Supreme Administrative Court of 11 July 1994, IV SA 974/93, Wokanda No. 11, 1994, p. 4; M. Dyl, [in] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 30.08.2018).

[42] B. Adamiak, *supra* n. 36.

decision until the said decision ceases to be effective, i.e. until it expires, is repealed or amended.[43]

Under the procedure provided for in the new Water Law, the issuance and delivery of a decision in the form of an information slip finalises the procedure for determining the amount of water service fee or constitutes the basis for lodging a complaint. In the latter case, the same body re-examines the case as a result of the objections raised by the obliged entity, and only then does it issue an administrative decision, which, in our view, is at odds with the existing judicial practice referred to above and with the views expressed in the legal doctrine.

It should be pointed out, however, that the legislator, in Article 271 para. 1 and Article 272 para. 11 of the new Water Law, emphasises that it is the Polish Water Management Enterprise (and not any of its governing bodies) that determines the fee for water services and then makes it known to the obliged entity in an annual information slip. This might suggest that, at this stage of the procedure, we do not deal with either administrative proceedings or an administrative decision, since no administrative body is involved, whereas an administrative decision, by definition, can only be issued by an administrative body. At this juncture, however, one should consider the existing practice of the Polish Water Management Enterprise,[44] where the information slip specifying the amount of fee for water services is actually issued by a governing body of the enterprise, namely, by directors of the Drainage Area Boards of the Polish Water Management Enterprise; crucially, under Article 14 para. 2 of the new Water Law, proceedings before the governing bodies mentioned in para. 1(3)–(6), including the director of a Drainage Area Board of the Polish Water Management Enterprise, are subject to the provisions of the Code of Administrative Procedure.[45]

In view of the above reservations, some further doubts of a legal nature should be considered in relation to the complaint procedure, i.e. a situation where the obliged entity does not agree with the amount of the fee and decides to challenge the amount specified in the information slip. The new Water Law requires a complaint to be lodged with the Polish Water Management Enterprise, the same entity that has issued the original information slip;[46] if the complaint is accepted, the new information slip is again issued by the Polish Water Management Enterprise. The legislator stipulates that only if the complaint is rejected, an administrative decision determining the amount of water service fee is issued by a governing body of the Polish Water Management

---

[43] Ruling of the Voivodeship Administrative Court in Warsaw of 14 October 2009, II SA/Wa 818/09, Legalis, No. 271181.

[44] Ruling of the Voivodeship Administrative Court in Szczecin of 2 July 2018, II SA/Sz 514/18, Legalis, No. 1807646; ruling of the Voivodeship Administrative Court in Gdańsk of 28 June 2018, II SA/Gd 288/18, Legalis, No. 1806120.

[45] Here, it should also be mentioned that, under Article 14 para. 6(2) of the new Water Law, in matters falling within the scope of operation of the Polish Water Management Enterprise, the competent authority – as defined in the Code of Administrative Procedure of 14 June 1960 – is, among others, the director of a Drainage Area Board of the Polish Water Management Enterprise, although only with respect to decisions stipulated in Article 271 para. 7, Article 272 para. 19, Article 273 para. 6, Article 275 paras 15 and 19, and Article 281 para. 7, that is, in situations where the legislator makes direct references to the issuance of administrative decisions rather than information slips by the Polish Water Management Enterprise.

[46] Article 273 para. 1 of the new Water Law.

Enterprise, so also at this stage doubts can be raised as to the nature of the ongoing proceedings and the rights that the obliged entity may have in this connection.[47]

The regulation under which a complaint can be lodged only once in a given reporting period, both for the fixed and for the variable fee, also give rise to numerous doubts of a legal nature. The regulation effectively means that a complaint can be lodged once a year for the fixed fee (payable in four quarterly instalments) or once a quarter for the variable fee. Thus, an obliged entity wishing to challenge, e.g. the amount of the fourth instalment of the fixed fee, must do so only after the receipt of the information slip specifying the amount of the entire annual fee (i.e. before the end of the first quarter). Moreover, the legislator does not explicitly address the issue of the partial acceptance of a complaint. Under an interpretation based on legislative intent, only if a complaint is accepted in full, will a new information slip specifying the amount of the fee as calculated by the obliged entity be issued. Given the provisions of the Water Law, this should be the final (non-appealable) decision, considering the fact that an obliged entity can only lodge one complaint within a given reporting period. In the absence of an administrative decision, the legislator did not make a direct provision for an appeal procedure under the Code of Administrative Procedure in a case like this, on the assumption that the acceptance of a complaint implies that the obliged entity agrees to pay the fee in the amount determined as a result of the complaint having been accepted.[48] However, one cannot rule out that a complaint will be accepted only in part or that it will be accepted in full but for reasons other than those indicated in the complaint. Let us consider, for example, a situation where the legal or factual grounds for the complaint (objections) have proved to be justified, but the amount of the fee itself has been calculated by the administrative body quite correctly; or, by contrast, a situation where, although the objections have turned out to be unjustified, the body examining the complaint decides to change the previously calculated amount of fee because it has discovered an error of its own – a decision with which the obliged entity may or may not agree. In a situation like that, one must not lose sight of Article 7a CAP, which introduces the principle of a favourable interpretation of precepts of law (*in dubio pro libertate*);[49] in our opinion, however, this principle does not invalidate our proposition that, in a situation described above, an administrative decision must be issued so that the interested party could lodge an appeal (this time, under the Code of Administrative Procedure). Irrespective of what administrative decision is adopted, it is the will of the party (an obliged entity) that should ultimately decide whether the decision made is to its benefit and whether it fully reckons with its interests. Especially given that the calculated amount of the fee

---

[47] Article 273a of the new Water Law merely states that, in the case of a complaint lodged under Article 273 para. 1, the applicability of the provisions of the Code of Administrative Procedure shall not be limited to Article 10 § 1 and Article 61 § 4 CAP, which can only be interpreted to mean that the remaining provisions of the Code of Administrative Procedure are also applicable.

[48] See K. Filipek, M. Kucharski, P. Michalski, *Nowe prawo wodne najważniejsze zmiany dla gmin i przedsiębiorstw wodno-kanalizacyjnych*, C.H. Beck, Warszawa 2018, pp. 92–94.

[49] The admissibility of the application of this provision of the Code of Administrative Procedure during the procedure for determining the amount of water service fee is confirmed by the Voivodeship Administrative Court in Szczecin in the statement of reasons for its judgment of 2 July 2018, No. II SA/Sz 514/18, published in Legalis.

for water use may vary considerably depending on the underlying assumptions used for the calculation, as we demonstrate in another paper.[50]

The above considerations and assumptions must provide an answer to another key question, namely, at what point the administrative proceedings under discussion are initiated. In order to be able to answer this question, one should first determine the moment when administrative proceedings can be initiated. According to Article 61 § 1 CAP, administrative proceedings are initiated either at the request of an interested party or *ex officio*. The form in which administrative proceedings are initiated is determined primarily by the provisions of substantive law.[51] On the other hand, whenever regulations of administrative law do not expressly determine how administrative proceedings are to be initiated, the generally accepted judicial practice is to assume that, if the subject-matter of proceedings is conferral of a right, the proceedings are based on the grievance procedure, whereas if the subject-matter is the imposition of an obligation, the proceedings are initiated *ex officio*.[52] As it has been repeatedly emphasised in judicial practice, the date of an *ex officio* initiation of proceedings should be considered the date of the first official action towards a party or of an action undertaken on a case *ex officio* by a public administration body;[53] furthermore, the fact that the action has been undertaken must be communicated to the interested party.[54]

In the case of the fixed fee for water services, the first moment when the obliged entity learns that an obligation has been imposed on it to pay for water services is the moment when it receives the annual information slip specifying the amount of fee for water services, which would correspond to the date on which possible administrative proceedings on this particular case are initiated. Of course, in order to be able to determine the amount of the fixed fee, an administrative body must be in possession of all the necessary data, and in particular:

1) the unit rate of the fixed fee,
2) the maximum amount of water that can be abstracted (in m^3/s) as per the water permit or integrated permit,

---

[50] B. Jawecki, M. Sobota, E. Burszta-Adamiak *The Influence of New Legal Regulations on the Method of Determining the Amount of Fees for Discharging Rain Water and Snow Water to Water*, Ekonomia i Środowisko No. 1(68), 2019, pp. 37–56.

[51] Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, PWN, Warszawa 1995, p. 166.

[52] See ruling of the Supreme Administrative Court of 24 May 2001, IV SA 599/99, unpublished; ruling of the Supreme Administrative Court of 25 October 2006, II OSK 1257/05, Legalis, No. 232954; ruling of the Supreme Administrative Court of 27 February 2007, II OSK 314/06, Legalis, No. 116402; ruling of the Supreme Administrative Court of 3 March 2006, I OSK 991/05, Legalis No. 271465; ruling of the Supreme Administrative Court of 22 March 2006, II GSK 28/06, Legalis, No. 241315; ruling of the Voivodeship Administrative Court in Białystok of 2 October 2007, II SA/Bk 471/07, Legalis, No. 101593; R. Stankiewicz, [in] R. Hauser, M. Wierzbowski (eds) *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 30.08.2018).

[53] See ruling of the Supreme Administrative Court of 13 October 1999, IV SA 1364/97, unpublished; ruling of the Supreme Administrative Court of 20 January 2010, II GSK 321/09, Legalis, No. 224515.

[54] See resolution of the Supreme Administrative Court of 4 March 1981, SA 654/81, ONSA 1981, No. 1, item 15; ruling of the Supreme Administrative Court of 26 October 1999, III SA 7955/98, Legalis, No. 62631.

3) the amount of groundwater resources available or SNQ for surface water,
4) the reporting period expressed in days.

However, due to the fact that the obliged entity does not take part in these actions, undertaken by the administrative body, nor indeed is notified of them, it can execute no rights at this stage. Moreover, the legislator does not specify the deadline for the completion of these activities by the administrative body. Correspondingly, at this point, administrative proceedings cannot be considered to have been initiated.

The situation looks different in the case of the variable fee for water services, which as a rule is calculated as a product of the fixed fee and the amount of water abstracted, and thus the administrative body must undertake additional steps in order to determine the quantity of water abstracted. Pursuant to Article 272 para. 11 of the new Water Law, the amount of water consumption can be established using the readings of metering devices or on the basis of data from metering systems; the readings of metering devices are taken by an employee of the Polish Water Management Enterprise.[55] Correspondingly, it may happen that the obliged entity will learn about the action taken towards it in connection with the calculation of the variable fee from an employee of the Polish Water Management Enterprise. In our view, however, it is not clear whether such actions of the employee of the Polish Water Management Enterprise can be considered actions in a specific individual case, since it cannot be ruled out that the meter readings will also be used for the purposes of other administrative proceedings, e.g. inspections. Given the above, one has to adopt the same solution as in the case of the fixed fee, namely, that proceedings are initiated with the first action in the case, which is the delivery of an information slip to the obliged entity.

A similar analysis is applicable to the factual situation referred to in Article 552 para. 2a of the new Water Law,[56] where the amount of water service fee (in the period until 31 December 2020) is determined on the basis of statements submitted by entities required to pay for water services. It is our view that, also in this case, proceedings are not initiated with the submittal of the statement, since administrative proceedings can only be considered initiated with the first official action undertaken with respect to a party or with an action undertaken by an administrative body, neither of which is the case here.

The peculiar status of the initiation of an administrative procedure under the Water Law may give rise to fundamental doubts of a legal – and even constitutional – nature, considering that one of the parties is deprived of any influence on the ongoing proceedings and, in fact, does not learn about their initiation and completion before the receipt of the information slip specifying the amount of the water service fee.

---

[55] Article 272 para. 14 of the new Water Law.

[56] Article 552 para. 2a, added by the Act of 20 July 2018 (Dz.U. 2018, item 1722), which entered into force on 20 August 2018.

4. CONCLUSIONS: DOUBTS OF A CONSTITUTIONAL NATURE

Already in the course of legislative works on the new Water Law, some people, including representatives of industries, voiced concern that the rules for determining the amount of fees for water services proposed in the bill contradicted the principles established in the Code of Administrative Procedure, especially in view of the provisions of Article 14 para. 2 of the new Water Law.[57] Furthermore, it was pointed out that a complaint is handled by the beneficiary of the fee, i.e. the Polish Water Management Enterprise.[58] The Bureau of Research of the Chancellery of the Sejm also voiced doubts in this respect, pointing out that the procedure for determining the amount of water service fee described in the Water Law bill introduces a number of exceptions from the general administrative procedure regulated by the Code of Administrative Procedure. A more explicit and unambiguous confirmation is required of the acceptability of departure from the two-tier principle (the constitutional right to appeal) when determining the amount of fee in a decision issued following the rejection of a complaint. One should be aware, however, that this solution may give rise to doubts as to its conformity with the Constitution, although arguments have been voiced in favour of its acceptability.[59] We fully share the above doubts as to whether the regulations in question are in conformity with the legal precepts stipulated in the Code of Administrative Procedure and in the Constitution of Poland.

Admittedly, although Article 78 of the Constitution of Poland establishes the two-tear principle (effectively, the right to appeal), it also stipulates that exceptions to this rule can be introduced by statute. The possible form and extent of such exceptions is determined by the judicature of the Constitutional Court[60] and the views expressed in the doctrine. Crucially, the exceptions mentioned in the second sentence of Article 78 of the Constitution of Poland are generally confronted with the provisions of Article 31 para. 3 of the Constitution.[61] As the article states, "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

---

[57] Video recording of the meeting of the Extraordinary Subcommittee for the Examination of the Governmental Bill of a New Water Management Law (print No. 1529) held on 9 June 2017, at approx. 10:00.

[58] Video recording of the meeting of the Extraordinary Subcommittee for the Examination of the Governmental Bill of a New Water Management Law (print No. 1529) held on 27 June 2017, at approx. 12:59.

[59] M. Bajor-Stachańczyk, *Opinia prawna w sprawie zgodności przepisów rządowego projektu ustawy – Prawo wodne (druk sejmowy nr 1529) wprowadzających procedury postępowania administracyjnego (w tym w zakresie opłat przewidzianych w projekcie) z zasadami postępowania administracyjnego*, Biuro Analiz Sejmowych Kancelarii Sejmu, Warszawa 2017.

[60] See the judgments of the Constitutional Court of: 17 February 2004, SK 39/02, OTK-A 2004, No. 2, item 7; of 18 October 2004, P 8/04, OTK-A 2004, No. 9, item 92; of 14 October 2010, K 17/07, OTK-A 2010, No. 8, item 75; of 3 July 2012, K 22/09, OTK-A 2012, No. 7, item 74; of 6 December 2011, SK 3/11, OTK-A 2011, No. 10, item 113; of 8 October 2013, K 30/11, OTK-A 2013, No. 7, item 98; of 22 October 2013, SK 14/13, OTK-A 2013, No. 7, item 100; of 26 November 2013, SK 33/12, OTK-A 2013, No. 8, item 124; resolution of the Constitutional Court of 3 October 2005, TS 81/05, OTK-B 2006, No. 1, item 40.

[61] See P. Grzegorczyk, K. Weitz, [in] M. Safian, L. Bosek (eds), *Konstytucja RP*, Vol. I, *Komentarz art. 1–86*, C.H. Beck, Warszawa 2016, http://www.legalis.pl (accessed 31.08.2018).

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 freedoms and rights. These limitations cannot affect the substance of freedoms and rights." In view of the above, a departure from the principle of two tiers can only be established by statute as an exception; in addition, it must be clearly and unambiguously expressed. In the case at hand, the most frequently cited argument in support of such a departure is considerations of public order,[62] and in particular, the efficiency and speed of proceedings. However, the principle of expediency hardly justifies a total surrender of subjective rights and, in any case, one should carefully consider whether the efficiency and speed of proceedings cannot be achieved by other statutory mechanisms, without the need to limit decisions affecting rights and freedoms to the first instance only. In view of the above objections, it should be said that the apparent conflict between the protraction of proceedings resulting from the lodging of an appeal against administrative decisions, on the one hand, and the desire to ensure efficient and correct operation of administrative bodies, on the other, should always or nearly always be resolved in favour of protecting the right of appeal at the expense of the efficiency, speed, and effectiveness of proceedings.[63]

First of all, one should note the lack of consistency on the part of the legislator, since the new Water Law provides for two distinct procedures, each implying different rights of an entity required to pay for water services. Under the first procedure, an obligation to pay for water services is initially imposed by the issuance of an information slip; if the obliged entity challenges the amount to be paid, it lodges a complaint, and only if the complaint has been rejected, an administrative decision proper is issued regarding the amount of the fee. This decision can only be challenged by way of a complaint with an administrative court. Under the second procedure, the lack of payment by the statutory deadline of the amount specified in the information slip issued by the Polish Water Management Enterprise results in the issuance of an administrative decision that can be appealed against under the Code of Administrative Procedure.

As follows from what representatives of the Ministry of the Environment communicated to the public during the meeting of the Extraordinary Subcommittee for the Examination of the Governmental Bill of a New Water Management Law held on 22 June 2017,[64] one of the legislative intents of the initiators of the new Water Law was to limit the possibility of challenging decisions on the amount of water service fees. In the current legal situation, the Polish Water Management Enterprise exercises exclusive control over the course of these proceedings, both in

---

62 See ruling of the Constitutional Court of 26 November 2013, SK 33/12, Legalis, No. 740185.

63 See P. Grzegorczyk, K. Weitz, *supra* n. 61.

64 Video recording of the meeting of the Extraordinary Subcommittee for the Examination of the Governmental Bill of a New Water Management Law (print No. 1529) held on 22 June 2017, at approx. 17:24: "People have raised objections saying it must be a[n administrative] decision. I know why: because then you would be able to immediately lodge an appeal and take us to courts, involving us, well, the Polish Water Management Enterprise, into never-ending litigations, but the information slip has been decisively approved by the Government Centre for Legislation. In fact, it has been recommended, and we stand by this regulation."

the case of a complaint and in the case when the decision is challenged by the lack of payment by the statutory deadline.[65] Here it should be reiterated that a complaint will be examined by the very same entity that has issued the original decision, the next stage being a complaint with an administrative court. In practice this means that the proceedings, at their administrative stage, are single-tiered (involve one instance only), which gives rise to numerous doubts, first and foremost, with regard to constitutionality. If the water service fee specified in the information slip has not been paid, a complaint lodged under the Code of Administrative Procedure is also examined by a unit of the Polish Water Management Enterprise.

In addition to the doubts as to constitutionality discussed above, there are objections concerning the form employed to impose payment obligations on the entity concerned. Since the decision is issued in the form of an information slip and, according to the legislator, does not therefore constitute an administrative decision, it cannot be appealed against under the Code of Administrative Procedure; in fact, at this stage of the procedure, no administrative proceedings are conducted.

As demonstrated above, in the light of the judgments of administrative courts in cases governed by the new Water Law, this position cannot be upheld. Information slips are *de facto* issued by governing bodies of the Polish Water Management Enterprise; moreover, administrative courts have pointed out that fees for water services constitute a public levy,[66] and that their application must stay in conformity with the entire body of currently binding regulations and constitutional principles. In our opinion, this is yet another argument in favour of the view that an information slip specifying the amount of water service fee may, in fact, constitute an administrative decision issued as part of an administrative procedure. However, the adoption of such an analysis, given the current legal situation, definitely requires statutory changes, since the legislator has provided for a different path of challenging the legitimacy of the decision contained in the information slip, namely, a complaint that cannot be treated as an appeal under the Code of Administrative Procedure due to, among other things, its non-devolutive nature. Furthermore, in this case, one can reasonable suggest that legislative changes should be introduced under which the obliged entity would be notified of the initiation of administrative proceedings to which it is a party.

We suggest that, under the existing legal situation, at least until a uniform case law has been developed in this respect (or until the legislation has been changed), an obliged entity wishing to challenge the amount of fee for water services should take the path that offers the right for an appeal under the Code of Administrative Procedure, followed by a complaint with an administrative court. Namely, on receipt of an information slip specifying the amount of the fee, the obliged entity should abstain from payment; after receiving an administrative decision determining the amount of the fee, the obliged entity can appeal against the decision with a second-instance body and, should the need arise, lodge a complaint with an administrative

[65] Article 14 paras 1–6 of the new Water Law.

[66] Which is confirmed by Article 300 of the new Water Law, containing references to the provisions of the Tax Regulation of 29 August 1997, published in Dz.U. 2018, item 800, as amended.

court. What we see as important here is that the adoption of this mode of action ensures that the administrative proceedings are two-tired (involve two instances), as required by the first sentence of Article 78 of the Constitution of Poland.

BIBLIOGRAPHY

Adamiak B., [in] B. Adamiak, J. Borkowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2017, http://www.legalis.pl (accessed 28.08.2018).

Bajor-Stachańczyk M. (2017), *Opinia prawna w sprawie zgodności przepisów rządowego projektu ustawy – Prawo wodne (druk sejmowy nr 1529) wprowadzających procedury postępowania administracyjnego (w tym w zakresie opłat przewidzianych w projekcie) z zasadami postępowania administracyjnego*, Biuro Analiz Sejmowych Kancelarii Sejmu, Warszawa 2017.

Białek M., Chojnacki D., Grabarczyk T., *Opłaty za usługi wodne w nowym prawie wodnym*, C.H. Beck, Warszawa 2018.

Dawidowicz W., *Zarys procesu administracyjnego*, PWN, Warszawa 1989.

Dyl M., [in] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 30.08.2018).

Elżanowski F., [in] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http:// www.legalis.pl (accessed 27.08.2018).

Filipek K., Kucharski M., Michalski P., *Nowe prawo wodne najważniejsze zmiany dla gmin i przedsiębiorstw wodno-kanalizacyjnych*, C.H. Beck, Warszawa 2018.

Grzegorczyk P., Weitz K., [in:] M. Safian, L. Bosek (eds), *Konstytucja RP*, Vol. I, *Komentarz art. 1–86*, C.H. Beck, Warszawa 2016, http://www.legalis.pl (accessed 31.08.2018).

Janowicz Z., *Kodeks postępowania administracyjnego. Komentarz*, PWN, Warszawa 1995.

Jawecki B., Sobota M., Burszta-Adamiak E., *The Influence of New Legal Regulations on the Method of Determining the Amount of Fees for Discharging Rain Water and Snow Water to Water*, Ekonomia i Środowisko No. 1(68), 2019.

Kędziora R., *Kodeks postępowania administracyjnego*, C.H. Beck, Warszawa 2017, http://www.legalis.pl (accessed 30.08.2018).

Kotulska M., *Czas a postępowanie administracyjne*, [in:] J. Niczyporuk (ed.), *Kodyfikacja postępowania administracyjnego na 50-lecie k.p.a.*, Lublin 2010.

Majczak P., *Podstawa prawna decyzji administracyjnej*, Ius Novum No. 4, 2016.

Malanowski J., [in:] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 27.08.2018).

Stankiewicz R., [in:] R. Hauser, M. Wierzbowski (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa 2018, http://www.legalis.pl (accessed 30.08.2018).

LEGAL ASPECTS OF THE PROCEDURE FOR DETERMINING THE FEE FOR WATER SERVICES UNDER NEW WATER LAW

Summary

The authors of this article analyse legal aspects of the procedure connected with determining charges for water services regulated in the new Water Law Act. First of all, the authors indicate interpretational doubts related to a specific form of decision-making procedure and also related to appeal procedure. The authors interpret legal regulations connected with the specific form used by the legislator within this procedure, i.e. "information" through which the Polish Water Management Enterprise (Wody Polskie) notifies the obliged entities of the amount of charge for water services. What is more, the authors try to attribute formal and legal status to such form of decision-making. An issue related to applying provisions of the Administrative Procedure Code within aforementioned procedure is also considered in relation to passing on the administrative decision and also to the appeal procedure. Under the applied research method, the authors refer to the interpretation of legal provisions, views of representatives of the doctrine, and the Constitutional Tribunal and administrative courts' case law.

Keywords: water law, water services, charges for water services, annual information, administrative procedure, administrative decision

PRAWNE ASPEKTY PROCEDURY OKREŚLENIA OPŁATY ZA USŁUGI WODNE W NOWYM PRAWIE WODNYM

Streszczenie

W pracy przedstawiono prawne aspekty związane z procedurą określania wysokości opłat za usługi wodne na gruncie przepisów nowego prawa wodnego. Autorzy przede wszystkim zwracają uwagę na wątpliwości interpretacyjne związane ze szczególną formą rozstrzygnięcia wydawaną w toku postępowania, jak i trybem odwoławczym w ramach tej procedury. Dokonują wykładni przepisów prawa związanych ze szczególną formą wykorzystaną przez ustawodawcę w ramach przedmiotowego postępowania, tj. „informacją", za pośrednictwem której Wody Polskie przekazują podmiotom obowiązanym do ponoszenia opłat za usługi wodne wysokość tej opłaty. Nadto autorzy podejmują próbę przypisania tej formie rozstrzygnięcia formalnego statusu prawnego w ramach obowiązującego porządku prawnego. Rozważają także, w jakim zakresie, w ramach badanej procedury, znajdują zastosowanie przepisy kodeksu postępowania administracyjnego w związku z wydaniem decyzji administracyjnej, jak również na gruncie postępowania odwoławczego. W przyjętej metodzie badawczej autorzy przede wszystkim opierają się na wykładni przepisów prawa, poglądach doktryny i bazują na orzecznictwie Trybunału Konstytucyjnego oraz sądów administracyjnych.

Słowa kluczowe: prawo wodne, usługi wodne, opłaty za usługi wodne, informacja roczna, postępowanie administracyjne, decyzja administracyjna

ASPECTOS LEGALES DEL PROCESO DE DETERMINACIÓN DE PAGO POR LOS SERVICIOS DE AGUA EN LA NUEVA LEY DE AGUAS

Resumen

El artículo presenta los aspectos legales relacionados con el proceso de determinación de la cuota a pagar por los servicios de agua en virtud de la nueva ley de aguas. Los autores sobre todo llaman la atención a las dudas interpretativas de la forma especial de la decisión emitida durante el proceso, así como la vía de impugnación en el marco de dicho proceso. Los autores interpretan los preceptos relativos a la forma especial utilizada por el legislador en el marco del proceso en cuestión, o sea, "información" mediante la cual Las Aguas Polacas trasmiten el importe a los sujetos obligados a pagar por los servicios de agua. Además, los autores intentan asignar a esta forma de decisión formal de estatus legal en el ordenamiento jurídico vigente. Los autores contemplan también en qué ámbito, en el proceso examinado, se aplicarán los preceptos del código de procedimiento administrativo en relación con la emisión de acto administrativo, también en la segunda instancia. En los métodos de investigación utilizados, los Autores sobre todo se basan en la interpretación de los preceptos, posturas en la doctrina y en la jurisprudencia del Tribunal de Constitución y de tribunales administrativos.

Palabras claves: derecho de aguas, pago por servicio de aguas, información anual, procedimiento administrativo, acto administrativo

ПРАВОВЫЕ АСПЕКТЫ ПОРЯДКА ОПРЕДЕЛЕНИЯ ОПЛАТЫ ЗА ВОДОСНАБЖЕНИЕ В НОВОМ ЗАКОНОДАТЕЛЬСТВЕ О ВОДОПОЛЬЗОВАНИИ

Резюме

В статье рассмотрены правовые аспекты, связанные с порядком определения размера оплаты за водоснабжение на основании положений нового законодательства о водопользовании. Авторы, в первую очередь, указывают на интерпретационные неясности, связанные с особой формой решения, принимаемого в ходе разбирательства, а также с порядком обжалования в рамках данной процедуры. Авторы приводят толкование положений права, относящихся к особой форме решения, предусмотренной законодателем для соответствующего разбирательства, а именно, к «справке», с помощью которой государственный орган управления водным хозяйством «Польские воды» сообщает субъектам, обязанным оплачивать услуги водоснабжения, сумму этой платы. Кроме этого, делается попытка определить формально-правовой статус данной особой формы решения в рамках существующей правовой системы. Авторы также рассматривают вопрос о том, в какой степени в рамках данной процедуры применимы положения административно-процессуального кодекса относительно вынесения административного решения и порядка обжалования. Принятый авторами метод исследования основан, прежде всего, на толковании положений законодательства, существующей правовой доктрине, а также на решениях Конституционного суда и административных судов.

Ключевые слова: законодательстве о водопользовании, услуги водоснабжения, оплата услуг водоснабжения, годовая справка, административное производство, административное решение

RECHTLICHE ASPEKTE DES VERFAHRENS ZUR FESTSETZUNG DER GEBÜHR FÜR WASSERDIENSTLEISTUNGEN IM NEUEN WASSERRECHT

Zusammenfassung

In dem Papier werden die rechtlichen Aspekte im Zusammenhang mit dem Verfahren zur Bestimmung der Gebühren für Wasserdienstleistungen auf Grundlage der Bestimmungen des neuen Wasserrechts dargelegt. Die Autoren weisen vor allem auf Zweifel und Bedenken hinsichtlich der Auslegung im Zusammenhang mit der besonderen Form der im Laufe des Verfahrens erlassenen Entscheidung und der Rechtsbehelfsentscheidung im Rahmen dieses Verfahrens hin. Die Autoren interpretieren die gesetzlichen Bestimmungen in Bezug auf die vom Gesetzgeber im Rahmen des fraglichen Verfahrens verwendete Sonderform, d.h. der „Auskunft", mittels der die staatliche Wasserwirtschaft Wody Polskie den zur Entrichtung der Abgaben für Wasserdienstleistungen verpflichteten Unternehmen, die Höhe dieser Gebühr mitteilen. Darüber hinaus versuchen die Autoren, dieser Form des Bescheids einen förmlichen rechtlichen Status innerhalb der geltenden Rechtsordnung zuzuordnen. Die Autoren erwägen außerdem, inwieweit im Rahmen des geprüften Verfahrens im Zusammenhang mit dem Ergehen einer Verwaltungsentscheidung sowie auf Grundlage eines Rechtsmittelverfahrens die Bestimmungen der polnischen Verwaltungsverfahrensordnung Anwendung finden. Bei der angewandten Untersuchungsmethode stützen sich die Autoren in erster Linie auf die Auslegung von Rechtsvorschriften, die Ansichten der Rechtslehre und lehnen sich in ihrer Argumentation an die Rechtsprechung des polnischen Verfassungsgerichtshofes und der polnischen Verwaltungsgerichte an.

Schlüsselwörter: Wasserrecht, Wasserdienstleistungen, Abgaben bzw. Gebühren für Wasserdienstleistungen, Jährliche Auskunft, Verwaltungsverfahren, Verwaltungsentscheidung

ASPECTS JURIDIQUES DE LA PROCÉDURE DE DÉTERMINATION DE LA REDEVANCE POUR LES SERVICES D'EAU DANS LA NOUVELLE LOI SUR L'EAU

Résumé

Le document présente les aspects juridiques liés à la procédure de détermination du montant des redevances pour les services de l'eau en vertu des dispositions de la nouvelle loi sur l'eau. En premier lieu, les auteurs attirent l'attention sur les doutes d'interprétation liés à la forme particulière de la décision rendue au cours de la procédure, ainsi qu'à la procédure de recours dans le cadre de cette procédure. Les auteurs interprètent les dispositions de la loi relatives à la forme spéciale utilisée par le législateur dans le cadre de la procédure en question, c'est-à-dire «l'information», par laquelle les «Eaux Polonaises» communiquent le montant de redevance pour les services de l'eau aux entités tenues de la payer. En outre, les auteurs tentent d'attribuer un statut juridique formel à cette forme de règlement en vertu de la loi applicable. Les auteurs examinent également dans quelle mesure, dans le cadre de la procédure en cours d'examen, les dispositions du Code de procédure administrative s'appliquent lorsqu'une décision administrative est rendue ainsi que dans une procédure de recours. Dans la méthode de recherche adoptée, les auteurs s'appuient principalement sur l'interprétation de dispositions légales, d'opinions doctrinales, ainsi que sur la jurisprudence du Tribunal constitutionnel et des tribunaux administratifs.

Mots clés: loi sur l'eau, services de l'eau, redevances pour les services de l'eau, information annuelle, procédure administrative, décision administrative

ASPETTI GIURIDICI DELLA PROCEDURA DI DETERMINAZIONE DELLE TARIFFE DEI SERVIZI IDRICI NEL NUOVO DIRITTO DELLE ACQUE

Sintesi

Nel lavoro sono stati presentanti gli aspetti giuridici legati alla procedura di determinazione delle tariffe dei servizi idrici alla luce delle norme del nuovo diritto delle acque. Gli autori soprattutto fanno notare i dubbi interpretativi legati alla particolare forma di decisione emessa attraverso il procedimento, così come alla modalità di impugnazione nell'ambito di tale procedura. Gli autori eseguono l'interpretazione delle norme del diritto legate alla forma particolare utilizzata dal legislatore nell'ambito del provvedimento in oggetto, ossia la cosiddetta "informazione" attraverso la quale l'azienda statale Wody Polskie trasmette ai soggetti obbligati al pagamento per i servizi idrici l'importo di tale tariffa. Inoltre gli autori tentano di attribuire a tale forma di decisione uno status giuridico formale, nell'ambito dell'ordinamento giuridico vigente. Gli autori riflettono anche su quale ambito, nell'ambito della procedura esaminata, trovino applicazione le norme del codice di procedura amministrativa legate al rilascio di una decisione amministrativa, così come sulla base della procedura di impugnazione. Nel metodo di studio assunto gli autori si basano soprattutto sull'interpretazione delle norme del diritto, sulle opinioni della dottrina, così come sulla giurisprudenza del Tribunale costituzionale e dei tribunali amministrativi.

Parole chiave: diritto delle acque, servizi idrici, tariffe dei servizi idrici, informazione annuale, procedimento amministrativo, decisione amministrativa

Cytuj jako:

Sobota M., Jawecki B., Legal aspects of the procedure for determining the fee for water services under new Water Law *[Prawne aspekty procedury określenia opłaty za usługi wodne w nowym prawie wodnym]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 114–134. DOI: 10.26399/iusnovum.v13.4.2019.46/m.sobota/b.jawecki

Cite as:

Sobota, M., Jawecki, B. (2019) 'Legal aspects of the procedure for determining the fee for water services under new Water Law'. *Ius Novum* (Vol. 13) 4, 114–134. DOI: 10.26399/iusnovum.v13.4.2019.46/m.sobota/b.jawecki

GLOBAL OR STRATEGIC TRADE? SOME OBSERVATIONS ON PRESIDENT DONALD TRUMP'S STYLE OF MAKING DOMESTIC AND FOREIGN POLICY

RETT R. LUDWIKOWSKI*

DOI: 10.26399/iusnovum.v13.4.2019.47/r.r.ludwikowski

1. INTRODUCTION

The preparation of this paper for publication results from the reflections of the commentator observing a transformation of the United States' priorities during Donald Trump's presidency. The changes in the style of making foreign and domestic policy mainly consist in a combination of an assumption that American economic interests are of major importance and an inclination to trivialise the harmfulness of "trade wars" for American citizens.

The controversy of this conjunction justifies asking successive, more detailed questions: To what extent does the "strategic policy" (as Trump's advisers call it), carried out from the perspective of one country's benefits, substitute for global policy? Is President Trump first of all a businessman or a political strategist? Is the possibility of impeachment or even bringing criminal charges against the president who is in office, which is discussed by American law experts, realistic or is it part of the nature of the United States' political scene?[1] What are the prospects for re-election of the president, whose personal counsel, Michael Cohen, has been sentenced to three years' imprisonment and a number of other associates are waiting for the results of an investigation into the alleged collaboration with Russia during the presidential electoral campaign?[2]

* PhD, Professor Emeritus and Director of International Trade and Business Program, Columbus School of Law of the Catholic University of America, Washington D.C.; e-mail: ludwikowski@cua.edu; ORCID: 0000-0001-7457-3096

1 As far as this issue is concerned, it is worth referring the reader to the article by an outstanding American studies expert, Professor Longin Pastusiak, *Pętla wokół Trumpa się zaciska*, Angora-Peryskop No. 3, 20.01.2019, p.71.

2 On 22 March 2019, Robert Mueller submitted a report on the investigation into Russian interference into the American presidential election to William Barr, US Attorney General.

2. DONALD TRUMP'S RE-ELECTION DILEMMA: IS THE GLOBALISATION ERA COMING TO AN END?

Lecturers of political studies, international law, international trade law and many related sciences may notice that the terms such as internationalisation, globalisation, regionalisation or glocalisation get the listeners to their lectures into an understandable terminological mess. It is not easy to answer the question what the difference between trends and doctrines promoting, for example, international or global values is. The terms seem to be similar but we must assume that the fact that we use them means that differences between them are equally important as similarities.[3]

In order to understand the dilemmas of politicians in the first decades of the 21st century, it is worth starting our considerations with a few basic explanations. It is worth reminding the reader that the term "internationalism" was popularised in the 20th century by international organisations such as the League of Nations founded in the inter-war period or the United Nations founded after World War II. They first of all aimed to find alternatives to the era when concepts of "national states" were born and were accompanied by nationalist doctrines that protected their interests. Simply speaking, "internationalism" was to mean the protection of values common to all nations and opposition to political, economic or ethnic isolation.

Although historians are looking for the roots of globalisation in the Middle Ages and the Renaissance, contemporary globalism is usually connected with the observation popularised in the last decades of the 20th century that common values unite not only nations but first of all individuals. It is hard to deny that, for instance, the protection of human rights or the protection of the environment, health and food resources is important for every man.

Anti-globalists, who undermine the fundamental assumptions of globalisation supporters, indicate that the above-mentioned values may be precious for all people but this cannot shade the fact that their hierarchy may differ and culture, tradition

---

Mueller, former Director of FBI, was appointed by Deputy Attorney General as special counsel in the case on 17 May 2017. After almost two years' investigation and filing charges against Paul Manafort, Trump campaign chairman, and Michael Flynn, Trump's national security adviser, the report did not provide any new details. Further congressional committee hearings that Mueller attended also failed to find new information. The conclusions of his report may be summarised in two statements: firstly, his investigation could not lead to filing charges against the president in office; secondly, the collected material could not lead to a conclusion that the president was exonerated by Mueller's commission or excluded from the list of persons that could have used measures affecting the election results. For details concerning the investigation, compare D. Gregorian and J. Ainsley, *Mueller Submits Report on Trump Investigation to AG Barr, no new Charge. The Transmission of the Document ends a Lengthy Probe into the President and Russian Interference in the Campaign*; news: https://www.nbcnews.com/politics/justice-department/mueller-sends-report-trump-investigation-ag-barr-n974006 (accessed 25.08.2019).

[3] For a broader commentary on the comparison of basic theses of globalists and supporters of regionalism, compare A.C. Kacowicz, *Regionalization, Globalization, and Nationalism*, December 1998; https://kellogg.nd.edu/sites/default/files/old_files/documents/262.pdf. For more exhaustive bibliography concerning the visions of a global world and a world of regions, see R.R. Ludwikowski, *Handel międzynarodowy,* 4th edn, Warszawa 2019, pp. 528–534.

or religious priorities may reduce the acceptance of globalisation assumptions. For example, the assumption that the protection of human rights may gain common acceptance does not mean that freedom is more important than equality for all ethnic groups in different regions of the world and that the dignity of a human being is a commonly accepted basis for all rights.

Obviously, the problems with globalisation of law, political standards or best economic programmes may be augmented; nevertheless, two visions of the world order emerge from those discussions: in case of globalisation, it is a vision of a system governed from one coordination centre, and in case of an alternative conception of "the world of islands", from different regions that agree about the list of common values but differ over how important they are.

On the borderline between globalists and regionalisation supporters' attitudes, a doctrine trying to reconcile both visions of the world was born. It assumes that the list of values may be common but the roads to their protection may be different.

The turn of the 21st century brought anti-globalists' successive attacks on fundamental theses of programmes presented by international globalist organisations such as the General Agreement on Tariffs and Trade (GATT), to a great extent replaced by the World Trade Organization (WTO) and the International Monetary Fund (IMF). It was indicated that globalists' free trade assumptions do not work in practice; contemporary states led by the United States do not need free trade but more trade. World banks cannot spread democratic principles, which globalisation was to promote, because their decision-making system is indeed undemocratic.

International relations experts explained that the increase in the trade potential requires a new strategy, which means a policy differentiated depending on trade partners' aims and interests. The term "strategy" gradually adopted an almost magic meaning. The supporters of this trend emphasised that harmonisation of trade regulations that took place under the auspices of the GATT and the WTO causes more damage than profits at present. For many years, the United States was against all GATT principles and it was criticised for not following them. At present, the network of bilateral agreements may serve the American interests better than the network of multilateral agreements signed under the auspices of the WTO. Secondly, in their domestic policy, countries have to work out a series of tactics protecting their national industry against harmful consequences of competition or states that are better at adjusting their corporations to the changing trade conditions. The conclusion is clear: the era of global trade is coming to an end and must be replaced by strategic trade mechanisms.[4]

[4] For a broader commentary concerning the issue of alternative trade strategies, see A.V. Deardorff, R.M. Stern, M.N. Greene, *The Implications of Alternative Trade Strategies for the United States*, [in:] D.B.H. Denoon (ed.), *The New International Economic Order. A U.S. Response*, New York 1979, pp. 78–108.

3. AMERICAN ELECTORAL SYSTEM FROM THE PERSPECTIVE OF THE 2016 PRESIDENTIAL ELECTION

The presidential election of 2016 confirmed the above observation by justifying the questions: What level of social legitimacy provides the president with the freedom necessary to develop an adequate strategy in foreign policy? Did the newly elected president, Donald Trump, have such social acceptance? Is the president supposed to be first of all a political strategist or a businessman?[5]

Let me remind that Donald Trump garnered 304 electoral votes, while Hillary Clinton only 227.[6] Nevertheless, when popular vote was counted, it turned out that 2,864,974 more people voted for Clinton than for Trump, which is 2.1% of the total number of votes. Thus, there was a considerable margin between the Electoral College vote and nationwide popular vote, although the fact that such a difference occurs is not exceptional at all. It must be reminded that in 2000 Al Gore garnered half a million more popular vote than G.W. Bush, who won the election. The US Supreme Court had to confirm Bush victory.[7]

Following the announcement of the 2016 election, large political protests broke out and went beyond the standard American post-election scenario. In response to Trump's opponents' street protests, the new president announced that the national popular vote result had been falsified by millions of illegal immigrants staying in the US and having no right to vote. To prove the thesis that the difference between the Electoral College vote and the popular vote resulted from the violation of electoral procedure, Trump established the Voter Fraud Commission.[8] However, it did not find evidence of electoral fraud that might challenge the result of the election.[9]

Before going on to the analysis of the new president's first decisions, it should be noted that the legitimacy (within the meaning of social acceptance) of his power

---

[5] Trying to answer these questions, the author used the fragments of his article *Demokracja elektorska i populistyczna z perspektywy wyboru D. Trumpa na Prezydenta USA*, Państwo i Prawo No. 1, 2018.

