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POSITION OF THE HEAD OF STATE IN THE PROCESS OF EXERCISING THE POWER OF APPOINTMENT

MARTA TÓTHOVÁ*

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1. INTRODUCTION

The head of state, as one of the basic constitutional institutes, is an institutional and symbolic expression of the sovereignty and unity of the state, and also a part of what is called the power triangle. Although the head of state is not explicitly (except for the presidential form of government) the immediate bearer of one of the classic powers in the state, he occupies an important position in the system of the separation of powers. He is also the institute through which changes are made in the distribution and balance of the power in the state, due to diverse constitutional arrangements.

In the course of the history, constitutional models have been formed either with a strong or weak head of state. The starting point to evaluate the position of the head of state in a given constitutional system are the powers (authorities) and responsibilities conferred and defined by the constitution, under which the specific position of power of the head of state is established. The head of state can co-create the dynamic and flexible constitutional system, when he is allowed to exercise few, but extremely important powers, such as:

– the right to dissolve the chamber of deputies,
– the right to veto which can be overcome by the qualified majority vote,
– the power to appoint high non-political officials (especially judges, ambassadors, military officers),
– the right to appoint (and change) the prime minister together with the parliament.

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For the sake of flexibility, the system calls for greater independence of the head of state in the process of exercising of his powers conferred by the constitution. On the other hand, the need for stability forces the constitutional officials to seek consensus, which can be achieved mainly through the position of the head of state, as a functional arbitrator, who is able to respond effectively to changing societal needs.

A greater degree of independence, however, does not mean a greater degree of non-responsibility. The development of modern constitutional systems proves that the broadly conceived non-responsibility of the head of state is a monarchical anachronism, which in a democratic form of government loses its justification. The application of wider responsibility towards the head of state is not only the demand of the modern state of the rule of law, but it is also the requirement for the efficient functioning of the mechanism of state power and the balancing of power relations within the constitutional system.

Powers conferred on the head of state by the constitution are classified mainly according to the degree of autonomy of the expression of will, and in this respect, divided into separate or autonomous powers and bound or shared powers, for which the intended legal effects can only be achieved by legal acts of the head of state in collaboration with other public bodies.[1]

The scope of shared competences is significant if the constitutional framers constitute a weak head of state which is typical of the traditional parliamentary form of government. In the forms of government characterised by the powerful position of the head of state, by contrast, many powers shared in the classical parliamentary system are set as autonomous.

The decision-making process of the head of state is unambiguous only if the constitution expressly confers competences or requires responsibilities. In other cases, it is necessary to shape the constitutional status of the president by amending the relevant provisions of the constitution or by interpretation of the constitutional (or even sub-constitutional) norms. In systems with long-standing traditions, where the living constitution is an essential part of the constitutional system, the decision-making process is also regulated by unwritten rules.

The powers of appointment belonging to the head of state denote his powers and responsibilities in the process of forming of the public authorities. When exercised, the degree of his autonomy can be different in the relation to the holders of individual branches of power. The degree of his autonomy is logically restricted in the exercise of those powers that are linked to the expression of will of other state authorities. However, the texts of different constitutions are sometimes problematic and not always clear as to the degree of consideration, the degree of autonomous discretion, the limits of this discretion and even the exact obligation to appoint. Constitutions generally use expressions like "make appointments", "has authority to appoint", "ernennt", "nomination", "designado", "mianuje". This problem is characteristic of the Slovak constitutional system as well, even if there are views that the terms "appoint" or "make appointment" indicate clear imperative, because,

[1] See, for example, L. Orosz, K. Šimuničová, *Prezident v ústavnom systéme Slovenskej republiky*, p. 23 et seq.

if the constitutional framers had intended to give the head of state discretion, they would have used the phrase "President can appoint upon the recommendation".[2]

Specific decisions, therefore, entail conflict situations between the highest state authorities, which are resolved (or should be resolved) by the interpretation of the state authority empowered by the constitution to provide the authoritative interpretation: constitutional courts, or supreme courts (depending on the form of constitutionality control). Based on the scope of interpretation, the interpretation of constitutional institutions can be declaratory, but also constitutive, even associated with the law-making process (e.g. if departing from the literal meaning of the text or bringing more new features into interpretation), which may lead to changes in the constitution or even form of government.[3] Such practice is typical of systems with rigid constitutions with a long-standing tradition (e.g. the United States). In the continental Europe such type of interpretation is usually unacceptable, and more attention is paid to the borders of interpretation. In the process of interpretation of the constitutional text, the boundaries are determined by the concrete text and language, but also by the need to maintain consistency, coherence, rationality and necessity to preserve the procedural rights of the parties. Further, international commitments and the jurisprudence of international tribunals are also taken into account, as well as the case law of the interpreting body.

However, there are situations in our legal culture when the boundaries of declaratory interpretation are crossed. The question is therefore: how far can the authorities go in the process of creative interpretation of the constitution? The answer is not easy, especially, in a period when one encounters increased degree of politicisation of law. Authorities interpreting the constitution are in their essence hybrid bodies, which are also linked with politics, just like the constitution. Secondly, the answer is not simple owing to the nature of the terms that the constitution contains. The constitution is the most abstract legal rule and its text is often open, allowing flexibility in response to the diversity of social reality and development. The text often remains open and vague, due to lack of political consensus in the process of creation of some constitutional institutions. Thirdly, the answer is not easy because individual cases usually have the character of hard ones and concern issues on which the constitution often remains silent.[4]

The interpretation of the constitution and constitutional acts should primarily be consistent, although, one cannot ignore the fact that the interpretation process itself is subject to evolution. Despite this, it is inappropriate for the interpreting body to give different answers to an analogous, comparable questions in a short time-span without providing any rational and convincing reasons why it has departed from its own case law (e.g. because of changes in social circumstances or because of the need to correct its own decision).

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[2] See, for instance, T. Herz, *Rozsah politického uváženia prezidenta*, Justičná revue, č. 8–9/2010, pp. 869–936.

[3] T. Ľalík, *Interpretácia ústavy a úloha ústavného súdu*, available at: http://www.academia.edu/18283296/Interpret%C3%A1cia_%C3%BAstavy_a_%C3%BAloha_%C3%BAstavn%C3%A9ho_s%C3%BAdu.

[4] *Ibid.*

In relation to the interpretation of the scope of discretion of the head of state in parliamentary systems and forms derived from them, it is widely accepted that discretion may be wider if the head of state acts within the scope of executive power.[5] If he is seen mainly as a part of the executive branch, he has a superior position over some of the appointed state bodies (e.g. as the Commander-in-Chief of the Armed Forces).