[6] Seven faithless electors voted for other parties' candidates. For more on the election results, see *Presidential Election Results: Donald J. Trump Wins*, New York Times, 10.02.2017, https://www.nytimes.com/elections/results/president.

[7] For more, see R.R. Ludwikowski, *Aspekty prawne wyborów prezydenta w Stanach Zjednoczonych*, Państwo i Prawo No. 4, 2001, pp. 33–45. Also compare E. Kilgore, *Final Results for the Presidential Popular Vote*, Daily Intelligencer, 20.12.2016, http://nymag.com/intelligencer/2016/12/the-final-final-final-results-for-the-popular-vote-are-in.html (accessed 25.08.2019).

[8] A. Vitali, P. Alexander, K. O'Donnell, *Trump Establishes Voter Fraud Commission*, NBC News, 11.05.2017, http://www.nbcnews.com/politics/white-house/trump-establish-vote-fraud-commission-n757796; *A Fraudulent Commission on Voter Fraud*, Burlington County Times, 21.05.2017, http://www.burlingtoncountytimes.com/8e2ceb04-d810-51dc-bb3a-729f11717e35.html (accessed 25.08.2019).

[9] In summer 2019, Trump returned to the arguments that the electoral process in the United States was distorted and, as a result, weakened his position in the former election; compare M. Waldman, *Trump's Voter Fraud Fantasy*, Brennan Center for Justice, editorial, 22.08.2019; also compare J. Lemon, *Trump "Damaging" our Democracy with Baseless Voter Fraud Claims. Federal Election Commission Chair Warns*, Newsweek, 22.08.2019, https://www.newsweek.com/trump-damaging-democracy-voter-fraud-claims-federal-election-commission-chair-1454995 (accessed 22.08.2019).

was low. Each presidential election in the US resulting in one candidate's victory in nationwide popular vote and the other one in the Electoral College vote leads to inter-party conflicts, mass protests, citizens' dissatisfaction caused by disillusionment with the American electoral system and even attempts to impeach the president in office.[10] Comparative research also shows that the American model of the Electoral College does not receive approval even in countries that have a presidential or a semi-presidential system. Thus, it is hard to negate that imperfection of the indirect electoral system was one of the reasons behind the post-electoral problems in the US.

The reader of the article must be aware of the fact that the Constitution of the United States, regardless of its glorification as the best and the earliest basic law in the world, has many loopholes that American constitutionalists have carefully covered up for over 200 years. Nevertheless, despite the seemingly "seditious" nature of those comments, one cannot ignore an observation that the elasticity of the American Constitution means its vagueness in many cases.

4. AMERICAN ELECTORAL SYSTEM AND ITS IMPACT ON THE LEGITIMACY OF THE PRESIDENT LOSING NATIONWIDE POPULAR VOTE

Many articles ask questions, e.g.: Is the separation of powers and functions in the United States clear enough? Can the Supreme Court decide about the election of the President of the United States? Are the so-called "impeachable offences" (grounds for bringing charges against a president or a state official before Congress) sufficiently explained within the interpretation of the Constitution or case law?[11]

The new president's advisors asked the same questions when he entered the political scene. They indicated that, regardless of the arguments that Trump persistently repeated in his thesis that electoral fraud had caused his relatively poorer support of individual voters, the American Electoral College system had impact on the image of a politician introducing a doctrine of strategic trade instead of global trade onto the international arena.

Let us focus on this observation for a while and limit to an example very briefly explaining the mechanisms conducive to the development of differences between the Electoral College vote and the nationwide popular vote.

Let me remind that the model of electing president, established in the Philadelphia Convention, was introduced in Section I Article II Federal Constitution. It stipulates that every state shall have the same number of electoral votes as the number of seats

---

[10] E. Perez, *Sources: White House Lawyers Research Impeachment*, CNN Politics, 19.05.2017, http://edition.cnn.com/2017/05/19/politics/donald-trump-white-house-lawyers-research-impeachment/index.html.

[11] The author presented detailed arguments concerning certain ambiguity of the American Constitution in his article: R.R. Ludwikowski, *Czy najlepsza na świecie? Kilka refleksji sceptycznych o konstytucji Stanów Zjednoczonych*, [in:] P. Mikuli, A. Kulig, J. Karp, G. Kuca (eds), *Ustroje. Tradycje i porównania. Księga jubileuszowa dedykowana prof. dr hab. Marianowi Grzybowskiemu*, Wydawnictwo Sejmowe, Warszawa 2015, pp. 240–248.

in the Senate and the House of Representatives, which means at least three votes.[12] The total number of electoral votes is 538, which includes 435 votes that equal the number of representatives, 100 votes that correspond to the number of senators, and three votes (in accordance with the Twenty-third Amendment to the Constitution of the United States) were granted to the District of Columbia commonly referred to as Washington, D.C., and covers the capital city of Washington. Thus, in order to win, a candidate must win at least 270 votes. However, it can happen that the candidates will win an equal number of votes (269 to 269) and then the House of Representatives will have the right to elect.

In case no candidate wins a presidential electoral vote from the majority of the electors, in accordance with the Twelfth Amendment to the Constitution, the House of Representatives shall elect president from three candidates who have won the biggest number of electoral votes. In a similar situation, the Senate shall run a contingency election for vice-president from two candidates.[13]

In the early history of the United States, electors were selected by each state's Legislature; at present citizens elect them. In practice, every state casts all its electoral votes for the candidate who wins in the state. It is based on the unit rule introduced in 1836 under which a winner of the majority vote wins the entire vote of the state electors.[14]

Assessing this conception in the light of population criteria, it must be admitted that if each state (having two senators) obtained the right to two electors, the distribution of electoral votes would be unequal. For example, in the eight most populated states, 54% of all the voters in the country would elect 16 senators and would have the right to 16 electoral votes. At the same time, in the eight least populated states, 3% of all the voters in the country would also have the right to elect 16 senators and the right to appoint 16 electors to the Electoral College.[15]

The hypothetical scenario presented above shows that a candidate winning electoral votes in a few less populated states has a competitive advantage over his rival who wins support of electors in fewer states with the biggest population.[16]

---

[12] Neither a congressman, a senator, nor an officer holding a position in the federal administration can be an elector.

[13] The amendment was enacted in 1824, when no candidate won the majority of the Electoral College vote. Then, the right to elect president was passed to the House of Representatives, where thirteen state delegations voted for John Quincy Adams, seven delegations voted for Andrew Jackson, and three for William H. Crawford. J.Q. Adams was elected president, although A. Jackson won a bigger number of popular vote.

[14] Compare *House of Representatives Committee on the Judiciary Subcommittee on the Constitution Subcommittee Hearing on Proposals for Electoral College Reform: H.J. Res. 28 and H.J. Res. 43, September 4, 1997*. Maine and Nebraska are exceptional states, where votes are distributed with the use of a special key called a district method. The system means that only two of the four electoral votes in Maine and two of the five electoral votes in Nebraska are guaranteed for the winning candidate. The rest may be distributed proportionally to the number of votes cast for parties. Such a situation might happen if different candidates won in particular districts, which has never happened so far.

[15] For more, see N.W. Polsby, A.B. Wildavsky, *Presidential Elections. Strategies of American Electoral Politics*, New York 1968, p. 242 et seq.

[16] For example, in the 2016 election, winning direct election in California alone, Hilary Clinton won an excess of 4 million votes, which Trump could not balance winning electoral

5. MOST IMPORTANT STRATEGIC ASSUMPTION: "AMERICA FIRST"

Going on to the analysis of the process of developing Trump's political strategy, it should be emphasised that its origin can be found in the assumption repeated in countless variants that the president acts in the interest of the people. However, there were no doubts he interpreted this interest on his own.

Michael Cohen, the personal counsel to the President, sentenced for three years' imprisonment for fraud resulting from the will to multiply his own profits, the lies to Congress and the violation of the presidential election campaign rules, challenged the President's care for the interests of the nation. Cohen, described as "Trump's fixer", has worked for Trump for over 10 years as "a man to carry out special assignments". He claimed that everything he did was directly ordered by his boss or done for the purpose of his protection.[17]

The announcement of the 2016 presidential election results in the United States surprised, as Cohen stated, the candidate himself and many commentators observing the election. However, the vision of Donald Trump's policy based on the assumption that American interests must predominate in the world, although undoubtedly contributed to his victory over Hilary Clinton, started a series of conflicts going far beyond the routine post-election disputes between the Democrats and the Republicans.

The leaders of the new president's electoral campaign took care that his vision of the world would become a doctrine clearly illustrating the American protectionism close to national megalomania typical of Trump. In 2017 his advisors founded America First Policies aimed to spend 100 million dollars in 2018 on advertising the presidential doctrine. As Super PAC (Political Action Committee), the organisation raises funds to support aims commonly recognised as public. Officially, PAC is a non-profit organisation that does not finance any party programmes. However, it may, for example, support activities weakening the position of local political opponents.[18]

6. NEW EDITION OF THE APPRENTICE? – "YOU'RE FIRED!"

Still during the electoral campaign, a question was raised whether the traditional phrase "You're fired!" finishing the reality TV show hosted by Donald Trump will be the new president's leitmotif. The reality show that presents Trump as a model

---

votes in a few smaller states. For detailed explanation of the dilemma, the reader should see the author's publication analysing examples of the American electoral anomalies: R.R. Ludwikowski, *supra* n. 7, pp. 33–45.

[17] See A. Desiderio, *Cohen Testimony on Trump: "He is a Racist. He is a Conman. He is a Cheat"*, Politico, 27.02.2019, https://www.politico.com/story/2019/02/26/cohen-trump-racist-conman-cheat-1189951 (accessed 25.08.2019).

[18] For more information about the role of PACs, see *Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, https://www.opensecrets.org/outsidespending/faq.php. For a commentary on the role of American First Action, see Z. Stern, *America First Policies*, https://www.factcheck.org/2018/04/america-first-policies/ (accessed 20.04.2018).

investor who decides on the selected candidates' capabilities to make a career in business shaped his public image of a ruthless decision-maker determining what is best for the viewers of the show.

Observation of the selection process of the new state boss's associates confirmed the hypothesis that he would transfer his experience from the TV entertainment programmes into the sphere of politics.[19]

Immediately after the inauguration, the expectations were almost completely fulfilled: the American government policy started to resemble the scenes from *The Apprentice*. After ten days in office, Trump dismissed Sally Yates, the Attorney General. Yates reported that Michael Flynn had not reported his meeting with the Russian ambassador to the US, Sergey Kislyak. Flynn resigned on 13 February 2017 after a month in office. A month after he became president, Trump dismissed Preet Bharara, the US Attorney for the Southern District of New York, who started investigation into the case of Tom Price, who Trump was planning to nominate for the position of US Secretary of Health and Human Services.

The Director of FBI, James Comey, was another person who stepped on the Republican Administration's toes by announcing that his office is running an investigation into Russian hackers' interference into the American election and secret contacts of Trump's closest associates with the representatives of the Russian government. In response, on 9 May 2017, Trump dismissed Comey from the position of the Director of FBI. Almost a year later (on 17 April 2018) Comey published a book *A Higher Loyalty: Truth, Lies and Leadership*.[20] Presenting various spicy moments in Trump's life in interviews, Coney concludes that: "he is a person of average intelligence (…) morally inappropriate to hold the position of a president".[21] The dismissal of Rex Tillerson, the Secretary of State, who officially called Trump a "moron" was an even more serious government change.[22]

Summing up the above observations, it is worth emphasising that Donald Trump entering world politics in January 2017 as the 45th president of the United States undoubtedly brought to it his business experience, which had let him efficiently use his real estate fortune inherited and multiplied in the course of investment. However, he entered politics in the atmosphere of scandals best exemplified by his contacts with Stormy Daniels (true name: Stephanie Clifford), a cabaret actress in programmes for adults. The above-mentioned Michael Cohen was to cover up the

---

[19] P.W. Stevenson, *President Trump has now Fired 3 Officials who were Investigating his Campaign or Administration*, The Washington Post, 10.05.2017.

[20] The book published by The Macmillan Press, New York, became a bestseller overnight; for more, compare B. Stelter, *James Comey's Book is Already a Best Seller, with Trump's Help*, CNN Media, http://money.cnn.com/2018/03/18/media/james-comey-book-best-seller/index.html. To learn more about the atmosphere in the White House after Trump election, it is worth reading a book that is also available in Polish: M. Wolff, *Fire and Fury: Inside the Trump White House*, Henry Holt and Co., 2018 (Polish edition: *Ogień i Furia. Biały Dom Trumpa*, Warszawa 2018).

[21] For more, see G. Lyons, *Blindsided By Moral Vanity. James Comey Still Doesn't get it*, The National Memo, 17.04.2018. For a commentary in Polish press, see P. Milewski, *Pierwszy glina USA donosi na swojego szefa*, Newsweek, N.J. No. 20, 13.05.2018.

[22] K. Collins, B. Starr, J. Zeleny, E. Landers and K. Liptak, *Tensions Escalate after Tillerson Calls Trump "Moron"*, CNN Politics, 5.10.2017, https://edition.cnn.com/2017/10/04/politics/tillerson-trump-moron/index.html.

information leak to the press during the electoral campaign reportedly by paying the actress 130,000 dollars from his own account.[23]

There is no need to provide more and more examples illustrating the atmosphere conducive to exchange of epithets between the president and his subordinates.[24] What was more and still is more important is the question whether the new president really has a plan and a strategy that can be distinguished from political decisions taken *ad hoc.*

7. BORDER WALL WAR: PARTIAL SHUTDOWN OF FEDERAL GOVERNMENT OPERATIONS AND DECLARATION OF NATIONAL EMERGENCY

During the electoral campaign Trump declared that he would build a wall separating the United States from Mexico. In his opinion, a physical barrier should considerably reduce trafficking in drugs and people, and limit the number of crimes committed in the US by criminals crossing the border illegally. Moreover, during the campaign Trump announced that Mexico would pay for a 3,100-kilometre wall[25] and the US would save an enormous sum of money that it has to spend on the military and ICE (Immigration and Customs Enforcement) inspectors enforcing immigration law.

When it turned out that Mexico did not feel responsible for South American cavalcades heading across its territory towards the US border, Trump declared he would impose higher taxes on Mexican products and use the funds to build the wall.

Another variant of the project assumed the construction of a fibre optic wall and there was an attempt to convince the Mexicans that access to new technologies would be advantageous for them.[26]

---

[23] Cohen testified in Congress that Trump repaid the sum he gave to Daniels to cover up the scandal. The actress confirmed the scandal in press interviews, however, in March 2018 she filed a lawsuit to recognise the agreement void because it lacked the president's signature. On 7 March 2019, Cohen also filed a complaint to court claiming that the sum he was paid by Trump Organisation did not cover the remuneration for his work as counsel. See J. Palazzolo and M. Rothfeld, *Trump Lawyer Used Private Company, Pseudonyms to Pay Porn Star "Stormy Daniels". Michael Cohen Created Limited Liability Company just Before $130,000 Payment*, The Wall Street Journal, 18.01.2018, https://www.wsj.com/articles/trump-lawyers-payment-to-porn-star-was-reported-as-suspicious-by-bank-1520273701?tesla=y&mod=e2tw. Also see C. Dolmetsch, *Michael Cohen Sues Trump Organization in Bid for Lawyer Fees*, Bloomberg, https://www.msn.com/en-xl/northamerica/northamerica-top-stories/michael-cohen-sues-trump-organization-in-bid-for-lawyer-fees/ar-BBUvhJx?ocid=spartandhp.

[24] Commenting on the influence of Trump's epithets in his tweets on students, M. Stetz asks a question: "Is civility dead in Trump age?"; see M. Stetz, *Why we Hate Trump*, National Jurist Vol. 28, No. 1, 2018, p.18.

[25] *Donald Trump's Mexico Wall: Who is Going to Pay for it?*, BBC News, 6.02.2017, https://www.bbc.com/news/world-us-canada-37243269.

[26] C. Treleavent, *"A Border Wall" Trump, Pelosi, and Mexico's President All Could Love*, 4.03.2018, Medium Co., https://medium.com/@ctreleaven/a-border-wall-trump-pelosi-and-mexicos-president-all-could-love-af5a7ec46dd4 (accessed 15.08.2019).

When this idea did not seem too attractive to Mexico, during the budget negotiations at the beginning of the 2019 fiscal year, Trump decided he would pay 18 million to 20 million dollars for his project from the funds allocated for the State defence.[27]

However, new obstacles occurred. During the midterm elections on 6 November 2018, the control of Congress changed. The Democrats who won the majority in the House of Representatives, led by Nancy Pelosi, did not want to agree with the Republicans' arguments that the project had been initiated by Democratic presidents. Although Trump reduced the sum he demanded from Congress to 5.7 billion dollars, he left negotiations when Nancy Pelosi stated the House would not spend even a single dollar. It seemed that the President repeated Reagan's move during the meeting with Gorbachev in Reykjavik in October 1986, which the American President left and provoked both countries' administrations to renegotiate and eventually sign the modified Intermediate-Range Nuclear Forces Treaty.

In a successive attempt to involve the Democrats in the idea of funding the project of the southern border protection, following the expectations of the competitive parties' leaders, Trump proposed he would agree to grant the right to citizenship to illegal immigrants' children brought to the US and separated from their parents (the so-called Dreamers).[28] The proposal was also left for later negotiation when the House of Representatives proposed the provisional budget, which allocated only 1.3 billion dollars for general defence spending. In response, Trump threatened he would announce a partial shutdown of the federal government operations, which actually took place on 22 December 2018.[29]

The situation reminds the US fiscal cliff of October 2013, which resulted from the Republicans' attempts to block the healthcare system reform commonly called "Obama care". Having no access to funds, the federal government announced a shutdown, i.e. it suspended many of its activeness areas, e.g. national parks, museums, and stopped paying salaries to 800,000 federal employees.[30]

A similar roundabout of "American paradoxes" started moving again in 2018. It is not possible to present all the fights between Trump and Congress here. Indeed, the article does not aim to present a complete timeline of events but only the characteristics of Donald Trump's "presidency style". Thus, let me expose just the most important moments.

---

[27] *Everything we Know About Donald Trump's Proposed Border Wall*, Bloomberg, 19.01.2018, http://fortune.com/2018/01/19/donald-trump-border-wall (accessed 15.08.2019).

[28] For more, see letters to the editor of Washington Post, *"Dreamers" and Trump's Dream of a Wall*, 26.12.2018, https://www.washingtonpost.com/opinions/dreamers-and-trumps-dream-of-a-wall/2018/12/26/9fd77a80-07b9-11e9-8942-0ef442e59094_story.html?utm_term=.20bab13d0163 (accessed 15.08.2019).

[29] *USA: Senat przyjął prowizorium budżetowe, by uniknąć zawieszenia rządu*, YouTube, 20.12.2018, https://www.youtube.com/watch?v=gJNMidJNRfo.

[30] Compare the author's article presenting the details of the late 2013 crisis: R.R. Ludwikowski, *Początki i zmierzch filibusteringu w Stanach Zjednoczonych*, [in:] J. Majchrowki, A. Zięba (eds), *Prawo konstytucyjne. Doktryny ustrojowe. Partie polityczne. Śladami idei Marka Sobolewskiego*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2015, pp. 113–142.

The 2018 shutdown lasted 35 days and was the longest in the United States' history.[31] It was really unavoidable after Charles Schuman, the Democratic minority leader in the Senate, declared that further negotiations with the President constantly changing his conditions were not possible. "It's like trying to speak to Jell-O pudding", said the senator.[32]

Seeing no prospects for obtaining funds from the federal budget to protect the southern border, Trump used his ultimate argument, i.e. the declaration of national emergency. Trump referred to the powers that Congress granted to the President in the National Emergencies Act of 1976.[33] In 1977, Congress additionally enacted the International Economic Emergency Powers Act, which in fact gave the President discretion to decide whether a situation in the State requires immediate response. Since then, presidents have referred to this Act 58 times and it must be admitted that it has not always been directly connected with (internal or external) threats to the State security.[34]

For Trump, the declaration of national emergency meant that he would be able to move funds allocated for the State security to finance the construction of the wall without the consent of Congress and actual indication that they can be used for the protection of the southern border. Trump was rather careless to state that "reference to the Act of 1976 would not have been necessary if (...)". "If" obviously meant the negative result of the negotiations with the Democrats in the House of Representatives. The leaders of that party immediately criticised the President's decision based on his own statement that there had been no emergency whatsoever.[35]

The roundabout of events, disorienting even the Americans as well as foreign observers, was moving faster and faster.[36] The Democrats succeeded in the House in the battle against legal grounds for the declaration of national emergency and 12 Republican senators unexpectedly supported the Democratic faction in the Senate.

---

[31] The shutdown lasted from 22 December 2018 to 25 January 2019, i.e. the moment when the House of Representatives proposed a 2.5 -week advance budget payment.

[32] On 10 March 2019, Trump presented his budget project for 2020 and demanded $8.6 billion, https://www.politico.com/latest-news-updates/government-shutdown-2019. For a more detailed report on negotiations before the shutdown, compare *McConnell: Senate will be back Sunday and "as Long as it Takes"* – live updates 21.01.2018, CBS News, https://www.cbsnews.com/news/government-shutdown-2018-01-20-live-updates-live-stream/.

[33] International Emergency Economic Powers Act, 50 U.S. Code Chapter 35 – I, codified in 1977. The National Emergencies Act, Pub. L. 94–412, 90 Stat. 1255, enacted 14 September 1976, codified at 50 U.S.C. §§ 1601–1651. For detailed comparison of the two statutes see R. Higgs and C. Twight, *National Emergency and the Erosion of Private Property Rights*, Independent Institute, 1.01.1987, http://www.independent.org/publications/article.asp?id=124 (accessed 25.08.2019).

[34] For more, compare D. Paul and C. Itkowitz, *What Exactly is a National Emergency? Here's What that Means and What Happens Next*, Washington Post, 15.02.2019, https://www.washingtonpost.com/politics/2019/02/15/what-exactly-is-national-emergency-heres-what-that-means-what-happens-next/?utm_term=.75eae91c812a.

[35] Trump stated: "I didn't need to do this, but I'd rather do it much faster," see P. Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, The New York Times, 15.02.2019, https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.

[36] For a more detailed report, see A. Bolton, *Senate Talks Collapse on Avoiding Trump Showdown over Emergency Declaration*, 13.03.2019, https://www.msn.com/en-us/news/politics/senate-talks-collapse-on-avoiding-trump-showdown-over-emergency-declaration/ar-BBUJzPa?ocid=spartandhp.

Following his former declarations, Trump vetoed both Chambers' statutes and American lawyers faced a bit unrealistic possibility of winning two-thirds majority by the presidential opposition in order to reject the presidential veto. Another step consisted in challenging the constitutionality of the declaration of emergency in courts but in case of that, as Trump stated, the Supreme Court was competent to take a final decision. And the majority of judges in it were of the conservative orientation. In this seemingly hopeless situation, the opposition returned to the possibility of impeachment of the President.

8. IMPEACHMENT: PRESIDENT'S CRIMINAL AND POLITICAL LIABILITY

As it is mentioned in the Introduction, the possibility of applying the procedure of impeachment against President Trump was considered by the Democratic Party congressmen and received widespread media coverage. However, one cannot fail to consider to what extent the possibility was realistic.

The Constitution of the United States stipulates that "The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[37] It is undoubtedly a short section of the Constitution but it must be emphasised that almost every word in it was subject to extremely intensive interpretation by courts as well as political and legal doctrines experts. In spite of that, it must be also admitted that it is difficult to give unambiguous answers to many questions, including the one asked above.

The participants of the Philadelphia Convention who were drafting the Constitution faced serious problems with determining the role of the judicature in the process of impeachment, who "civil Officers" are and, in particular, the definition of "high Crimes and Misdemeanors" as impeachable offences. As there was no unequivocal opinion, the explanation of the issues was left to be subject to practical interpretation, which, in view of a relatively small number of impeachment cases, solved the problem of the lack of clarity by referring to the flexibility of the Constitution.[38] In 1970, summing up the discussions of the interpretation of impeachable offences, President Gerald Ford concluded that "they are what the majority of the House of Representatives recognises in a given moment in history."[39]

---

[37] See http://constitutionus.com/.

[38] The history of the US recorded only three attempts to impeach the president. Andrew Jackson was impeached for the violation of the Tenure of Office Act and the Army Appropriation Act. However, the Senate did not take a positive decision concerning those charges. Richard Nixon resigned from office before the impeachment process started and was granted pardon by the next president, Gerald Ford. Pursuant to a plea bargain with the independent counsel, Robert Ray, Clinton was not charged with perjury and obstruction of justice; however, he had to pay a fine of 25,000 dollars and his law licence in Arkansas was suspended for five years.

[39] M.J. Franck, *Ford, the Court, and Impeachment*, National Review, 28.12.2006, https://www.nationalreview.com/bench-memos/ford-court-and-impeachment-matthew-j-franck/ (accessed 15.08.2019).

Coming back to the issue of the possibility of impeachment against Trump, it should be stated that, regardless of frequently repeated commentators' opinions about the possibility of impeaching the President in Congress, his "impeachable offences" had not been proved, until the work on this article started, and the fact that the Republicans have the majority in the Senate reduced the Democrats' hopes for removing the President from office. On the other hand, charging the President with criminal offences would not be possible before the completion of the impeachment process.[40]

As far as this issue is concerned, in the course of the proceedings against President Nixon, the Supreme Court only stated that the executive privilege to protect the right to refuse to provide prosecutors with evidence in the investigation they conduct in the case of impeachment cannot bear legal consequences. Nevertheless, in accordance with American courts' interpretation, before the decision of Congress, the President cannot be arrested or deprived of liberty when he is in office.[41] Summing up differences in the Democrats' opinions, in March 2019 Trump derisively thanked Nancy Pelosi for confirming helplessness of the House of Representatives in this matter.[42]

9. TWO STEPS FORWARD, ONE STEP BACK. STRATEGY OR CHAOS IN INTERNATIONAL RELATIONS?

Looking for the answer to the question about Trump's strategy, it is worth looking at his first decisions concerning international agreements.[43] Just before his election, Trump announced that he would exchange multilateral agreements for bilateral ones. Pursuant to the plan, the first move after the election was the United States' withdrawal from the Trans-Pacific Partnership. The agreement negotiated by President Obama aimed to develop trade cooperation between eleven American and Asian states.[44] American trade experts started asking questions about the President's motives behind the decision to terminate a few other agreements fundamental for the United States and the imposition of higher tariffs on numerous imported goods. "Under the pretence of caring for security, Trump starts a fire of protectionism",

---

[40] See https://constitution.com/articles-impeachment-richard-m-nixon/ (accessed 15.08.2019).

[41] See *Nixon v. Fitzgerald*, 457 US 731 (1982); also R.R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility*: *A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, American Journal of Comparative Law Vol. L Supplement (2002), p. 420.

[42] D. Jackson, *Donald Trump Mocks Impeachment, Says he "Greatly Appreciates" Nancy Pelosi's Statement*, USA Today, 3.03.2019, https://www.usatoday.com/story/news/politics/2019/03/13/trump-mocks-impeachment-says-he-appreciates-pelosi-statement/3148819002/. For more information on the issue of impeachment of a president in American law, see R.R. Ludwikowski, *supra* n. 41, pp. 404–436.

[43] The comments in this subchapter are quoted from a chapter in the 4th edition of the author's book, see R.R. Ludwikowski, *supra* n. 3, pp. 30–49.

[44] For a commentary, see Y. Saba, *Donald Trump to Withdraw US from Trans-Pacific Partnership*, Politico, 22.01.2016.

wrote Dan Ikenson of the liberal Cato Institute. American think tanks economists emphasised that higher tariffs would first of all strike the American automobile industry and in general local consumers. They warned that retaliatory actions would affect export of agricultural products, for which American farmers would have to pay.

It is hard to determine whether Trump's threats resulted from a well-thought strategy or a chaotic attempt to prove that the President of the United States can be unpredictable and make "two steps forward and one step back".

Further moves on the international trade chess board confirmed that Trump's policy was the latter option. On 16 February 2018, the US Department of Commerce (DOC) recommended that the President should impose higher tariffs on imported steel and aluminium products. The report referred to the provisions of Section 232 of the Trade Expansion Act of 1962, which banned American administration from reducing or eliminating tariffs on imported goods if such a policy constituted a threat to national security.[45]

At that moment, the president started considering another decision. Under threat of a trade war with the European Union and the NAFTA Member States, he started delaying the imposition of higher tariffs on Canada, Mexico and the EU Member States. It seemed that the United States would repeat G.D. Bush's mistake of 2002.[46] Trade experts again started asking questions whether Trump's "trade policy" evolves or the President changes his stand in a chaotic way.

Soon, the United States' closest partners, France and Great Britain, were made exempt from sanctions on steel products import, and Mexico and Canada prepared for negotiations of a new version of the North-American Free Trade Agreement (NAFTA).

On 31 May 2018, Trump made another move and revoked the United States' special privileges, which made Canada and Mexico exempt from tariffs imposed on the exporters of steel and aluminium products. The American administration justified the decision by pointing to poor progress in negotiations with the European Union and the NAFTA Member States. Commentators recognised that turn in the US policy as self-sabotage and Trump's return to trade wars. Trump alone, with

---

[45] Section 232 is codified in U.S. Code, Title 19, Chapter 7, Subchapter II, Part IV, § 1862, https://www.law.cornell.edu/uscode/text/19/1862.

[46] A question concerning the possibility of making the United States' "important political partners" exempt from sanctions was, from the international trade experts' point of view, extremely sensitive. Looking for examples of precedents, one should remind President George Bush's decision of 2002 on the imposition of 30% tariff on steel goods. The NAFTA Member States (Mexico and Canada) and a few developing countries, such as Argentina, Thailand and Turkey, were excluded from the list of countries on which the sanction was imposed. The decision on the imposition of extra sanctions was submitted to the World Trade Organization for verification by the European Union backed by Brazil, China, Japan, Korea, Switzerland and Taiwan. The Dispute Settlement Body (DSB) decided that the imposition of additional tariffs had not taken place in the period of increased import required for the application of the provisions on safeguards and additionally affected only selected trade partners. The WTO Appellate Body confirmed the decision of the DSB and in order to avoid retaliatory sanctions, Bush's administration partially withdrew from the policy of safeguarding the steel industry.

typical nonchalance, commented this turn in his trade strategy tweeting: "Fair Trade is now to be called Fool Trade if it is not Reciprocal".

Trump tried a similar manoeuvre in relation to China when he accused it of currency manipulations and theft of American patents. For a moment, it seemed that China would give in under the pressure of Trump's threats and would propose considerable concessions to American import. At the end of May 2018, Beijing announced a decrease in tariffs on American, European and Japanese cars to 15%. It was also announced that there is a possibility of suspending antidumping and countervailing investigations against the United States.

Two weeks later, dissatisfied President declared that the United States shall impose additional tariffs on Chinese goods worth 50 billion dollars. In response, China imposed additional tariffs and both parties declared they would apply further sanctions.[47]

The above-presented commercial manoeuvres are not the only ones on Trump's list of "strategic actions". Observing them, one must admit that Trump learned a lesson himself and over time his decisions were less chaotic and more predictable to the US trade partners.

In any case, it is not hard to notice that the leaders of the countries with which Trump had closer contacts learned from Trump, too. The American relations with North Korea are the best example. After two meetings with the leader of that country, Kim Jong Un, the media concluded that the process of Korea denuclearisation does not justify Trump's optimistic expectations. In response to Trump's confirmation that the meetings did not result in expected consequences, Kim Jong Un immediately announced preparation to successive nuclear tests suspended for the time of negotiations.[48]

10. CONCLUSIONS

It is hard to deny that every article, including this one, has a few tasks. Firstly, the author should aim to indicate questions that a reader can ask based on commonly known information. The questions organise the material analysed and the main aim of the article is to answer those questions. The end of the work, beside summing up the theses presented, includes a considerable number of assessments and forecasts that may justify further research into the issues.

---

[47] Compare D. Szymański, *Donald Trump, wykonując jeden ruch, zdradził prawdziwe powody zaostrzenia konfliktu z Chinami*, Business Insider. Polska, 4.04.2018, https://businessinsider.com.pl/finanse/makroekonomia/wojna-handlowa-usa-chiny-prawdziwe-zamiary-donalda-trumpa/2dehn48.

[48] *North Korea Says Kim Jong Un Mulling Resumption of Nuclear and Missile Tests*, CBS News, 15.03.2019, https://www.cbsnews.com/news/north-korea-kim-jong-un-us-nuclear-tests-missiles-donald-trump-pompeo-bolton/?bcmt=1In. In the face of prolonging bargaining with the United States, China adopted a similar strategy by starting trade negotiations with Italy. Compare C. Balmer, *China's Xi Looks to Strengthen Italian Ties, Evokes Ancient Trade Routes*, Reuters, 22.03.2019, https://www.reuters.com/article/us-italy-china-president/chinas-xi-looks-to-strengthen-italian-ties-evokes-ancient-trade-routes-idUSKCN1R318U (accessed 25.08.2019).

Following those comments, let me briefly emphasise a few positive as well as impressive characteristic features of Donald Trump's "style of policy-making".

Firstly, it is worth emphasising that Trump will remain in commentators' memory as one of the most active American presidents. In spite of his great age (he was 70 at the time of inauguration), his daily schedule was usually packed with events in which he participated.

Secondly, pointing out the President's characteristic features that were most often criticised, one must admit that many of his public addresses went beyond standard canons of political culture. His typical megalomania did not let him admit that even a politician of his rank can learn something. Undoubtedly, he gradually gained practical skills and in the seeming chaos of his constantly changing decisions, over time one could notice a political strategy.

Thirdly, it is hard to agree with Cohen's opinion that American interests were alien to the President and the slogan "America first" was just his strategic label. However, making this reservation, it is necessary to notice that the implementation of the policy behind this slogan pushed the United States into the battlefield of nationalist, anti-globalist and protectionist disputes. Trump, as I have tried to prove above, in spite of commentators' warnings, involved the United States in a series of "trade wars" that he ignored. He won some of them but in the case of others, the American citizens were to pay for the consequences of his risky decisions in the future.[49]

Fourthly, there is no doubt that the American economy was flourishing during the first half of Trump's presidency, that is at the time when the article was developed. Protectionism, regardless of all the criticism by the supporters of free trade, seemed to provide motivation for American businessmen who could move their investments back to the United States. The increase in GDP was really great and the number of new work places seemed to be impressive.

In the second quarter of 2019, the increase in GDP was lower and fell from 3.1% to 2.1%.[50] The commentators from the Democratic Party started to strongly emphasise damage to American farmers resulting from the trade war with China. The media favouring Trump called for further negotiations with Beijing and including the European Union in them. However, they decidedly rejected suggestions that the United States was in danger of recession.[51] Fifthly, as a result of politicization of the dispute over the protection of the US southern border by Trump as well as the

---

[49] For more, compare P. Coy, *Where Will Trade War Take US? The Damage from Trump's Disruptive Policies Will Take Years to Repair*, Bloomberg Business Week, 24.07.2018, pp. 12–14.

[50] Data from Trading Economics-US GDP, https://tradingeconomics.com/united-states/gdp (accessed 22.08.2019).

[51] On 25 August, before the G-7 meeting in France started, Trump stated that he regretted not raising tariffs on China and (referring to the above-mentioned Act of 1977) encouraged American investors to withdraw capital from that country, which caused considerable turbulences at the American stock-exchange. For more, compare A. Cone, *G7 Summit: Trump "Regrets" not Raising Tariffs on China Sooner*, World News, 25.08.2019, https://www.upi.com/Top_News/World-News/2019/08/25/G7-summit-Trump-regrets-not-raising-tariffs-on-China-sooner/6021566737930/ (accessed 25.08.2019).

Democrats, the United States divided into two camps the fights of which weakened the efficiency of the President's right attempts to strengthen the state security.

Many other Trump's reforms that were to respond to the problems of ordinary American citizens also raised doubts. For example, the modification of the tax system met with taxpayers' wide criticism. The decrease in taxes announced in the Conservative Party programmes produced totally different effects. It is true that filling in yearly tax returns became easier but the former possibilities of tax deductions, the so-called itemized deductions, were replaced by standard deductions, which caused that millions of tax payers lost the opportunity to get a tax refund and had to pay higher state taxes.

Anti-globalist trends in Trump's policy resulted in even more critical trade experts' comments. The article must be finished with a conclusion that the attempts to ignore the arbitration bodies of the World Trade Organization and even the structures of the United Nations seemed to pull the United States back to distant times of isolationism.[52]

BIBLIOGRAPHY

A World Without a U.N. (ed. Buron Yale Pines), The Heritage Foundation, Washington 1984.

Abbott F.M., *Regional Integration Mechanisms in the Law of the United States*, Indiana Journal of Global Legal Studies, Vol. 1/1, Autumn 1993.

Bachuss J., Lester S., Zhu H., *Disciplining China's Trade Practices at the WTO*, Policy Analysis – CATO Institute, No. 856, 15.11.2018.

Barfield C., *In Crippling the WTO, the U.S. Disarms Weapons Against Chinese High-tech Protectionism*, American Enterprise Institute, 18.12.2018.

Bhagwati J.N. (ed.), *The New International Economic Order: The North-South Debate*, Cambridge 1977.

Bhala R., *The Law of Foreign Exchange*, Carolina Academic Press, Durham 1997.

Bhala R., *International Trade Law: Theory and Practice*, Miamisburg 2000.

Bhala R., *International Trade Law Handbook*, Miamisburg 2001.

Bhala R., *Modern GATT Law*, Sweet & Maxwell, London 2005.

Bhala R., *Dictionary of International Trade Law*, Newark, New York 2008.

Bhala R., Frisch D., *Global Business Law: Principles and Practice*, Carolina Academic Press, Durham 1999.

Bierzanek R., Symonides J., *Prawo międzynarodowe publiczne*, Warszawa 1985.

Bowett D.W., *Claims Between States and Private Entities*, Catholic Univ. Law Rev., Vol. 35, 1986.

Brudnikowski A., *Międzynarodowe stosunki gospodarcze*, Warszawa 2003.

Buczkowski S., Nowakowski Z.K., *Prawo Obrotu Uspołecznionego*, Warszawa 1974.

Bush J., *Europe Must Find a way to Domesticate its own Tigers*, The Times, Economic View, 21.07.1994.

Calus A., *Prawo cywilne i handlowe państw obcych*, Warszawa 1985.

[52] Compare e.g. J. Bachuss, S. Lester and H. Zhu, *Disciplining China's Trade Practices at the WTO*, Policy Analysis – CATO Institute, No. 856, 15.11.2018, pp. 1–33; also C. Barfield, *In Crippling the WTO, the U.S. Disarms Weapons Against Chinese High-Tech Protectionism*, American Enterprise Institute, 18.12.2018, pp. 1–3.

Calus A., *Źródła prawa handlowego w wysoko rozwiniętych państwach kapitalistycznych*, Warszawa 1986.
Capling A., Low P., *Governments. Non-State Actors and Trade-Policy Making*, Cambridge: Cambridge University Press 2010.
Chow D.C.K., Schoenbaum T.J., *International Business Transactions*, St. Paul 2008.
Cline W.R., *Trade Policy and Global Poverty*, Center for Global Development, Washington 2004.
Coy P., *Where Will Trade war Take US? The Damage from Trump's Disruptive Policies Will Take Years to Repair*, Bloomberg Business Week, 24.07.2018.
Deardorff A.V., Stern R.M., Greene M.N., *The Implications of Alternative Trade Strategies for the United States*, [in:] D.B.H. Denoon (ed.), *The New International Economic Order. A U.S. Response*, New York 1979.
Denoon D.B.H. (ed.), *The New International Economic Order. A U.S. Response*, New York 1979.
Destler I.M., *International Financial Statistics: Supplement on Trade Statistics*, Washington 1988.
Destler I.M., *American Trade Politics*, Washington 1992.
Falk R.A., *A New Paradigm for International Legal Studies: Prospects and Proposals*, [in:] R. Falk, F. Kratochwil, S. Mendlovitz, *International Law: A Contemporary Perspective*, Princeton 1985.
Falk R.A., Kim S.S., Mendlovitz S.H., *Toward a Just World Order*, Boulder 1982.
Feenstra R.C., Taylor A.M., *International Economics*, New York 2010.
Feilmeth A.X., *The Law of International Business Transactions*, St. Paul 2009.
Folsom R.H., Gordon M.W., Spanogle J.A., *International Business Transactions*, 7th edn, St. Paul 2004.
Folsom R.H., Gordon M.W., Spomogle J.A., *Principles of International Business Transactions, Trade and Economic Relations*, St. Paul 2005.
GATT. Trade Policy Review Mechanism. United States, 1994.
Gelberg L., *Zarys prawa międzynarodowego*, Warszawa 1977.
Gregorian D., Ainsley J., *Mueller Submits Report on Trump Investigation to AG Barr, no new Charge. The Transmission of the Document ends a Lengthy Probe into the President and Russian Interference in the Campaign*, news: https://www.nbcnews.com/politics/justice-department/mueller-sends-report-trump-investigation-ag-barr-n974006 (accessed 25.08.2019).
Grimwade N., *International Trade*, London–New York 2000.
Gurtov M., *Global Politics in the Human Interest*, 1988.
Helpman E., *Understanding Global Trade*, Cambridge Massachusetts, 2011.
Hiscox M.J., *International Trade and Political Conflict: Commerce, Coalitions and Mobility*, Princeton University Press, Princeton 2002.
Hołowiński J., *Międzynarodowe prawo handlowe dla ekonomistów*, Warszawa 1982.
Jackson J.H., Davey W.J., Sykes A.O. Jr., *Legal Problems of International Economic Relations. Cases, Materials and Text*, St. Paul 2008.
Jakubowski J., Tomaszewski M., Tynel A., Wiśniewski A., *Zarys międzynarodowego prawa handlowego*, Warszawa 1983.
Katner W.J. (ed.), *Podmioty gospodarcze 1992. Zbiór przepisów prawa gospodarczego (stan prawny na 1 kwietnia 1992 r.)*, Warszawa 1992.
Katner W.J., *Komercjalizacja i prywatyzacja. Komentarz*, Warszawa 2003.
Katzenstein P.J., *A World of Regions: America, Europe, and East Asia*, Indiana Journal of Global Legal Studies, Vol. I, 1993.
Kim S., *The Quest for a Just World Order*, Boulder 1984.
Kindleberger Ch.P., *International Economics*, Homewood 1976.
Klafkowski A., *Prawo międzynarodowe publiczne*, Warszawa 1964.
Kłosiński K., Masłowski A., *Globalizacja sektora usług w Polsce*, Warszawa 2005.

Kotyński J., *Globalizacja i integracja europejska. Szanse i zagrożenia dla polskiej gospodarki*, Warszawa 2005.

Kravis I.B., Heston A., Summers R., *World Product and Income: International Comparisons of Real Gross Product*, Baltimore 1982.

Kruczalak K., *Prawo handlowe. Zarys wykładu*, Warszawa 1994.

Krugman P.R., Obstfeld M., Melitz M., *International Economics*, 9th edn, Boston MA 2011.

Kuroda M., *Strengthening Japan – US Cooperation and the Concept of Japan – US Free Trade Agreements, Free Trade Areas U.S. Trade Policy* (ed. J.J. Schott), Washington 1989.

Lankosz K., Chorośnicki M., Czubik P., *Walka z terroryzmem w świetle prawa międzynarodowego*, Bielsko-Biała 2004.

Lester S., Mercurio B., Davies A., *World Trade Law. Text, Materials and Commentary*, Oxford 2018.

Ludwikowski R.R., *Ameryka – Świat Biznesu*, Kraków 1991.

Ludwikowski R.R., *Regulacje handlu i biznesu międzynarodowego. Handel międzynarodowy*, Vol. 1, 1996.

Ludwikowski R.R., *Regulacje handlu i biznesu międzynarodowego. Międzynarodowe transakcje biznesowe*, Vol. 2, 1998.

Ludwikowski R.R., *Aspekty prawne wyborów prezydenta w Stanach Zjednoczonych*, Państwo i Prawo No. 4, 2001.

Ludwikowski R.R., *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility*: *A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, American Journal of Comparative Law Vol. L Supplement (2002).

Ludwikowski R.R., *Czy najlepsza na świecie? Kilka refleksji sceptycznych o konstytucji Stanów Zjednoczonych*, [in:] P. Mikuli, A. Kulig, J. Karp, G. Kuca (eds), *Ustroje. Tradycje i porównania. Księga jubileuszowa dedykowana prof. dr hab. Marianowi Grzybowskiemu*, Wydawnictwo Sejmowe, Warszawa 2015.

Ludwikowski R.R., *Początki i zmierzch filibusteringu w Stanach Zjednoczonych*, [in:] J. Majchrowki, A. Zięba (eds), *Prawo konstytucyjne. Doktryny ustrojowe. Partie polityczne. Śladami idei Marka Sobolewskiego*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2015.

Ludwikowski R.R., *Demokracja elektorska i populistyczna z perspektywy wyboru D. Trumpa na Prezydenta USA*, Państwo i Prawo No. 1, 2018.

Ludwikowski R.R., *Handel międzynarodowy,* 4th edn, Warszawa 2019.

Lyons G., *Blindsided by Moral Vanity. James Comey Still Doesn't get it*, The National Memo, 17.04.2018.

Manak I., *The Damage Done by Trump's Trade Wars Will Outlast his Presidency*, CATO Trade Chronicles, 7.08.2018.

Marczuk S., Sowa K. (eds), *Studia nad transformacją polskiej gospodarki*, Vol. 1, Rzeszów 1993.

McDougal M., Laswell H., Chen L., *Human Rights and World Public Order*, New Haven 1980.

McNair L., *The Law of Treaties*, Oxford 1961.

Mennon P.K., *An Introduction to the Law of Treaties*, Cave Hill 1992.

Miklaszewski S., Mesjasz L., Molendowski E., Małecki P., Pera J., Bieda M., Garlińska-Bielawska J., *Międzynarodowe stosunki gospodarcze u progu XXI wieku*, DIFIN Centrum Doradztwa i Informacji, 2003.

Milewski P., *Pierwszy glina USA donosi na swojego szefa*, Newsweek, N.J. No. 20, 13.05.2018.

Milner H.V., Rosendorff B.P., *International Trade and Domestic Politics: the Domestic Sources of International Trade Agreements and Institutions*, [in:] E. Benvenisti, M. Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge 2004.

Munko A., Rybowski W., *Współczesne tendencje w międzynarodowej polityce handlowej*, Handel Zagraniczny No. 1–2, 1992.

Neuman G.R., *Adjustment Assistance for Trade-Displaced Workers*, [in:] D.B.H. Denoon (ed.), *The New International Economic Order. A U.S. Response*, New York 1979.
Pasternak K., *Zarys zarządzania gospodarką*, Warszawa 2005.
Pastusiak L., *Pętla wokół Trumpa się zaciska*, Angora-Peryskop No. 3, 20.01.2019.
Pazdan M., *Rezolucja bazylejska z 1991 r. w sprawie autonomii woli w zakresie umów zawieranych w międzynarodowym obrocie handlowym*, Problemy Prawne Handlu Zagranicznego, Vol. 17, Katowice 1993.
Polsby N.W., Wildavsky A.B., *Presidential Elections. Strategies of American Electoral Politics*, New York 1968.
Restatement of the Law. The Foreign Relations Law of the United States, St. Paul 1987.
Reuvid J., Sherlock J., *The International Trade: An Essential Guide to the Principles and Practice of Export*, London–Philadelphia 2011.
Ripert G. (ed. E. Rablot), *Traite elementaire de droit commercial*, Paris 1989.
Rivera-Batiz L., Oliva M.A., *International Trade, Strategies and Evidence*, Oxford 2004.
Rymarczyk J. (ed.), *Handel zagraniczny*, Warszawa 2005.
Saba Y., *Donald Trump to Withdraw US from Trans-Pacific Partnership*, Politico, 22.01.2016.
Scharf M., *The Law of International Organization*, Durham, NC, 2001.
Shaw M.N., *International Law*, Cambridge 1991.
Steiner J., Vagts D.F., *Transnational Legal Problems*, Mineola 1986.
Stephan III P.B., Wallace D. Jr., Roin J.A., *International Business and Economics. Law and Policy*, Charlottesville 1993.
Stetz M., *Why we Hate Trump,* National Jurist Vol. 28, No. 1, 2018.
Stevenson P.W., *President Trump has now Fired 3 Officials who were Investigating his Campaign or Administration*, The Washington Post, 10.05.2017.
Stowell A.M., *US International Trade Laws*, 1986 Edition, Washington 1986.
Surrey S.W., Wallace D. Jr., *A Lawyer Guide to International Business Transactions* (parts 1 and 2), Philadelphia 1980.
Surrey W.S., Wallace D. Jr., *International Business Transactions*, Philadelphia 1980.
Swan A.C., Murphy J.F., *Cases and Materials on the Regulation of International Business and Economic Relations*, New York 1991.
Świerkocki J., *Zarys międzynarodowych stosunków gospodarczych*, Warszawa 2004.
Taylor J., *NAFTA's Green Accords: Sound and Fury Signifying Little*, Policy Analysis, No. 198, 17.11.1993.
The Globalization of Law, Politics, and Markets, Implications for Domestic Law Reform (symposium), Indiana Journal of Global Legal Studies, Vol. 1, Autumn 1993.
Touval S., *Why the U.N. Fails: It Cannot Mediate,* Foreign Affairs Vol. 73/5, September–October 1994.
Trebilcock M.J., Howse R., *The Regulations of International Trade*, London 1999.
Triqueros I., *A Free Trade Agreement Between Mexico and the United States?*, [in:] J.J. Schott (ed.), *Free Trade Areas. U.S. Trade Policy*, Washington 1989.
Vagts D.F., *Transnational Business Problems*, Cambridge MA 1986.
Vishny P.H., *International Trade for Nonspecialist,* Philadelphia 1992.
Waldman M., *Trump's Voter Fraud Fantasy*, Brennan Center for Justice, editorial, 22.08.2019.
Walker R., *One World/Many Worlds: Struggles for a Just World Peace*, Boulder 1988.
Weston B.H., Falk R.A., Charlesworth H., Strauss A.L., *International Law and World Order. A Problem-oriented Coursebook*, St. Paul 2006.
Weston B.H., Falk R.A., D'Amato A. (eds), *Basic Documents in International Law and World Order*, St. Paul 1990.
Winiarz J. (ed.), *Prawo obrotu gospodarczego*, Warszawa 1987.

Włodyka S., *Prawo gospodarcze. Zarys systemu*, Warszawa 1982.
Władyka T. (ed.), *Polityka gospodarcza*, Warszawa 2007.
Władyka T., *Dwa dwudziestolecia gospodarki rynkowej w Polsce*, Warszawa 2008.
Wolff M., *Fire and Fury: Inside the Trump White House*, Henry Holt and Co., 2018 (Polish edition: *Ogień i Furia. Biały Dom Trumpa*, Warszawa 2018).
Wonnacott P., Lutz M., *Is There a Case for Free Trade Areas?*, [in:] J.J. Schott (ed.), *Free Trade Areas. U.S. Trade Policy*, Washington 1989.
Yoo J.H., *More Free Trade Areas: A Korean Perspective*, [in:] J.J. Schott (ed.), *Free Trade Areas. U.S. Trade Policy*, Washington 1989.
Zalewski L., *Sposoby zawierania umów w handlu międzynarodowym*, Rzeczpospolita No. 66, 1993.

Online sources

A Fraudulent Commission on Voter Fraud, Burlington County Times, 21.05.2017, http://www.burlingtoncountytimes.com/8e2ceb04-d810-51dc-bb3a-729f11717e35.html.
Baker P., *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, The New York Times, 15.02.2019, https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.
Balmer C., *China's Xi Looks to Strengthen Italian Ties, Evokes Ancient Trade Routes*, Reuters, 22.03.2019, https://www.reuters.com/article/us-italy-china-president/chinas-xi-looks-to-strengthen-italian-ties-evokes-ancient-trade-routes-idUSKCN1R318U.
Bolton A., *Senate Talks Collapse on Avoiding Trump Showdown over Emergency Declaration*, 13.03.2019, https://www.msn.com/en-us/news/politics/senate-talks-collapse-on-avoiding-trump-showdown-over-emergency-declaration/ar-BBUJzPa?ocid=spartandhp.
Collins K., Starr B., Zeleny J., Landers E., Liptak K., *Tensions Escalate after Tillerson Calls Trump "Moron"*, CNN Politics, 5.10.2017, https://edition.cnn.com/2017/10/04/politics/tillerson-trump-moron/index.html.
Comey J., *A Higher Loyalty: Truth, Lies and Leadership*, Macmillan Press, New York 2018.
Cone A., *G7 Summit: Trump "Regrets" not Raising Tariffs on China Sooner*, World News, 25.08.2019, https://www.upi.com/Top_News/World-News/2019/08/25/G7-summit-Trump-regrets-not-raising-tariffs-on-China-sooner/6021566737930/.
Desiderio A., *Cohen Testimony on Trump: "He is a Racist. He is a Conman. He is a Cheat"*, Politico, 27.02.2019, https://www.politico.com/story/2019/02/26/cohen-trump-racist-conman-cheat-1189951.
Dolmetsch C., *Michael Cohen Sues Trump Organization in Bid for Lawyer Fees*, Bloomberg, https://www.msn.com/en-xl/northamerica/northamerica-top-stories/michael-cohen-sues-trump-organization-in-bid-for-lawyer-fees/ar-BBUvhJx?ocid=spartandhp.
Donald Trump's Mexico Wall: Who is Going to Pay for it?, BBC News, 6.02.2017, https://www.bbc.com/news/world-us-canada-37243269.
"Dreamers" and Trump's Dream of a Wall, 26.12.2018, https://www.washingtonpost.com/opinions/dreamers-and-trumps-dream-of-a-wall/2018/12/26/9fd77a80-07b9-11e9-8942-0ef442e59094_story.html?utm_term=.20bab13d0163.
Everything we Know About Donald Trump's Proposed Border Wall, Bloomberg, 19.01.2018, http://fortune.com/2018/01/19/donald-trump-border-wall.
Franck M.J., *Ford, the Court, and Impeachment*, National Review, 28.12.2006, https://www.nationalreview.com/bench-memos/ford-court-and-impeachment-matthew-j-franck/.
Higgs R., Twight C., *National Emergency and the Erosion of Private Property Rights*, Independent Institute, 1.01.1987, http://www.independent.org/publications/article.asp?id=124.

Jackson D., *Donald Trump Mocks Impeachment, Says he "Greatly Appreciates" Nancy Pelosi's Statement*, USA Today, 3.03.2019, https://www.usatoday.com/story/news/politics/2019/03/13/trump-mocks-impeachment-says-he-appreciates-pelosi-statement/3148819002/.

Kacowicz A.C., *Regionalization, Globalization, and Nationalism*, December 1998; https://kellogg.nd.edu/sites/default/files/old_files/documents/262.pdf.

Kilgore E., *Final Results for the Presidential Popular Vote*, Daily Intelligencer, 20.12.2016, http://nymag.com/intelligencer/2016/12/the-final-final-final-results-for-the-popular-vote-are-in.html.

Lemon J., *Trump "Damaging" our Democracy with Baseless Voter Fraud Claims. Federal Election Commission Chair Warns*, Newsweek, 22.08.2019, https://www.newsweek.com/trump-damaging-democracy-voter-fraud-claims-federal-election-commission-chair-1454995.

McConnell: Senate Will be Back Sunday and "as Long as it Takes" – live updates 21.01.2018, CBS News, https://www.cbsnews.com/news/government-shutdown-2018-01-20-live-updates-live-stream/.

North Korea Says Kim Jong Un Mulling Resumption of Nuclear and Missile Tests, CBS News, 15.03.2019, https://www.cbsnews.com/news/north-korea-kim-jong-un-us-nuclear-tests-missiles-donald-trump-pompeo-bolton/?bcmt=1In.

Outside Spending: Frequently Asked Questions About 501(c)(4) Groups, https://www.opensecrets.org/outsidespending/faq.php.

Palazzolo J., Rothfeld M., *Trump Lawyer Used Private Company, Pseudonyms to Pay Porn Star "Stormy Daniels". Michael Cohen Created Limited Liability Company just Before $130,000 Payment*, The Wall Street Journal, 18.01.2018, https://www.wsj.com/articles/trump-lawyers-payment-to-porn-star-was-reported-as-suspicious-by-bank-1520273701?tesla=y&mod=e2tw.

Paul D., Itkowitz C., *What Exactly is a National Emergency? Here's What that Means and What Happens Next*, Washington Post, 15.02.2019, https://www.washingtonpost.com/politics/2019/02/15/what-exactly-is-national-emergency-heres-what-that-means-what-happens-next/?utm_term=.75eae91c812a.

Perez E., *Sources: White House Lawyers Research Impeachment*, CNN Politics, 19.05.2017, http://edition.cnn.com/2017/05/19/politics/donald-trump-white-house-lawyers-research-impeachment/index.html.

Presidential Election Results: Donald J. Trump Wins, New York Times, 10.02.2017, https://www.nytimes.com/elections/results/president.

Stelter B., *James Comey's Book is Already a Best Seller, with Trump's Help*, CNN Media, http://money.cnn.com/2018/03/18/media/james-comey-book-best-seller/index.html.

Stern Z., *America First Policies*, https://www.factcheck.org/2018/04/america-first-policies/.

Szymański D., *Donald Trump, wykonując jeden ruch, zdradził prawdziwe powody zaostrzenia konfliktu z Chinami*, Business Insider. Polska, 4.04.2018, https://businessinsider.com.pl/finanse/makroekonomia/wojna-handlowa-usa-chiny-prawdziwe-zamiary-donalda-trumpa/2dehn48.

Trading Economics-US GDP, https://tradingeconomics.com/united-states/gdp.

Treleavent C., *"A Border Wall" Trump, Pelosi, and Mexico's President All Could Love*, 4.03.2018, Medium Co. https://medium.com/@ctreleaven/a-border-wall-trump-pelosi-and-mexicos-president-all-could-love-af5a7ec46dd4.

USA: Senat przyjął prowizorium budżetowe, by uniknąć zawieszenia rządu, YouTube, 20.12.2018, https://www.youtube.com/watch?v=gJNMidJNRfo.

Vitali A., Alexander P., O'Donnell K., *Trump Establishes Voter Fraud Commission*, NBC News, 11.05.2017, http://www.nbcnews.com/politics/white-house/trump-establish-vote-fraud-commission-n757796.

GLOBAL OR STRATEGIC TRADE? SOME OBESERVATIONS ON PRESIDENT DONALD TRUMP'S STYLE OF MAKING DOMESTIC AND FOREIGN POLICY

Summary

The article refers to the main theses of the author's fourth edition of *Handel międzynarodowy* published by C.H. Beck. It is a handbook that, due to its didactic nature, only updates information about the regulations of global and regional international trade. The preparation of this article for publication results from the reflections of a commentator who observes the transformation of the United States' priorities during Donald Trump's presidency. An observer of trade policy must consider whether we deal with a "new era" in international trade. The answer to this question, whether positive or not, is subject to agreement. Nevertheless, the inclination of President Trump, a helmsman of the policy of the most important partner in international trade, to trivialise "trade wars" and emphasise that the US interests are of crucial importance is unquestionable and justifies asking successive detailed questions: To what extent does strategic trade, carried out from the perspective of one country's benefits, substitutes for global trade? Is President Trump first of all a businessman or a political strategist? Is the possibility of impeachment or even bringing criminal charges against the president who is in office, which is discussed by American law experts, realistic or is it part of the nature of the United States' political scene? What are the prospects for re-election of the president, whose personal counsel, Michael Cohen, has been sentenced to three years' imprisonment and a number of other associates are waiting for the results of an investigation into the collaboration with Russia during the presidential electoral campaign?

Keywords: globalisation and regionalisation, internationalism, glocalisation, anti-globalism, strategic trade, protectionism and isolationism, impeachment, national economic emergency, electoral democracy and populist democracy, recession

HANDEL GLOBALNY CZY STRATEGICZNY? KILKA REFLEKSJI NAD STYLEM PROWADZENIA POLITYKI WEWNĘTRZNEJ I ZAGRANICZNEJ PRZEZ PREZYDENTA DONALDA TRUMPA

Streszczenie

Artykuł nawiązuje do głównych tez będącego w druku przez C.H. Beck IV wydania *Handlu międzynarodowego*, autora niniejszego artykułu. Wspomniana książka jest podręcznikiem, który ze względu na jego dydaktyczny charakter, aktualizuje jedynie informacje o regulacjach globalnego i regionalnego międzynarodowego obrotu gospodarczego. Przygotowanie do druku niniejszego artykułu wynika z refleksji komentatora obserwującego transformacje priorytetów Stanów Zjednoczonych za prezydentury Donalda Trumpa. Obserwator polityki handlowej musi się zastanowić, czy mamy do czynienia z „nowa erą" w handlu międzynarodowym. Odpowiedź na to pytanie – twierdząca lub przecząca – jest sprawą umowną, niemniej skłonność Prezydenta Trumpa, a więc sternika polityki najważniejszego partnera międzynarodowych stosunków handlowych, do trywializacji możliwości „wojen handlowych" i do podkreślania, że interesy ekonomiczne Ameryki mają pierwszoplanowe znaczenie jest niepodważalna i uzasadnia postawienie kolejnych, bardziej szczegółowych pytań: Do jakiego

stopnia handel strategiczny, prowadzony z perspektywy korzyści jednego kraju, zastępuje handel globalny? Czy prezydent Trump jest przede wszystkim biznesmanem czy strategiem politycznym? Czy dyskutowana przez ekspertów od prawa amerykańskiego możliwość impeachmentu lub nawet przedstawienia kryminalnych zarzutów urzędującemu prezydentowi jest realna czy też jest jedynie częścią kolorytu politycznej sceny Stanów Zjednoczonych? Jakie są perspektywy reelekcji prezydenta, którego doradca prawny, Michael Cohen, zostaje skazany na trzy lata pozbawienia wolności a szereg kolejnych współpracowników czeka na wyniki śledztwa prowadzonego w sprawie kolaboracji z Rosją w trakcie prezydenckiej kampanii wyborczej?

Słowa kluczowe: globalizacja i regionalizacja, internacjonalizm, glokalizacja, antyglobalizm, handel strategiczny, protekcjonizm i izolacjonizm, impeachment, stan wyższej konieczności gospodarczej, demokracja elektorska i demokracja populistyczna, recesja

COMERCIO GLOBAL O ESTRATÉGICO – UNAS REFLEXIONES SOBRE LA FORMA DE LLEVAR LA POLÍTICA INTERIOR Y EXTERIOR DEL PRESIDENTE DONALD TRUMP

Resumen

El artículo hace referencia a tesis principales de la IV edición del "Comercio Internacional" que actualmente está en imprenta en la editorial C.H. Beck, escrito por el presente autor. El libro mencionado es un manual que, debido a su carácter didáctico, únicamente actualiza la información sobre regulación global y regional de trafico económico internacional. La elaboración del presente artículo resulta de la reflexión del comentador que observa la transformación de prioridades de los Estados Unidos durante la presidencia de Donald Trump. El observador de la política comercial ha de pensar si estamos ante la "nueva era" en el comercio internacional. La respuesta a esta pregunta – tanto positiva como negativa – es una cuestión convencional, sin embargo la inclinación del Presidente Donald Trump, el piloto de la política del socio más importante de relaciones mercantiles internacionales a trivializar la posibilidad de "guerras comerciales" y a subrayar que los intereses económicos de América tienen importancia primordial es indiscutible y da pie a más preguntas detalladas. ¿Hasta qué punto el comercio estratégico, llevado desde la perspectiva de beneficio de un país sustituye el comercio global? ¿Será el presidente Trump sobre todo el hombre de negocios o estratega político? ¿Es real la posibilidad de impeachment debatida por expertos de derecho americano o incluso la posibilidad de imputarle al presidente actual la comisión de delitos o bien sólo forma parte de la escena política colorida de los Estados Unidos? ¿Cuáles son las perspectivas de reelección del presidente, cuyo asesor legal Michael Cohen está condenado a la pena de 3 años de privación de libertad y numerosos sus colaboradores están esperando a los resultados de investigación sobre la colaboración con Rusia durante la campaña presidencial electoral?

Palabras claves: globalización y regionalización, glocalización, antiglobalización, comercio estratégico, proteccionismo y aislacionismo, impeachment, estado de necesidad económico, democracia electoral y democracia populista, recesión

ГЛОБАЛЬНАЯ ИЛИ СТРАТЕГИЧЕСКАЯ ТОРГОВЛЯ: НЕСКОЛЬКО ЗАМЕЧАНИЙ О СТИЛЕ ПРОВЕДЕНИЯ ВНУТРЕННЕЙ И ВНЕШНЕЙ ПОЛИТИКИ ПРЕЗИДЕНТОМ ДОНАЛЬДОМ ТРАМПОМ

Резюме

В статье нашли отражение основные тезисы учебника *Handel międzynarodowy* [Международная торговля] того же авторства, четвертое издание которого готовится к печати в издательстве C.H. Beck. В силу дидактического характера указанной книги в очередном ее издании обновлена только информация, касающаяся регулирования международного торгового обмена на глобальном и региональном уровнях. Данная статья стала результатом размышлений автора, возникших в ходе наблюдения за трансформацией приоритетов США под руководством президента Дональда Трампа. Наблюдатель, интересующийся внешнеторговой политикой, не может не задуматься, имеем ли мы здесь дело с «новой эрой» в международной торговле? Конечно, как положительный, так и отрицательный ответ на этот вопрос носил бы довольно условный характер. Тем не менее, нельзя отрицать, что президент Трамп, который определяет политику одного из основных участников международного торгового обмена, имеет склонность часто прибегать к «торговым войнам». Он постоянно подчеркивает, что первостепенное значение должны иметь экономические интересы Америки. В этой связи возникает ряд более конкретных вопросов. В какой степени стратегическая торговля, проводимая с точки зрения выгоды одной страны, занимает место глобальной торговли? Является ли президент Трамп, главным образом, бизнесменом или политическим стратегом? Является ли реальной обсуждаемая экспертами по американскому праву возможность импичмента действующего президента или даже предъявление ему уголовных обвинений, или же это всего лишь колоритный элемент американской политической сцены? Каковы перспективы переизбрания президента, юридический советник которого, Майкл Коэн, приговорен к трем годам лишения свободы, а ряд других его сотрудников ожидает результатов расследования по делу сговора с Россией в ходе президентской избирательной кампании?

Ключевые слова: глобализация и регионализация, интернационализм, глокализация, антиглобализм, стратегическая торговля, протекционизм и изоляционизм, импичмент, экономическая необходимость, электоральная и популистская демократия, экономический спад

GLOBALER ODER STRATEGISCHER HANDEL – EINIGE ÜBERLEGUNGEN ZUM STIL DER GESTALTUNG DER INNEN- UND AUSSENPOLITIK DURCH US-PRÄSIDENT DONALD TRUMP

Zusammenfassung

Der Artikel nimmt auf die wichtigsten These der im Druck befindlichen, bei C.H. Beck erscheinenden 4. Auflage von *Handel międzynarodowy* [Internationaler Handel] des Autors dieses Artikels Bezug. Das genannte Buch ist ein Lehrbuch, das aufgrund seines didaktischen Charakters Informationen zu den Regelungen für den globalen und regionalen internationalen Wirtschaftskreislauf lediglich aktualisiert. Die Druckvorlage dieses Artikels folgt den Reflexionen eines Kommentators, der die Verschiebung bei den US-Prioritäten unter der Präsidentschaft von Donald Trump beobachtet. Jeder Beobachter der Handelspolitik muss sich die Frage stellen, ob wir es mit einer „neuen Ära" des internationalen Handels zu tun haben? Über die Antwort auf diese Frage – bejahend oder verneinend – lässt sich ausgiebig diskutieren, doch ist die

Neigung von Präsident Trump, d.h. des politischen Steuermanns des wichtigsten Partners in den internationalen Handelsbeziehungen, die Möglichkeiten von „Handelskriegen" zu trivialisieren und zu betonen, dass die wirtschaftlichen Interessen Amerikas stets Vorrang haben, nicht zu bestreiten und rechtfertigt weitere tieferbohrende Fragen: Inwieweit ersetzt der aus Perspektive des Nutzens für ein bestimmtes Land betriebene strategische Handel den globalen Handel? Ist Präsident Trump in erster Linie Geschäftsmann oder eher politischer Stratege? Ist die von US-amerikanischen Rechtsexperten diskutierte Möglichkeit einer Amtsenthebung oder der strafrechtlichen Verfolgung des amtierenden Präsidenten als real zu betrachten oder gehört diese nur zum Kolorit der politischen Landschaft in den USA? Wie stellen sich die Aussichten für die Wiederwahl des Präsidenten dar, dessen Rechtsberater Michael Cohen zu drei Jahren Haft verurteilt wurde und von dem mehrere weitere Mitarbeiter auf die Ergebnisse der Untersuchung zur Zusammenarbeit während des Präsidentschaftswahlkampfs mit Russland warten?

Schlüsselwörter: Globalisierung und Regionalisierung, Internationalismus, Glokalisierung, Antiglobalismus, strategischer Handel, Protektionismus und Abschottung, Amtsenthebung, wirtschaftlicher Notstand, Wahldemokratie und populistische Demokratie, Rezession

COMMERCE MONDIAL OU STRATÉGIQUE – QUELQUES RÉFLEXIONS SUR LE STYLE DE POLITIQUE INTÉRIEURE ET ÉTRANGÈRE POURSUIVI PAR LE PRÉSIDENT DONALD TRUMP

Résumé

L'article fait référence aux thèses principales de la 4ème édition de *Handel międzynarodowy* [Commerce international] de l'auteur de cet article en cours d'impression par C.H. Beck. Le livre est un manuel qui, en raison de sa nature didactique, ne fait que mettre à jour les informations sur les réglementations en matière de chiffre d'affaires économique international mondial et régional. La préparation de cet article pour impression résulte de la réflexion d'un commentateur observant la transformation des priorités des États-Unis sous la présidence de Donald Trump. Un observateur de la politique commerciale doit déterminer s'il s'agit d'une «nouvelle ère» dans le commerce international. La réponse à cette question – affirmative ou négative – est arbitraire, mais l'inclination du président Trump, un dirigeant de la politique du principal partenaire des relations commerciales internationales, à banaliser les possibilités de «guerres commerciales» et à souligner que les intérêts économiques de l'Amérique sont d'une importance primordiale est incontestable et justifie de poser des questions plus spécifiques: Dans quelle mesure le commerce stratégique, conduit du point de vue des avantages d'un pays, remplace-t-il le commerce mondial? Le président Trump est-il avant tout un homme d'affaires ou un stratège politique? La possibilité de mise en accusation ou même de poursuites pénales contre le président en exercice discutée par des experts du droit américain est-elle réelle ou s'agit-il simplement de la couleur de la scène politique américaine? Quelles sont les perspectives de réélection du président, dont le conseiller juridique, Michael Cohen, est condamné à trois ans d'emprisonnement et plusieurs autres collaborateurs attendent les résultats de l'enquête sur la collaboration avec la Russie pendant la campagne pour l'élection présidentielle?

Mots-clés: mondialisation et régionalisation, internationalisme, glocalisation, anti-mondialisation, commerce stratégique, protectionnisme et isolationnisme, impeachment, condition économique de nécessité supérieure, démocratie électorale et démocratie populiste, récession

COMMERCIO GLOBALE O STRATEGICO: ALCUNE RIFLESSIONI SULLO STILE DI CONDUZIONE DELLA POLITICA INTERNA ED ESTERA DA PARTE DEL PRESIDENTE DONALD TRUMP

Sintesi

L'articolo fa riferimento alle tesi principali della IV Edizione di *Handel międzynarodowy* [Commercio Internazionale] in corso di stampa da parte di C.H. Beck, dell'autore del presente articolo. Il libro richiamato è un manuale, che a motivo del suo carattere didattico, aggiorna solamente le informazioni sulle regolamentazioni del commercio internazionale globale e regionale. La preparazione alla stampa del presente articolo deriva dalla riflessione del commentatore che osserva le trasformazioni delle priorità degli Stati Uniti durante la presidenza di Donald Trump. L'osservatore della politica commerciale deve domandarsi, se abbiamo a che fare con una "nuova era" nel commercio internazionale. La risposta a questa domanda, affermativa o negativa, è una questione di convenzione, tuttavia la tendenza del presidente Trump, e quindi del timoniere della politica del più importante partner dei rapporti commerciali internazionali, a banalizzare la possibilità di "guerre commerciali" e a sottolineare che gli interessi economici dell'America hanno un'importanza di primo piano è indiscutibile e giustifica il porsi successive domande, più dettagliate. Fino a che grado il commercio strategico, condotto con la prospettiva dei vantaggi per un unico paese, sostituirà il commercio globale? Il presidente Trump è soprattutto un uomo d'affari o uno stratega politico? La possibilità di impeachment o addirittura di accuse penali al presidente in carica, discussa dagli esperti di diritto americano, è reale o costituisce solamente parte del folklore della scena politica degli Stati Uniti? Quali sono le prospettive di rielezione del presidente, il cui consulente legale, Michael Cohen, è stato condannato a 3 anni di reclusione e una serie di altri collaboratori attendono i risultati di un indagine condotta sulla questione della collaborazione con la Russia durante la campagna elettorale presidenziale?

Parole chiave: globalizzazione e regionalizzazione, internazionalismo, glocalizzazione, antiglobalizzazione, commercio strategico, protezionismo e isolazionismo, impeachment, stato di necessità economica, democrazia elettorale e populismo, recessione

Cytuj jako:

Ludwikowski R.R., Global or strategic trade? Some observations on President Donald Trump's style of making domestic and foreign policy *[Handel globalny czy strategiczny? Kilka refleksji nad stylem prowadzenia polityki wewnętrznej i zagranicznej przez prezydenta Donalda Trumpa]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 135–161. DOI: 10.26399/iusnovum.v13.4.2019.47/r.r.ludwikowski

Cite as:

Ludwikowski, R.R. (2019) 'Global or strategic trade? Some observations on President Donald Trump's style of making domestic and foreign policy'. *Ius Novum* (Vol. 13) 4, 135–161. DOI: 10.26399/iusnovum.v13.4.2019.47/r.r.ludwikowski

Ius Novum
4/2019

ROLE OF LEGAL CULTURE IN DEVELOPING STANDARDS OF JUDGES' PROFESSIONAL ETHICS

MARCIN KRYŃSKI*

DOI: 10.26399/iusnovum.v13.4.2019.48/m.krynski

1. INTRODUCTION – DILEMMAS ABOUT DEFINITION

Law is one of the most important elements of culture[1] since it is a product of culture and a major culture-creative factor. Law and culture are inter-related and affect each other in many different ways. Relationships between law and culture are usually analysed in two ways – either such analyses cover solely the notion of legal culture, or the notions of law and culture are compared to identify the relationships between the notions.[2] The duality of studies on the notions of law and culture somehow is due to the fact that it is extremely difficult to clarify the notion of culture as such. This situation is clearly manifested in the statement of the German sociologist Johann Herder who in the forward to his *Ideas on the Philosophy of the History of Mankind* wrote: "There is nothing more indefinite that the word 'culture'".[3]

In its original Latin understanding, culture means: "'cultivation' consisting in transformation of the natural condition or nature and man into a practically useful condition and positive in moral and intellectual sense".[4] Originally, the notion referred to agriculture but soon it began to be used in a metaphoric sense also with reference to other areas, for instance, Cicero wrote about the "culture of soul".[5]

* Master of Laws, doctoral student at the Faculty of Law of the University of Białystok; e-mail: marcin-krynski2@wp.pl; ORCID: 0000-0002-6610-3673

1 Quote after K. Pałecki, *O pojęciu kultury prawnej*, Studia Socjologiczne No. 2, 1972, p. 205.

2 O. Kucharski, *Koncepcje kultury prawnej w naukach prawnych*, Disputationes Ethicae. Etyka a prawo – Etyka działania, No. 3, 2007, p. 71.

3 Quote after A. Kłoskowska, *Socjologia kultury*, Wydawnictwo Naukowe PWN, Warszawa 2007, p. 19.

4 A. Kłoskowska, *Kultura. Zagadnienia istoty kultury. Kultura a natura*, [in:] *Encyklopedia Socjologii*, Vol. 2, letters K–N, (ed.) W. Kwaśniewicz, Oficyna Naukowa, Warszawa 1999, p. 100.

5 J. Szacki, *Kultura*, [in:] *Wielka Encyklopedia PWN*, Vol. 15, (ed.) J. Wojnowski, Wydawnictwo Naukowe PWN, Warszawa 2003, p. 181.

In its colloquial meaning, culture is understood as certain selected areas like literature, art, music, theatre, cinema. However, the term does not refer to religion, science or technology. In another sense, culture is understood as an area of habits, e.g. cultural behaviour at the table, culture of work, culture of co-existence.[6]

Nowadays, it is commonly accepted that the term "culture" does not have one consistent and commonly acceptable definition. The uncertainty results in many works being published in which the authors attempted to define the complex notion. One of the best known is the work by Alfred Kroeber and Clyde Kluckhohn. The authors decided to present a set of over 200 definitions of culture as can be found in anthropological works, dissertations in other social sciences and humanities. An attempt to determine one consistent definition generated the identification of six aspects used to define culture: a descriptive and enumerative approach, a historic, prescriptive, psychological, structural and genetic approach.[7] In line with the above aspects, the most comprehensive Polish work on the definition of culture was presented by Antonina Kłoskowska in her book *Sociology of Culture*.[8]

Generally speaking, sociological definitions combine several elements and accept that culture is a feature of the society and not of an individual. That is why, it affects social life and creates its appropriate structure. Culture encompasses everything that a human being learns in social life and that is transferred from one generation to the next. In Ralph Linton's opinion, culture is the "social heritage of members of the society".[9] Norman Goodman and Gary T. Marx named culture as a "knowing, socially transferred heritage of products, knowledge, values and standardised expectations and the heritage supporting members of the society in handling problems as they arise".[10]

Marshall Sahlins wrote that culture includes patterns of meaning that have been created by people. A feature of human beings who live in a material world shared with other organisms is a specific subordination of the way of life to those patterns.[11]

In sociology there is also a view that: "culture derives from nature in its phylogenetic dimension. (…) However, in the ontogenetic dimension, in the development of human beings accessible to empirical studies, culture may not be derived directly from nature."[12] This means only that in a sense culture derives, originates from nature. However, that does not mean that it has been developed solely as a result of transformations in nature. In this context, culture is a derivative of nature, but it is not directly derived from nature.[13]

---

[6] *Ibid*.

[7] M. Borucka-Arctowa, *Kultura prawna na tle myśli filozoficznej i społecznej o kulturze*, Studia Prawnicze No. 1(151) 2002, p. 5.

[8] A. Kłoskowska, *supra* n. 3.

[9] R. Linton, *Kulturowe podstawy osobowości*, PWN, Warszawa 1975, p. 67.

[10] Quote after N. Goodman, *Wstęp do socjologii*, (transl.) J. Polak, J. Ruszkowski, U. Zielińska, Wydawnictwo Zysk i S-ka, Poznań 1997, p. 37.

[11] A. Kłoskowska, *supra* n. 4, p. 100.

[12] *Ibid*., p. 101.

[13] *Ibid*.

Additionally, Edward B. Tylor notes as follows: "Culture or civilisation is a complex whole covering knowledge, beliefs, art, law, morality, customs and all other skills and habits acquired by a human being as a member of the society."[14]

Since the definition of culture by Edward B. Tylor covers various multiple areas of human activity, including law and morality, therefore his definition constitutes the basis for a further discussion concerning culture and law, including legal culture.

Defining "legal culture", similarly to the notion of "culture", also poses problems. It was Bronisław Wróblewski who introduced the definition of legal culture[15] to legal studies[16]. He stated that legal culture meant: "updates or reflection in behaviour of legal values, the value of justice as well as equity and usability values in a form adjusted to previous ones."[17]

In the 1960s, the term of "legal culture" was quite often used; however, no attempts were made to define its meaning and it was used only intuitively assuming that it was: compliance with law, assessment of law, legal awareness, foundations related to applying and development of law or lawfulness.[18]

Now quite often "legal awareness" is used as a synonym of "legal culture". However, the notions do not have identical meanings and often they are not knowingly differentiated.[19] Therefore, there are at least several definitions of "legal culture".

The concepts of legal culture in Polish science can be split into four core groups:
– sociological and legal (Maria Borucka-Arctowa, Anna Gryniuk, Krzysztof Pałecki),
– historic and legal (Stanisław Russocki and Stanisław Grodziski),
– comparative and legal (Roman Tokarczyk),
– philosophical and legal (Włodzimierz Gromski).[20]

According to Maria Borucka-Arctowa, the normative concept of culture stemming from anthropological studies is the most "incontestable and useful" factor to define legal culture. The author understands culture as: "comprehensive prescriptive patterns of behaviour, socially acceptable and passed on from one generation to the next using thematic symbols". On that basis, relying on her own research, she defined legal culture as: "comprehensive prescriptive patterns of behaviour and values related to those standards, socially acceptable, learned (or taken over as a result of interaction and mutual contacts between persons and groups of persons), passed on with thematic symbols either within one generation (diachronically), or from one generation to the next (synchronically) so that such transfer is permanent".[21]

---

[14] Quote after A. Kłoskowska, *supra* n. 3, p. 22.

[15] More precisely, B. Wróblewski uses the notion of "lawyers' culture". This is most likely related to the origin of the term "legal culture".

[16] Quote after O. Kucharski, *supra* n. 2, p. 72.

[17] B. Wróblewski, *Studia z dziedziny prawa i etyki*, Kasa im. Mianowskiego, Warszawa 1934, p. 423; Quote after O. Kucharski, *supra* n. 2, p. 72.

[18] O. Kucharski, *supra* n. 2, p. 72.

[19] M. Borucka-Arctowa, *supra* n. 7, p. 6.

[20] O. Kucharski, *supra* n. 2, p. 74.

[21] M. Borucka-Arctowa, *supra* n. 7, p. 15; O. Kucharski, *supra* n. 2, pp. 74–75.

Krzysztof Pałecki offers a most general approach to call "legal culture a set of socially performed symbolic actions performing the patterns of symbolic behaviour incorporated in law".[22] Additionally, the author (which should be specifically stressed) performed a systematic arrangement of the notions of "legal culture" that are used. He identified: (1) understanding of legal culture as a metric of compliance with law (with a certain variety of the notion as a popularity metric of legalistic attitude in a society), (2) understanding of legal culture as a metric of the extent of internalisation of legal standards, (3) understanding of legal culture as a metric of knowledge about law, (4) understanding of legal culture as a metric of the level of legal awareness, (5) understanding of legal culture as a metric of the historic continuity of law.[23] Krzysztof Pałecki indicates that the notion of "legal culture" is further used to characterise the activities of people who professionally practise law, which is material for the discussion at hand. When the notion of "legal culture" is used with reference to activities of people who professionally practise law, minimum two ways of understanding the notion can be identified: "a) legal culture as a measure of lawfulness – legal culture is referred to in that sense when law-enforcement agencies in their activities strictly follow legal regulations and avoid manipulating the regulations that would be contradictory to the assumptions underlying the legal regulations; b) legal culture as a measure of effective functioning of law enforcement agencies – legal culture in that sense is referred to when the process of law application is fast and when it generates legally desirable effects".[24]

It is also worth adding that the above-named author also identifies the notion of "lawyers' culture". In his opinion, legal culture is referred to in relation to the entire society, that is legal and symbolic activities pursued by the entire society (this concerns legal symbolic activities pursued in various specific situations by various society members). In this context, the knowledge about legal culture among those members of the society who professionally practice law is of special importance. That group of people is called lawyers by Krzysztof Pałecki, understood as all people who professionally practise law. In that connection, he terms lawyers' culture as "overall legal symbolic activities pursued by lawyers in their professional activities over certain time".[25]

Such lawyers' culture, in his opinion, is an "integral part of social legal culture and its identification is solely a methodological trick to facilitate the performance of corresponding research".[26]

Essentially, a conclusion can be drawn that there is no thematic difference between legal culture and lawyers' culture, the difference is rather with respect to coverage. According to Stanisław Tochowicz, in case of legal culture "we usually face overall legal symbolic activities pursued by the entire population that is subject to certain legal regulations, while [in lawyers' culture – addition by M.K.] we face

---

22 K. Pałecki, *O użyteczności pojęcia kultura prawna*, Państwo i Prawo No. 2, 1974, p. 70.
23 *Ibid.*, p. 72.
24 *Ibid.*, p. 73.
25 *Ibid.*, pp. 73–74.
26 *Ibid.*, p. 74.

such laws, symbolic activities that are performed by lawyers. However, such lawyers have been understood very broadly".[27]

Additionally, the notion of "legal culture" is also used to characterise the activities of people professionally practising law.