A narrower scope of discretion is expected in cases, where the head of state exercises his powers to appoint with regard to the proposal of the constitutional authority which falls outside the sphere of the executive branch and is not directly or indirectly subordinate to it (e.g. when the judges are appointed upon recommendation of judicial councils). The narrowest range of discretion is expected if the head of state decides on the proposal of the parliament which has a dominant position in the system of constitutional bodies, in the parliamentary form of government also due to respect for the principle of the sovereignty of parliament.[6]

2. APPOINTING AUTHORITY IN THE SPHERE OF EXECUTIVE POWER

At present, the head of state is usually subsumed under the executive power, his position in this field, however, considerably varies in different systems. In classical parliamentary forms of government, one can see the tendency to extricate the head of state from the field of the executive power and to strengthen his arbitration function as the fourth force instead, which becomes very important in the process of resolving conflicts between the parliament and the nowadays increasingly strengthened government. In systems where the head of state performs only representative functions (notably most monarchies), he is not entrusted with the powers of the executive (usually, limited to the right to be informed or consulted) or his powers are reduced to formal confirmation of the will of another authority. In this case, the possibility to interfere with the executive ultimately depends only on the degree of personal influence of the head of state. In semi-presidential systems (including new hybrid models), the head of state is dominant; in presidential systems, the head of state is the sole representative of the executive.

Powers that can significantly affect mutual relationships between the head of state and the government are bestowed upon the head of state, in particular, the power to appoint and dismiss members of the government, as well as the power to introduce mandatory regulations and the decision-making powers. Powers on the government's side are especially those which require countersignature for the issued acts and sometimes the powers to initiate (and possibly create) acts issued by the head of state.

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[5] For instance, in the Slovak constitutional system, the President according to the case law of the Constitutional Court no. I. ÚS 39/93 has "in fact a dominant position" within the executive power.

[6] A dissenting opinion of the judges Ján Luby and Ladislav Orosz in the decision no. PL. ÚS 4/2012, available at: www.ustavnysud.sk/vyhladavanie-rozhodnuti#!DecisionsSearchResultView.

With regard to the relation between the government and the head of state, in systems based on the parliamentary form of government, the process of forming the government and the degree of participation of the head of state in this process is especially important. The exclusion of the head of state from this process is exceptional (e.g. in Sweden and Israel) and rather atypical of current democracy.

Several factors influence the scope of free will of the head of state in this process, such as real balance of power in society in the light of the results of parliamentary elections (usually, the head of state only formalises by his act the will of the strongest parliamentary fraction), the method of formation of the government and the designation of the prime minister, constitutional traditions, etc.

The position of power and the authority of the head of state are predicated mainly on the possibility to influence the composition of the government. It is generally accepted that the authority of the prime minister to organise the work of the government includes the power to determine its composition. The question whether the head of state must necessarily accept the proposals for the members of the government, or whether any of them may be rejected (e.g. for political reasons), is often a major dilemma in modern constitutional structures.

The appointing powers of the head of state with the possibility to reject a proposed candidate for the post of a member of the government under certain conditions may in this case be an important power control mechanism (i.e. the democratic checks). In the Slovak constitutional system, the choice of the president to decide autonomously whether to accept the proposal for the post of minister was, in the past, a matter of dispute between President Michal Kováč and Prime Minister Vladimír Mečiar (the appointment of Ivan Lexa as minister). Although, in this case the Constitutional Court in its decision no. I ÚS 39/93 confirmed the competence of the president not to appoint a candidate, following the constitutional change based on the Constitutional Act no. 9/1999 Coll., one fraction of the professional community opted for the obligation of the president to appoint the recommended candidates. By reason of setting up the democratic checks in relation to the appointing authorities, it may be useful to provide the head of state with the authority to reject the appointment of candidates proposed by the prime minister for two major reasons: in cases of unlawful procedure in proposing candidates and in the event any reasonable doubt arises about the personal guarantees of the proposed candidate to show respect for the Constitution.[7]

3. APPOINTING AUTHORITY IN THE SPHERE OF THE JUDICIARY

Comparing the position of the head of state in the system of separation of powers and his relation to the legislative and the executive, one can certainly notice that the mutual relations to the judiciary, including mutual checks and balances, are considerably limited. It is associated with the principle of independence of the judiciary and the need to remove any political influence on the sphere of justice. Since the

[7] P. Holländer, *Základy všeobecné státovědy*, Plzeň, 2012, p. 388.

head of state is often a representative and nominee of a particular political party, and its non-partisan approach after the elections remains just an illusion in many states, the ongoing process of complete detachment of the judiciary from the head of state is an understandable and desirable phenomenon.

The study of relations between the head of state and the judiciary is also special, because this relationship cannot be classified according to the forms of government or by existing models, as in the case of other powers. While in relation to other powers certain patterns that are typical of different forms of government have gradually developed there, in relation to the judiciary, different solutions are manifested that are not always classifiable according to a form of government (except for the dominant position of the president in the presidential form of government represented by the United States).

The selection and appointment of judges can be accomplished in several ways: upon recommendation of the executive body, either by the government, the ministry or head of state, or by elections, by co-opting of councils composed of judges and non-judges. In some countries such methods may be combined, or alternatively, may be applied to various posts of different types of courts.

In presidential forms of government, represented by the constitutional system of the United States, the nomination of judges by the president is implemented at the federal level. The president nominates all candidates for federal judges. Of course, the greatest interest and attention is paid to the nomination of judges of the U.S. Supreme Court. The opportunity to nominate a judge of the Supreme Court is often used as an opportunity for important political gestures. For example, President Ronald Reagan hoped that the first woman nominated for the position of a judge of the Supreme Court would impress the women's movement.

The final step in the judicial appointment process of federal judges is taken by a majority vote by the Senate. Historically, a practice in the U.S. Senate has developed, known as senatorial courtesy, according to which the Senate confirms only those presidential appointees approved by both senators of the state of appointee or by the senior senator of the president's party. However, while such "polite" behaviour is common in approving judges of district courts, senators did not give up the possibility to refuse the president's nominee for the position of the judge of the Supreme Court. The chance of success of the president in this regard is about 79%, but the majority of refusals dates back to the nineteenth century.[8]

At present, an important question arises in the United States as to who will replace the deceased Supreme Court Judge Antonin Scalia, one of the most influential conservative lawyers of the recent period. Even more interesting is the fact that after Scalia's death, the distribution of power between the conservative and liberal judges in the Supreme Court is broadly balanced. President Barack Obama did not have many possibilities to enforce his candidate, as it was not allowed by the Republican majority in the Senate, regardless of the fact that in comparison with the parliamentary and semi-presidential systems, the U.S. President has definitely

[8] *Outline of the U.S. Legal System*, Bureau of International Information Programs, United States Department of State, 2004, pp. 142–151.

a stronger position, and he is generally considered the most powerful politician of the planet.

Similarly, in semi-presidential and hybrid systems, the head of state has a strong position, but this position is reflected more in relation to the government, in some cases also to the parliament, and less in relation to the judiciary. Generally speaking, the Western European countries proceed by weakening the interference of the head of state with the process of appointment of judges, even if it is not the rule; e.g. the French President as a guarantor of judicial independence has multiple options how to interfere in the process.

In a classic parliamentary form of government, the role of the head of state in the process of appointing of judges can be manifold. He may either not participate in this process or only formally confirm the appointment of judges nominated by other bodies, mostly judicial councils or the executive, or the higher courts.