Stanisław Russocki and Stanisław Grodziski also proposed a historic and legal approach to legal culture.

As stated by Anna Rosner, Stanisław Russocki was trying to identify "if and to what extent (…) political and systemic distinctiveness [is – addition by M.K.] reflected in legal relations and standards".[28] That is why, Stanisław Russocki verified and exemplified his theoretical discussion of legal culture with legal institutions and their social perception in Mazowsze that he considered a specific region which "in its system has a number of elements characteristic for the time of feudal fragmentation".[29] Russocki's interest in the history of law and social history underlay his definition of legal culture understood as a "set of intermingled attitudes and behaviour types – both individual and collective – and the results thereof versus law being duties, rules, imposed standards, provided with adequate sanctions and systematically enforced by an authority appropriate for the society and resulting from the system of values shared by the community; the said set of attitudes, behaviour and results thereof, shared, absorbed and transferred to others in the form of patterns, also in an objective and symbolic way, serves to transfer human communities into a separate society, aware of the status."[30]

The definition of "legal culture" proposed by Stanisław Grodziski is the most popular one. In his opinion, legal culture can be defined as: "socially manifested individual and collective attitudes vis-a-vis law, both understood as a structure enforcing justice, its institutions and specific legal standards delimiting the borders of freedom and prohibition zones".[31] Scientists focusing on that type of moral reflection in law agree that legal culture incorporates the notion of professional ethics.[32] An obvious conclusion is that such vision of legal culture and lawyers' ethics understood as professional ethics of lawyers are complementary. The relationship consist, inter alia, in the fact that as a result of applying the moral principles of lawyers' responsibility for law and thus for legal culture, and due to "taking an attitude to pursue the principle, it is possible to apply self-limitation of lawyers dominating in the culture and that they obtain social confidence which is a form to obtain legitimacy of their activities or simply substituting the legitimacy".[33]

Roman Tokarczyk's concept of legal culture is classified as a comparative and legal approach to the issue since legal culture is interpreted in the context of

---

[27] S. Tochowicz, *Kultura prawna oraz kultura prawnicza jako elementy działań nauczyciela*, Studia Pedagogiczne No. 13, 1985, p. 186.

[28] A. Rosner, *Profesor Stanisław Russocki (1930–2002)*, Rocznik Mazowiecki No. 15, 2003, p. 164.

[29] *Ibid*.

[30] S. Russocki, *Wokół pojęcia kultury prawnej*, Przegląd Humanistyczny No. 11/12, 1986, p. 16.

[31] S. Grodziski, *Z dziejów staropolskiej kultury prawnej*, Universitas, Kraków 2004, p. 10.

[32] A. Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2010, pp. 64–72.

[33] P. Skuczyński, *Status etyki prawniczej*, LexisNexis, Warszawa 2010, p. 262 et seq.

various relations with religion–morality–law and the relations are treated as the basic criterion to identify legal cultures of the world.[34] Therefore, legal culture by "incorporating law to the world of culture being everything that has been created by human beings contrary to what has been created by nature must lead to using major achievements of philosophy of culture and culture sciences to describe and assess macro units of law".[35]

Włodzimierz Gromski developed his own philosophical and legal concept of legal culture on the basis of Jezry Kmita's achievements. Gromski is of the opinion that one of the functions of legal culture is to ensure autonomy of law which determines axiological limits of law instrumentation acts and affects certain conditions of its effectiveness.[36]

In the author's opinion, the notion of legal culture can be used in a sense to clarify the limits and effectiveness of the instrumental nature of law. However, that should be done prudently in view of the fact that legal culture "acquires a specific ideological character". The dynamics of European legal culture is determined by the needs of a post-industrial society that does not manifest uniform normative and directive beliefs. The convictions make up a specific legal culture. Legal culture becomes conservative. It is believed that a feature of extreme autonomic nature of law is to reject standards resulting in the specific legal culture, which is then treated as positivist and oppressive by nature.[37]

Włodzimierz Gromski assumed that the "instrumental nature of law 'by nature' determined by the use thereof implies its analysis from the viewpoint of theories of acts of speech, intentions and will of law users. As a result, a problem arises how in acts of speech the commonly existing categories of notions are manifested as well as ways of understanding common to all law 'users'. Consideration should be given to what element is the bridge between law and use thereof. It turned out that the bridge is made up of the European legal culture treated in a prescriptive manner."[38]

The legal culture of a society may be analysed from an external and internal viewpoint. The external viewpoint refers to the occurrence of observed regularities governing the [society's] behaviour types which are a manifestation of the rules of a specific legal culture. And the internal viewpoint relies on volitional and cognitive elements supporting the identification of the rules of a specific legal culture. Thus, it is a reflexive and critical approach from the viewpoint of the rules characteristic for a specific legal culture. Manifestations of a specific legal culture may also be perceived without any reflection as an expression of certain behaviour, statuses or events independent of human will and cognition. Such behaviour may generate from customs and habits. For that reason, the notion of legal culture happens to be

---

[34] R. Tokarczyk, *Zmiany tradycji i postępu w prawie*, Teka Komisji Prawniczej Vol. I, PAN, Warszawa 2008, p. 193.

[35] *Ibid*.

[36] M. Smolak, *Jak prawo łączy się ze światem. Uwagi na marginesie książki W. Gromskiego, Autonomia i instrumentalny charakter prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny Year LXIII, No. 3, Poznań 2001, p. 191.

[37] *Ibid*., p. 194.

[38] *Ibid*., pp. 195–196.

perceived as conservative since "law, its development and application are treated as a local practice followed by small communities, and thus it contradicts the existence of legal culture as a set of ideas, values and beliefs, or directives of conduct of a political community."[39]

Paweł Skuczyński is of the opinion that if reflectiveness and assumption of moral responsibility are features of institutions of the contemporary world and the culture which is developed must ensure the reflectiveness, then this means that ethics should rely on critical thoughts on one's own professional activity in relation to the entire legal culture. Therefore, according to the above author, "Such ethics has to apply to a view of the activities and legal culture as if from the outside, 'as if' since the entity in the discussed situation may not get rid of its socialisation. Such a quasi-external view is possible due to procedures typical of professional ethics, such as the distance of roles".[40] As a result, individuals are able to understand the roles they perform in a society, including professional roles and "realise which elements of their identity result from actions within the specified institutions. (...) Thus one can say that (...) ethics of distance is a solution since it is the distance that supports the implementation of the principle of moral responsibility."[41] This requires that individuals critically approach their own professional roles and discourses related to those roles, specific objectives and values that are central for them. "Such discourses may result in developing a vision to improve an institution, which is a regulatory idea including an element of reflectiveness of the institution. The ethics of responsibility is ethics of distance since distance to one's own activities supports responsible activities."[42]

2. PROFESSIONAL ETHICS OF JUDGES

Ethics of judges is part of a broader subject of lawyers' ethics. As concerns ethics of professional judges, an adaptation is made of more general ethical standards of lawyers' ethics to more detailed situations related to that profession. The task is to identify the way of exercising the profession of a judge that may be characterised as ethically correct. The role of ethics of judges is also to confront a morally correct method to pursue the profession with behaviour that can be termed as incorrectly ethical or immoral. Judges' ethics relies on an idea to prevent judges' behaving in a morally reprehensible manner or unethically. There is a conviction in the society that a higher prestige may be identified with respect to judges than in relation to other legal professions. This is most probably linked to an opinion that the profession of a judge is the top level of legal professions and the function is the ultimate

---

[39] *Ibid*., p. 196.

[40] P. Skuczyński, *Jakiej etyki potrzebuje sprofesjonalizowana kultura prawna?*, [in:] *Perspektywy juryscentryzmu*, Wrocław 2011. This paper was presented under the title *Jakiej etyki potrzebuje juryscentryzm?* during the conference *Perspektywy juryscentryzmu*, organised by the Department of Theory and Philosophy of Law of the University of Wrocław, p. 101.

[41] *Ibid*.

[42] *Ibid*.

accomplishment for legal professionals.[43] Judges – who perform different functions from other lawyers – "are bound by moral standards adequate for the function. They are in contact with the principles of lawyers' ethics in many ways: sometimes those standards are fully or partly identical to legal standards or etiquette standards, while sometimes they are not related."[44]

Thus, a statement can be made that judges' professional ethics provides how judges should act and how professional knowledge is to be combined with the values of moral good, while rejecting moral evil. The essence of judges' professional ethics is set forth by the social role attributable to judges with social expectations of judges being specific since they refer to their moral self-responsibility, and when this fails, moral and legal responsibility. In order to minimise situations whereby judges' moral self-responsibility is put at risk, codes have been developed to enforce moral attitudes compliant with judges' professional ethics. That happened at the beginning of the 20th century when legal regulations were developed that related to judges' ethics in the form of sets of moral standards.[45]

3. JUDGES' ETHICS VERSUS LEGAL CULTURE

The issue of judges' ethics, their approach to their profession and legal culture, closely related to the mission pursued by judges, are of particular importance also nowadays: until recently, a dispute has been carried out on the regulations applicable to the Constitutional Tribunal. Various environments developed various arguments that were often contradictory to one another. Two completely diverse standpoints may be presented that referred to judges' conscience: one of the candidate to the position of a Constitutional Tribunal judge who has been elected, Professor Zbigniew Jędrzejewski, and the other of the First President of the Constitutional Tribunal at that time, Professor Małgorzata Gersdorf. Responding to a number of questions about his opinion on the dispute, Zbigniew Jędrzejewski answered: "If I replied, you would announce that I am a PiS candidate and that I would rule one way or another; why do you wish to prove that I am a bad PiS member?"[46] A moment later he added that he would rule in compliance with his conscience, weighing pro and counter arguments.[47] According to Professor Jerzy Zajadło, Professor Zbigniew Jędrzejewski took a step backwards referring solely to unspecified deepest parts of his conscience and did not provide a straightforward response.[48] Professor Małgorzata Gersdorf, in a letter to the General Assembly of Judges of the Constitutional Tribunal, wrote as follows: "I would like to ask all Polish judges to display courage. Today they do not only act as 'the mouth of the legislator' but – I will say that with no pathos and

---

[43] R. Tokarczyk, *Etyka prawnicza*, LexisNexis, Warszawa 2011, pp. 115, 118.
[44] *Ibid*., p. 115.
[45] *Ibid*., p. 119.
[46] Quote after J. Zajadło, *Różne sumienia sędziego*, Gazeta Wyborcza of 26 April 2016, No. 97. 8704, p. 7.
[47] *Ibid*.
[48] *Ibid*.

exaggeration – they are depositories of the values of Polish democracy and holders of public power. (…) Thus, courts should file legal queries when they see poor law (…). It is worth reminding the thoughts of St Thomas Aquinas who admitted that laws may exist that 'are not binding in soul' and in fact they constitute lawlessness. There is nothing more important than standing on the right side: on the side of one's own rightful soul."[49] Definitely, the standpoint of Professor Małgorzata Gersdorf is no evasion of the question asked. That was an appeal with a clear message in which stress was put on the paramount principle referring to judges' conscience. The question is about the principle that legal regulations that in an obvious way are against natural law and inherent dignity of each human being, that are incompliant with judges' conscience and common sense, become lawless and no judge should apply them under any circumstances.

As noted by Professor Jerzy Zajadło: "judges' conscience is not about being faithful to one's own individual views but being faithful to the values underlying a democratic state of law."[50]

4. PRINCIPLES OF PROFESSIONAL ETHICS OF JUDGES

Despite the fact that the issues of judges' ethics and the role of legal culture affecting the ethics continue to be valid, for many years there were no written regulations in Poland concerning professional ethics of judges. The issue itself has an abundant tradition in our country. For quite some time, postulates were raised to compile basic principles of judges' ethics, ideas were put forward as to their characteristics and even certain proposals of such regulations were presented. Among the first attempts to identify the major canons of judges' ethics and to make them a binding standard was the speech of a member of the Polish Parliament in the 17th or 18th century. The author (whose name remains unknown) in 17 canons incorporated recommendations that he further developed in his detailed observations. He often referred to Latin maxims and observations of lawyers of various generations.[51]

Postulates to compile the rules of judges' professional ethics in the form of codified regulations were also raised in the period between the two world wars. In 1938 an observation was made that "young lawyers are faced with so many issues and duties at the same time that it is extremely purposeful to provide them with something like a 'Code of Ethics' to be binding in the judiciary".[52] Despite the postulates, both a draft of *Code of Conduct of Polish Judiciary* and of *Code of Ethics in Judiciary* did not become legally binding.[53] In the literature of that time attention was also paid to the rank of the judges' profession which should be treated with specific

---

[49] *Ibid*.

[50] Quote after J. Zajadło, *ibid*.

[51] J.R. Kubiak, *Wokół idei kodeksu etyki zawodowej sędziów*, Palestra No. 39/3–4(447–448), 1995, pp. 77–97, at p. 78.

[52] E. Merle, *Z dezyderatów sądowych. O etykę zawodową*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym No. 12, 1938, pp. 962–963.

[53] R. Tokarczyk, *supra* n. 43, p. 127.

seriousness and respect. For those reasons, judges accepted that also out of court judges should maintain specific elements of attire manifesting their profession and raising due respect also in private situations. Supporting their standpoint, judges gave examples of officials of other state functions who had uniforms. Another issue that may be found strange for today's readers was the issue of insufficient railway ticket discounts for members of the judicial circles.[54]

It is worth noting that in the period between the two world wars material values were identified to be followed by judges when passing judgments. The aspect of judges' independence is of special importance and may be subject to no exceptions. It is impossible to be independent in certain aspects, while dependent in certain other. There is a view in contemporary literature that judges' independence should apply not only to each specific judgment passed by judges but also their entire professional work, or even the entire life. Judges' independence may not be treated as a right of judges since this is one of their duties that may not be treated as a privilege.[55]

In the second half of the 20th century note was taken that judges and public prosecutors, as representatives of professions of public trust, do not have a code of professional ethics.[56] During a public debate, a view emerged that it was necessary to codify professional ethics of all professions, not only judges; e.g. Roman Łyczywek stated as follows: "I can see no distinction between professions into those that will develop their systems of professional ethics and those that will not. That will be done by all professions once they consolidate their social functions."[57] A different standpoint on the codification of ethics of individual professions was presented by Władysław Biegański. He stated as follows: "the idea of codifying ethical standards and making them mandatory, the idea of implementing legal procedures related to ethics will not support the achievement of the intended purpose: to raise the level of professional ethics."[58]

Nowadays, self-regulations, autonomous approaches to judges' ethics are opposed to regulatory heteronymous developments. Standards developed by the "IUSTITIA" Polish Judges Association may be treated as a self-regulation. The regulations concerning lawyers' ethics come from outside the judiciary and are specified, inter alia, in the Act of 27 July 2001: Law on the common court system.[59]

The "IUSTITIA" Polish Judges Association compiled their regulations concerning judges' ethics as *Principles of Conduct by Judges*. The publication includes an extensive preamble followed by three parts: general rules of conduct by judges, principles of performing the service, rules of conduct by judges outside the service. As the preamble specifies, the objective of the publication was to "set criteria to assess conduct of judges and standards of their ethical conduct".[60] On the basis of the

---

[54] A. Stankiewicz, *Sądownicze troski*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym No. 12, 1938, pp. 964–965.

[55] A. Bobkowski, *Niezawisłość sędziowska a chwila obecna*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym No. 10, 1938, pp. 752–753.

[56] K. Kąkol, *Przy redakcyjnym stole. O etyce zawodowej*, Prawo i Życie No. 1(253), 1966, p. 3.

[57] R. Łyczywek, *Kilka problemów etyki zawodowej*, Prawo i Życie No. 3(255), 1966, p. 4.

[58] *Ibid*.

[59] Dz.U. 2001, No. 98, item 1070.

[60] R. Tokarczyk, *supra* n. 43, p. 127.

Principles of Conduct by Judges, key features were identified to characterise each judge. Among them, those especially important are: impartiality combined with knowledge, integrity, dignity, disinterestedness and equal treatment of the parties.[61]

In 2003 the National Council for the Judiciary as the legally competent body modified the code developed by "IUSTITIA" and changed its name to the *Principles of Professional Ethics of Judges*.[62] The document was approved pursuant to an explicit statutory authority of Resolution No. 16/2003 of the National Council for the Judiciary of 19 February 2003 approving the principles of professional ethics of judges. In view of the nature of the regulation, it is not, and it may not be an act enumerating the principles of professional ethics of judges. The standards in the document are only an attempt to make precise and identify as well as to supplement the principles of professional deontology as set forth in the Act of 27 July 2001: Law on the common court system.[63] The regulations in the principles are not autonomous, and thus they may not be competitive to statutory standards.[64] The newly published *Principles of Professional Ethics of Judges* show that special focus should be given to such values as: taking of immediate action, maintenance of independence and impartiality, clear substantiation of judgments, cultural conduct at court proceedings.[65] With respect to the attitude of judges to law, § 16 of the principles was found to be of special importance, in accordance with which: "By no conduct, may judges make even appearance that they do not respect the legal order".[66] This means that judges should respect the legal order compliant with the current legislation.[67] Despite the fact that the *Principles of Professional Ethics of Judges* were expanded, the document no longer is a closed catalogue as judges in view of their moral self-responsibility should avoid any behaviour that might discredit their dignity, even if not specified in the *Principles of Professional Ethics of Judges*.[68]

For that **reason**, the development of the Polish code of judges' professional conduct was equally needed by judges and the entire society. The code informs citizens what should be expected of judges and of their conduct. The code of judges' professional ethics serves not only judges but also people from outside this group, thus, everybody can refer actual conduct of judges to the codified standards.[69]

---

[61] *Ibid*.

[62] *Ibid*.

[63] Dz.U. 2016, item 2062, as amended.

[64] G. Ławnikowicz, *Etyka sędziego w czasie przełomu ustrojowego*, [in:] A. Machnikowska (ed.), *Legitymizacja władzy sądowniczej*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2016, p. 89.

[65] R. Tokarczyk, *supra* n. 43, p. 127.

[66] Annex to the Resolution No. 16/2003 of the National Council for the Judiciary of 19 February 2003: *Principles of Professional Ethics of Judges* [*Zbiór Zasad Etyki Zawodowej Sędziów*], p. 5.

[67] *Zasady etyki zawodowej, etyka zawodowa sędziów*, [in:] G. Borkowski (ed.), *Etyka zawodów prawniczych w praktyce. Wzajemne relacje i oczekiwania*, Oficyna Wydawnicza Verba, Lublin 2012, p. 273.

[68] M. Dziurnikowska-Stefańska, *Opinie sędziów o potrzebie kodyfikacji zasad etyki zawodowej*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006, p. 195.

[69] *Ibid*., p. 199.

5. ATTRIBUTES OF JUDGES

Legal culture as overall standard patterns of conduct and values related to the standards, socially accepted, transferred from one generation to the next, is a foundation of a pre-determined profile of a judge. That is why, the legal culture of judges as law enforcement bodies is manifested primarily in the features that should characterise actions taken by judges. It is an indisputable opinion that judges should be independent and impartial in their judgments. They should maintain such stance not only when in office but also in life. As a result, their impartiality and neutrality will not raise any doubts. Judges may not be people who are vulnerable to any pressure and their actions may not manifest any sense of threat or fear. This is of special importance as judges vulnerable to impact by other people could be easily manipulated and their judgments could be deprived of impartiality. Nowadays, it is the media that pose a major hazard to judges as they often try to affect the activity of independent judges.[70] Judges have to be integral so that in their judgments they could be rid of personal preferences, subjective likings, emotions and convictions.[71] Activities of judges should further be characterised with courage that is combined with major responsibility for their judgments. Judges must be able to cope with various consequences and distress on the part of the society that may occur when certain judgments are perceived as unjust, although they are legally justified and appropriate.[72] There is also a view that fortitude should be an attribute of judges, in its daily meaning somewhat similar to courage. It is one of cardinal virtues that include prudence, justice and moderation. Judges should be courageous since this is the only way to remain independent in their judgments. This means that judges should be characterised primarily by overall independence and independence of thinking. This is of primary importance as we live in the times when everyone – not only judges – is subject to attempts to be persuaded or even forced to follow the only one, proper way of thinking. Although many people finally accept the imposed beliefs and give in to pressure, judges are obliged to be able to withstand and not to give in to such influence. It is also worth noting the existence of "unjust law". A great German thinker and lawyer, Gustav Radbruch, termed such law as "statutory lawlessness". Those are situations when applicable laws are contrary to basic human rights and the fundamental sense of justice. Therefore, a "courageous" judge may not hesitate and apply a solution – exceptional if not extreme – or simply refuse to apply a standard that is contrary to the basic system of values.[73]

Prudence is considered to be the most important cardinal virtue and, in this context, it is perceived as a synonym of wisdom. This in a feature absolutely required of each judge, while persons devoid of it may not be accepted as those qualified to judge others. Justice is another cardinal virtue. An indispensable component of

---

[70] M. Romer, *Etyka sędziego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006, p. 34.

[71] M. Safjan, *Etyka zawodu sędziowskiego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006, pp. 47–48.

[72] M. Romer, *supra* n. 70, pp. 34–35.

[73] A. Górski, *Triada cnót sędziowskich*, Krajowa Rada Sądownictwa No. 3(8), 2010, pp. 49–50.

justice is reliance solely on facts. When ascertaining facts, thoroughness is required, and inquiries and assessments should be comprehensive. Law is inseparable from facts. Justice is extremely important for judges since the basic tasks of judges is to make subsumptions, which means attribution of facts to a correctly interpreted legal regulation. Sometimes, this is a very difficult task in view of extensive and complex regulations that are often amended. Such situation creates favourable circumstances to excessive formalism, literal treatment of regulations, or solely applying linguistic interpretation. That may generate dangerous consequences such as judgments passed exclusively based on superfluous meaning of regulations. For that reason, in the opinion of Antoni Górski, a just judge is one who is able to avoid such risk due to an in-depth, comprehensive and multi-faceted analysis performed not with a view to a person and his/her act referred to the applicable law but also from the applicable law to the person.[74]

The essence of the virtue of moderation is to control one's emotions. Judges must always be able to control emotions, not only during hearings but also – due to their office – also in private life outside of court. The issue is also carefully listening to all parties to the trial so that no appearances of partiality are created. The skill to courteously address the people involved in the trial is by no means negligible, which beyond any doubt manifests the treatment of them as subjects. However, moderation is most important when decisions are taken that are of fundamental importance for the case, such as: attribution of guilt and the type of guilt, the punishment, remedy of losses, amount of damages or compensation. Judges must prudently, with moderation, perform an analysis and take final decisions. Similarly, when wording the justification to judgments, moderation should play an important role and be decisive for the wording and content of the arguments incorporated in the justification.[75]

Judges should also follow maximum objectivity with reference to the cases at hand. I think that this is most difficult with reference to criminal cases since the society follows an erroneous belief that judges should adjudicate the most severe punishment available to criminals as this is the only way to achieve the objectives of punishment. In Maria Romer's opinion, this is an erroneous thinking. Judges should always pass judgments that, in their opinion, are adequate to the perpetrator's guilt and will contribute to achieve the objectives of punishment.[76]

6. PUBLIC PERCEPTION OF JUDGES

In compliance with moral responsibility of lawyers for law and thus legal culture, it is extremely important that within the culture judges obtain social trust that is a way to legitimise their activity.

However, a decreasing number of people in the society trust judges or treat them with esteem. Studies can be quoted in that respect carried out by the CBOS

---

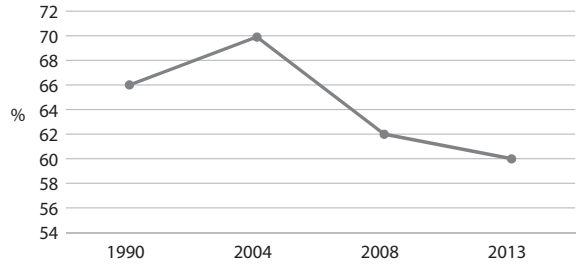
74 *Ibid*.

75 *Ibid*., p. 50.

76 M. Romer, *supra* n. 70, pp. 34–35.

Public Opinion Research Centre. The studies show that 66% of the respondents declared esteem for judges in 1999. In 2004 a slight increase was observed: 69.9% of the respondents declared esteem for judges. However, afterwards there was a major decline of social trust to the judicature. In 2008 only 62% of the respondents appreciated the rank of the judges' profession.[77] In 2013 only 60% of the society declared esteem for judges.[78]

Chart 1. Public esteem for judges



Source: the author's specification on the basis of the CBOS studies carried out in the years indicated above.

On the basis of the studies carried out in 2008 among 33 professions with prestige reviewed by the CBOS, the profession of a judge was ranked 11th. Higher prestige than that of judges is enjoyed by the following professions: university professors (84% of major esteem) or medical doctors (73%) as well as fire fighters, nurses, engineers in factories and even qualified workers (machine operators, bricklayers). Bus drivers are also ranked ahead of judges and enjoy esteem of 61% of the society.[79] The situation was even worse in 2013 when judges were ranked in the 15th position of the esteem study out of 30 reviewed professions. Fire fighters were ranked first (87%) followed closely by university professors (82%). It is worth noting that the following professions were ranked ahead of judges: individual farmers with average farms (69%) or accountants (63%).[80]

In 2016 a study was held on the honesty and professional reliability of representatives of various professions as viewed by the society. According to it, 27% of the respondents viewed judges' reliability and honesty as very low or quite low, and 41% viewed judges' reliability as medium or average. Only 3% of the respondents perceived the reliability of judges working in courts as very high.

---

[77] E. Łojko, *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, Krajowa Rada Sądownictwa No. 4(9), 2010, p. 65.

[78] On the basis of the announcement of the CBOS studies concerning the prestige of professions (BS/164/2013) published in 2013. The study was performed on 1–12 August 2013 on a representative random sample of 904 adult inhabitants of Poland, p. 3.

[79] On the basis of the announcement of the CBOS studies on the prestige of professions, published in January 2009. The survey was performed in November 2008 on a representative random sample of 1,050 inhabitants of Poland, p. 2; E. Łojko, *supra* n. 77, p. 65.

[80] On the basis of the announcement of the CBOS studies concerning the prestige of professions (BS/164/2013) published in 2013, supra n. 78, p. 3.

Generally speaking, a vast majority perceives judges quite negatively. With time, judges generally are viewed increasingly worse in terms of honesty and reliability. In 1997 the average grade of judges in the scale of 1 to 5 was 3.02, while in 2016 this was only 2.85. However, it should be noted that there has been a slight change in the trend since the assessment of judges was improved in 2006-2016 and grew from the average of 2.76 to 2.85.[81]

The studies of the Public Opinion Research Centre conducted in February 2017 on a representative random sample of 1,016 adult inhabitants of Poland[82] show that the respondents asked about their general attitude to judges, most often (45%, a drop by 6 percentage points since 2012) defined it as ambivalent. According to the CBOS, a supposition may be made that the above was largely due to the effect of limited experience in contacts with courts. Less than one-fourth (24%) of the respondents have a negative attitude to judges, while over one-fifth (22%, a growth by 3 percentage points) – positive. Although in all social and demographic groups most often the assessment is neutral, relatively worse opinions on Polish judges are voiced by people with low income per capita (31%), and people who live in cities from 100 thousand to 500 thousand inhabitants (30%). The studies by the CBOS show that personal contact with the system of justice only slightly affects the attitude to Polish judges.[83]

Table 1. Esteem for judges in the opinion of students

Study of 1997		**Study of 2008**	
Year 1	**Year 5**	**Year 1**	**Year 5**
(n=202)	(n=138)	(n=365)	(n=216)
78.7%	87%	77%	87%

Source: E. Łojko, *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, Krajowa Rada Sądownictwa No. 4(9), 2010, p. 66.

Judges are treated quite differently by young lawyers (those who have been working in the profession for four to five years, graduates of law faculties): 78.3% of them declared their highest esteem for judges. Among all legal professions, it was young law graduates who declared their highest esteem for judges.[84] Law students are of the opinion that it is judges who enjoy the highest respect from among all

[81] On the basis of the announcement of the CBOS studies concerning social assessment of professional honesty and reliability (No. 34/2016) of 2016. The survey was performed on 3–10 February 2016 on a representative random sample of 1,000 adult inhabitants of Poland, pp. 2, 6.

[82] On the basis of the announcement of the CBOS studies concerning assessment of justice (No. 31/2017). The computer-assisted (CAPI) surveys were carried out face-to-face on 2–9 February 2017, p. 1.

[83] *Ibid*., pp. 10–11.

[84] E. Łojko, *Role i zadania prawników w zmieniającym się społeczeństwie: raport z badań*, Wydawnictwo Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, Warszawa 2005, p. 137.

legal professions. The opinion was shared by a growing percentage of students in the senior year of their studies (see Table 1). Students in each year of their studies are of the opinion that the society feels increasing respect for judges.[85]

Also judges themselves are aware that their prestige has deteriorated. Such opinion was shared by as many as 67.2% of the questioned judges and every fourth of them was quite convinced of that respect (26.9%).[86]

7. CONCLUSIONS

Remaining within the sphere of discussions related to the role of legal culture in the development of standards of judges' professional ethics, it is worth reminding Robert Jessop's thought, according to whom each "idea" creates certain notional framework which is to support individuals or human communities in coping with the reality.[87] This view also applies to professional ethics of judges.

As the analysis performed above shows, law is a product of culture and one of its major components. Law understood as a set of regulations contains a number of symbolic patterns. This means that actions taken in compliance with legal patterns are symbols conveying abstract content.

However, the knowledge about legal culture is of special importance for those members of the society who professionally practice law, including judges. The social weight of legal symbolic acts performed by judges results primarily from the fact that in many instances it is only their acts that may generate certain effects, i.e. accomplish statuses conventionally attributable to such acts. Therefore, acts of judges performed when applying law are usually important since those are acts that reflect their legal culture, which is of primary importance to the development of standards of judges' professional ethics.

In accordance with the concepts of legal culture presented above, it may be accepted as the "third" element between law and application of law. Therefore, legal culture performs a social and regulating role. As a result, legal actions can be taken in order to implement certain values (e.g. values of the state of law) as well as actions that are not aimed at achieving certain values but at accomplishing pre-planned objectives.[88] The heart of the matter is that the legal culture of the bodies that apply law is not contradictory to the commonly accepted systems of values and that it serves the society. This is of major importance in the context of judges' independence, especially when nowadays there has been an increasing influence exerted by politics on judges' activity.

---

[85] E. Łojko, *supra* n. 77, p. 66.

[86] *Ibid*., p. 66.

[87] Quote after W.J. Wołpiuk, *Kultura prawna z perspektywy dystynkcji między cywilizacją a kulturą*, Gdańskie Studia Prawnicze Vol. XXXI, 2014, p. 179.

[88] M. Smolak, *supra* n. 36, p. 197.

BIBLIOGRAPHY

Announcement of the CBOS study concerning the prestige of professions, January 2009.

Announcement of the CBOS studies concerning the prestige of professions (BS/164/2013), 2013.

Bobkowski A., *Niezawisłość sędziowska a chwila obecna*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym, No. 10, (ed.) K. Fleszyński, Warszawa 1938.

Borkowski G. (ed.), *Etyka zawodów prawniczych w praktyce. Wzajemne relacje i oczekiwania*, Oficyna Wydawnicza Verba, Lublin 2012.

Borucka-Arctowa M., *Kultura prawna na tle myśli filozoficznej i społecznej o kulturze*, Studia Prawnicze No. 1(151) 2002, (ed.) A. Bierć, Wydawnictwo Naukowe Scholar, Warszawa 2002.

Dziurnikowska-Stefańska M., *Opinie sędziów o potrzebie kodyfikacji zasad etyki zawodowej*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka, nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006.

Goodman N., *Wstęp do socjologii*, (transl.) J. Polak, J. Ruszkowski, U. Zielińska, Wydawnictwo Zysk i S-ka, Poznań 1997.

Górski A., *Triada cnót sędziowskich*, Krajowa Rada Sądownictwa No. 3(8), Wolters Kluwer, Warszawa 2010.

Grodziski S., *Z dziejów staropolskiej kultury prawnej*, Universitas, Kraków 2004.

Kąkol K., *Przy redakcyjnym stole. O etyce zawodowej*, Prawo i Życie No. 1(253), (ed.) K. Kąkol, Wyd. Zrzeszenia Prawników Polskich, Warszawa 1966.

Kłoskowska A., *Kultura. Zagadnienia istoty kultury. Kultura a natura*, [in:] *Encyklopedia Socjologii*, Vol. 2, letters K-N, (ed.) W. Kwaśniewicz, Oficyna Naukowa, Warszawa 1999.

Kłoskowska A., *Socjologia kultury*, Wydawnictwo Naukowe PWN, Warszawa 2007.

Kozak A., *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2010.

Kubiak J.R., *Wokół idei kodeksu etyki zawodowej sędziów*, Palestra No. 39/3–4(447–448), 1995.

Kucharski O., *Koncepcje kultury prawnej w naukach prawnych*, Disputationes Ethicae. Etyka a prawo – Etyka działania, (ed.) T. Grabińska, Educator No. 3, Częstochowa 2007.

Linton R., *Kulturowe podstawy osobowości*, PWN, Warszawa 1975.

Ławnikowicz G., *Etyka sędziego w czasie przełomu ustrojowego*, [in:] A. Machnikowska (ed.), *Legitymizacja władzy sądowniczej*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2016.

Łojko E., *Role i zadania prawników w zmieniającym się społeczeństwie: raport z badań*, Wydawnictwo Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, Warszawa 2005.

Łojko E., *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, Krajowa Rada Sądownictwa No. 4(9), Wolters Kluwer, Warszawa 2010.

Łyczywek R., *Kilka problemów etyki zawodowej*, Prawo i Życie No. 3(255), (ed.) K. Kąkol, Wyd. Zrzeszenia Prawników Polskich, Warszawa 1966.

Merle E., *Z dezyderatów sądowych. O etykę zawodową*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym, No. 12, (ed.) K. Fleszyński, Warszawa 1938.

Pałecki K., *O pojęciu kultury prawnej*, Studia Socjologiczne No. 2, (ed.) W. Markiewicz, Zakład Narodowy im. Ossolińskich, Warszawa 1972.

Pałecki K., *O użyteczności pojęcia kultura prawna*, Państwo i Prawo No. 2, 1974.

Romer M., *Etyka sędziego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006.

Rosner A., *Profesor Stanisław Russocki (1930–2002)*, Rocznik Mazowiecki No. 15, 2003.

Russocki S., *Wokół pojęcia kultury prawnej*, Przegląd Humanistyczny No. 11/12, Wydawnictwo Uniwersytetu Warszawskiego, 1986.
Safjan M., *Etyka zawodu sędziowskiego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2006.
Skuczyński P., *Status etyki prawniczej*, LexisNexis, Warszawa 2010.
Skuczyński P., *Jakiej etyki potrzebuje sprofesjonalizowana kultura prawna?*, [in:] *Perspektywy jury-scentryzmu*, Wrocław 2011.
Smolak M., *Jak prawo łączy się ze światem. Uwagi na marginesie książki W. Gromskiego, Autonomia i instrumentalny charakter prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny Year LXIII, No. 3, Poznań 2001.
Stankiewicz A., *Sądownicze troski*, Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym, No. 12, (ed.) K. Fleszyński, Warszawa 1938.
Szacki J., *Kultura*, [in:] *Wielka Encyklopedia PWN*, Vol. 15, (ed.) J. Wojnowski, Wydawnictwo Naukowe PWN, Warszawa 2003.
Tochowicz S., *Kultura prawna oraz kultura prawnicza jako elementy działań nauczyciela*, Studia Pedagogiczne No. 13, 1985.
Tokarczyk R., *Zmiany tradycji i postępu w prawie*, Teka Komisji Prawniczej Vol. I, PAN, Warszawa 2008.
Tokarczyk R., *Etyka prawnicza*, LexisNexis, Warszawa 2011.
Wołpiuk W.J., *Kultura prawna z perspektywy dystynkcji między cywilizacją a kulturą*, Gdańskie Studia Prawnicze Vol. XXXI, 2014.
Wróblewski B., *Studja z dziedziny prawa i etyki*, Kasa im. Mianowskiego, Warszawa 1934.
Zajadło J., *Różne sumienia sędziego*, Gazeta Wyborcza of 26 April 2016, No. 97. 8704.
Załącznik do uchwały Nr 16/2003 Krajowej Rady Sądownictwa z dnia 19 lutego 2003 r. *Zbiór Zasad Etyki Zawodowej Sędziów* [Annex to the Resolution No. 16/2003 of the National Council for the Judiciary of 19 February 2003: *Principles of Professional Ethics of Judges*].

ROLE OF LEGAL CULTURE IN DEVELOPING STANDARDS OF JUDGES' PROFESSIONAL ETHICS

Summary

The aim of the article was to define the role of the legal culture in development of the standards of judges' professional ethics, to indicate the most representative definitions of culture and legal culture, and to specify the most important characteristics of judges required both in their work and in private life. The discussion covers also the issue of the legitimacy and significance of elaborating the most important principles of the judges' professional ethics in the form of a code both in the past and present. The article presents the problem of the prestige of the judicial profession as viewed by the general public, lawyers, students and judges themselves. The analyses of documents, literature, as well as the historical and statistical techniques were exploited in the article. As a result of the conducted analyses, it was recognized that legal culture is the "third" element between law and its use, by which it also fulfils a social-regulatory role. The legal culture of authorities that apply law should not be in contradiction with the general system of values and ought to serve the society. This is particularly important in the context of judicial independence, because nowadays more and more influence of politicians and various lobbies on the activity of the judges is observable. As

a consequence, it leads to the instrumental use of the legal acts and makes the position of the judge not impeccable in terms of ethics. In turn, this state of affairs brings about a significant decline of public esteem for judges.

Keywords: culture, legal culture, ethics, judge

ROLA KULTURY PRAWNEJ W KSZTAŁTOWANIU STANDARDÓW ETYKI ZAWODOWEJ SĘDZIEGO

Streszczenie

Celem artykułu było określenie roli kultury prawnej w kształtowaniu standardów etyki zawodowej sędziego, wskazanie najbardziej reprezentatywnych definicji kultury i kultury prawnej, a także wyszczególnienie najistotniejszych cech sędziego, wymaganych zarówno w jego pracy zawodowej, jak i w życiu prywatnym. Przedmiotem refleksji była też kwestia zasadności i istotności opracowania najważniejszych zasad etyki zawodowej sędziego i ich ujęcie w ramy kodeksu w kontekście historycznym. W artykule poruszono również zagadnienie prestiżu zawodu sędziego w opinii ogółu społeczeństwa, prawników, studentów i samych sędziów. Posłużono się metodą analizy dokumentów, analizy literatury, wykorzystano także metodę historyczną, jak i techniki statystyczne. W wyniku przeprowadzonych analiz uznano, że kultura prawna jest „trzecim" elementem między prawem i jego użyciem, przez co pełni też niejako rolę społeczno-regulującą. Należy dążyć do tego, aby kultura prawna organów, które stosują prawo, nie pozostawała w sprzeczności z ogólnie przyjętymi systemami wartości i służyła społeczeństwu. Jest to szczególnie istotne w kontekście niezawisłości sędziowskiej, ponieważ współcześnie uwidacznia się coraz większy wpływ polityków i różnorakich lobby na działalność sędziowską. W konsekwencji prowadzi to do instrumentalnego stosowania aktów prawnych i powoduje, że pozycja sędziego nie jest nieskazitelna pod względem etycznym. Ten stan rzeczy wpływa z kolei na znaczący spadek poważania dla zawodu sędziego w opinii społeczeństwa.

Słowa kluczowe: kultura, kultura prawna, etyka, sędzia

EL PAPEL DE CULTURA JURÍDICA EN LA FORMACIÓN DE ESTÁNDARES DE ÉTICA PROFESIONAL DE JUEZ

Resumen

La finalidad del artículo consiste en determinar el papel de cultura jurídica en la formación de estándares de ética profesional del juez, indicar las definiciones más representativas de la cultura y de la cultura jurídica, así como enumerar las características más importantes de un juez requeridas tanto en su trabajo como en su vida privada. La obra trata también de la cuestión de justificación e importancia de elaborar los principios más importantes de la ética profesional de juez en forma de un código. Se habla del prestigio de la profesión de juez en la sociedad, entre los juristas, estudiantes y los jueces en sí. Se ha utilizado el método de análisis documental, análisis de literatura, se ha utilizado también el método histórico y técnicas de estadística. Como resultado de dichos análisis se hace constar que la cultura jurídica es el "tercer" elemento entre el derecho y su aplicación, por lo que desempeña de cierta

forma el papel social y regulador. Hay que aspirar a que la cultura jurídica de los órganos que aplican el derecho no sea contraria al sistema general de valores y que sirva a la sociedad. Esto es muy importante en relación con la independencia de los jueces, porque actualmente se observa cada vez mayor influencia de políticos y de diferentes lobby a la actividad judicial. En consecuencia, esto conlleva a que la posición del juez no es impecable desde el punto de vista ético. Tal estado de las cosas influye a caída importante del respeto de la profesión del juez en la opinión de la sociedad.

Palabras claves: cultura, cultura jurídica, ética, juez

РОЛЬ ПРАВОВОЙ КУЛЬТУРЫ В ФОРМИРОВАНИИ НОРМ ПРОФЕССИОНАЛЬНОЙ ЭТИКИ СУДЬИ

Резюме

Статья написана с целью определить роль правовой культуры в формировании норм профессиональной этики судьи, указать наиболее представительные определения культуры вообще и правовой культуры в частности, а также перечислить наиболее существенные черты характера судьи, требуемые как в его профессиональной деятельности, так и личной жизни. Автор также размышляет в историческом контексте о проблеме обоснованности и важности формулирования основных принципов профессиональной этики судьи в рамках соответствующего кодекса. В статье также затронут вопрос престижа профессии судьи в глазах широкой общественности, юристов, студентов и самих судей. При работе использован метод анализа документов и специальной литературы, а также исторический подход и статистические методы. Проведенный анализ позволяет утверждать, что правовая культура является «третьим» элементом между правом и его применением, что в каком-то смысле придает ей роль общественного регулятора. Следует стремиться к тому, чтобы правовая культура правоприменительных органов не шла вразрез с общепринятой системой ценностей и служила интересам общества. Это особенно важно в контексте независимости судебной власти, поскольку в настоящее время становится все более очевидным влияние политиков и различных лобби на деятельность судебных органов. Как следствие, законодательные акты могут применяться инструментально, а положение судьи перестает быть безупречным с этической точки зрения. В свою очередь, такое состояние дел приводит к значительному ухудшению репутации профессии судьи в глазах общественности.

Ключевые слова: культура, правовая культура, этика, судья

DIE ROLLE DER RECHTSKULTUR BEI DER FESTLEGUNG BERUFSETHISCHER STANDARDS FÜR RICHTER

Zusammenfassung

Ziel des Artikels ist es, die Rolle, die der Rechtskultur bei der Gestaltung der Standards der Berufsethik für Richter zukommt, zu bestimmen, die gängigsten Begriffsbestimmungen der Kultur und Rechtskultur aufzuzeigen und die wichtigsten, sowohl in seiner beruflichen Tätigkeit als auch in seinem Privatleben geforderten Eigenschaften eines Richters aufzulisten. Behandelt wird außerdem die Frage der Legitimität und Bedeutung der Ausarbeitung der wichtigsten Grundsätze der Berufsethik für Richter und deren Einbeziehung in den Verhal-

tenskodex in einem historischen Kontext. In dem Artikel wird auch die Frage des Ansehens des Rechtsberufs in der Gesamtbevölkerung, bei Anwälten, Studenten und Richtern selbst aufgegriffen. Genutzt wurden die Methode der Dokumentenanalyse und der Literaturanalyse und außerdem hat der Verfasser auf den historischen Ansatz zurückgegriffen und statistische Techniken eingesetzt. Im Ergebnis der durchgeführten Analysen wurde deutlich gemacht, dass die Rechtskultur als „drittes" Element zwischen Gesetz und seiner Anwendung anzusehen ist und ihr folglich auch eine soziale und regulatorische Rolle zukommt. Es ist darauf hinzuarbeiten, dass die Rechtskultur der Organe und Stellen, von denen die Gesetze angewendet werden, nicht mit den anerkannten Wertesystemen in Konflikt steht und der Gesellschaft dient. Dies ist insbesondere im Zusammenhang mit der Unabhängigkeit der Justiz von Bedeutung, da der zunehmende Einfluss von Politikern und verschiedenen Interessengruppen auf die Justiz immer deutlicher sichtbar ist. Das führt in der Konsequenz zu einer instrumentalen Anwendung von Rechtsakten und führt dazu, dass die Position des Richters in ethischer Hinsicht nicht mehr makellos und unangreifbar ist. Dadurch wiederum nimmt das Ansehen des Richterberufs in den Augen der Gesellschaft erheblichen Schaden.

Schlüsselwörter: Kultur, Rechtskultur, Ethik, Richter

LE RÔLE DE LA CULTURE JURIDIQUE DANS L'ÉLABORATION DES NORMES D'ÉTHIQUE PROFESSIONNELLE DES JUGES

Résumé

Le but de l'article était de déterminer le rôle de la culture juridique dans l'élaboration des normes d'éthique professionnelle judiciaire, d'indiquer les définitions les plus représentatives de la culture et de la culture juridique, ainsi que de répertorier les caractéristiques les plus importantes d'un juge requises dans son activité professionnelle et dans sa vie privée. Le sujet de la réflexion a également été la question de la légitimité et de l'importance de développer les principes les plus importants de l'éthique professionnelle du juge et de les inclure dans le cadre du code dans un contexte historique. L'article aborde également la question du prestige de la profession de juge dans l'opinion publique, des avocats, des étudiants et des juges eux-mêmes. La méthode d'analyse des documents et de la littérature, ainsi que la méthode historique et les techniques statistiques ont été utilisées. À la suite des analyses effectuées, il a été reconnu que la culture juridique constituait le «troisième» élément entre la loi et son utilisation, remplissant ainsi également un rôle social et réglementaire. Il est important de veiller à ce que la culture juridique des organes qui appliquent la loi n'entre pas en conflit avec les systèmes de valeurs acceptés et serve la société. Ceci est particulièrement important dans le contexte de l'indépendance des juges, car l'influence croissante des hommes politiques et des divers groupes de pression sur l'activité judiciaire devient de plus en plus évidente. Par conséquent, cela conduit à une application instrumentale d'actes juridiques et signifie que la position du juge n'est pas éthiquement irréprochable. À son tour, cet état de fait réduit considérablement le respect de la profession de juge de la part de l'opinion publique.

Mots-clés: culture, culture juridique, éthique, juge

IL RUOLO DELLA CULTURA GIURIDICA NELLA FORMAZIONE DEGLI STANDARD DI ETICA PROFESSIONALE DEL GIUDICE

Sintesi

Obiettivo dell'articolo è definire il ruolo della cultura giuridica nella formazione degli standard di etica professionale del giudice, indicare la definizione maggiormente rappresentativa di cultura e cultura giuridica, nonché specificare le caratteristiche più essenziali del giudice, richieste sia nel suo lavoro che nella sua vita privata. Oggetto della riflessione è anche la questione della fondatezza e importanza dell'elaborazione dei più importanti principi di etica professionale del giudice e il loro inserimento nell'ambito del codice, nel contesto storico. Nell'articolo è stata toccata anche la questione del prestigio della professione di giudice nell'opinione generale della società, dei giuristi, degli studenti e degli stessi giudici. Si è utilizzato il metodo di analisi dei documenti, della letteratura, si è fatto uso anche del metodo storico e delle tecniche statistiche. Dai risultati è emerso che la cultura giuridica è un "terzo" elemento, tra il diritto e la sua applicazione, e in questo svolge in qualche modo un ruolo di regolatore sociale. Bisogna aspirare al fatto che la cultura giuridica delle autorità che applicano la legge non sia in contraddizione con il sistemi di valore generalmente accettati e che sia al servizio della società. Questo è particolarmente importante nel contesto dell'indipendenza dei giudici, perché oggigiorno si presenta un influsso sempre maggiore dei politici e di svariate lobby sull'attività dei giudici. In conseguenza questo porta a una applicazione strumentale degli atti giuridici e rende la posizione del giudice sempre meno immacolata sotto l'aspetto etico. Questo stato di fatto determina a sua volta un calo del rispetto della professione di giudice nell'opinione della società.

Parole chiave: cultura, cultura giuridica, etica, giudice

Cytuj jako:

Kryński M., Role of legal culture in developing standards of judges' professional ethics *[Rola kultury prawnej w kształtowaniu standardów etyki zawodowej sędziego]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 162–183. DOI: 10.26399/iusnovum.v13.4.2019.48/m.krynski

Cite as:

Kryński, M. (2019) 'Role of legal culture in developing standards of judges' professional ethics'. *Ius Novum* (Vol. 13) 4, 162–183. DOI: 10.26399/iusnovum.v13.4.2019.48/m.krynski

Ius Novum
4/2019

PERSONAL DATA PROCESSING CONTRACT

PIOTR BRZEZIŃSKI*

DOI: 10.26399/iusnovum.v13.4.2019.49/p.brzezinski

The article aims to discuss some elements of a personal data processing contract as part of the contract for the provision of services in accordance with Article 28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[1] and contractual clauses the application of which raises doubts in practice. The article in particular examines the criteria for determining whether in given factual circumstances it is necessary to enter into a contract for the provision of service in the form of a personal data processing contract.

1. PERSONAL DATA PROCESSING IN THE LIGHT OF DIRECTIVE 95/46

On 25 May 2018, GDPR replaced Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,[2] which regulated the rules for the processing of personal data by a processor in a less complex way than GDPR does now. Directive 95/46/EC emphasised the importance of regulating the obligation concerning confidentiality of the processing[3] and

* PhD, Assistant Professor at the Business Law Department of Lazarski University in Warsaw; e-mail: piotr_brzezinski1@wp.pl; ORCID: 0000-0002-6830-0857

1 OJ L 119, 4.05.2016, pp. 1–88; hereinafter referred to as GDPR.

2 OJ L 281, 23.11.1995, pp. 31–50; hereinafter referred to as Directive 95/46.

3 The provision of Article 16 Directive 95/46 stipulated: "Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law."

security of the processing[4] in the data processing contract. Under the rule of Directive 95/46/EC, a personal data processing contract was subject to the provisions of Article 31 Act on the protection of personal data of 29 August 1997.[5] Arwid Mednis expressed an opinion, and it was a right one, that in the light of Article 31 Act of 1997, a data controller's and processor's liability was regulated in a different way: a controller was liable based on the provisions laid down in statute and a processor was liable based on the contract entered into with the data controller.[6] Mark Webber drew attention to the fact that the obligation to ensure the compliance of personal data processing with the EU law was imposed on data controllers and processors processing data on behalf of controllers and was not directly subject to the provisions of Directive 95/46.[7] The EU legislator decided that, in the light of GDPR, processors shall be directly obliged to meet given requirements concerning personal data that were applicable to data controllers under the rule of Directive 95/46.[8] Below, I present the elements that a data processing contract should contain in the light of GDPR and the consequences of omitting any of the elements laid down in Article 28 para. 3 GDPR.

---

[4] The provision of Article 17 Directive 95/46 stipulated:

"1. Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.
Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.
2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.
3. The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:
– the processor shall act only on instructions from the controller,
– the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor.
4. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form."

[5] Dz.U. 1997, No. 133, item 883, consolidated text Dz.U. 2016, item 922; hereinafter referred to as Act of 1997. For changes in the data processing contracts in the light of GDPR, see e.g. R. Corbet, A. Cox, *Data Protection Clauses in Contracts – Adapting to GDPR*, Privacy & Data Protection 16(6), 2016, pp. 9–10.

[6] A. Mednis, *Komentarz do art. 31 ustawy o ochronie danych osobowych*, [in:] A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, LEX 1999.

[7] M. Webber, *The GDPR's Impact on the Cloud Service Provider as a Processor*, Privacy & Data Protection 16(4), 2016, p. 11.

[8] J. Byrski, *Umowne powierzenie do przetwarzania danych osobowych w ustawie o ochronie danych osobowych, dyrektywie 95/46 i w ogólnym rozporządzeniu o ochronie danych*, [in:] G. Sibiga (ed.), *Ogólne rozporządzenie o ochronie danych. Aktualne problemy ochrony danych osobowych 2016*, Biblioteka Monitora Prawniczego 2016, p. 35.

2. ELEMENTS OF A PERSONAL DATA PROCESSING CONTRACT IN THE LIGHT OF GDPR

A data processing contract should specify the parties to that contract, i.e. a controller[9] and a processor[10]. The terms "controller"[11] and "processor"[12] were explained by the Working Party of the Protection of Individuals with Regard to the Processing of Personal Data set up in accordance with Article 29 in its opinion 1/2010 concerning the terms "data controller" and "processor". To tell the truth, the opinion was based on Directive 95/46 but the concepts do not considerably differ from the terms controller and processor adopted in GDPR. Following the guidelines provided in the opinion, one should acknowledge that in order to establish whether a given entity is a data controller[13] or a processor, it is necessary to first of all verify which entity decides for what purposes and in what way personal data are processed.[14] It is necessary to emphasise here that it is not an agreed will of the parties to the contract but the findings of the analysis of factual circumstances of the processing that decide whether a given entity is a controller. Gerard Karp is right to emphasise that the provisions of law as well as the clauses of particular contracts may constitute very important factors in determining whether a given entity has a status of a controller.[15] As practice shows, it is not always easy to determine whether, within a given contract, i.e. between the two entities, there is a relationship between two controllers[16] or it is necessary to enter into a data processing contract. One must share the opinion of Karol Cieniak, who indicates that the most important for distinguishing between the role of a controller and a processor is to establish who decides

---

[9] The provision of Article 4(7) GDPR: "'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law."

[10] The provision of Article 4 para. 8 GDPR: "'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller."

[11] The provision of Article 2(d) Directive 95/46: "'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law."

[12] The provision of Article 2(e) Directive 95/46: "'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller."

[13] I do not discuss situations in which the provisions of law stipulate that a given entity shall be a controller.

[14] Grupa Robocza ds. Ochrony Danych powołana na mocy art. 29, *Opinia 1/2010 w sprawie pojęć „administrator danych" i „przetwarzający"* (WP 169), 16.02.2010, pp. 14–15; see https://giodo.gov.pl/pl/1520057/3595.

[15] G. Karp, *Administrator danych osobowych – podmiot decydujący o celach i środkach przetwarzania danych*, Palestra No. 1–2, 2011, p. 62.

[16] It is not possible to exclude a situation in which the same entity can be a controller of some data and a processor of some other. Personal data can also be processed by a few controllers that are referred to as co-controllers. However, the issue of the processing of personal data by co-controllers goes beyond the subject-matter of this article.

about the purposes of data processing. However, it is necessary to differentiate the purpose of the processing from the interest of the processing.[17] The author rightly indicates that it is not important who the beneficiary of the processing is but where the decision-making centre determining the purpose of the processing is.[18] Still, one should emphasise that it is sometimes extremely difficult to decide whether under a certain contract there is one decision-making centre or two (i.e. whether every entity has their own purpose of the processing), which would mean that there are two controllers.

A personal data processing contract can be entered into as a result of concluding a main contract between the entities or as an independent one. Many data processing agreements are entered into beside a main contract, although data processing is not carried out on behalf of the controller. For example, it is justified to ask the question whether there is a relationship between a controller and a processor in case of a seller and an acquirer of a company stake. In M&A transactions, a seller usually provides an acquirer with information about the company concerned, including the personal data of employees and clients. The parties enter into an agreement on confidentiality in which they agree, inter alia, what type of personal data and in what way will be made available to the acquirer for the purpose of the company evaluation (called due diligence). As Roisín Cregan and Sekou Taylor rightly notice, it is not possible to limit the acquirer's purpose of the processing to that determined by the seller. An acquirer processes indicated data for the need of determining the price of the acquisition and the conditions of the transaction.[19] The authors rightly draw attention to the fact that in such a situation, an acquirer is a data controller.[20] In Chrystian Poszwiński's opinion, Article 6 para. 1(f) GDPR constitutes grounds for data processing by an acquirer in an M&A transaction.[21] According to this author, data processing by an acquirer in accordance with Article 6 para. 1(f) GDPR may mean that the entity is granted the status of a controller.[22]

There is also a question whether personal data processing is entrusted to another entity in a situation when one bank (a subsidiary) uses the information system implemented by another bank (a parent company) that makes it possible to verify clients' data in connection with the fulfilment of the obligations resulting from the Act on the prevention of money laundering and terrorist financing in spite of the fact that the former bank makes its clients' data available to the parent company based on the outsourcing contract entered into under Article 6a para. 1(2) Act: Banking Law. In my opinion, the wording of Article 6a para. 1(2) Act: Banking Law is not a decisive factor in determining the status of banks. The legislator made the following reservation in it: "A bank may, based on a contract entered into in

---

[17] K. Cieniak, *Powierzanie przetwarzania danych osobowych*, Monitor Prawniczy No. 9, 2019, p. 507.

[18] *Ibid*.

[19] R. Cregan and S. Taylor, *How Much Control Makes a Controller?* Privacy & Data Protection 18(6), 2018, p. 11.

[20] *Ibid*.

[21] Ch. Poszwiński, *Risk based approach w ochronie danych osobowych a ryzyka w transakcjach*, Przegląd Prawa Handlowego No. 4, 2019, p. 27.

[22] *Ibid*.

writing, *entrust* an entrepreneur or a foreign entrepreneur, with the reservation of Article 6d, with the task of performing (...) activities actually connected with banking operations." [emphasis added]. Although, in Article 6a para. 1(2) Act: Banking Law, the legislator used the word "entrust", it does not mean that there is a controller-processor relationship between a bank and an entrepreneur commissioned to perform activities actually connected with banking operations. It seems that an entrepreneur will always have the status of a processor if a bank entrusts them with the task to perform activities in accordance with Article 6a para. 1(1) Act: Banking Law, where the legislator stipulated that such an entity acts "on behalf of and in favour of the bank", which excludes its recognition as a controller (co-controller) that always acts on their own behalf and in favour of themselves.

Article 28 para. 1 GDPR stipulates that a processor should only be an entity having sufficient organisational and technical measures that guarantee that processing will meet the requirements of GDPR and the rights of data subjects.[23] In practice, entrepreneurs choose a processor in accordance with their internal procedure, which most often envisages carrying out a survey with a potential processor. The survey contains a series of questions concerning the processing analysed, e.g. questions concerning guarantees that persons authorised by the processor to process personal data have committed themselves to confidentiality.

GDPR stipulates what elements should be included in a data processing agreement. In accordance with Article 28 para. 3 GDPR, a data processing contract should set out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. It is not clear how the term "subject-matter of the processing" should be interpreted. Jan Byrski assumes that the subject-matter of the processing of personal data should mean the description of particular operations on the data and the indication whether they are independent or subsidiary to the main contract or the territorial scope of data processing.[24] In

---

[23] Recital 81 GDPR stipulates: "To ensure compliance with the requirements of this Regulation in respect of the processing to be carried out by the processor on behalf of the controller, when entrusting a processor with processing activities, the controller should use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organisational measures which will meet the requirements of this Regulation, including for the security of processing. The adherence of the processor to an approved code of conduct or an approved certification mechanism may be used as an element to demonstrate compliance with the obligations of the controller. The carrying-out of processing by a processor should be governed by a contract or other legal act under Union or Member State law, binding the processor to the controller, setting out the subject-matter and duration of the processing, the nature and purposes of the processing, the type of personal data and categories of data subjects, taking into account the specific tasks and responsibilities of the processor in the context of the processing to be carried out and the risk to the rights and freedoms of the data subject. The controller and processor may choose to use an individual contract or standard contractual clauses which are adopted either directly by the Commission or by a supervisory authority in accordance with the consistency mechanism and then adopted by the Commission. After the completion of the processing on behalf of the controller, the processor should, at the choice of the controller, return or delete the personal data, unless there is a requirement to store the personal data under Union or Member State law to which the processor is subject."

[24] J. Byrski, *supra* n. 8, pp. 39–40.

order to indicate that a data processing contract meets the requirement of setting out the subject-matter of the processing, it is sufficient to indicate the types of processing activities, e.g. as it was determined in the Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council. In practice, parties to a data processing contract do not often describe what particular activities a processor will carry out and limit themselves to indicate that the processor will process them following the rules laid down in the contract and in accordance with GDPR. In my opinion, the indication set out in a subsidiary data processing contract that the processing of personal data will be performed only for the purpose of implementing the main contract indirectly indicates operations that the processor will perform on the data and it meets the requirement of defining "the subject-matter of the processing" referred to in Article 28 para. 1 GDPR.

A personal data processing contract is usually entered into for the duration of the main contract provided that it is subsidiary in nature. If it is an independent contract, the duration of data processing depends on the parties' agreement. The specification of the purpose for which the data is to be processed is extremely important because if the processor processes the data beyond the scope of the purpose determined in the contract with the controller, it may turn out that the data are processed by the processor acting as another controller and not on behalf the one who is the party to the data processing contract signed.

A data processing contract should also specify the type of personal data, e.g. a natural person's given name, surname and e-mail address. It is not sufficient to specify in a contract that a processor (a person who is a party to a contract for the provision of services to another entity in the form of office administration) shall process personal data of the controller's employees. It must be indicated what type of data will be transferred to the processor for the processing. It is necessary to specify in the contract what category of persons will be data subjects, e.g. the controller's employees or clients.

The EU legislator clearly indicated that a data processing contract should specify the rights and obligations of the controller and provided an example catalogue of the processor's obligations (Article 28 para. 3(a) to (h) GDPR).

A question is raised whether a controller and a processor may make a reservation limiting their compensatory liability for failure to perform or inappropriate performance of the processor's duties laid down in Article 28 para. 3 GDPR. Emmanuel Salami believes that Article 82 GDPR may be interpreted in two ways.[25] On the one hand, the author indicates that the provision of Article 82 GDPR may mean that the limitation of the processor's contractual liability to the controller would be in conflict with the principle of the controller's/processor's liability for the "entire damage" caused by them in the course of data processing.[26] On

[25] E. Salami, *Examining the Legality of Limitation of Liability Clauses under the GDPR*, Computer and Telecommunications Law Review No. 24(8), 2018, pp. 177–178.

[26] *Ibid.*, p. 177.

the other hand, the author argues that the provision of Article 82 GDPR concerns only the principles of the controller's/processor's compensatory liability to the data subject[27] and, as a result, the introduction of the limitation of compensatory liability for failure to perform or inappropriate performance of a data processing contract to that contract is in conformity with GDPR. John O'Brien indicates that many processors try to introduce the liability limitation clause to a contract to cap the level to 12-month remuneration.[28] Rob Corbet argues that after GDPR entered into force, a processor should be more careful and never accept the unlimited liability for non-compliance with the provisions for the protection of data.[29] In my opinion, there are no obstacles to introduce a liability limitation clause in a data processing contract and establish the maximum level of a processor's compensatory liability to a controller for the infringement of the provisions of GDPR. In practice, contracts also contain clauses that envisage a controller's right to recourse in case the controller pays compensation to the data subject whose personal data were subject to processing as a result of a pecuniary penalty imposed on the controller by a supervisory authority.

It is worth drawing attention to the fact that there are clauses appearing in data processing contracts which lay down an obligation to pay a processor remuneration for the performance of data processing activities specified in the contract. For example, the following clause can be found in contracts: "The Processor's remuneration for the performance of the activities specified herein is covered by the monthly salary laid down in § 6 of the contract entered into by the Controller and the Processor in Warsaw on (...)". In Emmanuel Salami's opinion, a processor cannot demand that a controller pay the remuneration for the fulfilment of obligations resulting from the provisions of law that are absolutely binding.[30] Katarzyna Witkowska-Nowakowska indicates that the parties to a personal data processing contract may come to an agreement on remuneration for the processing of personal data. Undoubtedly, GDPR stipulates whether a data processing contract can prescribe remuneration. It seems that there are no obstacles in the way the parties establish remuneration for a processor for the preparation of infrastructure necessary for fulfilling the processor's obligations resulting from GDPR. It also seems that a data processing contract can contain a clause determining remuneration just for the processing in accordance with GDPR, in spite of the fact that a processor is obliged to fulfil obligations specified in Article 28 para. 3 GDPR, regardless of whether remuneration is paid or not. The determination of remuneration for a processor remains outside the scope of the EU law interest and can be regulated in a data processing contract based on the principle of the freedom of contracts (Article 353^1 Civil Code).

The provision of Article 28 para. 3 GDPR requires that a controller and a processor enter into a data processing contract provided that the processing is not subject to another legal measure. Thus, a question arises whether the processing carried out

---

[27] *Ibid*., pp. 178–179.

[28] J. O'Brien, *GDPR Series: Outsourcing Contracts – all Changed, Changed Utterly?*, Privacy & Data Protection 18(4), 2018, p. 4.

[29] R. Corbet, A. Cox, *supra* n. 5, p. 10.

[30] E. Salami, *supra* n. 25, p. 179.

on no legal grounds (i.e. not based on a contract or another legal instrument) is a legal activity that is void (i.e. does not take effect). This opinion is expressed in literature.[31] Another question can also be asked. What are the legal consequences of omitting any of the elements specified in Article 28 para. 3 GDPR in a data processing contract? It seems that the lack of a contract alone or any of the elements specified in Article 28 para. 3 GDPR does not make this agreement entirely or partially null and void (i.e. ineffective). I agree with Maciej Gutowski's opinion that admits the recognition of a given activity as ineffective in the light of Article 58 Civil Code because it is in conflict with the EU law, i.e. GDPR.[32] Nevertheless, GDPR stipulates sanctions for the infringement of Article 28 GDPR in an exhaustive way.[33] It seems that the lack of any of the elements indicated in the above-mentioned Article 28 para. 3 GDPR does not make a data processing contract invalid. Article 83 para. 4(a) GDPR stipulates a sanction for the infringement of the provisions constituting a controller's and a processor's obligations specified in Article 28 para. 3 GDPR. In my opinion, the sanctions laid down in Article 83 para. 4(a) GDPR constitute a complex regulation and it is groundless to look for legal consequences for the infringement of Article 28 para. 3 GDPR in the provisions of member states' national law. It seems that reference to national sanctions (i.e. Article 58 Civil Code) in case of the infringement of the requirements laid down in Article 28 para. 3 GDPR by the parties to a data processing contract is in conflict with the principle of the member states' procedural autonomy, which may cover the issues of substantive law.

3. CONCLUSIONS

Unlike in Directive 95/46, in GDPR the EU legislator introduced more detailed formal requirements that a data processing contract should meet. However, as practice shows, the application of the provisions of GDPR still raises a number of controversies and, as it is indicated in this article, the establishment whether there is a controller-processor relationship between the parties in a given factual state and whether, as a result, they should enter into a data processing contract (provided that another legal instrument does not constitute grounds for the processing) is not an easy task. Moreover, a series of clauses can be found in data processing contracts that raise controversies in the doctrine, e.g. a processor can be paid remuneration for data processing specified in a data processing contract. It is also unclear what consequences can result from the omission of any of the elements specified in Article 28 para. 3 GDPR in a data processing contract, and whether such a contract is null and void if it is concluded with the infringement of Article 28 para. 9 GDPR.[34] In order

---

[31] K. Witkowska-Nowakowska, [in:] E. Bielak-Jomaa, Dominik Lubasz (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2018, p. 635.

[32] M. Gutowski, *Sprzeczność z prawem Unii Europejskiej jako przesłanka nieważności czynności prawnej na podstawie art. 58 k.c.*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 1, 2006, p. 120.

[33] Compare Article 83 GDPR.

[34] The provision of Article 28 para. 9 GDPR stipulates: "The contract or the other legal act referred to in paragraphs 3 and 4 shall be in writing, including in electronic form."

to resolve the above-mentioned problems, it is necessary to refer to the principles of the EU law (e.g. the principle of procedural autonomy)[35] and the limitations within which the EU legislator regulated the rules for the processing of personal data. With regard to the consequences of the infringement of GDPR in the area concerning the maintenance of a specified written form of a data processing contract (the oral form is excluded) as well as formal requirements specified in Article 28 para. 3 GDPR, the EU regulation is complete. There is no need to refer to the provisions of national law in order to identify sanctions applicable in case of the infringement of GDPR in the area discussed above. In my opinion, there are also no obstacles to introduce additional clauses to a data processing contract (e.g. concerning contractual compensation in case of the infringement of the rules for data processing by a processor or the remuneration for the processing of personal data on behalf of a controller).

BIBLIOGRAPHY

Byrski J., *Umowne powierzenie do przetwarzania danych osobowych w ustawie o ochronie danych osobowych, w dyrektywie 95/46 i w ogólnym rozporządzeniu o ochronie danych*, [in:] G. Sibiga (ed.), *Ogólne rozporządzenie o ochronie danych. Aktualne problemy ochrony danych osobowych 2016*, Biblioteka Monitora Prawniczego 2016.

Cieniak K., *Powierzanie przetwarzania danych osobowych*, Monitor Prawniczy No. 9, 2019.

Corbet R., Cox A., *Data Protection Clauses in Contracts – Adapting to GDPR*, Privacy & Data Protection 16(6), 2016.

Cregan R., Taylor S., *How Much Control Makes a Controller?*, Privacy & Data Protection 18(6), 2018.

Grupa Robocza ds. Ochrony Danych powołana na mocy art. 29, *Opinia 1/2010 w sprawie pojęć „administrator danych" i „przetwarzający"* (WP 169), 16.02.2010, https://giodo.gov.pl/pl/1520057/3595.

Gutowski M., *Sprzeczność z prawem Unii Europejskiej jako przesłanka nieważności czynności prawnej na podstawie art. 58 k.c.*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 1, 2006.

Karp G., *Administrator danych osobowych – podmiot decydujący o celach i środkach przetwarzania danych*, Palestra No. 1–2, 2011.

Mednis A., *Komentarz do art. 31 ustawy o ochronie danych osobowych*, [in:] A. Mednis, *Ustawa o ochronie danych osobowych. Komentarz*, LEX 1999.

Miąsik D., *Zasady ogólne (podstawowe) prawa Unii Europejskiej*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Warszawa 2010.

O'Brien J., *GDPR Series: Outsourcing Contracts – all Changed, Changed Utterly?*, Privacy & Data Protection 18(4), 2018.

Poszwiński Ch., *Risk based approach w ochronie danych osobowych a ryzyka w transakcjach*, Przegląd Prawa Handlowego No. 4, 2019.

Salami E., *Examining the Legality of Limitation of Liability Clauses under the GDPR*, Computer and Telecommunications Law Review No. 24(8), 2018.

[35] Dawid Miąsik argues that the procedural autonomy covers both systemic issues and strictly procedural ones, and sometimes also issues related to substantive law. D. Miąsik, *Zasady ogólne (podstawowe) prawa Unii Europejskiej*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Warszawa 2010, p. 241.

Webber M., *The GDPR's Impact on the Cloud Service Provider as a Processor*, Privacy & Data Protection 16(4), 2016.
Witkowska-Nowakowska K., [in:] E. Bielak-Jomaa, Dominik Lubasz (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2018.

PERSONAL DATA PROCESSING CONTRACT

Summary

The author of the article describes selected elements of a data processing contract such as the parties to a contract and the subject-matter of processing. Moreover, he analyses contractual clauses that can be found in business practice, e.g. the remuneration for data processing clause or the limitation of a processor's liability for the infringement of contractual provisions, and evaluates them with respect to the compliance with the General Data Protection Regulation.

Keywords: personal data processing contract, personal data, processor's liability, GDPR

UMOWA O POWIERZENIU PRZETWARZANIA DANYCH OSOBOWYCH

Streszczenie

W niniejszym artykule autor opisał wybrane elementy umowy o powierzeniu przetwarzania danych osobowych, takie jakie strony umowy i przedmiot przetwarzania. Ponadto w artykule przeanalizowano spotykane w obrocie gospodarczym klauzule umowne, jak np. klauzulę odpłatności przetwarzania danych, granic odpowiedzialności podmiotu przetwarzającego za naruszenie postanowień umowy, poddając je ocenie pod kątem zgodności z ogólnym rozporządzeniem o ochronie danych osobowych.

Słowa kluczowe: umowa powierzenia przetwarzania danych osobowych, dane osobowe, odpowiedzialność podmiotu przetwarzającego, RODO

CONTRATO DE ENCARGO DE TRATAMIENTO DE DATOS PERSONALES

Resumen

En el presente artículo el autor describe elementos esenciales del contrato de encargo de tratamiento de datos, tales como las partes del contrato, el objeto de tratamiento. Además, el artículo analiza las cláusulas contractuales conocidas en el tráfico mercantil, como p.ej. cláusula de pago por el tratamiento de datos, límites de responsabilidad del sujeto que trata los datos por la infracción del contrato, valorándolas desde el punto de vista de conformidad con el reglamento de protección de datos.

Palabras claves: contrato de encargo de tratamiento de datos personales, datos personales, responsabilidad por el sujeto que trata los datos, RGPD

ДОГОВОР О ПОРУЧЕНИИ ОБРАБОТКИ ПЕРСОНАЛЬНЫХ ДАННЫХ

Резюме

В данной статье автор рассматривает отдельные элементы договора по аутсорсингу обработки персональных данных, а именно: стороны договора, объект обработки. Кроме того, в статье анализируются договорные положения, встречающиеся в хозяйственной практике, как например: пункт об плате за обработку данных, пределы ответственности обработчика за нарушение положений договора. Оценивается их соответствие Общему регламенту ЕС по защите персональных данных.

Ключевые слова: договор поручения обработки персональных данных, персональные данные, ответственность субъекта осуществляющего обработку персональных данных, Общий регламент ЕС по защите персональных данных

DER VERTRAG ÜBER DIE DATENVERARBEITUNG IM AUFTRAG

Zusammenfassung

Im vorliegenden Artikel beschreibt der Autor ausgewählte Vertragsbestandteile des Auftragsdatenverarbeitungs-Vertrages, wie beispielsweise die Parteien der Vereinbarung und den Gegenstand der Datenverarbeitung. Darüber hinaus werden in dem Beitrag im Geschäftsverkehr übliche Vertragsklauseln, wie die Klausel über die Vergütung der Datenverarbeitung, und die Grenzen der Haftung des Auftragsverarbeiters für Verstöße gegen die Vertragsbedingungen analysiert und diese einer Bewertung hinsichtlich ihrer Vereinbarkeit mit der Datenschutz--Grundverordnung unterzogen.

Schlüsselwörter: Vertrag über die Datenverarbeitung im Auftrag, Auftragsdatenverarbeitungs--Vertrag, personenbezogene Daten, Rechenschaftspflicht des Auftragsverarbeiters, DSGVO

CONTRAT DE SOUS-TRAITANCE DES DONNÉES PERSONNELLES

Résumé

Dans cet article, l'auteur décrit certains éléments du contrat de sous-traitance des données personnelles, tels que les parties au contrat, l'objet du traitement. En outre, l'article analyse les clauses contractuelles rencontrées dans les transactions commerciales, telles que la clause relative au paiement du traitement des données, des limites de la responsabilité du sous-traitant en cas de violation des dispositions contractuelles, les soumettant à une évaluation de leur conformité au règlement général sur la protection des données.

Mots-clés: contrat de sous-traitance de données à caractère personnel, données à caractère personnel, responsabilité du sous-traitant, GDPR

IL CONTRATTO DI AFFIDAMENTO DEL TRATTAMENTO DEI DATI PERSONALI

Sintesi

Nel presente articolo l'autore ha descritto elementi scelti del contratto di affidamento del trattamento dei dati personali, come le parti del contratto, l'oggetto del trattamento. Inoltre nell'articolo ha analizzato le clausole contrattuali utilizzate nei rapporti commerciali, come ad esempio la clausola di remunerazione del trattamento dei dati, dei limiti della responsabilità del responsabile del trattamento per la violazione delle norme contrattuali, valutandole sotto l'aspetto della conformità al regolamento sulla protezione dei dati personali.

Parole chiave: contratto di affidamento del trattamento dei dati personali, dati personali, responsabilità del responsabile del trattamento, GDPR

Cytuj jako:

Brzeziński P., Personal data processing contract *[Umowa o powierzeniu przetwarzania danych osobowych]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 184–195. DOI: 10.26399/iusnovum.v13.4.2019.49/p.brzezinski

Cite as:

Brzeziński, P. (2019) 'Personal data processing contract'. *Ius Novum* (Vol. 13) 4, 184–195. DOI: 10.26399/iusnovum.v13.4.2019.49/p.brzezinski

Ius Novum
4/2019

JACEK KOSONOGA*

DOI: 10.26399/iusnovum.v13.4.2019.50/kosonoga

Gloss
on the Supreme Court ruling of 24 January 2018, II KK 10/18[1]

The time of the commission of an act is one of the elements of the objective aspect of the offence. It is determined by court and may be specified as different from that in the description of the act which constitutes a charge presented in the indictment, provided that the evidence taken in the trial gives grounds for such a change. The determination itself that the event(s) covered by the indictment took place at the time different from that stated in the indictment is admissible and does not mean going beyond the limits of a prosecutor's complaint.

In the analysed ruling, the Supreme Court dealt with the issue of the time of the commission of an offence as an element of its objective aspect. In particular, it analysed the allegation that the determination of the time limits for the commission of an offence in a sentence that differs from what the prosecutor's complaint states goes beyond the limits of the indictment.

The counsel for the defence claimed the infringement of Article 14 § 1 Criminal Procedure Code (henceforth CPC) in conjunction with Article 17 § 1(9) CPC and Article 399 § 1 CPC by means of the assumption that the accused committed the alleged act in the period between February 2015 and 31 August 2015 in a situation when the indictment covered the period between June 2015 and 31 August 2015. This, in their opinion, constituted the breach of the principle of accusatorial system because of the lack of a complaint filed by the entitled prosecutor with reference to the scope of conduct of the accused in the period between February and June 2015, which was not referred to in the indictment. As it was raised in the cassation, the role of the accused in criminal proceedings is not to defend against a hypothetical charge but a charge precisely determined in a prosecutor's complaint in terms of both the description of the conduct of the accused and the time when it took place. At the same time, this misconduct results in the occurrence of absolute grounds

* PhD hab., Associate Professor at the Department of Criminal Law of Lazarski University in Warsaw; e-mail: jacek.kosonoga@lazarski.pl; ORCID: 0000-0001-7348-944X

[1] LEX No. 2439961.

for an appeal laid down in Article 439 § 1(9) CPC, especially as the accused was charged under Article 190a § 1 CC, in case of which the examination of the period when the incriminated conduct took place is important for the assessment whether the features of the prohibited act were matched.

The Supreme Court did not share the arguments and rightly stated that, in accordance with the principle of accusatorial system (Article 14 § 1 CPC), the frameworks of the jurisdictional procedure are determined by a historical event described in the indictment and not by particular elements of this description. The time of committing an act is one of the elements of the objective aspect of an offence. It must be determined by a court and may be specified in a way different from that in the description of an act in the indictment if the evidence taken in the course of a trial justifies such a change. The determination alone that an event (events) took place at a time different from that stated in the indictment is admissible and does not mean going beyond the limits of a prosecutor's complaint.

The principle of accusatorial system does not negate this statement, either. On the one hand, it states that a court cannot go beyond the limits of the indictment because the initiative to prosecute is a prosecutor's competence and only a prosecutor determines the framework of the indictment; e.g. it cannot adjudicate in the case concerning the accused that is not included in the indictment and on an act that is not the subject matter of a complaint.[2] On the other hand, the act specified in the indictment is hypothetical and the version of events presented by the prosecutor and their legal classification cannot be recognised as final. It is a trial that is to make it possible to verify that hypothesis. The legal classification proposed by a prosecutor constitutes just a legal opinion about an act in question,[3] on which a court takes its own independent stand. This is both a court's right and obligation.[4] A trial does not deal with the description of an act presented by a prosecutor in the indictment but a criminal act that actually took place and was indicated in the indictment.[5]

Thus, an indictment as a basic complaint outlines the framework of a trial, however, the description of an act the accused is charged with or the legal classification indicated in the indictment does not determine it.[6] A historical event

---

[2] See the Supreme Court ruling of 11 December 2006, II KK 304/06, OSNwSK 2006, item 2403.

[3] See S. Waltoś, *Akt oskarżenia w procesie karnym*, Warszawa 1963, p. 45 et seq.; S. Stachowiak, *Funkcje zasady skargowości w polskim procesie karnym*, Poznań 1975, p. 208.

[4] The Supreme Court judgment of 8 September 2016, III KK 294/16, OSN Prok. i Pr. 2016, No. 11, item 16.

[5] Judgment of the Court of Appeal in Łódź of 24 November 1999, II AKa 176/99, Biul. PA w Łodzi 1999, No. 9, p. 15.

[6] For more in the legal doctrine see, inter alia: P. Hofmański, S. Zabłocki, *Granice skargi oskarżycielskiej w świetle orzecznictwa*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008, pp. 133–150; P. Kardas, *O zależnościach między prawem materialnym i procesowym na przykładzie tożsamości czynu w prawie karnym*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, Warszawa 2009, pp. 718–746; P. Kardas, *Materialnoprawne i proceduralne ujęcia tożsamości czynu w prawie karnym. Komplementarne czy alternatywne modele tożsamości?* [in:] Z. Jędrzejewski, Z. Wiernikowski, S. Żółtek, M. Królikowski (eds), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warszawa 2014, pp.153–172; A. Pilch, *Kryteria tożsamości czynu*, Prokuratura i Prawo No. 12, 2010,

on which the indictment is based determines its limits. It concerns an event that constitutes the basis for the specification of an act the accused is charged with,[7] a real act, i.e. an objective event.[8]

A historical event is a concept having a broader meaning than the term "act" committed by the accused consisting in their actual action or omission. Thus, a court may come to different findings in the case and decide on a different legal classification, provided that the actual identity determined by the real framework of the event is maintained.[9] In the legal doctrine and case law, it is assumed that it also occurs when the place of an act subject to accusation, within the same historical event, may be attributed to the accused, even when the description and legal assessment are changed but it matches the same category of human conduct.[10] The requirement for remaining within the limits of the indictment is that the descriptions of the act alleged and at least partially attributed to the accused have a common area; it is necessary that there are at least some common features of the alleged act and the attributed one. The real grounds for liability on which an indictment was developed are not subject to change when at least a part of the criminal action or omission matches the criminal action or omission specified in the indictment.[11] When the issue is assessed from a different perspective, it is raised that the identity of an act is excluded if there are such significant differences in its comparable descriptions that, in accordance with the reasonable practical assessment, they cannot be actually recognised as descriptions of the same event.[12]

In adjudication practice, the change of the description of an act attributed in comparison with the description of an alleged act, also with respect to the determination of the time frame, takes place in many cases. However, it does not indicate adjudication goes beyond the framework of the indictment.[13]

---

pp. 48–70; M. Rogalski, *Tożsamość czynu w procesie karnym*, Państwo i Prawo No. 6, 2005, pp. 49–64; M. Rogalski, *Kryteria tożsamości czynu w skargowym procesie karnym*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008, pp. 307–321; M. Rogalski, *Niezmienność i niepodzielność przedmiotu procesu a tożsamość czynu*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marina Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, pp. 999–1011; M. Rusinek, *Kilka uwag o „tożsamości czynu"*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 557–563; S. Zabłocki, *Granice skargi oskarżycielskiej przy przestępstwach zbiorowych*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 551–556.

[7] The Supreme Court judgment of 9 June 2005, V KK 446/04, Biul. PK 2005, No. 3, item 1.2.2.

[8] Judgment of the Court of Appeal in Katowice of 30 September 2008, II AKa 231/08, Biul. SA w Katowicach 2008, No. 4; the Supreme Court ruling of 5 June 2007, II KK 91/07, KZS 2007, No. 10, item 38.

[9] The Supreme Court ruling of 19 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50.

[10] Ruling of the Court of Appeal in Katowice of 29 October 2008, II AKz 777/08, OSN Prok. i Pr. 2009, No. 7–8, item 43; the Supreme Court ruling of 19 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50; the Supreme court judgment of 7 April 2009, II KK 329/07, OSNwSK 2009, item 880.