Unlike in the case with the judges of ordinary courts, the head of state is often granted the power to appoint judges of the constitutional court. The appointment of judges of the constitutional court can take many forms: most often, it is made in such way that individual state officials, including the head of state, have the power to appoint one fraction of the judges. The head of state can act autonomously or upon the request of other bodies. For instance, the Italian President appoints one-third of the judges of the Constitutional Court, his Austrian colleague appoints one section of the judges of the Federal Constitutional Court, although, on the recommendation of the Federal Government. Another option is to grant the head of state a certain degree of autonomy in the selection of judges from a submitted list of candidates.[9]

4. APPOINTING AUTHORITY IN RELATION TO PARLIAMENT PROPOSALS

The relations between the head of state and the legislative authorities are determined by the form of government, constitutional traditions and overall concept of the position of the head of state, either as a fourth (neutral) power (with important arbitration functions) or as part of the executive or as a subject with mostly representative powers.

As the formal head of state with representative powers, he has only several important powers to eliminate constitutional crises, which are, in addition, usually conditioned by the requirement of countersignature by the government. Moreover, in the classical form of the parliamentary government, his position shifts to a subject dependent on the parliament (and political parties) in the process of establishing and removing from office. In other cases, the relationship between the head of state

[9] In accordance with critical opinions regarding the method of appointing judges of the constitutional court by the president (e.g. in the Czech Republic), judges, who are argumentative representation, should be elected by a qualified majority in the parliament and include the opposition, based on the argument of "No argumentative representation without dissenting votes," see: R. Alexy, *Constitutional Rights and Constitutional Review*, lecture given at the Faculty of Law of Charles University in Prague, 15 October 2012.

and the parliament is more balanced owing to the tools provided to both public authorities.

The head of state, as a part of the executive, may act as a competing power against the legislative branch (in the presidential form of government), where the most effective brake is the veto. In the semi-presidential form of government, the head of state is the dominant power provided with more powers against the parliament by the constitutional system, such as the right to veto, but also the right of legislative initiative, strong dissolution right and emergency powers in crises.

The head of state viewed as the fourth (neutral) power is typical of the parliamentary form of government, which seeks to model the highest state authorities in a way that neither of them is in the dominant position to others and the power relations are organised in the form of a flexible quadrilateral. This requires a slight strengthening of the right to veto (raising the threshold required to break the veto over ordinary majority) and expansion of the opportunities for dissolution of the parliament with some necessary space for an independent assessment of the situation by the head of state.

The powers that significantly affect the mutual relations between the head of state and the parliament are, on the part of the head of state, the right to veto and the dissolving power against the parliament, and on the part of the parliament, the powers to elect and dismiss the head of state and to prosecute him in the event of liability for breach of standards, or alternatively, the power to approve some decisions of the head of state (typical especially of the presidential form of government). These powers have recently been extended to include also the powers of the head of state to initiate legislation and the power of the head of state to convene and adjourn meetings of the parliament, predominantly in emergency cases (especially in the Central and Eastern Europe).

It is not an easy task for the constitutional framers to equip both authorities with the above-mentioned powers in a way to make the operation of the constitutional system balanced, effective and able to eliminate crises. However, it generally turns out that the complex social processes ongoing from the second half of the last century to the present day lead to the creation of mixed constitutional systems that are modelled through the empowerment of the head of state. This is done through the strengthened right to initiate legislation, strengthened right to veto, expanded power to dissolve the parliament, by delegated legislation and legislative powers in emergencies.

In systems with the parliamentary form of government, the narrowest scope of discretion of the head of state is assumed when he decides to appoint state officials upon the proposal of the parliament.[10] Apart from judges, this mostly concerns the attorney general (if the prosecutor's office is created as the *sui generis* body and the attorney general is elected by the parliament), further, it affects the ombudsman, the heads of audit institutions (e.g. the Czech President appoints the President and

[10] According to the above-mentioned dissenting opinion of the judges Orosz and Luby to the decision no. PL. ÚS 4/2012.

Vice-President of the Supreme Audit Office upon the proposal of the Chamber of Deputies), etc.

Breaking the legitimately expressed will of the parliament by another constitutional body without an express constitutional framework can be taken into account only exceptionally. It must be done for such constitutionally acceptable reasons which cannot challenge the dominance of the parliament in the system of constitutional bodies, and which correspond to functions and obligations the constitution confers on the head of state in the exercise of his nominating powers.

In Slovak conditions, the Constitutional Court took the view that in relation to the powers of the President, the notarial character of the powers could not be derived in general, not even for the parliamentary form of government (e.g. PL. ÚS 14/06). This opinion, including the possibility of potential broad interpretation of the powers of the head of state, was the platform for decision-making in the jurisdictional dispute between the President and the Parliament about the appointment of the Attorney General.

The Constitutional Court provided an interpretation of Article 102 para. 1(t) and Article 150 of the Constitution (PL. ÚS 4/2012-77), under which the President is obliged to consider the Parliament's proposal for the appointment of the Attorney General; and if he is elected in accordance with law, he must, within a reasonable time, either appoint the proposed candidate or to inform the Parliament about his rejection to appoint this candidate. The President may not appoint the candidate merely "by reason of non-compliance with the legal requirements for appointment or because of a serious circumstance related to the person of the candidate, which raises reasonable doubt about his ability to act in the way that would not threaten the dignity of the constitutional function or of the entire body of which that person is to be the supreme representative; or in a manner consistent with the actual mission of that body, if it would result in the violation of the proper functioning of the constitutional authorities. The President shall provide the reasons for non-appointment and they must not be arbitrary."[11]

This interpretation of the Constitutional Court has in essence extended the "exploratory" right of the President to investigate the personality of the candidates as well. This decision is of fundamental political and constitutional significance, since it is also related to the question of the form of government and its potential to shift to semi-presidentialism.

Reservations against such broad-ranging possibilities of discretion of the President have emerged not only from one part of the professional community, but also from the dissenting opinions of some judges of the Constitutional Court. The dissenting opinion of the judge Gajdošíková favoured a minimum range of discretion of the President, the judges Mészáros, Orosz and Luby expressed the possibility for the President not to appoint a candidate merely because he fails to comply with the legal requirements for the appointment or due to any particularly serious circumstances relating to the person of the candidate which raises reasonable doubt about his ability to act in a way that would not reduce respect for the constitutional function

[11] http://portal.concourt.sk/pages/ viewpage.action?pageId=1277961.

or the entire body of which that person is to be the supreme representative; or in a manner that would be consistent with the actual mission of that body, if it would result in the violation of the proper functioning of the constitutional authorities. The President must provide the reasons for the non-appointment, and these must not be arbitrary (Orosz, Luby). According to the judge Mészáros, the President may refuse to appoint the candidate merely by reason of special constitutional significance relating to the person of the candidate, which would mean that the proper functioning of the constitutional bodies would be obstructed (Article 101 para. 1, second sentence of the Constitution of the Slovak Republic).[12]

According to these opinions, the President should remain a neutral authority, even if he exercises the powers which do not require countersignature and he should interfere only in case of structural constitutional defects, which does not deny the neutrality, quite the opposite, it respects it. In such case, he would act as the last constitutional policy, the use of which could be envisaged only on rare occasions of almost state-security nature, e.g. if it is additionally proven that the candidate has been actively involved in human rights violations during the period of unfreedom.