[11] S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1948, p. 447, cited by W. Waltoś, *Zarys systemu*, 7th edn, Warszawa 2003, p. 25.

[12] The Supreme Court judgment of 2 March 2011, III KK 366/10, OSNKW 2011, No. 6, item 51.

[13] See the Supreme Court judgment of 30 October 2012, II KK 9/12, LEX No. 1226693.

Thus, the modification of the description of the alleged act with respect to time, place, mode and circumstances of its commission as well as consequences, in particular the size of damage or the identity of the aggrieved by an offence against property, does not go beyond the limits of an indictment, provided that it concerns the same real event the prosecution of which constitutes the expression of a prosecutor's will.[14] There are also other factual findings in the course of a trial that are different from those described in the indictment, which do not constitute the departure from the indictment, e.g. circumstances that have impact on the stricter legal classification;[15] the value of the object of an offence;[16] the size of damage;[17] the intention;[18] the intentional mode of operation of individual perpetrators;[19] the date,[20] including the seven-day shift in its establishment;[21] the period of the commission of an offence,[22] including the introduction of a new element to a continuous act that has impact on the determination of its commission[23] and consequences[24] as well as: adding of particular features to the description of an act[25] or the description

---

[14] The Supreme Court judgment of 4 January 2006, IV KK 376/05, OSNwSK 2006, item 35; the Supreme Court judgment of 21 September 2006, V KK 10/06, LEX No. 196961; the Supreme Court judgment of 2 March 2001, III KK 366/10, OSNKW 2011, No. 6, item 51; the Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202, the Supreme Court ruling of 19 October 2006, II KK 246/06, LEX No. 202125; the Supreme Court ruling of 5 February 2002, V KKN 473/99, OSNKW 2002, No. 5–6, item 34; the Supreme Court resolution of 15 June 2007, I KZP 15/07, OSNKW 2007, No. 7–8, item 55.

[15] See the Supreme Court judgment of 17 July 1973, V KRN 264/73, OSNKW 1973/12, item 163.

[16] The Supreme Court judgment of 17 November 1972, II KR 162/72, OSNKW 1973, No. 4, item 46.

[17] The Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

[18] The Supreme Court ruling of 11 March 2010, V KK 344/09, OSN Prok. i Pr. 2010, No. 9, item 4.

[19] The Supreme Court judgment of 23 September 1994, II KRN 173/94, OSNKW 1995, No. 1–2, item 9.

[20] Judgment of the Court of Appeal in Katowice of 5 September 2001, II AKa 150/01, OSN Prok. i Pr. 2002, No. 11, item 24; judgment of the Court of Appeal in Kraków of 17 March 2015, II AKa 24/15, KZS 2015, No. 4, item 92; the Supreme Court ruling of 21 January 2009, II KK 200/08, Biul. PK 2009, No. 3, item 1.2.11.

[21] The Supreme Court ruling of 6 August 2008, V KK 248/08, Biul. PK 2008, No. 12, item 1.2.13.

[22] See the Supreme Court judgment of 11 May 1984, Rw 262/84, OSNKW 1985, No. 1–2, item 10; the Supreme Court judgment of 22 April 1986, IV KR 129/86, OSNPG 1986, No. 12, item 167; the Supreme Court judgment of 19 March 1997, IV KKN 4/97, Wokanda No. 9, 1997, p. 15; the Supreme Court ruling of 30 September 2003, III KK 194/02, unpublished; the Supreme Court judgment of 4 January 2006, IV KK 376/05, OSNwSK 2006, No. 1, item 35; the Supreme Court ruling of 21 August 2012, III KK 217/12, Biul. PK 2012, No. 9, item 7; the Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202; the Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

[23] The Supreme Court ruling of 27 September 2013, II KK 245/13, LEX No. 1391478.

[24] The Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

[25] Ruling of the Court of Appeal in Katowice of 12 October 2005, II AKz 625/05, OSN Prok. i Pr. 2006, No. 4, item 44; however, differently, in the Supreme Court ruling of 24 April 2007, IV KK 58/07, OSNwSK 2007, item 924.

of an act with the use of features properly describing a perpetrator's conduct;[26] recognising that the acts the accused is charged with constitute one offence;[27] recognising that the attributed act is a form of aiding and abetting instead of an attempt;[28] linking the causative act of a consecutive offence committed by omission to another obligation of the accused (Article 2 Criminal Code, henceforth CC) that is different from the one indicated in the alleged act;[29] a different finding by a court concerning the ownership of the object of an executive action,[30] or a perpetrator's modus operandi[31] and his/her role in the event.[32]

Offences with alternatively specified features of an executive action constitute another issue. They occur when a prosecutor formulates a charge of an offence by matching the features of one of the alternatives and a court attributes an offence by matching, apart from the features matching the description of an act provided in the indictment, also the features of the other alternative. It is rightly indicated in case law that it is not possible to make an abstract decision whether the identity of an alleged and attributed act has been maintained. The situation in which, by reference to both alternatively specified features of the executive action in the sentence, the proceeding body determines that a perpetrator embarked on two independent courses of conduct consisting in two separate historical events and infringing two separate, although laid down in the same legal provision, sanctioned norms, should be distinguished from a situation in which matching one executive action is in such an immediate connection with the other executive action mentioned in the sentence that they compose one act that is the object of a prosecutor's complaint.[33]

Attention should be also drawn to the fact that the assessment of the limits of an indictment should be done in the course of the whole proceedings, thus also taking into account appropriate procedural decisions taken at the stage of the preparatory proceedings. Thus, if a body carrying out preparatory proceedings and placing an indictment, by means of an adequate decision, clearly decides to exclude a part of conduct (to be subject to separate proceedings), this limitation of a public complaint is binding for a court.[34] Hence, in a situation in which a prosecutor, having complete knowledge about the courses of conduct of a perpetrator and then the accused, first in preparatory proceedings and then in the indictment, limits the scope of charges, it should be recognised that a court cannot go beyond the limits of this complaint.[35] Such a procedural situation may only be changed by means of another decision taken by a body authorised to combine proceedings (Article 33 CPC) or to

---

[26] The Supreme Court ruling of 7 August 2013, II KK 15/13, Biul. SN 2013, No. 8, item 1.2.1.
[27] The Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202.
[28] The Supreme Court ruling of 7 August 2013, II KK 15/13, Biul. SN 2013, No. 8, item 1.2.1.
[29] The Supreme Court ruling of 5 February 2002, V KKN 473/99, OSNKW 2002, No. 5–6, item 34.
[30] The Supreme Court ruling of 2 April 2003, V KK 281/02, OSNKW 2003, No. 5–6, item 59.
[31] The Supreme Court ruling of 30 April 2001, V KKN 111/01, LEX No. 51844.
[32] The Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202.
[33] The Supreme Court ruling of 21 March 2013, III KK 267/12, OSNKW 2013, No. 3, item 58.
[34] The Supreme Court judgment of 6 April 2017, V KK 330/16, LEX No. 2270908.
[35] The Supreme Court judgment of 14 April 2016, V KK 458/15, LEX No. 2294600.

extend the indictment (Article 398 CPC), provided that the statutory requirements are met.[36]

The modification of the description of an alleged act may result in the necessity of changing the legal classification, which in consequence, determines the obligation to inform the parties to the proceedings about that fact (Article 399 § 1 CPC). *Ratio legis* of the norm expressed in Article 399 § 1 CPC consists in the fact that a court's decisions on the legal assessment of the acts described in the indictment should not catch the parties to the proceedings by surprise, which is also the obligation resulting from the principle of procedural loyalty.[37] This is to ensure the right to defence, regardless of whether *in concreto* the information is really important for the defence.[38] The element of surprise, which as a rule also constitutes the infringement of the right to defence, is most often connected with the fact that a court adopts (within the limits of an indictment) the legal provision matching the features of another offence different from the one specified in the indictment, and with adding of still another provision that is in cumulative concurrence or conjunction with the provisions in the indictment as well as the result of recognition that the act the accused is charged with constitutes an offence that is in real concurrence.[39]

The guaranteed requirement to warn the parties of the possibility of legal subsumption different from that indicated in the indictment (Article 399 § 1 CPC) is met when a court signals such a possibility in whatever form, even if it is not directly addressed or clarified. If it were not sufficient, the parties could request a clearer statement.[40]

What is obvious, the obligation to warn the parties present at a trial prescribed in this provision is updated not only in the proceedings before the first-instance court but also, in conjunction with Article 458 CPC, in the appellate proceedings[41] and not only at the trial but, in case of the adoption of the linguistic interpretation instead of the functional one, also at other stages of the proceedings, e.g. during the seating

---

[36] The Supreme Court judgment of 6 April 2017, V KK 330/16, LEX No. 2270908.

[37] For more see, iter alia: M. Cioczek, *Zmiana kwalifikacji prawnej czynu na rozprawie (kwestie wybrane)*, Studia Iuridica Lublinensia Vol. XIV, 2010, pp. 1147–1160; E. Klimowicz-Górowska, *Zmiana kwalifikacji prawnej a niezmienność przedmiotowych granic rozpoznania sprawy*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 564–567; T. Kozioł, *O stosowaniu art. 399 k.p.k.*, Przegląd Sądowy No. 4, 2004, pp. 25–48; M. Skwarcow, *Wybrane zagadnienia zmiany kwalifikacji prawnej czynu na tle orzecznictwa Sądu Najwyższego i sądów apelacyjnych*, Przegląd Sądowy No. 4, 2005, pp. 74–97; S. Stachowiak, P. Wiliński, B. Janusz-Pohl, *Zmiana kwalifikacji prawnej w toku postępowania karnego*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji zmian*, Warszawa 2009, pp. 108–137.

[38] The Supreme Court judgment of 14 March 2008, IV KK 436/07, Studia Iuridica Lublinensia Vol. XII, 2009, pp. 281–283, with an approving gloss by M. Cioczek, Studia Iuridica Lublinensia Vol. XII, 2009, pp. 281–289; also see the ruling of the Court of Appeal in Łódź of 22 June 2006, II AKa 96/06, OSN Prok. i Pr. 2007, No. 7–8, item 51.

[39] The Supreme Court judgment of 16 March 2004, III KK 353/03, OSN Prok. i Pr. 2004, No. 10, item 11.

[40] Judgment of the Court of Appeal in Kraków of 6 December 2001, II AKa 189/01, KZS 2002, No. 2, item 41.

[41] The Supreme Court judgment of 17 July 2002, III KKN 485/99, OSN Prok. i Pr. 2003, No. 2, item 7.

scheduled pursuant to Article 339 § 3 CPC in conjunction with Article 349 CPC.[42] However, in the face of the fact that, in accordance with Article 442 § 3 CPC, the court adjudicating the case again is bound by legal opinions of the appellate court, including the opinions concerning the legal classification, the court rehearing the case does not have the obligation to warn the parties of the possibility of adopting a different legal classification from the one in the indictment (Article 399 § 1 CPC) if it adopts the legal classification that is in conformity with the appellate court's stance.[43]

It is commonly assumed that failure to warn the parties about the possibility of changing the legal classification of an act examined does not always and in every situation constitute contempt of the procedural provisions, which is essential in appellate adjudication but only in case it might influence the content of the first-instance court sentence;[44] thus it will not always constitute flagrant infringement of the provisions that might influence the content of a sentence within the meaning of Article 523 § 1 CPC.[45]

The obligation to inform pursuant to Article 399 CPC is applicable only to the situation in which there is a possibility of classifying an act in accordance with another legal provision and not in case the description of the act is changed within the same legal classification.[46] The provision of Article 399 CPC is not applicable also in a situation when, based on the circumstances that have been revealed in the course of a trial, it turns out that the accused should be charged with another act apart from the one covered in the indictment (Article 398 CPC). The obligation to inform the parties about the change of the legal classification is absolutely not applicable to another historical section of reality composing a separate act committed by the accused and not originally covered in the prosecutor's complaint. In case law, it is indicated that, as a result, the extension of changes in the description of an act by the court, which actually goes beyond the limits of the indictment, cannot be convalidated within the framework of Article 399 § 1 CPC and constitutes a flagrant infringement of the law resulting in the necessity of quashing the sentence, provided

---

[42] The Supreme Court resolution of 16 November 2000, I KZP 35/2000, OSNKW 2000, No. 11–12, item 92; R.A. Stefański (approving), *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r.*, Wojskowy Przegląd Prawniczy No. 2, 2001, p. 102.

[43] The Supreme Court judgment of 7 October 2008, II KK 62/08, OSNKW 2008, No. 12, item 102.

[44] Judgment of the Court of Appeal in Kraków of 28 September 2006, II AKa 135/06, OSN Prok. i Pr. 2007, No. 4, item 30; judgment of the Court of Appeal in Gdańsk of 9 April 2014, II AKa 14/14, OSN Prok. i Pr. 2015, No. 4, item 37.

[45] The Supreme Court ruling of 7 February 2002, V KKN 185/99, OSNKW 2002, No. 5–6, item 45; the Supreme Court ruling of 18 December 2008, II KK 157/08, OSN Prok. i Pr. 2009, No. 5, item 18.

[46] See judgment of the Court of Appeal in Lublin of 21 November 2002, II AKa 232/02, OSN Prok. i Pr. 2004, No. 2, item 26; judgment of the Court of Appeal in Lublin of 30 October 2003, II AKa 100/03, Prz. Orz. PA w Lublinie 2004, No. 26, item 43; the Supreme Court ruling of 8 August 2013, III KK 234/13, LEX No. 1375217; judgments of the Court of Appeal in Szczecin of 12 September 2013, II AKa 151/13, LEX No. 1378838, and of 5 June 2014, II AKa 85/14, LEX No. 1477320; judgment of the Court of Appeal in Łódź of 31 March 2016, II AKa 280/15, OSN Prok. i Pr. 2017, No. 4, item 26.

that at the same time the requirements prescribed in Article 398 § 1 CPC concerning the possibility of recognising another act in the same proceedings if the accused gives his/her consent are met.[47]

In the particular trial-related situation, it is indicated that if the prosecutor had charged the accused with conduct that, as it turned out, was allowed, in particular the action within the statutory justification that excludes unlawfulness of this conduct, a different course of conduct matching the features of a prohibited act is totally beyond the limits established by Article 399 § 1 CPC, i.e. the limits of the indictment. Thus, in case it is recognised that the accused acted in self-defence, i.e. committed the act under Article 162 § 1 CC against a perpetrator of an assault, it is possible to make it exempt in accordance with Article 398 CPC. If the prosecutor had formulated a charge concerning conduct which proved to be lawful, the disclosure of the circumstances confirming that the accused committed a prohibited act later opened two proceeding methods: the one prescribed in Article 398 CPC or that laid down in Article 414 § 1 CPC in conjunction with Article 17 § 1(2) CPC.[48]

In case law, going beyond the limits of the indictment, regardless of the implementation of the directive of Article 399 § 1 CPC, is recognised in case of e.g. the change of the description of an act from that equivalent to the felony of attempting to murder into the one that is adequate to an offence under Article 157 § 2 CC with the simultaneous conviction for two other acts: punishable threat (Article 190 § 1 CC) and insult (Article 216 § 1 CC). In the legal assessment of an act as an attempt to murder, it is not possible to find the objective features, not to speak about the subjective features, of the offence of a punishable threat or insult.[49]

It is also not possible to speak about the identity of acts when the offence of receiving of stolen goods (Article 291 CC) attributed instead of the alleged offence of theft (Article 279 CC) or burglary and theft (Article 279 CC) took place already some time after committing that theft and in circumstances having nothing in common with the description and actual legal basis of the act classification as theft or burglary and theft. In such a case, this is not only the different method of obtaining objects originating from a prohibited act but a completely different factual event during which the possession was taken.[50] However, the attribution of the offence of appropriation instead of the offence of fraud does not constitute going beyond the limits of the indictment when the descriptions of the two courses of conduct have a common area, i.e. are characterised by the subjective identity and the identity of the object of an assault as well as the identity of time and place of the event.[51]

In case law, the attribution of an act committed by omission to the accused and its classification under Article 162 CC in case of the original charges under

---

[47] See the Supreme Court judgment of 19 June 2001, II KKN 506/98, GS 2001, No. 12, p. 32 with a gloss by M. Skworcow (approving), Pal. 2005, No. 5–6, pp. 284–290.

[48] The Supreme Court judgment of 9 June 2005, V KK 446/04, Biul. PK 2005, No. 3, item 1.2.2.

[49] Judgment of the Court of Appeal in Lublin of 6 November 2000, II AKa 175/00, OSN Prok. i Pr. 2002, No. 1–2, item 29 and OSN Prok. i Pr. 2002, No. 6, item 26.

[50] The Supreme Court ruling of 14 July 2011, IV KK 139/11, OSNKW 2011, No. 9, item 84.

[51] The Supreme Court judgment of 5 May 2015, IV KK 412/14, OSN Prok. i Pr. 2015, No. 6, item 18.

Article 207 CC and Article 156 CC is also recognised as doubtful.[52] The attribution of the offence of robbery to the accused charged with participation in battery would also infringe the principle of immutability of the subject matter of the trial.[53]

The above analysis proves that a court adjudicating in a criminal case has considerable discretion over the development of subjective-objective description and legal assessment of the conduct of the accused during a historical event that constitutes grounds for adjudication and the subject matter of the trial. Just the change of the date of the act or its time frame does not constitute going beyond the limits of the indictment and does not infringe the principle of accusatorial system.

BIBLIOGRAPHY

Cioczek M., *Zmiana kwalifikacji prawnej czynu na rozprawie (kwestie wybrane)*, Studia Iuridica Lublinensia Vol. XIV, 2010.

Hofmański P., Zabłocki S., *Granice skargi oskarżycielskiej w świetle orzecznictwa*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Gereckia-Żołyńska A., Górecki P., Paluszkiewicz H., Wiliński P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Kardas P., *O zależnościach między prawem materialnym i procesowym na przykładzie tożsamości czynu w prawie karnym*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, Warszawa 2009.

Kardas P., *Materialnoprawne i proceduralne ujęcia tożsamości czynu w prawie karnym. Komplementarne czy alternatywne modele tożsamości?* [in:] Z. Jędrzejewski, Z. Wiernikowski, S. Żółtek, M. Królikowski (eds), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warszawa 2014.

Klimowicz-Górowska E., *Zmiana kwalifikacji prawnej a niezmienność przedmiotowych granic rozpoznania sprawy*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

Kozioł T., *O stosowaniu art. 399 k.p.k.*, Przegląd Sądowy No. 4, 2004.

Pilch A., *Kryteria tożsamości czynu*, Prokuratura i Prawo No. 12, 2010.

Rogalski M., *Tożsamość czynu w procesie karnym*, Państwo i Prawo No. 6, 2005.

Rogalski M., *Kryteria tożsamości czynu w skargowym procesie karnym*, [in:] A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Rogalski M., *Niezmienność i niepodzielność przedmiotu procesu a tożsamość czynu*, [in:] W. Cieślak, S. Steinborn (ed.), *Profesor Marina Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013.

Rusinek M., *Kilka uwag o „tożsamości czynu"*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

Skwarcow M., *Wybrane zagadnienia zmiany kwalifikacji prawnej czynu na tle orzecznictwa Sądu Najwyższego i sądów apelacyjnych*, Przegląd Sądowy No. 4, 2005.

Stachowiak S., *Funkcje zasady skargowości w polskim procesie karnym*, Poznań 1975.

---

[52] Judgment of the Court of Appeal in Katowice of 8 September 2011, II AKa 239/11, OSN Prok. i Pr. 2012, No. 3, item 32.

[53] The Supreme Court judgment of 17 December 1999, IV KKN 512/99, OSN Prok. i Pr. 2000, No. 6, item 10.

Stachowiak S., Wiliński P., Janusz-Pohl B., *Zmiana kwalifikacji prawnej w toku postępowania karnego*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji zmian*, Warszawa 2009.
Stefański R.A., *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r.*, Wojskowy Przegląd Prawniczy No. 2, 2001.
Śliwiński S., *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1948.
Waltoś S., *Akt oskarżenia w procesie karnym*, Warszawa 1963.
Zabłocki S., *Granice skargi oskarżycielskiej przy przestępstwach zbiorowych*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

GLOSS ON THE SUPREME COURT RULING OF 24 JANUARY 2018, II KK 10/18

Summary

The author of the gloss approves of the thesis expressed in the Supreme Court ruling of 24 January 2018, II KK 10/18, in accordance with which the framework of the jurisdictional proceedings are determined by a historical event described in the indictment and not by particular elements of this description. The time of an act commission is one of the elements of the subjective aspect of an offence. It is subject to determination by a court and may be specified in a different way from that in the description of an act alleged in the indictment, provided that the evidence taken at a trial justifies such a change. The sole finding that the event covered by the indictment took place at the time different from that specified in it is admissible and does not mean going beyond the limits of a prosecutor's complaint. Having analysed the Supreme Court and appellate courts' adjudication practice, the author highlights additional elements of an act description that do not lead to going beyond the limits of an indictment. The gloss also covers the issue of the obligation to inform the parties present at a trial about the possibility of changing the legal classification of an act (Article 399 CPC) and the so-called incidental proceedings in the context of the identity of the act alleged in the indictment and the one attributed in the sentence.

Keywords: limits of the indictment, identity of an act alleged in the indictment and attributed in the sentence, change in the legal classification of an act, incidental proceedings, principle of accusatorial system, immutability of the subject matter of a trial

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z 24 STYCZNIA 2018 R., II KK 10/18

Streszczenie

W glosie autor zaaprobował tezę wyrażoną w postanowieniu SN z dnia 24 stycznia 2018 r., II KK 10/18, zgodnie z którą ramy postępowania jurysdykcyjnego są określone przez zdarzenie historyczne opisane w akcie oskarżenia, a nie przez poszczególne elementy tego opisu. Czas popełnienia czynu jest jednym z elementów strony przedmiotowej przestępstwa. Podlega on ustaleniu przez sąd i może być określony inaczej niż w opisie czynu zarzuconego w akcie oskarżenia, jeśli dowody przeprowadzone na rozprawie taką zmianę uzasadniają. Samo ustale-

nie, że zdarzenia objęte oskarżeniem nastąpiły w innym czasie niż przyjęto w akcie oskarżenia, jest dopuszczalne i nie świadczy wcale o wyjściu poza granice skargi oskarżyciela. Dokonując analizy praktyki orzeczniczej Sądu Najwyższego i sądów apelacyjnych, w glosie wskazano na dodatkowe elementy opisu czynu, które nie stanowią wyjścia poza granice oskarżenia. Poruszono także problematykę obowiązku pouczenia stron obecnych na rozprawie o możliwości zmiany kwalifikacji prawnej czynu (art. 399 k.p.k.) oraz tzw. postepowania wpadkowego w kontekście tożsamości czynu zarzucanego w akcie oskarżenia i przypisanego w wyroku.

Słowa kluczowe: granice oskarżenia, tożsamość czynu zarzucanego w akcie oskarżenia i przypisanego w wyroku, zmiana kwalifikacji prawnej czynu, postępowanie wpadkowe, zasada skargowości, niezmienność przedmiotu procesu

COMENTARIO DEL AUTO DEL TRIBUNAL SUPREMO DE 24 DE ENERO DE 2018, II KK 10/18

Resumen

En el comentario el autor aprueba la tesis expresada en el auto del TS, conforme con la cual los marcos del procedimiento jurisdiccional quedan determinados por el suceso histórico descrito en el escrito de acusación y no por los elementos particulares de dicha descripción. El tiempo de la comisión del hecho constituye uno de los elementos de la parte objetiva de delito. Queda determinado por el tribunal y puede ser fijado de otra forma que en la descripción del hecho imputado en el escrito de acusación, siempre que las pruebas practicadas en la vista oral fundamenten tal modificación. La determinación que los hechos incluidos en la acusación tuvieron lugar en otro momento que descrito en el escrito de acusación es admisible y no excede los límites de la acusación. Analizando la práctica jurisprudencial del Tribunal Supremo y de tribunales de apelación en el comentario se señalan elementos adicionales de la descripción de los hechos que no exceden los límites de acusación. Se menciona también la obligación de advertir a las partes presentes en la vista sobre la posibilidad de modificación de la calificación legal del hecho (art. 399 del código de procedimiento penal) y la llamada ampliación objetiva de la acusación en cuanto a la identidad del hecho imputado en el escrito de acusación y descrito en la sentencia.

Palabras claves: límites de la acusación, identidad del hecho imputado en el escrito de acusación y descrito en la sentencia, modificación de la calificación legal de los hechos, ampliación objetiva de la acusación, principio acusatorio, invariabilidad del objeto del proceso

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЕРХОВНОГО СУДА ОТ 24 ЯНВАРЯ 2018 ГОДА, II KK 10/18

Резюме

В комментарии автор с одобрением отзывается о тезисе, содержащемся в обсуждаемом постановлении Верховного суда, согласно которому рамки юрисдикционного процесса определяются имевшим место событием, описанным в обвинительном заключении, а не отдельными элементами этого описания. Момент совершения деяния является одним из элементов объективной стороны преступления. Он подлежит установлению в суде и может быть

определен иначе, чем в описании деяния, содержащемся в обвинительном заключении, если такое изменение обосновано доказательствами, рассмотренными в суде. Само по себе установление того факта, что события, описанные в обвинительном заключении, произошли в иной момент времени, чем предполагалось обвинителем, вполне допустимо и не свидетельствует о выходе за рамки обвинения. В ходе анализа судебной практики Верховного суда и апелляционных судов в комментарии указываются дополнительные элементы описания деяния, которые не выходят за рамки обвинения. Кроме этого, в статье затронута проблематика, связанная с обязанностью разъяснению сторонам, присутствующим на заседании, возможности изменения юридической квалификации деяния (ст. 399 УПК), а также с так называемым дополнительным производством в контексте тождественности деяния, о котором говорится в обвинительном заключении, и деяния, по которому вынесен приговор.

Ключевые слова: рамки обвинения; тождественность деяния, о котором говорится в обвинительном заключении, и деяния, по которому вынесен приговор; изменение юридической квалификации деяния; дополнительное производство; принцип обвинения; неизменность предмета процесса

GLOSSE ZUR ENTSCHEIDUNG DES OBERSTEN GERICHTSHOFS DER REPUBLIK POLEN VOM 24. JANUAR 2018, II KK 10/18

Zusammenfassung

In seiner Glosse befürwortet der Autor die in der Entscheidung des Obersten Gerichtshofs der Republik Polen, der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, vom 24. Januar 2018 zum Ausdruck kommende Auffassung, wonach der Rahmen eines gerichtlichen Verfahrens von dem in der Anklage beschriebenen zurückliegenden Ereignis, nicht aber durch einzelne Elemente der Beschreibung dieser Straftat bestimmt wird. Der Zeitpunkt der Begehung der Tat ist einer der objektiven Tatbestände einer strafbaren Handlung. Er wird durch das Gericht ermittelt und kann anders als in der Beschreibung der strafbaren Straftat in der Anklageschrift angegeben werden, wenn die in der Verhandlung erhobenen Beweise eine derartige Änderung rechtfertigen. Die bloße Feststellung, dass die in der Anklage geschilderten, verfolgten Ereignisse zu einem anderen Zeitpunkt stattgefunden haben als in der Anklageschrift angegeben, ist zulässig und bedeutet keineswegs, dass über die Eingrenzung des Klagegegenstands durch den Ankläger hinausgegangen wird. Bei der Analyse der Rechtspraxis des Obersten Gerichtshofs der Republik Polen und der nationalen Berufungsgerichte wird in der Glosse auf zusätzliche Tatbestandsmerkmale zur Bezeichnung einer Straftat hingewiesen, bei denen die Grenzen des Klagegegenstands nicht überschritten werden. Behandelt wird außerdem die Problematik der Pflicht zur Unterrichtung der in der Verhandlung anwesenden Parteien über die Möglichkeit der Änderung der rechtlichen Qualifizierung der strafbaren Handlung (Artikel 399 der polnischen Strafprozessordnung) und des sogenannten Zwischenverfahrens im Kontext der Identifizierung der in der Anklageschrift vorgeworfenen und im Urteil zugerechneten Straftat.

Schlüsselwörter: Grenzen der Anklage, Eingrenzung des Klagegegenstands; Identifizierung der in der Anklageschrift vorgeworfenen und im Urteil zugerechneten strafbaren Handlung; Änderung der rechtlichen Qualifizierung einer Handlung; Zwischenverfahren; Anklagegrundsatz; Unveränderlichkeit des Prozessgegenstands

COMMENTAIRE À LA DÉCISION DE LA COUR SUPRÊME DU 24 JANVIER 2018, II KK 10/18

Résumé

Dans son commentaire, l'auteur a approuvé la thèse exprimée dans la décision de la Cour suprême du 24 janvier 2018 selon laquelle le cadre de la procédure juridictionnelle est déterminé par un événement historique décrit dans l'acte d'accusation et non par des éléments individuels de cette description. Le moment où l'acte est commis est l'un des éléments du crime en question. Il est soumis à la détermination du tribunal et peut être déterminé différemment de la description de l'infraction dans l'acte d'accusation, si les preuves administrées à l'audience justifient un tel changement. La simple détermination que les événements visés par les poursuites ont eu lieu à un moment différent de celui présumé dans l'acte d'accusation est recevable et ne signifie nullement que la plainte du procureur a été dépassée. Lors de l'analyse de la jurisprudence de la Cour suprême et des cours d'appel, l'auteur a souligné d'autres éléments de la description de l'acte, qui ne constituent pas un dépassement des limites de l'accusation. On a également soulevé la question de l'obligation d'informer les parties présentes à l'audience de la possibilité de modifier la qualification juridique d'un acte (article 399 du code de procédure pénale) et de la soit-disant procédure incidente dans le contexte de l'identité de l'acte reproché dans l'acte d'accusation et attribué dans le jugement.

Mots-clés: limites de l'accusation; l'identité de l'acte reproché dans l'acte d'accusation et attribué dans le jugement; changement de qualification juridique de l'acte; procédure incidente; principe de la procédure accusatoire; invariabilité du sujet du procès

GLOSSA ALL'ORDINANZA DELLA CORTE SUPREMA DEL 24 GENNAIO 2018, II KK 10/18

Sintesi

Nella glossa l'autore ha approvato la tesi espressa nell'ordinanza della Corte Suprema del, secondo la quale l'ambito del procedimento giudiziario è determinato dall'evento storico descritto nell'atto di accusa e non dai singoli elementi di tale descrizione. Il momento della commissione del reato è uno degli elementi sostanziali del reato. Viene determinato dal tribunale e può essere definito diversamente da quanto indicato nella descrizione del reato imputato nell'atto di accusa, se i mezzi di prova assunti all'udienza motivano tale variazione. La determinazione stessa che gli eventi inclusi nell'accusa abbiano avuto luogo in un momento diverso da quanto indicato nell'atto di accusa è ammissibile, e non costituisce affatto un superamento dei limiti del ricorso dell'accusa. Effettuando un'analisi della pratica giurisprudenziale della Corte Suprema e delle corti di appello, nella glossa sono stati indicati elementi aggiuntivi di descrizione del reato, che non costituiscono superamento dei limiti dell'atto d'accusa. È stata anche trattata la questione dell'obbligo di informazione delle parti comparse all'udienza circa la possibilità di modifica della qualificazione giuridica del reato (art. 399 del Codice di procedura penale) nonché circa il cosiddetto procedimento incidentale, nel contesto della corrispondenza tra il reato imputato nell'atto d'accusa e quello attribuito nella sentenza.

Parole chiave: limiti dell'atto d'accusa; corrispondenza tra il reato imputato nell'atto d'accusa e quello attribuito nella sentenza; modifica della qualificazione giuridica del reato; procedimento incidentale; principio accusatorio; immutabilità del petitum

Cytuj jako:

Kosonoga J., Gloss on the Supreme Court ruling of 24 January 2018, II KK 10/18 *[Glosa do postanowienia Sądu Najwyższego z 24 stycznia 2018 r., II KK 10/18]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 196–209. DOI: 10.26399/iusnovum.v13.4.2019.50/kosonoga

Cite as:

Kosonoga, J. (2019) 'Gloss on the Supreme Court ruling of 24 January 2018, II KK 10/18'. *Ius Novum* (Vol. 13) 4, 196–209. DOI: 10.26399/iusnovum.v13.4.2019.50/kosonoga

Ius Novum
4/2019

MAŁGORZATA SEKUŁA-LELENO*

DOI: 10.26399/iusnovum.v13.4.2019.51/m.sekula-leleno

Comments in relation to the resolution of the Supreme Court of 19 October 2018, III CZP 45/18[1]

Thesis: Assets acquired during matrimony with matrimonial property where funds partly come from one of the spouses' personal funds and partly from joint property, become part of the spouse's property and matrimonial property in shares being proportional to the funds destined for the acquisition from each respective property, unless the funds from the spouse's personal property or matrimonial property used to acquire the assets were investments in matrimonial or personal property, respectively.

The essence of the legal problem that arose as a result of the legal issue presented in the case by the District Court in Poznań to the Supreme Court is as follows: which property will cover an asset acquired by a matrimony as a result of a legal transaction in exchange for funds in part coming from matrimonial property and in part for funds coming from one of the spouses' personal property (spouses' personal property) that are subject to the principle of substitution.

FACTS OF THE CASE

The resolution was adopted to resolve the legal issue presented by the District Court in Poznań to determine which property will cover an asset acquired by a matrimony as a result of a legal transaction in exchange for funds in part coming from matrimonial property and in part for funds coming from one of the spouse's personal property (spouses' personal property) that is subject to the principle of substitution.

When finally the claim was set forth in detail – as a result of a suit to reconcile the content of a land and mortgage register with legal facts – the claimant requested that

* PhD, Assistant Professor at the Department of Civil Law and Civil Procedure of Lazarski University in Warsaw, assistant to the judge at the Civil Chamber of the Supreme Court; e-mail: malgorzata.sekula@lazarski.pl; ORCID: 0000-0001-5015-9018

1 BSN 2018, No. 10, p. 7.

an entry be made in section II of the land and mortgage register kept by the District Court in Szamotuły in relation to property in Rogierówek at ul. Kościuszki 22 for the title to the property in his favour and in favour of his former wife (defendant) of a half part each, in place of the existing entry of the title which showed only the defendant as the sole owner of the property. The claim was based on a statement that, although property had been acquired solely by the defendant, it was done with funds coming from matrimonial property when the parties remained married and they held joint matrimonial property, so it was the joint property of the spouses, while after their divorce it was transformed into co-ownership in equal parts.

In its judgment of 11 October 2017, the District Court in Szamotuły rectified the inconsistency between the actual legal status of the property by entering the claimant into section II of the land and mortgage register with the claimant's title to the property of 20/100 and limiting the defendant's share to 80/100.

The voted judgment was made on the basis facts in accordance with which on 5 November 2014 the defendant entered a property purchase contract stating that she acquired the property with her own funds to her personal property. The purchase of the property was partly funded from the defendant's personal property and in the remaining part from the joint matrimonial property of the parties, including a housing mortgage loan.

In the court's opinion, in that situation there was an inconsistency between the actual legal status of the property and the legal status disclosed in the land and mortgage register which has to be rectified (Article 10.1 of the Act on land and mortgage registers and on mortgage). The ownership right was disclosed solely for the defendant, while the claimant was also entitled to it since the property was acquired during the marriage, also from the joint property of the parties (the amount of PLN 200,000). The proportion of the committed funds showed that during the marriage the property in 60% constituted the defendant's personal property, while in 40% joint matrimonial property. The divorce resulted in the transformation of joint matrimonial property without identified shares into a co-ownership with shares identified as a half to each former spouse. In turn, that resulted in unequal shares of the parties in co-ownership of the disputed property: the defendant was attributed a share of 80/100, while the claimant a share of 20/100.

The court did not share the defendant's standpoint that in case of acquisition of a right of ownership with funds coming from personal property and partly from joint matrimonial property, the classification to personal property or joint property should be based on the proportion of the committed funds: if the personal property part is much higher, the asset does not become an element of the properties in fractional parts *pro rata* to the committed funds but it should constitute an element of personal property with an obligation to account to the spouse for the amount of the committed joint property.

The District Court in Poznań – reviewing the claimant's appeal against the judgment of the District Court in Szamotuły of 11 October 2017 – had material legal doubts which were expressed in the legal issue presented first above.

Justifying its position, the District Court analysed the problem of property reconciliation and stated that science and judgments present a diversity of views

as to which property assets acquired by a spouse should be classified when acquired during the validity of joint matrimonial property, with funds partly originating from the spouses' joint property and partly from the buyer's personal property. One view has it that such assets are always acquired to joint matrimonial property, irrespective of the amount of funds originating from specific properties and committed to the acquisition. Another view is as follows: the identification from which property a major part of funds for the acquisition comes from affects the decision about which property the asset will be classified to. A third view is the following: the acquired asset is purchased as co-ownership of the spouse holding personal property and to joint property simultaneously the shares in which co-ownership are determined *pro rata* to the funds originating from both properties, committed at the acquisition. Having reviewed the arguments quoted in literature and judgments by supporters of the above concept, the District Court expressed its preference to the first of them.

The Supreme Court, reviewing the legal issue presented by the District Court, in its resolution stated as follows: "Assets acquired during matrimony with matrimonial property where funds partly come from one of the spouses' personal funds and partly from joint property, become part of the spouse's property and matrimonial property in shares being proportional to the funds destined for the acquisition from each respective property, unless the funds from the spouse's personal property or matrimonial property used to acquire the assets were investments in matrimonial or personal property, respectively."

NOTE

Basically, the problem covered by the judgment consisted in answering a question on classification of assets to individual properties, which most often happens when the statutory joint matrimonial property ceases to exist.

It also happens (which is covered by this paper) that when joint matrimonial property arises, assets are acquired pursuant to legal transactions made by the spouses jointly or by one of them, simultaneously with funds coming from joint property or personal property of one spouse. The need to make a legal assessment of such situation resulted in wording of the above legal issue when during joint matrimonial property with the claimant it was only the defendant who acted as a party to the property acquisition transaction and the purchase price was covered with funds originating from her personal property and from joint property.[2]

It is worth making several introductory comments to the final view of the question.

The core principle defining the classification of assets in the system of joint matrimonial property was set forth in Article 31 § 1 of the Family and Guardianship Code (henceforth FGC) and consists in classifying all assets to the joint property as long as acquired during the validity of the joint property and not excluded therefrom on the basis of any legal regulation (Article 33 FGC). The legislator used a clear structure to set

[2] Cf. justification for the judgment of the Supreme Court of 19 October 2018, III CZP 45/18.

forth a general principle and a specific catalogue of exceptions to the rule. Decisions as to the classification of individual assets to certain properties in practice usually occur when the joint matrimonial property ceases to exist, when the spouses make mutual settlements, and rely on the moment of acquisition of certain assets and verification if they are not subject to an exception set forth in Article 33 FGC.[3]

The legislator used the term "acquired assets" which should be understood broadly.[4] Thus, assets may be included in joint property as a result of various events, such as: legal transactions (e.g. purchase-sale contracts, donations), acquisition of benefits, inheritance (Article 34 FGC) or acquisition of rights to an injury-compensating annuity due to a spouse as a result of complete or partial disability to work or due to their growing needs or limited prospects for the future (cf. Article 33.6 FGC). Thus, what is decisive with respect to acquisition of an asset is the time of acquiring the right or its occurrence or transfer to a spouse, and not the way of acquisition.

The identification of the composition of each property in the system of joint matrimonial property poses difficulties in certain circumstances, despite the general principle clearly set forth in Article 31 § 1 FGC. According to the principle, assets acquired by both spouses become components of joint property with the exception of those assets that are included in each spouse's personal property.[5] The composition of joint matrimonial property in the system of statutory joint property is stipulated in Articles 31, 33 and 34 FGC but they do not set forth a supposition that joint matrimonial property includes assets acquired during the validity of joint matrimonial property. Therefore, it is admissible to make a factual supposition that assets acquired during the validity of joint matrimonial property become part of joint property with funds originating from the property.[6]

The judgments of the Supreme Court, in the basis of Article 31 FGC assume the existence of statutory preference to joint property versus the spouses' personal property,[7] which is expressed inter alia by respecting a factual supposition that assets acquired during joint matrimonial property were acquired to property accumulated during the marriage.[8]

---

[3] J. Słyk, [in:] K. Osajda (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz*, Warszawa 2018; commentary on art. 31 no. 27, Legalis.

[4] Cf. E. Skowrońska-Bocian, [in:] J. Wierciński, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2014, p. 313.

[5] J.S. Piątowski (ed.), *System prawa rodzinnego i opiekuńczego*, part 1, Ossolineum 1985, p. 376.

[6] Cf. A. Dyoniak, *Ustawowy ustrój majątkowy małżeński*, Ossolineum 1985, p. 55; J. Ignaczewski, *Małżeńskie ustroje majątkowe*, Warszawa 2006, p. 19; judgment of the Supreme Court of 17 May 1985, III CRN 119/85, OSPiKA 1986, No. 9, item 185 with glosses by: Z. Gawlik, OSPiKA 1986, No. 9–10, item 185 and M. Goettel, OSPiKA 1988, No. 5, item 131; resolution of the Supreme Court of 6 February 2003, IV CKN 1721/00, Legalis.

[7] See resolution of the Supreme Court of 13 March 2008, III CZP 9/08, OSNC 2009, No. 4, item 54.

[8] See judgment of the Supreme Court of 17 May 1985, III CRN 119/85, OSP 1986, No. 9–10, item 185: "In the system of existing family law assuming a principle of the regime of statutory joint matrimonial property, a supposition may be made that certain assets in a transaction executed by a spouse were acquired from property generated in the marriage for statutory joint matrimonial property. However, the acquisition of an asset from a spouse's separate property must stem not only from a statement by the spouse but also – and primarily – from overall legally material circumstances under FGC provisions"; judgment of the Supreme Court of 11 September 1998,

It is accepted that Article 32 § 1 FGC gives rise to a presumption that the assets acquired during the matrimony belong to the property generated during the marriage when acquired by both spouses or by either of them, while the fact that certain assets belong to personal property has to be proven by the interested spouse.[9] The fact that one spouse was a party to a contract is insufficient to presume that a share in a property acquired during the existence of statutory joint matrimonial property became a part of the property of the spouse who was the party to the contract.[10] It is stated that the above presumption may be invalidated by specifying that such asset was acquired with funds originating from personal property.[11] Also, literature presents a view that the ownership right acquired during the existence of joint matrimonial property becomes a part of joint property, irrespective of the fact whether it was acquired by either of the spouses or by both. It is of no importance if the funds used to acquire the ownership right originated from joint property or from personal (separate) property, unless the acquisition was made by way of substitution, understood as replacement of an asset in personal (separate) property with another asset acquired to replace it. Judgments by the Supreme Court present the same view that acquisition of certain assets from a spouse's personal property must stem clearly not only from a statement by the spouse but primarily from overall related circumstances.[12] As emphasized by the Supreme Court in its judgment of 9 January 2001 (II CK 1194/00, LEX No. 52375): "The party claiming substitution is obliged to evidence the funds applied to acquire such asset."