The issue of the scope of discretion of the head of state in the process of selection and appointment of judges of the Constitutional Court in the Slovak constitutional system is at present the subject of dispute between the head of state and the Parliament. The head of state has refused to appoint five out of six candidates elected by the Parliament. With regards to the Decision of the Constitutional Court no. PL. ÚS 4/2012, a significant part of the professional community favours the option of a wider range of the President's discretion in deciding on the appointment of the Constitutional Court judges (the same situation as in the case of the Attorney General). On the other hand, there could be doubts as to what extent the current situation is covered by the resolution no. PL. ÚS 4/2012, because the fact that the Slovak Parliament proposes a double number of the candidates and the President only appoints several judges can be seen as a distinguishing element from the case of appointment of the Attorney General, just because Article 134 of the Constitution envisages this discretion, i.e. it allows the President to choose half of the proposed candidates. If Article 134 allows greater discretion for the President, the conditions for refusing to nominate candidates for judges of the Constitutional Court under this Article of the Constitution should, therefore, be restricted, as in the case of Article 150 referring to the Attorney General.

However, other opinions pinpoint the fact that when interpreting the power of the President to appoint the Attorney General, the Constitutional Court created a relatively wide margin of discretion of the President and, according to that, Article 134 para. 2 of the Constitution provides the President with the discretion not only to choose judges proposed by the National Council, but even with the possibility to reject them completely. On the contrary, Article 150 of the Constitution confers on the President only the opportunity to appoint the Attorney General or to reject the candidate. The fact that in the latter case the President has the double number of candidates for the vacant positions does not exclude the situation that

[12] *Ibid*.

in relation to any proposed candidate there are reasons not to appoint them in accordance with the decision no. PL. ÚS 4/2012. In order to maintain consistency and predictability of the Constitution interpretation, it seems reasonable to hold the view that if in one case the President has the option to reject any candidate, he should have this possibility also in the latter case. The differences between the two cases are not of such serious nature that would lead to radically different conclusions.

The Constitutional Court itself, however, when deciding on the interpretation of the powers of the President to appoint judges of the Constitutional Court, in its decisions no. III. ÚS 571/2014 and no. PL. 4/2015, essentially denied any space for discretion of the President, or alternatively, it limited the discretion of the President concerning the appointment of judges of the Constitutional Court to choose from two candidates proposed by the Parliament for one vacant position.[13] By its plenary decision, the Constitutional Court rejected the President's proposal for the interpretation of Article 134 para. 2 in conjunction with Article 2 para. 2 of the Constitution, due to the absence of conflict, because in the opinion of the Plenum, this issue was already settled by the decision of Third Senate of the Court no. III. ÚS 571/2014. The Constitution does not grant any general legally binding effect on the Senate decisions (not even in the decision no. III. ÚS 571/2014), and therefore, the dispute between the President and the National Council could not be resolved. The legally binding effect applies only to findings declared in proceedings concerning the interpretation of the Constitution (Article 128, last sentence).

The following disputed issues remain to be resolved:

– whether the decision of the President not to appoint a candidate for the judge of the Constitutional Court, which was not legally annulled by the Constitutional Court, should terminate the nomination of the candidate proposed according to Article 134 section 2 of the Constitution, and if so,
– whether such a state in connection with two vacant positions for the judges of the Constitutional Court imposes a constitutional duty on the Parliament to propose the expected number of candidates to the President, in accordance with Article 134 para. 2 of the Constitution. The substance of the dispute lies also in divergent opinions whether the President is obliged or authorised in matters of appointment of judges of the Constitutional Court to follow the generally binding interpretation of the Constitution, which the Constitutional Court declared in its decision no. PL. ÚS 4/2012 of 24 October 2012. Both processes relate to the appointing authority of the President and are linked to a proposal of the National Council, and in both cases the President has an obligation to ensure the proper functioning of the constitutional bodies.

As regards the interpretation of the President's appointing authority, attention should be paid to Article 101 para. 1, second sentence of the Constitution, according to which the President has the obligation to ensure the proper functioning of the constitutional bodies, as this obligation is also present in the exercise of these powers. Two conclusions can be drawn here: it is the obligation of the President to

[13] *Ibid.*

refrain from acts that would jeopardize the proper functioning of the constitutional authorities, e.g. to disarm the state body by not appointing the candidates. Secondly, this also has a positive side: to ensure that the respective functions will be occupied by competent people, experts, which can open a possibility for a decision not to appoint unsuitable candidates for particularly serious reasons, even at the cost that the position will be vacant for a while. This is the essence of the so-called function of a constitutional fuse.

5. CONCLUSION

In relation to the exercise of the powers of the head of state, the Slovak constitutional practice clearly manifests the problem of "duplicated democratic legitimation" if both the Parliament and an executive-type of body (in this case the President) are elected by popular vote. Both constitutional authorities may have different political preferences; they may even stand in opposition to each other, in spite of the fact that they come from the same political party. The popular vote provides the President with strong democratic legitimacy, and if his powers are slightly enhanced by the Constitution, he can attempt to become an active political player with the potential to change the system to semi-presidential.

It is obvious that the increased presidential legitimacy cannot be ignored (probably not even within the constitutional interpretation), but indirect granting of powers may have the potential to change the text of the Constitution. In my opinion, the conclusions in the decisions of the Constitutional Court, which provide a wide scope for the exercise of the appointing authority of the head of state, should be corrected via the Constitutional Court's future case law.

In respect of the problems concerning the appointment of judges of the Constitutional Court *de constitutione ferenda*, it would be appropriate to pay attention to the following issues:

– tightening up the criteria for candidates for judges of the Constitutional Court, because the requirement of 15-year legal practice and age does not suffice as a guarantee for professionalism and quality,
– providing the President with either a discretionary option in the process of selection of a fixed number of judges of the Constitutional Court (e.g. the Italian President appoints three judges of the Constitutional Court), as it is in the case of the appointment of the members of the Judicial Council, or another option: electing candidates for judges of the Constitutional Court in the Parliament by 2/3 or 3/5 majority and setting out the duty of the President to appoint the candidates.

The essential requirement is that the chosen model of the constitutional system should correspond with the political culture of the society. Otherwise, the existing level of the political culture will "overwhelm" the individual institutes, or alternatively, deform their operation. The ideal situation is when the constitutional structure limits and forms the political culture within the democratic patterns, and not the opposite, i.e. when the political culture deforms the constitutional structure.

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POSITION OF THE HEAD OF STATE IN THE PROCESS OF EXERCISING THE POWER OF APPOINTMENT

Summary

The head of state is a fundamental constitutional institute, standing on top of the hierarchy of the highest state authorities. He has a unique significance for the existence and functioning of the state, in particular, because he expresses the sovereignty of the state and its integrity. The constitutional status and power of the head of state are created depending on his relationship to the supreme constitutional authorities representing the legislative, executive and judicial powers. The article analyses the position of the head of state in the exercise of his nominating powers. It highlights the most significant problems associated with the interpretation of those powers. In this context, it is important to define the scope of possibilities of the head of state to propose independently, review and possibly reject candidates for the posts of representatives of various state authorities. These options vary depending on whether the head of state is acting in relation to the proposals of executive bodies, other independent bodies or the parliament.

Keywords: head of state, power of appointment, separation of powers, discretion

POZYCJA GŁOWY PAŃSTWA W PROCESIE REALIZACJI POSIADANEGO UPOWAŻNIENIA DO MIANOWANIA

Streszczenie

Głowa państwa jest podstawową instytucją konstytucyjną, stojącą na szczycie hierarchii najwyższych władz państwowych. Ma ona wyjątkowe znaczenie dla istnienia i funkcjonowania państwa szczególnie ze względu na to, że wyraża suwerenność państwa i jego integralność.

Tworzenie konstytucyjnego statusu i usytuowania władzy głowy państwa jest uzależnione of jego relacji z naczelnymi organami władzy ustawodawczej, wykonawczej i sądowniczej. Artykuł poddaje analizie pozycję głowy państwa w zakresie wykonania przyznanych uprawnień. Podkreśla najistotniejsze problemy związane z interpretacją tych uprawnień. W tym kontekście ważne jest zdefiniowanie zakresu możliwości głowy państwa w dziedzinie samodzielnego proponowania, sprawdzania i ewentualnie odrzucania kandydatów na stanowiska reprezentujące poszczególne władze państwowe. Możliwości te różnią się w zależności od tego, czy głowa państwa odnosi się do propozycji organów wykonawczych, innych niezależnych organów czy parlamentu.

Słowa kluczowe: głowa państwa, upoważnienie do mianowania, podział władz, swoboda decyzji

LA POSICIÓN DEL JEFE DEL ESTADO EN EL PROCESO DE EJECUCIÓN DE LA FACULTAD DE NOMBRAR

Resumen

El Jefe del Estado es una institución constitucional básica que está en la cumbre de la jerarquía de las autoridades estatales más importantes. Tiene el significado excepcional para la existencia y funcionamiento del país, dado que expresa la soberanía del Estado y su integridad. La creación de la posición y ubicación del poder del Jefe del Estado depende de su relación con los órganos generales del poder constitutivo y judicial. El artículo analiza la posición del Jefe del Estado en cuando a la ejecución de facultades que le fueron atribuidos. En este contexto, es importante definir el ámbito de posibilidades del Jefe del Estado en cuanto a la propuesta, verificación y eventual rechazo de los candidatos para los puestos que representen los poderes públicos. Estas posibilidades son diferentes en caso el Jefe del Estado se pronuncie sobre propuestas de los órganos ejecutivos, de otros órganos independientes o del Parlamento.

Palabras claves: el Jefe del Estado, facultad de nombrar, división de poderes, libertad de decisión

ПОЗИЦИЯ ГЛАВЫ ГОСУДАРСТВА В ПРОЦЕССЕ РЕАЛИЗАЦИИ ПОЛНОМОЧИЙ ПО НАЗНАЧЕНИЮ НА ГОСУДАРСТВЕННЫЕ ПОСТЫ

Резюме

Глава государства является основным конституционным институтом, находящимся на вершине иерархии высших государственных органов. Данный институт имеет исключительное значение для существования и функционирования государства, являясь выразителем его суверенитета и целостности. Формирование конституционного статуса и позиции главы государства зависит от его отношений с главными органами законодательной, исполнительной и судебной власти. В статье анализируется позиция главы государства в том, что касается использования имеющихся у него полномочий. Особое внимание уделено проблемам, связанным с интерпретацией этих полномочий. В этом контексте важно определить объем полномочий главы государства по выдвижению, верификации и возможному отклонению кандидатов на должности, представляющие

различные ветви государственной власти. Эти возможности варьируются в зависимости от того, рассматривает ли глава государства предложения исполнительных органов, других независимых органов или же парламента.

Ключевые слова: глава государства, полномочия по назначению на государственные посты, разделение властей, свобода принятия решений

POSITION DES STAATSOBERHAUPTES BEI DER UMSETZUNG SEINER ERNENNUNGSERMÄCHTIGUNG

Zusammenfassung

Das Staatsoberhaupt ist die grundlegende Verfassungsinstitution, die an der Spitze der Hierarchie der höchsten staatlichen Behörden steht. Es hat eine große Bedeutung für die Existenz und das Funktionieren des Staates, insbesondere weil es die Souveränität des Staates und seine Integrität zum Ausdruck bringt. Die Schaffung des Verfassungsstatus und des Ortes der Macht des Staatsoberhauptes hängt von seinen Beziehungen zu den obersten Organen der Gesetzgebungs-, Exekutiv- und Justizgewalt ab. Der Artikel analysiert die Position des Staatsoberhauptes bei der Ausübung der gewährten Rechte. Hebt die wichtigsten Probleme hervor, die mit der Auslegung dieser Befugnisse verbunden sind. In diesem Zusammenhang ist es wichtig, den Umfang der Möglichkeiten des Staatsoberhauptes im Bereich des Selbstvorschlags, der Prüfung und möglicherweise der Ablehnung von Kandidaten für Positionen zu definieren, die einzelne staatliche Behörden vertreten. Diese Möglichkeiten variieren je nachdem, ob sich das Staatsoberhaupt auf die Vorschläge von Exekutivorganen, anderen unabhängigen Gremien oder dem Parlament bezieht.

Schlüsselwörter: Staatsoberhaupt, Ernennungsermächtigung, Gewaltenteilung, Entscheidungsfreiheit

POSITION DU CHEF DE L'ÉTAT DANS LE PROCESSUS DE MISE EN ŒUVRE DE SON AUTORISATION DE NOMINATION

Résumé

Le chef de l'État est l'institution constitutionnelle de base qui se situe au sommet de la hiérarchie des plus hautes autorités de l'État. Il a une signification unique pour l'existence et le fonctionnement de l'État, notamment parce qu'il exprime la souveraineté de l'État et son intégrité. La création du statut constitutionnel et la localisation du pouvoir du chef de l'État dépendent de ses relations avec les organes suprêmes du pouvoir législatif, exécutif et judiciaire. L'article analyse la position du chef de l'Etat dans l'exercice des pouvoirs accordés. Il souligne les problèmes les plus importants liés à l'interprétation de ces pouvoirs. Dans ce contexte, il est important de définir l'étendue des possibilités du chef de l'Etat en termes d'indépendance de proposer, vérifier et éventuellement rejeter des candidats à des postes représentant les différentes autorités de l'État. Ces possibilités varient selon que le chef de l'État se réfère aux propositions des organes exécutifs, d'autres organes indépendants ou du Parlement.

Mots-clés: chef d'État, autorisation de nomination, séparation des pouvoirs, liberté de décision

RUOLO DEL DI CAPO STATO NEL PROCESSO DI ESERCIZIO DEL POTERE DI NOMINA ATTRIBUITO

Sintesi

Il capo di Stato è la fondamentale istituzione costituzionale posta al vertice della gerarchia delle massime autorità statali. Ha un importanza particolare per l'esistenza e il funzionamento dello stato, soprattutto a motivo del fatto che esprime la sovranità dello stato e la sua integrità. La creazione dello status e della collocazione costituzionale dell'autorità del capo di Stato dipende dai suoi rapporti con le massime autorità del potere legislativo, esecutivo e giudiziario. L'articolo sottopone ad analisi il ruolo del capo di Stato nell'ambito dell'esercizio dei poteri attribuiti. Sottolinea i problemi più importanti legati all'interpretazione di tali poteri. In tale contesto è importante definite l'ambito delle possibilità del capo di Stato nel settore dell'autonoma proposta, verifica ed eventuale rifiuto dei candidati ai ruoli che rappresentano le singole autorità statali. Tali possibilità sono diverse a seconda se il capo di Stato faccia riferimento alle proposte delle autorità esecutive, di altre autorità indipendenti o del Parlamento.