APPLICATION OF THE SUBSTITUTION PRINCIPLE

The substitution principle counteracts increasing joint property at the expense of the spouses' personal property and guarantees that its value remains unchanged.[13]

The literature of the subject, when Article 33.3 FGC remained valid,[14] presents a view that the objective of substitution relating to separate property is to maintain

---

I CKN 830/97, unpublished; ruling of the Supreme Court of 6 February 2003, IV CKN 1721/00, LEX No. 78276; judgment of the Supreme Court of 16 April 2003, II CKN 1409/00, OSNC 2004, No. 7–8, item 113; decision of the Supreme Court of 18 January 2008, V CSK 355/07, LEX No. 371389. See also A. Dyoniak, *supra* n. 6, p. 55; J.S. Piątowski, *supra* n. 5, p. 366; Z. Gawlik, *Glosa do wyroku Sądu Najwyższego z dnia 17 maja 1985 r., III CRN 119/85*, OSPiKA 1986, No. 9–10, p. 411; M. Goettel, *Glosa do wyroku Sądu Najwyższego z dnia 17 maja 1985 r., III CRN 119/85*, OSPiKA 1988, No. 5, p. 248.

[9] See, e.g. judgments of: 11 September 1998, I CKN 830/97, unpublished; 29 June 2004, II CK 397/03 unpublished; 16 April 2003, II CKN 1409/00, OSNC 2004, No. 7–8, item 113; 30 June 2004, IV CK 513/03, unpublished; and resolution of 6 February 2003, IV CKN 1721/00, unpublished.

[10] Cf. resolution of the Supreme Court of 16 October 1997, I CKN 130/97, unpublished.

[11] See judgment of the Supreme Court of 9 January 2001, II CKN 1194/00, unpublished.

[12] Cf. judgment of the Supreme Court of 9 January 2001 r., II CKN 1194/00, LEX No. 52375; resolution of the Supreme Court of 6 February 2003, IV CKN 1721/00, LEX No. 78276; judgment of the Supreme Court of 27 November 2007 IV CSK 258/07, LEX No. 492180.

[13] Cf. M. Nazar, [in:] T. Smyczyński (ed.), *System Prawa Prywatnego*, Vol. 11, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 329.

[14] The Family Code of 1950 did not provide directly for the principle of substitution.

the value of the property, despite the fact that components thereof change.[15] The components listed in Article 33.1 and 33.2 FGC "constitute (...) a sort of basic fund of separate property which does not gradually merge with joint property (...) Article 33.3 is a compromise between an intention to retain separate property and a trend to develop joint property."[16]

The legal doctrine generally provides that the core condition for substitution is the fact that exclusion (disposal or loss) of an asset from separate property and acquisition of another asset (substitute) has resulted from the same legal transaction.[17] It is commonly accepted that the application of the substitution principle may be modified with the will of the spouse for whom such substitution is to take place.[18]

In its judgment of 12 May 2000 (V CKN 50/00, Legalis) the Supreme Court specified the premises underlying substitution as set forth in Article 33.3 FGC. There are two requirements: firstly, one and the same event resulted in exclusion of an asset from separate property and acquisition of another asset, and secondly, the acquired asset must be obtained in an economic sense at the expense of separate property. The asset acquired to personal property must be then an equivalent to the asset that is excluded from the property.[19]

However, the application of an additional economic criterion is partially questioned by the doctrine. In Stefan Breyer's opinion, the equivalence of substitution elements (that is the acquired and lost assets) is immaterial:[20] a legal or economic relationship must exist between elements of direct and indirect substitution, but the elements may be of a different nature and a different economic value.[21] This justifies the acceptance of a "fiction of economic identity of elements of substitution

---

[15] See, e.g. J.S. Piątowski, *supra* n. 5, p. 375; A. Dyoniak, *supra* n. 6, p. 159; E. Kitłowski, *Surogacja rzeczowa w prawie cywilnym*, Warszawa 1969, p. 100. The author stresses protection of separate property against potential depletion as a result of mixing it with joint property; the protection consists in ensuring the integrity of the total asset value in separate property, which, however, does not apply to each individual subjective right being part of the property.

[16] J.S. Piątowski, *supra* n. 5, pp. 375–376.

[17] *Ibid*., p. 377; A. Dyoniak, *supra* n. 6, p. 164; A. Ohanowicz, *Glosa do orzeczenia z dnia 6 lipca 1967 r., III CR 117/67*, Państwo i Prawo No. 8–9, 1968, p. 445; E. Kitłowski, *supra* n. 15, p. 19.

[18] A. Dyoniak, *supra* n. 6, p. 161; J.S. Piątowski, *supra* n. 5, p. 380; M. Sychowicz, [in:] K. Piasecki (ed.), *Kodeks rodzinny i opiekuńczy z komentarzem*, Warszawa 2001, p. 168.

[19] In its judgment of 15 October 2009 (I CNP 43/09, Legalis), the Supreme Court stated that a property separated in favour of a spouse in the process of consolidation and exchange of land during the existence of statutory joint property constitutes an equivalent of a property being part of separate property before joint property was established. In line with the principle of substitution, it is also possible to treat as personal property any refund of a loan obtained as a result of materialisation of receivables being part of the property (cf. judgment of the Supreme Court of 9 September 1970, I CR 298/70, OSNCP 1971, No. 6, item 102). In its ruling of 20 June 2008 (IV CSK 60/08, Legalis), the Supreme Court classified as personal property the ownership right to residential premises acquired as a result of tenant ownership and despite a fee paid from joint property in connection with the acquisition that underlay a claim for refund of expenditures pursuant to Article 45 FGC.

[20] S. Breyer, *Stosowanie surogacji w prawie małżeńskim*, Palestra No. 3, 1974, pp. 18–20 and C. Wiśniewski, *Glosa do uchwały z dnia 14 sierpnia 1985 r., III CZP 41/85*, Nowe Prawo No. 4, 1988, p. 90.

[21] S. Breyer, *supra* n. 20, pp. 18–20. Similarly, S. Breyer, S. Gross, [in:] B. Dobrzański, J. Ignatowicz (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 1975, p. 164.

or acceptance as substitution changes to certain legal relationships also by way of pursuing claims".[22] As a result, supporters of the discussed concept accept that economic identity (and thus substitution) occurs, irrespective of the origin of funds to cover the purchase price.[23]

The literature also presents a view that the substitution principle may be excluded in a legal transaction resulting in the acquisition of an asset and replaced with a claim for refund of expenditures from personal property to joint property.[24] However, the doctrine indicates no basis to accept admissibility of excluding the principle by a decision solely of one spouse.[25] The above could result in an acquisition of an asset in a way unacceptable to the other spouse with a simultaneous charge of the property with an obligation to refund the value thereof.

In that context, major doubts arise in a situation when assets are acquired both with funds originating from joint and personal property. The applicable regulations (Article 31 § 1 and Article 33.10 FGC) do not allow excluding *a priori* any of the concepts specified below; additionally, each of them is also approved in the doctrine and has supporters in jurisprudence.[26]

STANDPOINT OF JURISPRUDENCE

The representatives of jurisprudence for quite some time have been of a view that if nothing else stems from the nature of a legal transaction, the acquired asset is owned proportionately to the amount of funds used to acquire it from separate property and joint property, in an appropriate fractional part with respect to separate property and in the remaining part to joint property. However, the content of a legal transaction may be decisive if the acquired asset becomes a component of either property, and thus *ex lege* an obligation will be established in favour of the other property related to expenditures and outlays (Article 45 FGC). In the opinion

---

[22] S. Breyer, S. Gross, *supra* n. 21, p. 164.

[23] *Ibid*., p. 165.

[24] Cf. J.S. Piątowski, *supra* n. 5, p. 380; E. Skowrońska-Bocian, *supra* n. 4, p. 347.

[25] J. Słyk, *supra* n. 3, commentary on Article 33, thesis 57, Legalis.

[26] See, e.g. S. Breyer, *supra* n. 20, p. 19; A. Dyoniak, *supra* n. 6, pp. 161–163; Z. Gawlik, *supra* n. 8, pp. 411–412; M. Goettel, *Majątek odrębny małżonków*, Szczytno 1986, pp. 177–178; M. Goettel, *Glosa do uchwały SN z 29.09.1987 r., III CZP 54/87*, OSPiKA 1988, No. 5, p. 249; E. Kitłowski, *supra* n. 15, pp. 100–103; M. Nazar, *supra* n. 13, pp. 338–342; J.S. Piątowski, *supra* n. 5, pp. 380–381, 394; E. Skowrońska-Bocian, *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich*, Warszawa 2006, pp. 72–73; A. Stępień-Sporek, M. Ryznar, *Nabywanie przedmiotów przez małżonków za środki z różnych mas majątkowych*, Państwo i Prawo No. 11, 2010, pp. 84–86; R. Trzaskowski, *Przekształcenie prawa użytkowania wieczystego w prawo własności a stosowanie surogacji w prawie małżeńskim*, Palestra No. 7–8, 2010, pp. 248–251; A. Wolter, *Majątek wspólny i majątki odrębne małżonków pod rządem wspólności ustawowej*, Nowe Prawo No. 1, 1965, pp. 113–115, and the literaturę and case law cited therein. See J. Biernat, *Dopuszczalność wyłączenia zastosowania zasady surogacji w majątku osobistym małżonka przy dokonywaniu czynności prawnej*, [in:] M. Pecyna, J. Pisuliński, M. Podrecka (eds), *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, Warszawa 2013, p. 672; E. Drozd, [in:] J.S. Piątowski (ed.), *System prawa cywilnego. Prawo spadkowe*, Vol. IV, Ossolineum 1986, pp. 422–427. See also E. Kitłowski, *supra* n. 15, pp. 101–102.

of Józef Stanisław Piątowski,[27] in such situation inclusion of an asset in joint property is subject solely to the will of the spouse whose separate property, subject to substitution, has been contributed; while, inclusion in separate property is subject to the will of both parties "(...) unless the commitment of joint property in the case is a part of ordinary management".[28]

A different view in that matter was expressed by the Supreme Court which, under the provisions of the Family Code of 1950, in its resolution of 13 November 1962, III CO 2/62,[29] assumed that property acquired by a spouse during the marriage constituted joint property also when – apart from funds being a part of statutory joint property – some funds committed to the acquisition of the property constituted personal property of both spouses, unless the legal transaction specifies otherwise. The resolution stated that "it is not possible to assign decisive importance to statements by spouses that the acquired part of property does not belong to property generated in matrimony since such statement may not rule out the effects resulting from Articles 32–34 FGC when the spouses had statutory joint matrimonial property. Any restriction or exclusion therefrom is obviously possible with a marital contract providing for the above and made in the form of a notary deed."

In its justification, the court stated that "Substitution (...) is possible only when as a result of a legal operation no material change occurs, in an economic sense, in the status of the specific properties (personal property of a spouse or joint property), and therefore, the asset acquired by way of substitution may not be treated as property generated in the marriage. (...) The nature of substitution understood in that way does not support its presumption only on the basis of the fact that the buying spouse committed partly funds from personal property to acquire the asset. In order to identify substitution, it is necessary to specify the acquired asset or a part thereof in the contract which is sufficient to treat such acquired asset as an economic equivalent to the asset in the buyer's personal property that was disposed of in connection with the purchase."

The view was upheld by the Supreme Court in accordance with the Family and Guardianship Code. In its judgment of 17 May 1985, III CRN 119/85,[30] the Supreme Court emphasized that the notion of substitution may not be interpreted so broadly that each commitment of funds from property not subject to statutory joint matrimonial property results in the acquired asset being treated in whole or in part as private property of a spouse. If funds from separate property of a spouse were used to partly cover the purchase price and the remaining part was paid from

---

[27] J.S. Piątowski, *supra* n. 5, p. 381. See also Z. Gawlik, *supra* n. 8, p. 412; M. Goettel, *supra* n. 8, p. 249. The author claims that the spouses may exclude the statutory substitution effects: their intention must be disclosed not only explicitly but also *per facta concludentia*; similarly, E. Kitłowski, *supra* n. 15, pp. 101–102; cf. also M. Sychowicz, *supra* n. 18, p. 169.

[28] J.S. Piątowski, *supra* n. 5, p. 381. Similarly, E. Kitłowski, *supra* n. 15, p. 102. The author argues that the will to treat expenditures for the purchase of a substitute as an outlay from joint property may also be expressed by the spouse to whose personal property the acquisition of the new asset is closely related, as long as such transaction is performed as part of ordinary management.

[29] OSNCP 1963, No. 10, item 217.

[30] OSPiKA 1986, No. 9–10, item 185.

funds generated in the matrimony, the acquired share in property constitutes joint property. The spouse who committed funds from his/her private property could only claim refund of such funds pursuant to Article 45 FGC.[31]

One needs to quote a view of the Supreme Court that is materially applicable and which was expressed in assessing the basis to make an entry of ownership right in land and mortgage registers. The Supreme Court stated as follows: "Article 31 § 1 FGC does not provide for a legal presumption that the assets, including property, acquired during the marriage, covered with statutory joint matrimonial property in terms of economic relations, are included in statutory property."[32]

In its justification to the resolution of 19 August 2009, III CZP 53/09,[33] the Supreme Court stressed that: "the objective of substitution as set forth in the regulations referred to is to preserve the value of separate property, despite changes to specific components thereof." A similar objective is specified in the doctrine. The inclusion of the acquired right in exchange for some other right in separate property, is due to – in the opinion of Zbigniew Radwański – an assumed rationality of the legislator that "strives to ensure the durability of separate properties established by it" as in the case, for instance, of spouses' personal properties (Article 33.10 FGC).[34] Therefore, the value of personal property should not change in the statutory system.

In its judgment of 12 May 2000, V CKN 50/00,[35] the Supreme Court stated that the substitution referred to in Article 33.3 FGC (now in Article 33.10 FGC) must meet two requirements: "firstly, one and the same event results in exclusion of an asset from separate property and acquisition of another asset, and secondly, the acquired asset must be obtained in an economic sense at the expense of separate property." Therefore, as stressed by the Supreme Court in its ruling of 18 Octobe1961, IV CR 957/60:[36] "substitution does not occur when an asset constituting separate property of a spouse was used, consumed, etc. or sold, the proceeds applied, and a new asset of the same kind and with the same economic application, was acquired with funds originating from the spouse's current income. Similarly, literature stressed basically two criteria of substitution: legal and economic. The substitution occurs when both criteria are complied with."[37] However, the view is not universal. Elżbieta Skowrońska-Bocian, analysing two premises underlying substitution, stresses that the second premise, i.e. economic, consisting in the acquisition of an asset at the expense of personal property raises no doubt.[38] The author has objections to the first premise relating to "one event". If both premises underlying substitution are complied with, then the acquired asset is to be classified as a spouse's personal property. There is no need to continue interpretation of regulations that would result in introducing additional requirements related to substitution.

---

31 See also S. Breyer, S. Gross, *supra* n. 21, p. 167.
32 Cf. resolution of the Supreme Court of 5 September 2008, I CSK 60/08, Legalis.
33 LEX No. 511012.
34 See also Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2005, p. 141.
35 LEX No. 52579.
36 LEX No. 106398.
37 Cf. J.S. Piątowski, *supra* n. 5, p. 378.
38 Cf. E. Skowrońska-Bocian, *supra* n. 4, p. 346.

In compliance with the currently applicable Family and Guardianship Code, the Supreme Court presented a similar stand in its ruling of 5 December 2014, III CSK 87/14. The ruling states that an asset acquired in any part from joint property – and when there is no matrimonial contract to the contrary – becomes a part of joint property, while personal property incorporates a claim for refund of outlays or expenditures.[39] In the view of the Supreme Court, an extension of substitution supports a solution to "preserve appropriate proportions between joint property and personal property of the spouses and will not result in a substantial extension of personal properties at the expense of joint property".

However, it should be noted that if funds are committed from personal property, there is no extension of personal property at the expense of joint property. It seems that the text of the ruling specified above was influenced by the type of asset, being an enterprise and a complex nature of the related financial settlements.

Recently, a view became popular in case law that an asset is acquired to personal property or joint property and the final classification is subject to the majority of funds originating from either property.[40]

It should be noted that representatives of jurisprudence are in favour of the solution and stated that it was appropriate in cases when there is a major disproportion between funds originating from personal or joint property.

The judgment of 12 May 2000, V CKN 50/2000,[41] held that "The substitution specified in Article 33.3 FGC consists in replacing one separate asset with another asset. The premises underlying such substitution include two requirements: firstly, one and the same event resulted in exclusion of an asset from separate property and acquisition of another asset, and secondly, the acquired asset must be obtained in an economic sense at the expense of separate property."

The ruling of 18 January 2008, V CSK 335/2007,[42] provided that "it is not possible to assign decisive importance to statements by spouses that the acquired part of a property does not belong to property generated in matrimony since such statement may not rule out the effects resulting from Articles 32–34 FGC when the spouses had statutory joint matrimonial property. Any restriction or exclusion therefrom is possible with a marital contract providing for the above and made in the form of a notary deed." The Supreme Court claimed that the judgments are consistent in stating that Article 32 § 1 FGC gives rise to a presumption that the assets acquired during the matrimony belong to the property generated during the

---

[39] This stand was approved by some of the representatives of the doctrine, for instance M. Nazar, *supra* n. 13; M. Olczyk, *Komentarz do zmiany art. 33 Kodeksu rodzinnego i opiekuńczego wprowadzonej przez Dz.U. z 2004 r. nr 162 poz. 1691*, LEX 2005; or T. Sokołowski, *Komentarz do art. 33 Kodeksu rodzinnego i opiekuńczego*, [in:] H. Dolecki, T. Sokołowski (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, LEX 2013.

[40] See the Supreme Court judgment of 12 May 2000, V CKN 50/00, Legalis; the Supreme Court resolution of 18 January 2008, V CSK 355/07, Legalis; the Supreme Court resolution of 10 April 2013, IV CSK 521/12, MoP 2014, No. 7.

[41] LEX No. 52579.

[42] LEX No. 371389 and the ruling of 5 December 2014 III CSK 45/14 in which the Supreme Court stated as follows: "the classification of assets to spouses' joint property or to their personal properties is not decided by their statement that the acquired assets become components of any specific property since it is the applicable law that is decisive."

marriage when acquired by both spouses or by either of them, while the fact that certain assets belong to personal property has to be proven by the spouse concerned.[43] The fact that one spouse was a party to a contract is insufficient to presume that a share in a property acquired during the existence of statutory joint matrimonial property became a part of the property of the spouse who was the party to the contract.[44] A factual presumption that the asset was acquired by a spouse during the existence of statutory joint matrimonial property is the property generated during the matrimony (Article 32 § 1 FGC) may be abolished by specifying that the acquisition was made with funds constituting separate property.[45] The Supreme Court further stressed that the classification to a specific property should be subject to a comparison of the volume of funds originating from specific properties: some of the amounts should be much higher than the other, and thus be decisive for the classification of an asset to specific property.

Additionally, in the ruling of 10 April 2013, IV CSK 521/12,[46] the Supreme Court held that "The classification of an acquired asset to joint property or separate property shall be decided by a comparison of the volume of funds committed from those properties. As a result, the acquired asset may be classified to the property from which a major part of funds was committed. If the funds from the other property are insignificant, they are settled as an outlay in compliance with Article 45 FGC; if the criterion may not be applied since there is no major difference between the committed funds, then – unless the spouses decide otherwise – the acquired asset becomes a part of specific property items in fractional parts, proportional to the amount of committed funds."

In its ruling of 3 February 2016, V CSK 323/15, and in its judgment of 6 April 2016, IV CSK 385/15, the Supreme Court resumed the concept applied in earlier rulings accepting that the criterion decisive for classifying an asset to joint or personal property depends on the volume of committed funds. In the opinion of the Supreme Court, if the value of separate property "is materially larger", then the acquired asset will become part of such property.

There is an impression that also those cases were decided by the factual circumstances. In the first case, funds from personal property to purchase property accounted for 93% of the transaction value, while in the other case there was an exchange of an apartment personally owned by one spouse for another apartment, with a small additional amount paid from the funds coming from joint property. If seems that judgments on the subject do not reflect a uniform theoretical concept but are an effect of a functional interpretation searching for an optimum solution on the basis of specific facts.

---

[43] Cf. judgment of the Supreme Court of 11 September 1998, I CKN 830/97, unpublished; resolution of the Supreme Court of 6 February 2003, IV CKN 1721/00 unpublished; judgment of the Supreme Court of 29 June 2004, II CK 397/03 unpublished; judgment of the Supreme Court of 16 April 2003, II CKN 1409/00, OSNC 2004, No. 7–8, item 113; judgment of the Supreme Court of 30 June 2004, IV CK 513/03, unpublished.

[44] Cf. resolution of the Supreme Court of 16 October 1997, I CKN 130/97, unpublished.

[45] Judgment of the Supreme Court of 9 January 2001, II CKN 1194/00, unpublished.

[46] LEX No. 1331353.

POSITION OF THE DOCTRINE

The literature on the subject related to the circumstances of acquisition of an asset with funds originating from joint property and personal property specifies three different options of resolving the problem.[47]

According to the first standpoint, the acquired asset is incorporated into both properties in fractional parts, corresponding to the amount of funds committed in the purchase.[48]

An argument against that standpoint indicates that a "hybrid ownership relationship" arises between the spouses, characterised by total co-ownership of a share (which is part of joint property) in the "superior" fractional co-ownership of the right: that generates unavoidable complications in managing such joint right and restrictions in cancelling such hybrid fractional co-ownership (Article 210 of the Civil Code and Article 35 FGC).[49]

Another argument against the concept was that it gave priority to joint property, and thus was contrary to FGC which does not introduce any preferences to any type of property when classifying an asset to either of them.[50]

It seems that the criticism of that standpoint is not convincing since such hybrid co-ownership is generated by each acquisition of a share in a right by the spouses during their statutory joint matrimonial property.

According to the second standpoint, an asset is incorporated to private or joint property subject to a comparison of the volume of funds committed to the acquisition thereof originating from such properties. The criterion of a majority part of the expenditure would be decisive in that approach. As a result, the acquired asset should be classified to the property from which a larger part of funds was committed.[51]

---

[47] See, e.g. S. Breyer, *supra* n. 20, p. 19; A. Dyoniak, *supra* n. 6, pp. 161–163; Z. Gawlik, *supra* n. 8, pp. 411–412; M. Goettel, *Majątek*, *supra* n. 26, pp. 177–178; M. Goettel, *Glosa*, *supra* n. 26, p. 249; E. Kitłowski, *supra* n. 15, pp. 100–103; M. Nazar, *supra* n. 13, pp. 338–342; J.S. Piątowski, *supra* n. 5, pp. 380–381, 394; E. Skowrońska-Bocian, *supra* n. 26, pp. 72–73; A. Stępień-Sporek, M. Ryznar, *supra* n. 26, pp. 84–86; R. Trzaskowski, *supra* n. 26, pp. 248–251; A. Wolter, *supra* n. 26, pp. 113–115, and the literature and case law cited therein.

[48] See J. Biernat, *supra* n. 26, p. 672; E. Drozd, *supra* n. 26, pp. 422–427. See also E. Kitłowski, *supra* n. 15, pp. 101–102. Cf. J. Pietrzykowski, [in:] Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy z komentarzem*, Warszawa 1993, p. 214.

[49] Cf. M. Nazar, *supra* n. 13, pp. 340–341; M. Nazar, [in:] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2006, p. 149.

[50] A. Dyoniak, *supra* n. 6, p. 162 (however, the comments of the author were related solely to the practice of common courts, according to which even a small commitment of funds from joint property would exclude the possibility of applying the principle of substitution). Cf. M. Goettel, *supra* n. 8, p. 249 (in the author's opinion, the effects of substitution occur *ex lege* not only for the whole but also for a part of the acquired asset; it is not admissible to classify *a priori* the acquired asset to joint property without providing for the nature of funds committed to the purchase). Cf. also S. Szer, *Glosa do uchwały SN z dnia 13 listopada 1962 r., III CO 2/62*, OSPiKA 1963, No. 9, p. 537 (in the author's opinion, the effects of substitution occur *ex lege*, irrespective of the fact whether the funds from a spouse's personal property were used to apply to the asset in whole or a share in such asset and irrespective of the fact if the asset was acquired both with funds from the spouses' personal property and joint property).

[51] See A. Wolter, *supra* n. 26, p. 114.

Aleksander Wolter finds a standpoint that assumes the classification of shares in the acquired assets both to joint property and separate property as "theoretically most correct", further indicating that for practical reasons "it is hard to be enthusiastic about it".

The concept was partly approved by Stefan Breyer who indicated that it could be applicable when funds from one source "are disproportionately low versus the other source".[52]

The view was found as appropriate by Janusz Pietrzykowski,[53] however, if the criterion of majority funds fails, then a fractional co-ownership in the acquired asset is generated and the shares would be incorporated both to joint and separate property *pro rata* to the volume of funds generated from both property items.

However, the doctrine notes that the provisions of FGC do not provide the basis for such interpretation of Article 33.10 FGC which makes substitution (in terms of asset or value) subject to the proportion of funds from personal property and joint property. Neither linguistic, nor functional interpretation justify the above conclusion. The concept raises uncertainty in mutual economic relations between the spouses and in relations of the spouse with third parties. A binding identification of substitution would then be subject to a court ruling based on an imprecise criterion of "disproportion" or "material disproportion" of expenditures originating from various property of the spouses.[54]

Other arguments against the concept were that it did not provide for the will of the parties,[55] that it relies on imprecise qualitative criteria, would not resolve a situation when equal funds were committed to acquire assets, that the effects of applying the concept could generate incorrect solutions (e.g. when the proportion is 51% to 49%),[56] and additionally that there is no legal basis[57] or that it is contradictory to legal regulations.[58] It was stressed that the applicable regulations do not point to a criterion of a majority of funds spent on the asset as a decisive factor for assigning to a certain property, despite the fact that the solution has practical values.[59]

Finally, in accordance with the third concept, the commitment of funds to acquire an asset from joint property makes the asset included wholly in joint property.[60]

However, that position has gained approval neither of the doctrine nor jurisprudence.

---

[52] S. Breyer, *supra* n. 20, p. 20.

[53] J. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2003, Article 33, no. 25.

[54] Cf. M. Nazar, *supra* n. 13, Legalis, p. 142.

[55] The argument is unjustified since Aleksander Wolter clearly indicated that the spouses, when entering into the transaction, may decide how they will assign the acquired asset, whether to joint property or separate property, see A. Wolter, *supra* n. 26, p. 115.

[56] A. Dyoniak, *supra* n. 6, p. 162; E. Kitłowski, *supra* n. 15, p. 103.

[57] See J.S. Piątowski, *supra* n. 5, p. 381, footnote 178; M. Sychowicz, *supra* n. 18, p. 169.

[58] Thus, E. Kitłowski, *supra* n. 15, p. 103.

[59] Cf. J.S. Piątowski, *supra* n. 5, p. 381.

[60] Cf. M. Nazar, *supra* n. 13, p. 341; T. Sokołowski, *supra* n. 39, p. 182; cf. also the resolution of the Supreme Court of 13 November 1962, III CO 2/62, OSNCP 1963, No. 10, item 217.

In the opinion of Mirosław Nazar,[61] subjective substitution is possible solely with funds originating from personal property; otherwise, such asset should be included in joint property and personal property should cover a claim for refund of the expenditure (financial substitution).[62] In the author's opinion: "The proposed interpretation covers the basic function of substitution (ensuring the integrity of the global value of the property subject to substitution), it refers to clear criteria of subjective or financial substitution, and excludes the generation of hybrid joint rights."[63]

The literature of the subject additionally presents a concept which may be treated as a synthesis of the first and second standpoints discussed above. The view is as follows: the assignment of an acquired asset to personal property or joint property should be done on the basis of a comparison of the volume of funds originating from each property: the asset shall be classified to the property from which a "core" part of funds was committed if funds from the other property were "negligible" (then such part is a contribution settled in accordance with Article 45 FGC).[64] If the criterion cannot be applied due to no "major difference" between the committed funds – and those are typical situations – when the spouses do not agree otherwise, the acquired asset is included in each property (from which the funds originated) in fractional parts proportional to the volume of the committed funds.[65]

The concept was accepted by the Supreme Court, which is indicated by the reasoning to justification to its ruling of 12 May 2000.[66] The court clarified that the substitution provided for in Article 33.3 FGC consists in replacement of one asset in separate property with another asset and the premises underlying such substitution include two requirements: firstly, one and the same event resulted in exclusion of an asset from separate property and acquisition of another asset, and secondly, the acquired asset must be obtained in an economic sense at the expense of separate property. The Supreme Court stated that if the first condition was complied with, but the purchase occurred only partly from funds originating from separate property "(...) two solutions arise. One solution provides that the acquired assets – proportionately to the funds committed from separate property and joint property – are incorporated in appropriate fractions to separate property (substitution) and to joint property (the principle of Article 32 § 1 FGC). The other solution requires a comparison of the volume of funds committed from each property and incorporation of the acquired assets to the property from which a majority of the price was covered; while the funds committed from the other property should be treated as a contribution to the property to which the asset was incorporated. The latter solution seems justified when the volumes of funds originating from separate property and joint property are materially disproportional."

---

61 S. Breyer, S. Gross, *supra* n. 21, p. 167.
62 M. Nazar, [in:] J. Ignatowicz, M. Nazar, *supra* n. 49, p. 149.
63 *Ibid*., pp. 149–150.
64 J. Pietrzykowski, *supra* n. 53, p. 364.
65 See R. Trzaskowski, *supra* n. 26, pp. 244–252; and J. Pietrzykowski, *supra* n. 53, p. 364.
66 V CKN 50/00, LEX No. 52579.

A similar standpoint was also presented in the justification to the ruling of the Supreme Court of 18 January 2008.[67] The Court stated (in the context of Article 33.3 FGC) that "(...) with a hypothetical (...) assumption that the purchase of an asset by a spouse was funded partly from joint property, most recent literature accepts it that in order to incorporate such asset to either personal or joint property, it is necessary to compare the volumes of funds committed from both property items and one of the parts has to be much higher and decisive with respect to which property the asset will be assigned to (...)."

However, it is hard to classify the standpoint of the Supreme Court expressed in its justification to the ruling of 20 June 2008,[68] referred to earlier, in which the court stated that when a tenant's right to residential premises constituting personal property of one spouse is converted into ownership right "the right being a continuation of the previous right to the premises shall remain a component of such personal property and any additional contribution made for the conversion from funds of their joint property shall constitute a contribution from the joint property to personal property, to be settled in compliance with Article 45 FGC." It should be noted that the court did not refer directly to the principle of substitution and the use of the term "continuation of the previous right" may suggest a slightly different legal construct, perhaps similar to the concept of substitution identified by certain authors, based on an "economic" relation between elements of such substitution (concepts of Stefan Breyer and Stanisław Gross), or perhaps relying on an assumption that in the case of a conversion, no new right is acquired.

CONCLUSIONS

In dogmatic terms, the first standpoint approved in the doctrine seems most appropriate: it provides that if an asset is acquired with funds committed from two properties, the asset is assigned to personal property or joint property as a result of a comparison of the volume of funds committed from the two properties – the major part of the spending would be the decisive criterion. The concept was also supported by the Supreme Court in the analysed resolution of 19 October 2018. The court stated that "It provides for an element of the will of the spouses carrying out a specific transaction as well as the strictly specified (in Article 31 § 1 and Article 33 FGC) principles of incorporation of specific assets during the existence of joint matrimonial property to either joint property of the spouses or their respective personal properties as well as the limits of substitution determined inter alia in Article 33.10 FGC, without any unjustified extension of joint property at the expense of personal property or vice versa. Unless the legal transactions made by the spouses require otherwise, there is no reason to make an arbitrary assumption that the spouses – committing joint funds and their personal funds to acquire an asset – in a sense resign from co-ownership accepting it that the acquired asset is

[67] V CSK 355/07, LEX No. 371389.
[68] IV CSK 60/08, LEX No. 453028.

incorporated in one property in whole, while the person who committed his/her own funds to the purchase is left only with a claim for refund of expenditures, in particular, if those were contributions from personal property to joint property settled only upon request."

The vagueness of the proposed criteria and dogmatic problems with justifying the concept do not seem sufficient to deny it is appropriate. It seems that the allocation of the acquired asset should be decided not only on the basis of proportions of the funds committed to the acquisition but also of the decision whether the funds from the joint property were overall material. Basically, a view can be defended that in an economic sense the acquisition of an asset in whole (and not a share in an asset) is made with "funds obtained in exchange for assets" from separate property only when at least a majority part of the funds comes from separate property (in that case, the objective economic burden of the acquisition lies with the separate property). Such interpretation is also supported with a subjective element usually accompanying the transaction. When there is no clear intention of the buyer to the contrary, an assumption may be made that committing a majority of funds from separate property to acquire a new asset, the spouse does not intend to contribute the funds to joint property and any commitment of funds from joint property is only a contribution (Article 45 FGC).[69] However, if the funds committed from joint property are quite material – even if much lower than funds from separate property – they should be treated (inter alia considering the welfare of the family) as funds which were not to be transferred to separate property with a potential prospect of settlement (Article 45 FGC).

The acceptability of the solution is supported with clarity and simplicity of the allocation of specific assets to the spouses' property (joint or personal) as well as the exclusion of any hybrid structures of joint rights acquired partly with funds from joint and personal properties. Thus, acceptance of such solution provides for much higher security in trading and in relations between the spouses as it simplifies the management of joint property and also regulates the functions of the property. An interpretation excluding the application of substitution in that case is a response to the postulate of systemic interpretation requiring a strict interpretation of regulations stipulating exceptions to the regulations set forth in other statutes. Especially so that a very broad extent of substitution justifies a conclusion that its further extension would result in depletion of joint property much in excess of what the legislator intended. Such interpretation is also supported by the Polish Constitution since it assigns the family and its welfare a rank of the highest value. An assessment of the acquisition of an asset with funds only partly committed from joint property should provide for the protection of the family postulated by the Constitution and the method of preserving it as specified in the Code by the establishment of joint matrimonial property with no individual shares identified and which is indivisible to provide for the needs of the family that contributed to the property. Certainly, the spouses are not deprived of the right to own, acquire and

[69] See R. Trzaskowski, *supra* n. 26, pp. 244–252.

dispose of personal property; however, in case of joint matrimonial property, that is restricted to instances explicitly specified in statute and is an exception.

On the other hand, it seems that the first of the proposed concepts may be appropriate – the concept in a most detailed way resembles the legal status of the real estate property, despite the hybrid complex ownership status.

The legislator, regulating in FGC the type of the spouses' properties, the methods of establishment and components thereof, did not rank them or did not give priority to any of them. The fact that in procedural proceedings joint property is subject to more intensive protection, since the court *ex lege* determines the composition and value thereof and settles contributions made from joint property to personal properties, does not necessarily mean that the generation thereof is also privileged. It seems ungrounded to allocate an asset acquired with funds coming from both types of properties only to one of them, while leaving the right to settle the expenditures for third-party assets. That would mean an extension of joint property at the expense of personal property, or vice versa. A presumption that the spouses acquiring an asset as if resign from joint ownership accepting that the acquired asset becomes incorporated only to one property in whole seems unjustified. Additionally, such solution is unfair for the spouse who was deprived of ownership and left only with a claim for refund of expenditures. Firstly, this is because the spouse is deprived of a share in ownership, and secondly, because the spouse has to take effort to obtain refund of the equivalent of the expenditures.

An argument in favour of the concept is the acceptance of a structure of fractional acquisition of specific assets, in proportions corresponding to the committed funds, which supports a most comprehensive application of the respective regulations.[70] All the more so that, when relying on the literal wording, it is impossible to identify a criterion of a majority of funds spent on the asset as the decisive factor for assigning such asset to a certain property, despite the fact that the solution has practical values. Incorporation of an asset to joint property at all times when a portion of funds committed to acquire the asset originated from joint property is not convincing, especially when such funds cover only a small portion of the acquisition cost.

The argument contrary to the concept is not convincing; it refers to effects that are difficult to reconcile with an assumption of rational legislation. No acceptance should be given to the allegation of excessive complication of legal relationships when there are joint rights in ideal parts, applicable to one spouse or both spouses. This is observable primarily in problems with determining the governance rules of the asset subject to joint rights and identifying the admissibility of abolition of such joint right, and in particular the allegation of a breach by the resultant situation of the ban on claims to divide the joint property during the existence of joint matrimonial property if the joint right to an asset is abolished (cf. Article 35, first sentence, FGC). It should be noted that the joint right vis-a-vis a certain asset between one spouse and both spouses may *de lege lata* arise in connection with

---

[70] Cf., for instance, M. Sychowicz, *Komentarz do art. 33 k.r.o.*, [in:] K. Piasecki, *Kodeks rodzinny i opiekuńczy. Komentarz*, LexisNexis, 2011; M. Goettel, *supra* n. 8.

various legal events; thus, it is a construct admissible in Polish law, irrespective of the potential high complexity of the legal relationships related to the establishment thereof.

Acceptance of the above solution guarantees adequate protection of the spouses' interests in the economic sense and further ensures adequate protection for creditors of the spouses; that is due to a certain and immediate maintenance of relations between the value of assets in the specific properties that the spouses dispose of, and the value of the acquired shares in the assets. In the context of other concepts, certain disproportions may arise for which it is hard to find statutory justification. Although the disproportions may *a casu ad casum* be covered with claims for refund of expenditures from personal property to joint property or from joint property to personal property (Article 45 § 1 FGC), it should be noted that a claim for refund of expenditures is not necessarily successful materialisation thereof (cf. in particular Article 45 § 1, third sentence, FGC), while the materialisation as a rule is postponed (often materially) (cf. Article 45 § 2 FGC) and there is no certainty that it always will be complete.[71]

The standpoint is appropriately rooted in the applicable statutes. The acceptance of the standpoint supports spouses in the acquisition of a share in joint matrimonial property in compliance with the rule set forth in Article 31 § 1 FGC, while also applying the regulation implementing the substitution rule in the spouse's personal property (Article 33.10 FGC). This means that – contrary to the other concepts – the acceptance of the discussed standpoint does not exclude or restrict any of the specified statutory rules.[72]

Additionally, the above concept is free of the arbitrariness of the view resulting from the applied legal basis that refers to disproportionate values of specific assets as a criterion to determine the property to which the acquired asset is to be allocated. The arbitrariness raises even more doubts as it is based on an imprecise and internally contradictory identification of situations whereby the acquired asset is to be allocated solely to one property and, possibly, situations when such asset is to be allocated to various properties in fractional shares. That, in turn, may jeopardise the certainty and security of trading, not only at the time when the property (properties) is determined to which such asset is to be allocated, but also when determining if the statutory requirements have been complied with concerning correct conduct of legal transactions underlying the acquisition of such asset, in particular their validity and effectiveness.[73]

Acceptance of the above solution guarantees adequate protection of the spouses' interests in the economic sense and further ensures adequate protection for creditors of the spouses; that is due to a certain and immediate relation between the value

---

[71] Cf. J. Biernat, *Glosa do postanowienia SN z dnia 10 kwietnia 2013 r. IV CSK 521/12*, LEX No. 1331353.

[72] Cf. A. Dyoniak, *supra* n. 6, p. 162; M. Goettel, *Majątek*, *supra* n. 26, p. 177; E. Kitłowski, *supra* n. 15, pp. 101–102; A. Stępień-Sporek, M. Ryznar, *supra* n. 26, pp. 85–86.

[73] See M. Nazar, *Odpłatne nabycie własności do majątku wspólnego małżonków*, [in:] E. Drozd, A. Oleszko, M. Pazdan (eds), *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego ofiarowane Panu Rejentowi Romualdowi Sztykowi*, Kluczbork 2008, pp. 232–234, 237–246.

of assets in the specific properties that the spouses dispose of and the value of the acquired shares in the assets.[74]

Additionally, neither linguistic nor purposive interpretation of the provisions of Article 31 § 1 and Article 33.10 FGC justify a thesis that the application of the substitution principle to the spouse's personal property may take place only when the asset is acquired solely with funds originating from the spouse's personal property to which the principle applies.

BIBLIOGRAPHY

Biernat J., *Glosa do postanowienia SN z dnia 10 kwietnia 2013 r. IV CSK 521/12*, LEX No. 1331353.

Biernat J., *Dopuszczalność wyłączenia zastosowania zasady surogacji w majątku osobistym małżonka przy dokonywaniu czynności prawnej*, [in:] M. Pecyna, J. Pisuliński, M. Podrecka (eds), *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, Warszawa 2013.

Breyer S., *Stosowanie surogacji w prawie małżeńskim*, Palestra No. 3, 1974.

Breyer S., Gross S., [in:] B. Dobrzański, J. Ignatowicz (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 1975.

Drozd E., [in:] J.S. Piątowski (ed.), *System prawa cywilnego. Prawo spadkowe*, Vol. IV, Ossolineum 1986.

Dyoniak A., *Ustawowy ustrój majątkowy małżeński*, Ossolineum 1985.

Gawlik Z., *Glosa do wyroku Sądu Najwyższego z dnia 17 maja 1985 r., III CRN 119/85*, OSPiKA 1986, No. 9–10.

Goettel M., *Majątek odrębny małżonków*, Szczytno 1986.

Goettel M., *Glosa do uchwały SN z dnia 29 września 1987 r., III CZP 54/87*, OSPiKA 1988, No. 5.

Goettel M., *Glosa do wyroku Sądu Najwyższego z dnia 17 maja 1985 r., III CRN 119/85*, OSPiKA 1988, No. 5.

Ignaczewski J., *Małżeńskie ustroje majątkowe*, Warszawa 2006.

Kitłowski E., *Surogacja rzeczowa w prawie cywilnym*, Warszawa 1969.

Nazar M., [in:] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2006.

Nazar M., *Odpłatne nabycie własności do majątku wspólnego małżonków*, [in:] E. Drozd, A. Oleszko, M. Pazdan (eds), *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego ofiarowane Panu Rejentowi Romualdowi Sztykowi*, Kluczbork 2008.

Nazar M., [in:] T. Smyczyński (ed.), *System Prawa Prywatnego*, Vol. 11, *Prawo rodzinne i opiekuńcze*, Warszawa 2014.

Ohanowicz A., *Glosa do orzeczenia z dnia 6 lipca 1967 r., III CR 117/67*, Państwo i Prawo No. 8–9, 1968.

Olczyk M., *Komentarz do zmiany art. 33 Kodeksu rodzinnego i opiekuńczego wprowadzonej przez Dz.U. z 2004 r. nr 162 poz. 1691*, LEX 2005.

Piątowski J.S., [in:] J.S. Piątowski (ed.), *System prawa rodzinnego i opiekuńczego*, part 1, Ossolineum 1985.

Pietrzykowski J., [in:] K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2003.

Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 2005.

[74] Cf. J. Biernat, *supra* n. 71.

Skowrońska-Bocian E., *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich*, Warszawa 2006.
Skowrońska-Bocian E., [in:] J. Wierciński (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2014.
Słyk J., [in:] K. Osajda (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz*, Warszawa 2018.
Sokołowski T., *Komentarz do art. 33 Kodeksu rodzinnego i opiekuńczego*, [in:] H. Dolecki, T. Sokołowski (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, LEX 2013.
Stępień-Sporek A., Ryznar M., *Nabywanie przedmiotów przez małżonków za środki z różnych mas majątkowych*, Państwo i Prawo No. 11, 2010.
Sychowicz M., [in:] K. Piasecki (ed.), *Kodeks rodzinny i opiekuńczy z komentarzem*, Warszawa 2001.
Szer S., *Glosa do uchwały SN z dnia 13 listopada 1962 r., III CO 2/62*, OSPiKA 1963, No. 9.
Trzaskowski R., *Przekształcenie prawa użytkowania wieczystego w prawo własności a stosowanie surogacji w prawie małżeńskim*, Palestra No. 7–8, 2010.
Wiśniewski C., *Glosa do uchwały z dnia 14 sierpnia 1985 r., III CZP 41/85*, Nowe Prawo No. 4, 1988.
Wolter A., *Majątek wspólny i majątki odrębne małżonków pod rządem wspólności ustawowej*, Nowe Prawo No. 1 and No. 2, 1965.

COMMENTS IN RELATION TO THE RESOLUTION OF THE SUPREME COURT OF 19 OCTOBER 2018, III CZP 45/18

Summary

The analysis of the resolution was to determine which property will cover an asset acquired by a matrimony as a result of a legal transaction in exchange for funds in part coming from matrimonial property and in part for funds coming from one of the spouses' personal property (spouses' personal properties) that are subject to the principle of substitution. Sharing the arguments of the Supreme Court, in dogmatic terms, the first standpoint approved by the representatives of the legal doctrine seems most appropriate: it provides that if an asset is acquired with funds contributed from two funds, the asset is assigned to personal property or joint property as a result of a comparison of the volume of funds coming from both properties – the major part of the spending would be the decisive criterion.

Keywords: joint matrimonial property, principle of substitution, allocation of assets, financial settlement, joint property, separate properties

UWAGI NA TLE UCHWAŁY SĄDU NAJWYŻSZEGO Z 19 PAŹDZIERNIKA 2018 R., III CZP 45/18

Streszczenie

Przedmiotem analizy objętej glosowaną uchwałą było ustalenie, w skład jakiego majątku wchodzi przedmiot majątkowy nabyty przez małżonków w drodze czynności prawnej, częściowo w zamian za składniki majątkowe prowadzące do nabycia do majątku objętego wspólnością majątkową małżeńską, częściowo zaś w zamian za składniki majątkowe pochodzące z majątku osobistego małżonka (majątków osobistych małżonków), co do których ma zastosowanie zasada surogacji. Podzielając argumentację SN, pod względem dogmatycznym najbardziej prawidłowy wydaje się przyjmowany w doktrynie pogląd, który zakłada, że w przypadku nabycia przedmiotu ze środków mieszanych, o zaliczeniu przedmiotu majątkowego do majątku osobistego lub wspólnego decyduje porównanie wartości przeznaczonych na jego nabycie środków pochodzących z tych majątków – decydujące miałoby być w tym ujęciu kryterium przeważającej części wydatku.

Słowa kluczowe: wspólność majątkowa małżeńska, zasada surogacji, przynależność przedmiotów majątkowych, rozliczenia majątkowe, majątek wspólny, majątki odrębne

COMENTARIOS DE ACUERDO DEL TRIBUNAL SUPREMO DE 19 DE OCTUBRE DE 2018, III CZP 45/18

Resumen

El objeto de análisis del acuerdo comentado ha sido determinas, a cuál patrimonio entra objeto patrimonial adquirido por los cónyuges mediante el negocio jurídico en parte a cambio de componentes patrimoniales que conlleven a su adquisición a bienes gananciales y en parte a cambio de componentes patrimoniales provenientes del patrimonio personal del cónyuge (patrimonio personal de los cónyuges), a los que se aplica el principio de subrogación. Aprobando los fundamentos del Tribunal Supremo, desde el punto de vista dogmático la postura más correcta presentada en la doctrina consiste en que en caso de adquisición de objeto con fondos mixtos, sobre la inclusión de objeto patrimonial al patrimonio personal o a bienes gananciales decide la comparación de valores destinados a su adquisición procedente de estos patrimonios. El criterio de mayor gasto sería en este caso el elemento decisivo.

Palabras claves: bienes gananciales, principio de subrogación, inclusión de objetos patrimoniales, liquidaciones patrimoniales, patrimonio común, patrimonios individuales

КОММЕНТАРИИ ПО ПОВОДУ ПОСТАНОВЛЕНИЯ ВЕРХОВНОГО СУДА ОТ 19 ОКТЯБРЯ 2018 ГОДА, III CZP 45/18

Резюме

Постановление, принятое судьями Верховного суда, касается вопроса, частью какого имущества является предмет имущества, приобретенный супругами в ходе правовой сделки частично в обмен на элементы имущества, предусматривающие совместное владение приобретаемым предметом,

а частично в обмен на элементы личного имущества супруга (личного имущества супругов), к которым применим принцип замещения. Следует согласиться с аргументами Верховного суда, основанными на догматическом подходе к вопросу. Действительно, в правовой доктрине принята точка зрения, согласно которой, в случае приобретения предмета за смешанные средства, включение приобретаемого предмета имущества в состав личного либо совместного имущества супругов зависит от размера средств, выделенных на его приобретение из соответствующих имуществ. С этой точки зрения решающим критерием должна быть преобладающая доля в расходах на приобретение.

Ключевые слова: совместная собственность супругов, принцип замещения, принадлежность предметов имущества, имущественные споры, совместное имущество, отдельное имущество

ANMERKUNGEN ZUR ENTSCHEIDUNG DES OBERSTEN GERICHTSHOFS DER REPUBLIK POLEN VOM 19. OKTOBER 2018, III CZP 45/18 III CZP 45/18

Zusammenfassung

Gegenstand der Analyse der ergangenen Entscheidung war die Bestimmung, zu welchem Vermögen ein Vermögensgegenstand gehört, der von Ehegatten im Wege einer Rechtshandlung erworben wurde, zu einem Teil im Austausch gegen Vermögenswerte, die zum Erwerb von Vermögenswerten führen, die von der ehelichen Gütergemeinschaft abgedeckt sind, und teils im Tausch gegen Vermögenswerte, die aus dem persönlichen Eigentum von Ehegatten stammen (persönliches Eigentum der Ehepartner), für die das Surrogatsprinzip gilt. Teilt man die Argumentation des obersten polnischen Gerichtshofs in dogmatischer Hinsicht, scheint die Ansicht der Doktrin am zutreffendsten zu sein, nach der beim Erwerb eines Gegenstands, der aus verschiedenen Quellen finanziert wird, über die Zurechnung des Vermögensgegenstands zum persönlichen oder gemeinschaftlichen Eigentum ein Vergleich der Werte der für seinen Erwerb aus diesen Vermögenswerten eingesetzten Mittel entscheidet. Bei diesem Ansatz käme dem Kriterium des überwiegenden Teils der Ausgaben dann entscheidende Bedeutung zu.

Schlüsselwörter: eheliche Gütergemeinschaft, Surrogatsprinzip, Zugehörigkeit von Vermögensgegenständen, vermögensrechtliche Abwicklung, gemeinschaftliche Vermögenswerte, getrennte Vermögen

COMMENTAIRES CONCERNANT LA RÉSOLUTION DE LA COUR SUPRÊME DU 19 OCTOBRE 2018, III CZP 45/18

Résumé

L'objet de l'analyse couverte par la résolution votée était de déterminer quels biens comprenaient les biens acquis par les époux par un acte juridique en partie en échange d'actifs menant à l'acquisition d'actifs couverts par la communauté de biens des époux, et en partie en échange d'actifs provenant des biens personnels du conjoint (biens personnels des époux), auxquels s'applique le principe de substitution. Lorsque l'on partage les arguments de la Cour suprême en termes dogmatiques, l'opinion la plus correcte semble être l'opinion de la doctrine selon laquelle, dans le cas de l'acquisition d'un bien provenant de fonds mixtes, la comparaison de la valeur des fonds provenant de ces actifs affectés à l'achat d'un actif décide de classer cet actif

en tant que propriété personnelle ou conjointe – dans cette approche, le critère de la majorité des dépenses serait déterminant.

Mots-clés: communauté de biens des époux, principe de substitution, appartenance des biens, règlements de biens, biens communs, biens propres des époux

OSSERVAZIONI SULLO SFONDO DELLA DELIBERA DELLA CORTE SUPREMA DEL 19 OTTOBRE 2018, III CZP 45/18

Sintesi

Oggetto dell'analisi della delibera promulgata è la determinare in che patrimonio viene inserito un bene acquisito dai coniugi mediante un negozio giuridico, in parte in cambio di elementi patrimoniali che portano all'acquisizione nel patrimonio compreso nella comunione coniugale dei beni, e in parte in cambio di elementi patrimoniali che provengono dal patrimonio personale di un coniuge (dai patrimoni personali dei coniugi) per i quali si applica il principio di surrogazione. Condividendo l'argomentazione della Corte Suprema sotto l'aspetto dogmatico sembra più corretta l'opinione assunta dalla dottrina che considera che in caso di acquisizione di un bene con mezzi misti, per l'assegnazione dell'elemento patrimoniale al patrimonio personale o comune è decisivo il confronto del valore dei mezzi provenienti da questi patrimonio utilizzati per la sua acquisizione: in questo caso sarebbe decisivo il criterio della parte maggiore di spesa.

Parole chiave: comunione coniugale dei beni, principio di surrogazione, appartenenza degli elementi patrimoniali, liquidazioni patrimoniali, patrimonio comune, patrimonio distinto

Cytuj jako:

Sekuła-Leleno M., Comments in relation to the resolution of the Supreme Court of 19 October 2018, III CZP 45/18 *[Uwagi na tle uchwały Sądu Najwyższego z 19 października 2018 r., III CZP 45/18]*, „Ius Novum" 2019 (Vol. 13) nr 4, s. 210–232. DOI: 10.26399/iusnovum.v13.4.2019.51/m.sekula-leleno

Cite as:

Sekuła-Leleno, M. (2019) 'Comments in relation to the resolution of the Supreme Court of 19 October 2018, III CZP 45/18'. *Ius Novum* (Vol. 13) 4, 210–232. DOI: 10.26399/iusnovum.v13.4.2019.51/m.sekula-leleno

NOTES ON THE AUTHORS

Michał Leciak	PhD, Assistant Professor at the Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
Natalia Daśko	PhD, Assistant Professor at the Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
Jacek A. Dąbrowski	PhD, Assistant Professor at the Department of Criminal Law, Faculty of Law and Administration of Lazarski University in Warsaw, senior assistant to the judge at the Criminal Chamber of the Supreme Court
Maria Gołda-Sobczak	PhD hab., Associate Professor at the Institute of European Culture of Adam Mickiewicz University in Poznań
Maciej Kruk	Master of Laws, Department of Legal Philosophy and the Study of the State, Faculty of Law and Administration of the University of Warsaw
Adam Jakuszewicz	PhD, Assistant Professor at the Institute of Law and Economics of Kazimierz Wielki University in Bydgoszcz
Marcin Sobota	PhD, Assistant Professor at the Institute of Landscape Architecture, Faculty of Environmental Engineering and Geodesy of Wrocław University of Environmental and Life Sciences, attorney-at-law
Bartosz Jawecki	PhD hab. Eng., Professor at the Faculty of Environmental Engineering and Geodesy of Wrocław University of Environmental and Life Sciences
Rett R. Ludwikowski	PhD, Professor Emeritus and Director of International Trade and Business Program, Columbus School of Law of the Catholic University of America, Washington D.C.

Marcin Kryński	Master of Laws, doctoral student at the Faculty of Law of the University of Białystok
Piotr Brzeziński	PhD, Assistant Professor at the Business Law Department of Lazarski University in Warsaw
Jacek Kosonoga	PhD, hab., Associate Professor at the Department of Criminal Law of Lazarski University in Warsaw
Małgorzata Sekuła-Leleno	PhD, Assistant Professor at the Department of Civil Law and Civil Procedure of Lazarski University in Warsaw, assistant to the judge at the Civil Chamber of the Supreme Court

NOTY O AUTORACH

Michał Leciak	dr, adiunkt na Wydziale Prawa i Administracji Uniwersytetu Mikołaja Kopernika w Toruniu
Natalia Daśko	dr, adiunkt na Wydziale Prawa i Administracji Uniwersytetu Mikołaja Kopernika w Toruniu
Jacek A. Dąbrowski	dr, adiunkt w Katedrze Prawa Karnego na Wydziale Prawa i Administracji Uczelni Łazarskiego w Warszawie, starszy asystent sędziego w Izbie Karnej Sądu Najwyższego
Maria Gołda-Sobczak	dr hab., profesor UAM, Instytut Kultury Europejskiej Uniwersytetu im. Adama Mickiewicza w Poznaniu
Maciej Kruk	magister prawa, Katedra Filozofii Prawa i Nauki o Państwie na Wydziale Prawa i Administracji Uniwersytetu Warszawskiego
Adam Jakuszewicz	dr, adiunkt w Instytucie Prawa i Ekonomii Uniwersytetu Kazimierza Wielkiego w Bydgoszczy
Marcin Sobota	dr, adiunkt w Instytucie Architektury Krajobrazu na Wydziale Inżynierii Kształtowania Środowiska i Geodezji Uniwersytetu Przyrodniczego we Wrocławiu, adwokat
Bartosz Jawecki	dr hab. inż., prof. w Instytucie Architektury Krajobrazu na Wydziale Inżynierii Kształtowania Środowiska i Geodezji Uniwersytetu Przyrodniczego we Wrocławiu
Rett R. Ludwikowski	dr, prof. em., Dyrektor Programu Handlu Międzynarodowego i Biznesu, Columbus School of Law, Katolicki Uniwersytet Ameryki w Waszyngtonie
Marcin Kryński	magister prawa, doktorant na Wydziale Prawa Uniwersytetu w Białymstoku
Piotr Brzeziński	dr, adiunkt w Katedrze Prawa Gospodarczego Uczelni Łazarskiego w Warszawie

Jacek Kosonoga	dr hab., profesor w Katedrze Prawa Karnego Uczelni Łazarskiego w Warszawie
Małgorzata Sekuła-Leleno	dr, adiunkt w Katedrze Prawa i Postępowania Cywilnego Uczelni Łazarskiego w Warszawie, asystentka sędziego w Izbie Cywilnej Sądu Najwyższego

INFORMATION FOR AUTHORS

1. The quarterly publishes scientific articles devoted to issues within a broad field of law as well as reviews and reports on scholarly life in higher education institutions. Articles are subject to evaluation by two reviewers and their positive opinion is a condition for their publication.
2. Manuscripts should be submitted in one copy of a standard typescript (30 lines of 60 characters each, i.e. ca. 1,800 characters per page) together with a digital version saved on a data storage device and e-mailed to: wydawnictwo@lazarski.edu.pl.
3. Footnotes should be placed at the bottom of a page providing the initials of the author's given name(s), surname, the title (printed in italics), the name of a journal or a publisher, the place of publication (in case of books), the year of publication, and a page number. In case of books with multiple authors, the first name and surname of their editor with additional information: (ed.) shall be provided.
4. An article should be accompanied by its abstract informing about its aim, methodology, work findings and conclusions. The abstract should not exceed 20 lines of standard typescript. If the abstract contains specialist, scientific or technical terms, their English equivalents should be provided.
5. An article should not exceed 22 pages of a standard typescript and a review, scientific news or information: 12 pages.
6. The editor reserves the right to introduce changes in the manuscript submitted for publication, e.g. to shorten it, change the title and subheadings as well as correct the style.
7. Detailed guidelines for authors are available on Lazarski University Press website: http://www.lazarski.pl/pl/badania-i-rozwoj/oficyna-wydawnicza/dla-autorow/. Authors are obliged to provide bibliography.
8. A manuscript shall contain the author's full given name and surname, their residence address with the telephone/fax number, their e-mail address, scientific degree or title and the name of the scientific institution the author works for.

IUS NOVUM PUBLICATIONS REVIEW PROCEDURE

1. The thematic editors shall take preliminary decisions on accepting articles for review.
2. The Editor-in-Chief shall take the final decision to refer an article to a reviewer, having checked that an article meets all formal requirements, i.e. the author has provided all necessary information: affiliation, correspondence address, e-mail address, telephone number, co-authors' confirmation of cooperation and their input to the article, an abstract in the Polish language and key words.
3. A review should take into consideration the type of work (original, experimental, reviewing, casuistic, methodological), its scientific level, whether the work matches the subject matter suggested in its title, whether it meets the requirements of a scientific publication, whether it contains essential elements of novelty, the appropriate terminology use, reliability of findings and conclusions, layout, size, cognitive value and language, and provide recommendation to accept the article after necessary changes or decline it. The review shall be developed on a special review form.
4. Reviews shall be provided by standing reviewers and reviewers selected at random. Those shall be scientists with considerable scientific achievements in the given discipline. The list of standing reviewers is published on the quarterly website. Each issue of the quarterly publishes a list of reviewers of articles and glosses published in the issue.
5. Two independent reviewers shall review each publication.
6. Reviewers shall not be affiliated to the same scientific institution as authors.
7. Reviewers and authors shall not know their identity.
8. Reviewers appointed to review an article must not reveal the fact.
9. A review shall be developed in writing, following a special template (the review form) and provide recommendation to accept a manuscript for publication or decline it.
10. Reviewers shall submit their reviews in two formats: electronic and a hard copy with a handwritten signature. Such review is archived for two years.
11. An author is provided with a reviewer's comments and he/she is obliged to respond to them. The reviewer shall verify the text after changes introduced to it.
12. In the event of a negative assessment of an article by a reviewer, the Editor-in--Chief, after consulting a thematic editor, shall take a final decision whether to accept the article for publication or decline it.

DODATKOWE INFORMACJE

W 2019 r. kwartalnik Ius Novum, po przejściu procedury weryfikacyjnej i uzyskaniu pozytywnej oceny parametrycznej, znalazł się na wykazie czasopism punktowanych Ministerstwa Nauki i Szkolnictwa Wyższego, a za publikację na jego łamach przyznano **20 punktów** (Komunikat Ministra Nauki i Szkolnictwa Wyższego z dnia 31 lipca 2019 r. w sprawie wykazu czasopism naukowych i recenzowanych materiałów z konferencji międzynarodowych wraz z przypisaną liczbą punktów, poz. 27937).

Dalsze informacje w tym zakresie: http://www.bip.nauka.gov.pl/wykaz-czasopism-naukowych/

ADDITIONAL INFORMATION

In 2019 the Ius Novum quarterly, following the verification procedure and obtaining a positive parametric grade, was placed on the list of journals evaluated by the Ministry of Science and Higher Education with 20 points awarded for a publication in the quarterly (the Announcement of the Minister of Science and Higher Education of 31 July 2019 on the list of scientific journals and reviewed materials from international conferences with assigned points for publication, entry number 27937).

Further information on this topic are available at: http://www.bip.nauka.gov.pl/wykaz-czasopism-naukowych/

ARTICLES PUBLISHED IN 2019 WERE REVIEWED BY:

Wojciech Bieńkowski
Tomasz Braun
Przemysław Buczkowski
Helena Ciepła
Zbigniew Czarnik
Tomasz Demendecki
Katarzyna Dudka
Elżbieta Dynia
Dorota Dzienisiuk
Andrzela Gawrońska-Baran
Mariusz Godlewski
Robert Gwiazdowski
Andrzej Hankała
Dominika Harasimiuk
Wojciech Hartung
Stanisław Hoc
Jerzy Jaskiernia
Maria Jeż-Ludwichowska
Czesław Kłak
Violetta Konarska-Wrzosek
Marek Kulik
Agnieszka Kunert-Diallo
Artur Kuś
Zbigniew Kwiatkowski
Florian Lempa
Aneta Łazarska
Norbert Malec
Maciej Małolepszy
Mirosława Melezini
Marek Mozgawa
Ewelina Nojszewska
Bartłomiej Opaliński
Anna Osmańska
Maciej Rogalski
Magdalena Rycak
Andrzej Sakowicz
Jerzy Skorupka
Jacek Sobczak
Blanka J. Stefańska
Ryszard Strzelczyk
Ilona Szczepańska
Przemysław Szustakiewicz
Marta Tużnik
Małgorzata Wąsek-Wiaderek
Sławomir Żółtek

REGULAR REVIEWERS

1. Prof. Zbigniew Czarnik, PhD hab., WSPiA University of Rzeszów
2. Prof. Katarzyna Dudka, PhD hab., Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin
3. Prof. Jolanta Jakubowska-Hara, PhD hab., Criminal Law Department of the Institute for Legal Studies at Polish Academy of Sciences
4. Prof. Jerzy Jaskiernia, PhD hab., Faculty of Law, Administration and Management of Jan Kochanowski University in Kielce
5. Prof. Katarzyna Kaczmarczyk-Kłak, PhD hab., Faculty of Law and Administration of the WSPiA University of Rzeszów
6. Dariusz Kala, PhD, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
7. Prof. Tomasz Kalisz, PhD hab., Faculty of Law, Administration and Economics of the University of Wrocław
8. Prof. Czesław Kłak, PhD hab., Faculty of Law and Administration of the WSPiA University of Rzeszów
9. Prof. Violetta Konarska-Wrzosek, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
10. Prof. Zbigniew Kwiatkowski, PhD hab., Faculty of Law and Administration of the University of Opole
11. Jerzy Lachowski, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
12. Maria Jeż-Ludwichowska, PhD, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
13. Aneta Łazarska, PhD, Faculty of Law and Administration of Lazarski University in Warsaw
14. Eliza Maniewska, PhD, Faculty of Law and Administration of the University of Warsaw
15. Prof. Mirosława Melezini, PhD hab., Faculty of Social Sciences and Humanities of Łomża State University of Applied Sciences
16. Prof. Marek Mozgawa, PhD hab., Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin
17. Prof. Hanna Paluszkiewicz, PhD hab., Faculty of Law and Administration of the University of Zielona Góra
18. Mateusz Pilich, PhD, Faculty of Law and Administration of the University of Warsaw
19. Piotr Rączka, PhD hab., Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
20. Prof. Maciej Rogalski, PhD hab., Faculty of Law and Administration of Lazarski University in Warsaw
21. Prof. Jerzy Skorupka, PhD hab., Faculty of Law, Administration and Economics of the University of Wrocław
22. Andrzej Sakowicz, PhD hab., Faculty of Law of the University of Białystok

FOREIGN REVIEWERS

1. Prof. Regina Hučková, Faculty of Law of Pavol Jozef Šafárik University in Košice, Slovakia
2. Prof. Maciej Małolepszy, PhD hab., Faculty of Law of the European University Viadrina Frankfurt (Oder), Germany
3. Prof. Rodrigo Ochoa Figueroa, attorney, Department of Administrative Law of the Michoacan University of Saint Nicholas of Hidalgo, Mexico
4. Prof. Alembert Vera Rivera, Catholic University of Santiago de Guayaquil, Ecuador; attorney of the President of the Republic of Ecuador
5. Katarzyna Krzysztyniak, PhD, attorney, Czech Republic
6. Miguel Bustos Rubio, PhD, Faculty of Law of the University of Salamanca, Spain

ETHICAL STANDARDS

IUS NOVUM Editorial Board strives to ensure high ethical standards. Articles submitted for publication in *IUS NOVUM* are assessed for their integrity, compliance with ethical standards and contribution to the development of scholarship.
The principles listed below are based on the COPE's Best Practice Guidelines for Journal Editors.

STANDARDS FOR AUTHORS

Authorship should reflect individuals' contribution to the work concept, project, implementation or interpretation. All co-authors who contributed to the publication should be listed. Persons who are not authors but made substantial contributions to the article, should be listed in the acknowledgements section. The author should make sure that all co-authors have been listed, are familiar with and have accepted the final version of the article, and have given their consent for submitting the article for publication. Authors who publish the findings of their research should present the research methodology used, an objective discussion of the results and their importance for academic purposes and practice. The work should provide reference to all the sources used. Publishing false or intentionally untrue statements is unethical.

Conflict of interests and its disclosure
Authors should disclose all sources of their projects funding, contribution of research institutions, societies and other entities as well as all other conflicts of interests that might affect the findings and their interpretation.

Standards for reporting
Authors of articles based on their own research should present detail of performed work and discuss its importance. Data the work is based on should be presented in details. Statements that are not true or intentionally inaccurate will be treated as unethical and prohibited conduct.

Access to data and their retention
Authors should provide unprocessed data regarding the work submitted for reviewing or should be prepared to ensure access to such data. Authors should retain the data for at least a year's time from the publication.

Multiple, unnecessary or competing publications
In general, authors should not publish materials describing the same research in more than one journal or primary publication. Submitting the same work to more than one editor concurrently is unethical and forbidden.

Confirming sources
Authors must provide acknowledgement and references for all publications that affected the submitted work and must acknowledge each instance of using other authors' work.

Substantial errors in the published work
If authors find substantial errors or inaccuracies in their work, they will be obliged to notify the Editorial Board Secretary without delay. In case the article has already been published, the author should cooperate with the Editor in order to retract the article or publish an adequate erratum.

Originality and plagiarism
Authors must only submit original works. They should make sure that the names of authors cited in the work and/or cited fragments of their works are properly acknowledged or referenced.

Ghost/guest authorship
Ghost authorship is when someone makes a substantial contribution to a work but he/she is not listed as an author or his/her role in the publication is not acknowledged. Guest authorship takes place when someone's contribution is very small or inexistent but his/her name is listed as an author.

Ghost and guest authorship are manifestations of a lack of scientific integrity and all such cases will be disclosed, involving a notification of component entities (institutions employing the authors, scientific societies, associations of editors, etc.). The Editorial Board will document every instance of scientific dishonesty, especially the violation of the ethical principles binding in science.

In order to prevent ghost or guest authorship, authors are requested to provide declarations of authorship.

STANDARDS FOR REVIEWERS

Editorial decisions
Reviewers should support the Editor-in-Chief in decision-making and authors in correcting errors.

Feedback
Reviewers who cannot review a work or know they will not be able to submit a review within an agreed time limit should inform the Editorial Board Secretary about that.

Confidentiality
All reviewed works should be treated as confidential documents. They cannot be shown to or discussed with third parties who are not authorised members of the Editorial Board.

Anonymity
All reviews are made anonymously and the Editor does not reveal information on authors to reviewers.

Objectivity standards
Reviews should be objective. Derogatory personal remarks are inappropriate. Reviewers should clearly express their opinions and provide adequate arguments. All doubts as well as critical and polemical comments should be included in the review.

Conflict of interests and its disclosure
Confidential information and ideas arising as a result of a review must be kept secret and cannot be used for personal benefits. Reviewers should not review works of authors if there is a conflict of interests resulting from their close relationship.

Confirmation of sources
Reviewers should enumerate publications that an author has not referred to. Whatever statements are made about observations, sources or arguments that have previously been discussed should be supported by an adequate citation. Reviewers should also inform the Editorial Board Secretary about any substantial similarities or partial overlaps noticed.

Lazarski University Press
offers the following new publications:

1. *Legal Conditions of International Cooperation for the Safety and Efficiency of Civil Aviation*, Ewa Jasiuk, Roman Wosiek (eds), Warsaw 2019, ISBN 978-83-64054-27-3.
2. *Poland and Ukraine: Common Neighborhood and Relations*, Martin Dahl, Adrian Chojan (eds), Warsaw 2019, ISBN 978-83-64054-15-0.
3. *Resolving International Economic Problems with the Tools of Contemporary Econometrics*, Krzysztof Beck (ed.), Warsaw 2019, ISBN 978-83-64054-39-6.
4. *Elastyczne formy zatrudnienia we włoskim i polskim prawie pracy. Szanse i zagrożenia*, Angelica Riccardi (red.), Magdalena Rycak (red.), Warszawa 2019, ISBN 978-83-64054-51-8.
5. *Determinanty synchronizacji cykli koniunkturalnych w krajach Unii Europejskiej*, Krzysztof Beck, Warszawa 2019, ISBN 978-83-64054-43-3.
6. *Prawo a nowoczesność. Wyzwania – problemy – nadzieje*, Anna Hrycaj, Aneta Łazarska, Przemysław Szustakiewicz (red.), Warszawa 2019, ISBN 978-83-64054-63-01.
7. *Investors' Perceptions and Stock Market Outcomes. Interdisciplinary Approach*, Olha Zadorozhna, Martin Dahl (eds), Warsaw 2019, ISBN 978-83-64054-67-9.
8. *Charakterystyka umowy Time for Photos oraz roszczeń z tytułu jej niewykonania lub nienależytego wykonania*, Katarzyna Jedynak, Warszawa 2019, ISBN 978-83-64054-79-2.
9. *Nowy Porządek Świata. Dekompozycja państw i narodów*, Marian Guzek, Warszawa 2019, ISBN 978-83-64054-71-6.

Other publications:

1. Krystyna Regina Bąk (red.), *Statystyka wspomagana Excelem 2007*, Warszawa 2010.
2. Maria Biegniewicz-Steyer, O powstańczych dniach trochę inaczej, Warszawa 2018.
3. Wojciech Bieńkowski, Krzysztof Szczygielski, *Rozważania o rozwoju gospodarczym Polski*, Warszawa 2009.
4. Wojciech Bieńkowski, Adam K. Prokopowicz, Anna Dąbrowska, *The Transatlantic Trade and Investment Partnership. The 21st Century Agreement*, Warsaw 2015.
5. Remigiusz Bierzanek, *Przez wiek XX. Wspomnienia i refleksje*, Warszawa 2006.
6. Jacek Brdulak, Ewelina Florczak, *Uwarunkowania działalności przedsiębiorstw społecznych w Polsce*, Warszawa 2016.
7. Piotr Brzeziński, Zbigniew Czarnik, Zuzanna Łaganowska, Arwid Mednis, Stanisław Piątek, Maciej Rogalski, Marlena Wach, *Nowela listopadowa prawa telekomunikacyjnego*, Warszawa 2014.
8. Hans Ephraimson-Abt, Anna Konert, *New Progress and Challenges in The Air Law*, Warsaw 2014.
9. Janusz Filipczuk, *Adaptacyjność polskich przedsiębiorstw w warunkach transformacji systemowej*, wyd. II, Warszawa 2007.

10. Jerzy A. Gawinecki (red. nauk.), *Ekonometria w zadaniach*, praca zbiorowa, Warszawa 2008.
11. Jerzy A. Gawinecki, *Matematyka dla ekonomistów*, Warszawa 2010.
12. Grażyna Gierszewska, Jerzy Kisielnicki (red. nauk.), *Zarządzanie międzynarodowe. Konkurencyjność polskich przedsiębiorstw*, Warszawa 2010.
13. Tomasz G. Grosse (red. nauk.), *Między polityką a rynkiem. Kryzys Unii Europejskiej w analizie ekonomistów i politologów*, praca zbiorowa, Warszawa 2013.
14. Jan Grzymski, *Powrót do Europy – polski dyskurs. Wyznaczanie perspektywy krytycznej*, Warszawa 2016.
15. Marian Guzek, *Makroekonomia i polityka po neoliberalizmie. Eseje i polemiki*, Warszawa 2011.
16. Marian Guzek (red. nauk.), *Ekonomia i polityka w kryzysie. Kierunki zmian w teoriach*, praca zbiorowa, Warszawa 2012.
17. Marian Guzek, *Teorie ekonomii a instrumenty antykryzysowe*, Warszawa 2013.
18. Marian Guzek, *Kapitalizm na krawędzi*, Warszawa 2014.
19. Marian Guzek, *Doktryny ustrojowe. Od liberalizmu do libertarianizmu*, Warszawa 2015.
20. Marian Guzek, *Przyszłość kapitalizmu – cesjonalizm?*, Warszawa 2016.
21. Marian Guzek, Świat zachodu po nieudanym wejściu w erę postindustrialną, Warszawa 2018.
22. Anna Harasiewicz-Mordasewicz, *Word 2007*, Warszawa 2009.
23. Anna Harasiewicz-Mordasewicz, *Excel 2007*, Warszawa 2010.
24. Dominika E. Harasimiuk, Marcin Olszówka, Andrzej Zinkiewicz (red. nauk.), *Prawo UE i porządek konstytucyjny państw członkowskich. Problem konkurencji i wzajemnych relacji*, Warszawa 2014.
25. Stanisław Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Warszawa 2013.
26. „Ius Novum", Ryszard A. Stefański (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1/2007, 2–3/2007, 4/2007, 1/2008, 2/2008, 3/2008, 4/2008, 1/2009, 2/2009, 3/2009, 4/2009, 1/2010, 2/2010, 3/2010, 4/2010, 1/2011, 2/2011, 3/2011, 4/2011, 1/2012, 2/2012, 3/2012, 4/2012, 1/2013, 2/2013, 3/2013, 4/2013, Numer specjalny 2014, 1/2014, 2/2014, 3/2014, 4/2014, 1/2015, 2/2015, 3/2015, 4/2015, 1/2016, 2/2016, 3/2016, 4/2016, 1/2017, 2/2017, 3/2017, 4/2017, 1/2018, 2/2018, 3/2018, 4/2018, 1/2019, 2/2019, 3/2019.
27. Andrzej Jagiełło, *Polityka akcyzowa w odniesieniu do wyrobów tytoniowych w Polsce w latach 2000–2010 i jej skutki ekonomiczne*, Warszawa 2012.
28. Sylwia Kaczyńska, Anna Konert, Katarzyna Łuczak, *Regulacje hiszpańskie na tle obowiązujących przepisów międzynarodowego i europejskiego prawa lotniczego*, Warszawa 2016.
29. Anna Konert (red.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Warszawa 2013.
30. Anna Konert, *A European Vision for Air Passengers*, Warsaw 2014.
31. Anna Konert (red.), *Internacjonalizacja i europeizacja prawa lotniczego. Księga pamiątkowa ku czci Profesora Marka Żylicza*, Warszawa 2015.
32. Łukasz Konopielko, Michał Wołoszyn, Jacek Wytrębowicz, *Handel elektroniczny. Ewolucja i perspektywy*, Warszawa 2016.

33. Dariusz A. Kosior, Marek Postuła, Marek Rosiak (red.), *Doustne leki przeciwkrzepliwe. Od badań klinicznych do praktyki*, Warszawa 2013.
34. Dariusz A. Kosior, Marek Rosiak, Marek Postuła (red.), *Doustne leki przeciwpłytkowe w leczeniu chorób układu sercowo-naczyniowego. Okiem kardiologa i farmakologa*, Warszawa 2014.
35. Jerzy Kowalski, *Państwo prawa. Demokratyczne państwo prawne. Antologia*, Warszawa 2008.
36. Stanisław Koziej, *Rozmowy o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wywiadach i komentarzach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
37. Stanisław Koziej, *Rozważania o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wystąpieniach i referatach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
38. Stanisław Koziej, *Studia o bezpieczeństwie. O bezpieczeństwie narodowym i międzynarodowym w latach 2010–2015 w publikacjach i analizach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2017.
39. Rafał Krawczyk, *Islam jako system społeczno-gospodarczy*, Warszawa 2013.
40. Rafał Krawczyk, *Podstawy cywilizacji europejskiej*, Warszawa 2006.
41. Rafał Krawczyk, *Zachód jako system społeczno-gospodarczy*, Warszawa 2016.
42. Maria Kruk-Jarosz (red. nauk.), *System organów ochrony prawnej w Polsce. Podstawowe instytucje*, wyd. II zm. i popr., Warszawa 2008.
43. Maciej Krzak, *Kontrowersje wokół antycyklicznej polityki fiskalnej a niedawny kryzys globalny*, Warszawa 2012.
44. Michał Kuź, *Alexis de Tocqueville's Theory of Democracy and Revolutions*, Warsaw 2016.
45. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe w XXI wieku. Księga pamiątkowa profesor Renaty Szafarz*, Warszawa 2007.
46. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa profesor Renaty Sonnenfeld-Tomporek*, Warszawa 2006.
47. Jerzy Menkes (red. nauk.), *Wybór kazusów z prawa międzynarodowego. Zagadnienia ogólne*, zeszyt 1, Warszawa 2008.
48. Aleksandra Mężykowska, *Interwencja humanitarna w świetle prawa międzynarodowego*, Warszawa 2008.
49. Mariusz Muszyński (red. nauk.), Dominika E. Harasimiuk, Małgorzata Kozak, *Unia Europejska. Instytucje, polityki, prawo*, Warszawa 2012.
50. „Myśl Ekonomiczna i Polityczna", Józef M. Fiszer (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1(28)2010, 2(29)2010, 3(30)2010, 4(31)2010, 1–2(32–33)2011, 3(34)2011, 4(35)2011, 1(36)2012, 2(37)2012, 3(38)2012, 4(39)2012, 1(40)2013, 2(41)2013, 3(42)2013, 4(43)2013, 1(44)2014, 2(45)2014, 3(46)2014, 4(47)2014, 1(48)2015, 2(49)2015, 3(50)2015, 4(51)2015, 1(52)2016, 2(53)2016, 3(54)2016, 4(55)2016, 1(56)2017, 2(57)2017, 3(58)2017, 4(59)2017, 1(60)2018, 2(61)2018, 3(62)2018, 4(63)2018, 1(64)2019, 2(65)2019, 3(66)2019.
51. Edward Nieznański, *Logika dla prawników*, Warszawa 2006.
52. Marcin Olszówka, *Konstytucja PRL a system źródeł prawa wyznaniowego do roku 1989*, Warszawa 2016.

53. Marcin Olszówka, *Wpływ Konstytucji RP z 1997 roku na system źródeł prawa wyznaniowego*, Warszawa 2016.
54. Bartłomiej Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014.
55. Bartłomiej Opaliński (red. nauk.), *Prawo administracyjne w ujęciu interdyscyplinarnym*, Warszawa 2014.
56. Bartłomiej Opaliński, Maciej Rogalski (red. nauk.), *Kontrola korespondencji. Zagadnienia wybrane*, Warszawa 2018.
57. Bartłomiej Opaliński, Maciej Rogalski, Przemysław Szustakiewicz, *Służby specjalne w systemie administracyjnym Rzeczypospolitej Polskiej*, Warszawa 2016.
58. Bartłomiej Opaliński, Przemysław Szustakiewicz, *Policja. Studium administracyjnoprawne*, Warszawa 2013.
59. Bartłomiej Opaliński, Przemysław Szustakiewicz (red. nauk.), *Funkcjonowanie służb mundurowych i żołnierzy zawodowych w polskim systemie prawnym. Zagadnienia wybrane*, Warszawa 2015.
60. Leokadia Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej*, Warszawa 2007.
61. Leokadia Oręziak (red. nauk.), *Finansowanie rozwoju regionalnego w Polsce*, Warszawa 2008.
62. Leokadia Oręziak, Dariusz K. Rosati (red. nauk.), *Kryzys finansów publicznych*, Warszawa 2013.
63. Iryna Polets, Merlin's Faces. From Medieval Literature to Film, Warsaw 2018.
64. Maciej Rogalski, *Odpowiedzialność karna a odpowiedzialność administracyjna w prawie telekomunikacyjnym, pocztowym i konkurencji*, Warszawa 2015.
65. Maciej Rogalski, *Świadczenie usług telekomunikacyjnych*, Warszawa 2014.
66. Maciej Rogalski (red. nauk.), Wymiar wolności w prawie administracyjnym, Warszawa 2018.
67. Dariusz Rosati (red. nauk.), *Gospodarka oparta na wiedzy. Aspekty międzynarodowe*, Warszawa 2007.
68. Dariusz Rosati (red. nauk.), *Euro – ekonomia i polityka*, Warszawa 2009.
69. Grzegorz Rydlewski, Przemysław Szustakiewicz, Katarzyna Golat, *Udzielanie informacji przez administrację publiczną – teoria i praktyka*, Warszawa 2012.
70. Jacek Szymanderski, *Schyłek komunizmu i polskie przemiany w odbiorze społecznym*, Warszawa 2011.
71. Jacek Sierak, Kamila Lubańska, Paweł Wielądek, Marcin Sienicki, Tetiana Kononenko, Ryma Alsharabi, Malwina Kupska, Bartłomiej Rutkowski, Bogdan Olesiński, Remigiusz Górniak, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 1: Województwa Polski Północnej, Zachodniej i Południowej*, Warszawa 2016.
72. Jacek Sierak, Anna Karasek, Angelika Kucyk, Oleksandr Kornijenko, Marcin Sienicki, Anna Godlewska, Agnieszka Boczkowska, Albina Łubian, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 2: Województwa Polski Wschodniej i Centralnej*, Warszawa 2016.

73. Karol Sławik, *Zagrożenia życia i zdrowia ludzkiego w Polsce. Aspekty prawno-kryminologiczne i medyczne*, Warszawa 2015.
74. Jerzy Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach. Część szesnasta Dekretu przypisywanego Iwonowi z Chartres* (tłum. z jęz. łac.), Warszawa 2009.
75. Janusz Żarnowski, *Współczesne systemy polityczne. Zarys problematyki*, Warszawa 2012.

Lazarski University Press
02-662 Warsaw, ul. Świeradowska 43
tel.: (22) 54 35 450
fax: (22) 54 35 392
e-mail: wydawnictwo@lazarski.edu.pl
www.lazarski.pl