Parole chiave: capo di Stato, potere di nomina, separazione dei poteri, libertà di decisione

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WOMEN'S CRIME IN THE CONTEXT OF SELECTED SOCIOLOGICAL CONCEPTS OF CRIME

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1. INTRODUCTION[1]

Looking at women's crime, one cannot help but notice that the phenomenon has undergone a perceptible evolution over the last few decades. Women's crime is still seen as surprising and disturbing, all too often giving rise to negative perception in the society. Quite recently, it has been stressed that the nature and frequency of women's criminal acts evoke less interest among criminology scholars[2] and yet the phenomenon of women's crime today, with its changing dynamics and character, inspires in-depth analysis. One can no longer agree to accept a view that the overriding motive driving the criminogenic activity of women is the fact that women "(...) have been pushed to the margins of society and deprived of the opportunities for development and social advancement."[3] Considering the flow, direction and progress of social change that has taken place in Poland over the last three decades, one can conclude that the aforementioned view has become completely outdated. At the same time, among a number of conditions that trigger women's propensity

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2 C. Smart, *Woman, Crime and Criminology*, Feminist Critic, London–Boston 1976, p. 5; Z. Majchrzyk, *Kiedy kobieta zabija*, Warszawa 2009, pp. 72–73; W. Andraszczyk, *Przestępczość kobiet w wybranych teoriach kryminologicznych – konteksty płci kulturowej*, Resocjalizacja Polska No. 14, 2017, p. 86; The British Journal of Criminology, Vol. 26, Issue 3, 1 July 1986, p. 309, https://academic.oup.com/bjc/article-abstract/26/3/309/429892?redirectedFrom=fulltext.

3 I. Dembowska, *Profilowanie kryminalne sprawczyń seryjnych zabójstw*, Acta Erazmiana 2011, p. 362.

to transgress the law,[4] with biological,[5] bio-psychological,[6] anthropological,[7] sociological[8] or cultural[9] aspects having received attention, the fact that women live in a broader social community and need to adapt to its rules has been, and still is, one of the most important perspectives to analyse women's illegal activity. However, it is worth noting that, although the analysis of women's crime from a sociological perspective is a relatively recent addition,[10] it offers a valuable analytical aspect that helps to characterise it as a phenomenon, conditioned by a number of factors that "naturally" trigger its occurrence (e.g. poverty, efforts to improve career prospects, desire for financial stability, etc.).

Since, from a sociological perspective, women's participation in social life occurs on two planes, as Stanisław Szanter emphasised, i.e. subjective-biological (related to gender) and objective-sociological (related to career), one can get the impression that the latter has a much shorter history than the former, albeit it is certainly no less important. Taking into account the temporal aspects, the former perspective had nearly always been used to look at women's activity, while the latter emerged as women began to take up out-of-home occupational activities,[11] thus creating a sphere for highly positive behaviour types that are conducive to individuals' personal growth, as well as those that allow them to transgress the rules, including normative ones. Thus, unfortunately, women's ability to penetrate into areas that did not evoke positive consequences (leading to crime) became

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[4] J. Błachut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk 2004, pp. 221–222.

[5] K. Ostrowska, D. Wójcik, *Teorie kryminologiczne*, Warszawa 1986, p. 102; I. Budrewicz, *Środowiskowe uwarunkowania zachowań przestępczych nieletnich dziewcząt*, Bydgoszcz 1997, pp. 73–74; Z. Majchrzyk, *supra* n. 2, p. 75; J. Heizman, *Stan przewlekłego stresu w etiologii zabójstwa*, [in:] J.K. Gierowski, Z. Majchrzyk (eds), *Psychopatologia zabójstw*, Warszawa 2010, pp. 39–49; J. Błachut, *Kobiety recydywistki w świetle badań kryminologicznych*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981, p. 22; K. Spett, *Psychopatologia szczegółowa*, [in:] M. Cieślak, K. Spett, W. Wolter, *Psychiatria w procesie karnym*, Warszawa 1968, p. 238; S. Manczarski, *Medycyna sądowa w zarysie. Podręcznik dla studentów*, Warszawa 1957, p. 270 et seq.; K. Daszkiewicz, *O dzieciobójstwie (w świetle kodeksu karnego z 6 czerwca 1997)*, Palestra No. 5–6, 1998, p. 33 et seq.; J. Brzezińska, *Dzieciobójstwo. Aspekty prawne i etyczne*, Warszawa 2013.

[6] http://www.gazetaprawna.pl/artykuly/906025,przestepczosc-kobiet.html.

[7] C. Lombroso, W.G. Ferrero, *Kobieta jako zbrodniarka i prostytutka*, Warszawa 1895, p. 375; C. Lombroso, *Człowiek – zbrodniarz w stosunku do antropologii jurysprudencji i dyscypliny więziennej*, Warszawa Vol. 2, 1891, p. 73; F. Heidensohn, *Women and Crime*, New York 1985, p. 114.

[8] C. Smart, *supra* n. 2, pp. 66–67; R.J. Simon, *Women and Crime Revisited*, Social Science Quarterly No. 56, 1976, p. 663; M. Leśniak, *Kobieta i przestępstwo*, [in:] B. Urban (ed.), *Problemy współczesnej patologii społecznej*, Kraków 1998, p. 172; I. Błachut, *supra* n. 5, pp. 34–35; I. Budrewicz, *supra* n. 5, pp. 84–85; H. Sekuła-Kwaśniewicz, *Encyklopedia socjologii*, Vol. III, *Płeć*, Warszawa 2000, p. 123; cf. also J. Błachut, *Niektóre koncepcje kryminologiczne a problem przestępczości kobiet*, Archiwum Kryminologii Vol. XVI, 1989; A. Campbell, *Jej niezależny umysł. Psychologia ewolucyjna kobiet* [*A Mind of her Own: the Evolutionary Psychology of Women*], (transl.) J. Kanor-Martynuska, Kraków 2004, pp. 345–346.

[9] F. Adler, *Sisters in Crime: The Rise of the New Female Criminal*, New York 1975, p. 248; L. Gelsthorpe, A. Morris, *Feminism and Criminology in Britain*, The British Journal of Criminology Vol. 28, No. 2, 1998, pp. 93–110; J. Błachut, *supra* n. 8, p. 221.

[10] S. Szanter, *Socjologia kobiety*, Warszawa 1948; D. Klein, *Etiology of Female Crime: A Review of Literature*, Issues in Criminology No. 8, 1973, p. 3 et seq.

[11] S. Szanter, *supra* n. 10, p. 246; E. Orzeszkowa, *Kilka słów o kobietach*, Warszawa 1893, p. 198.

a certain measure of social progress,[12] expressed through women's entry into the activities previously reserved exclusively for men (becoming educated, undertaking subsequent professional activities or becoming promoted).

Today, the public perception of female perpetrators and the assessment of their behaviour can vary greatly. As Anne Campbell points out: "Today we have a whole array of contradictory ways of looking at the female criminal. She is both a scoundrel and a heroine. She is both strong and weak; she deserves sympathy and condemnation; she may be treated leniently or punished too harshly; she is economically liberated and suffers poverty; she is straightforward and hypocritical; she denies her femininity and exploits it; she is a victim of social repression and a symbol of female resistance against the power exercised over her. In brief, there is a terrible chaos in research on the criminal woman."[13]

The aim of the present reflections is to confront the ideas from selected sociological theories of crime in the context of the female gender, to indicate the level of women's criminal activity in selected categories of crime in Poland and to determine whether the core assumptions of the analysed theoretical concepts remain valid today or to what extent they need to be reformulated.

2. SELECTED THEORIES AND THEIR CORRELATION WITH THE LEVEL OF WOMEN'S CRIME

This paper will look more closely at four well-established criminological concepts of crime: the theory of social bonds as well as balance of control, the theory of anomy and the theory of social stigmatisation. These concepts have been selected on the basis of two important factors: their link with the sociological aspects that condition and explain the underlying causes of crime in general, together with the potential to extend the conclusions to the phenomenon of female crime.[14]

2.1. THEORY OF SOCIAL BONDS AND BALANCE OF CONTROL

The original elements of the theory of social bonds should be sought in the work of a French philosopher and sociologist Émile Durkheim and his theory of control. According to that theory, crime is a natural phenomenon, present in all societies, but a particular role should be attributed to social bonds since they offer the possibility to "control" crime and keep "a tight rein" on this phenomenon, which is how the society controls individual behaviour.[15] The mere fact of committing a crime

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[12] W.J. Cynarski, *Dynamiczna kobieta ponowoczesna*, Ido – Ruch dla Kultury: rocznik naukowy: [filozofia, nauka, tradycje wschodu, kultura, zdrowie, edukacja] No. 2, 2001, p. 190.

[13] A. Campbell, *supra* n. 8, p. 333.

[14] B. Hołyst, *Kryminologia*, Warszawa 1994, p. 229.

[15] La Fragilité, [in:] M. Marzano (ed.), *Dictionnaire de la violence*, Paris 2011, pp. 508–509; É. Durkheim, [in:] M. Canto Sperber (ed.), *Dictionnaire d'éthique et de philosophie morale*, Vol. 1, Paris 2004, pp. 584– 588; R. Gassin, S. Cimamonti, P. Bonfils, Criminologie, Paris 2011, pp. 467–468; É. Durkheim, *De la division du travail social*, Quadrige, 2007; É. Durkheim, *Le suicide. Étude de sociologie*, Quadrige 2007, https://www.matierevolution.fr/spip.php?article967.

significantly upsets the social balance. Durkheim stated that "(...) crime disrupts the social regulation (moral, legal), and upsets the social bonds (...)."[16] A counter-balance to this imbalance can be found in a society which is internally coherent and remains strongly integrated. Only then, can individuals remain mutually dependent and, therefore, internal cohesion excludes their arbitrary actions and, consequently, counteracts the rise of crime. Elements of control can be also traced in the writings of Durkheim's followers: Travis Hirschi[17] and Frances Heidensohn[18].

In its foundations, the theory of social bonds invoked the theory of control and assumed that the relationship between an individual and the society emerges and becomes fulfilled in four ways: (1) through the relationship with the immediate circle of people, (2) through the pursuit of socially desirable activities, (3) through participation in activities that remain consistent with social norms, (4) through the implementation of activities that are conditioned by conformist rules. Thus, the aforementioned theory focuses on reinforcing the concept of social bonds occurring in relations between individuals as well as the consequences involving the emergence of such bonds (by meeting expectations, or by fulfilling the predefined, binding rules that are established by members of the public). When looking for a link between the theory of social bonds and women's conduct, Frances Heidensohn stated that women are prepared from an early age to fulfil their social roles of mothers and wives. This model continues into adulthood, when the responsibilities arising from the gender role are sometimes superseded by career aspirations. The control aspect of that theory can be found in the fear of outward violence. Afraid of criminal interactions directly targeted at them (assault, theft, rape), women were inclined to stay within the familiar and safe environment (home) and to minimise participation in dangerously atypical or criminogenic situations.[19] In this context, it is interesting to quote the view formulated by Carol Smart, who stressed that "Girls are generally more controlled than boys, they are taught to stay passive and are domesticated (…). As a result, girls are expected to refrain from violence, which is why they are not taught how to fight and use weapons. Girls themselves tend to retreat from violence and seek care rather than learn the art of self-defence."[20]

The concept of balance of control could be seen as a continuation of the control theory. According to its founder, Charles Tittle, a crime is the result of the relationship between the extent of control over an individual and the extent of that individual's control over other people.[21] To explicate the assumptions of that theory, Tittle distinguished between two "poles" of control: surplus and deficit.

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[16] É. Durkheim, *Le suicide*, *supra* n. 15; L. Lernell, *Zarys kryminologii ogólnej*, Warszawa 1978, p. 198.

[17] H.J. Schneider, *Przyczyny przestępczości. Nowe aspekty międzynarodowej dyskusji o teoriach kryminologicznych*, Archiwum Kryminologii Vol. XIII–XIV, 1997–1998, p. 38.

[18] F. Heindesohn, *Women and Crime*, Macmillan, London 1985, p. 128 et seq.

[19] *Ibid*.

[20] C. Smart, *supra* n. 2, quoted after: K. Biel, *Przestępczość dziewcząt. Rodzaje i uwarunkowania*, Kraków 2009, p. 131 [backtranslated from Polish]; K. Sitnik, *Czynniki socjologiczne a przestępczość kobiet. Wybrane teorie kryminologiczne*, Nowa Kodyfikacja Prawa Karnego Vol. XXXVI, 2015, p. 93 et seq.

[21] M. Cabalski, *Przemoc stosowana przez kobiety*, Kraków 2017, p. 189.

The surplus is enjoyed by individuals who control themselves to a higher degree than they are controlled. Surplus of control can naturally lead to extreme or deviant behaviour in some individuals and manifest itself in crimes against those under the individual's control. In turn, the consequences of a deficit of control among those who are controlled include various transgressions of social rules, followed by certain categories of crimes (murders, thefts, abuse of drugs and narcotics, robberies, acts of vandalism). If we apply this theory to females, we should state that criminological observations indicate that women are controlled to a higher degree. In situations of a deficit of control, they show weakness and submissiveness and, consequently, remain vulnerable to various addictions. On the other hand, women who remain in control (surplus of control) tend to be aggressive and highly prone to conflict, and for this reason, this category of individuals tend to breach the law through crimes, especially those committed within a group of relatives as well as violent crimes (e.g. robbery).[22]

Referring to the aforementioned theoretical conclusions concerning the possibility that the accumulation of control in women may lead to criminal conduct, a decision was made to carry out a factual exemplification and to present statistics covering the category of robbery-related crimes committed by adult female perpetrators in Poland in 1992–2012 (Figure 1) in comparison with the results for juvenile female perpetrators (aged up to 16) who committed the same categories of crime in a similar period (2001–2012) (Figure 2). Based on the statistics contained in Figure 1, it should be noted that among women suspected of committing robberies there was first a regular upward trend in their participation in committing these prohibited acts in 1992–2005, and then the upward trend became more reinforced, especially in 2000–2005.[23] However, this was followed by a sustained decline in the number of women suspected of committing this category of crime, remaining at 30% between 2004 and 2012.

On the other hand, when analysing trends among suspected juvenile delinquents under the age of 16[24] (Figure 2), one can see a disturbing trend with a stable significant number (roughly 400 girls in 2008–2011) of juveniles suspected of robbery-related crimes (from a maximum of 446 to a minimum of 332 cases in 2001–2012). Given the category of crime, this trend indicates a high degree of demoralisation in the analysed group of girls.

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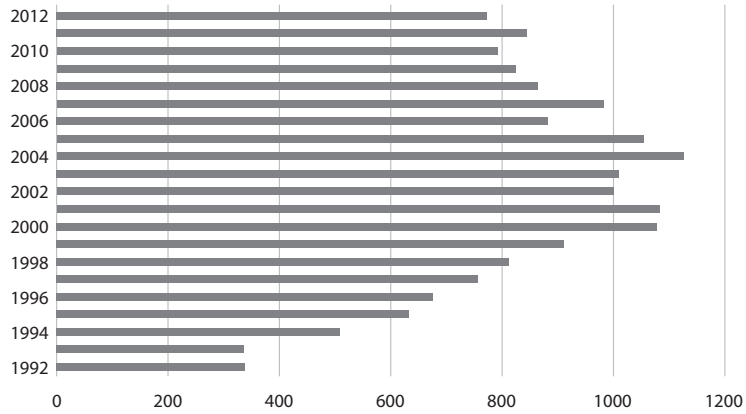
[22] *Ibid*., p. 190.

[23] M. Grzyb, E. Habzda-Siwek, *Płeć a przestępczość. O problemie dysproporcji płci wśród sprawców przestępstw z użyciem przemocy*, Archiwum Kryminologii Vol. XXXV, 2013, p. 121 et seq.

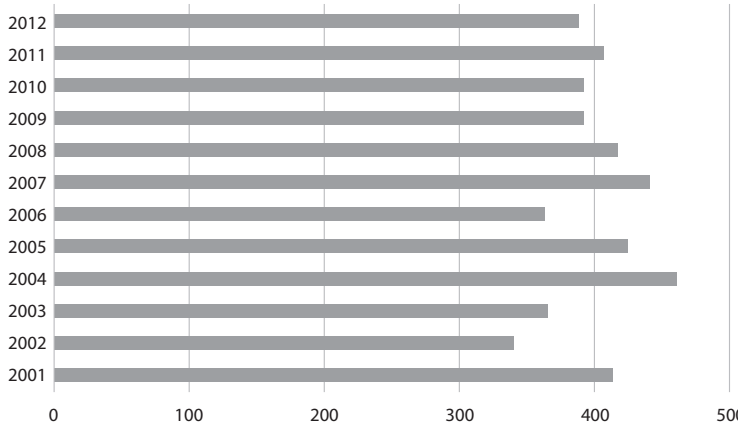
[24] The described age limit in the case of juveniles (under the age of 16) is based on the limit used by the institution which collected the statistics, i.e. the Police. Compare, especially, I. Budrewicz, *supra* n. 5; D. Woźniakowska-Fajst, *Nieletnie. Niebezpieczne, Niegrzeczne, Niegroźne?*, Warszawa 2009.

Figure 1. Number of women suspected of robbery-related crimes



Source: http://www.statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-kobiet/50869,Przestepczosc-kobiet.html

Figure 2. Number of juvenile females suspected of robbery-related crimes



Source: http://www.statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-kobiet/50869,Przestepczosc-kobiet.html

There seem to be several reasons underlying this situation. Young women with an unstable level of development seek acceptance and recognition, and commission of a crime which is very harmful to the society may become a negative form of obtaining such acceptance and recognition. Sometimes members of criminal groups verify their loyalty or courage and require the commission of a crime from this category. However, when looking at the aforementioned premises, one should not forget, above all, about the surplus of control which leads to such crime. It seems possible to argue that the surplus, with the resulting aggression and brutality that prevail in the early stages of women's growth (in girls up to the age of 16),

are transformed and vanish in their further adult life. However, regardless of the reasons that determine women's involvement in robbery-related criminal activity, it is important to note that, as statistics show, women in Poland become clearly less interested in this category of crime as they grow older.[25]

2.2. THEORY OF STRAIN

One other highly symptomatic and interesting theory in the social sciences that can be applied to look at the phenomenon of women's crime is the theory of strain that emerged in the mid-20th century.[26] According to its core assumptions, the higher the level of an individual's aspirations in life and the lower the possibility of fulfilling them, the more intensified the emotional reactions that could be channelled into crime (offences). The underlying reason behind the desire to violate the law was that the ambitions were difficult, or even impossible, to fulfil in ways other than by violating the existing laws. When confronting their ambitions with the actual chances of achieving them, individuals faced the following choice: never to achieve the desired goal or to achieve it relatively quickly in an illegal way. The gap between the pursuit of a goal and the possibility of achieving it inevitably led to the accumulation of frustrations, of varying degrees of intensity. At the same time, the struggle with the accumulated "failures in life" and the belief that one is doomed to them, strengthened the person's desire to end the period of failure and to move towards the fulfilment of the goals, even by resorting to commonly unacceptable methods, such as crime.[27]

In the 1980s, a modified version of the theory of strain was developed in the United States, with its core tenets being proposed by Robert Agnew.[28] As before, the belief that lied at the core of that concept was that socially-oriented crime is caused by accumulated individual strain, conditioned by negative emotions with a prolonged impact. All negative interactions with the society, triggering negative affective states, were conducive to the pursuit of crime. Overall, negative emotions could be identified at all levels of an individual's life in a particular social community.[29] Among the social relations that were conducive to violations of the law, the following were distinguished:

1) the family (tensions between family members),
2) the peer community (tensions between acquaintances, friends),
3) career (tensions between workers with regard to their status in the hierarchy or between them),

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[25] http://www.statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-kobiet/50869,Przestepczosc-kobiet.html.

[26] M. Cabalski, *supra* n. 21, pp. 192–193; K. Biel, *supra* n. 20, p. 156.

[27] The gap between the pursuit of a goal and the impossibility of achieving it gave rise to strain.

[28] R. Agnew, *A Revised Strain Theory of Delinquency*, Social Forces No. 64, 1985, p. 151 et seq.

[29] M. Cabalski, *supra* n. 21, pp. 194–195; B. Urban, *Zaburzenia w zachowaniu i przestępczość młodzieży*, Kraków 2000, p. 205 et seq.

4) material life (tensions caused by differences in living conditions),[30]
5) interpersonal relations (tensions between neighbours, members of specific communities).

In each of the aforementioned areas of an individual's life, there may be an asymmetry between the expectations with the actual possibilities of having them met. It is quite natural that the frustrations would exacerbate if the irregularities in the social relations of an individual occurred on more than one plane.[31] Subjected to negative influences, facing the discrepancy between expectations and goals, the individuals want mainly to "vent" the tension,[32] reaching for the only method that could satisfy their expectations and enable them to reach the planned goal in a short time. In response to that situation, the individuals would commit a crime.

In Agnew's theory of strain, a concentration of negative emotions, especially anger, may first lead to growing aggression and then contribute to the accumulation of affection which is subsequently vented by breaking the law. Violent emotions experienced by an individual can lead to violent acts. A specific negative emotional stimulus is externalised against the society, while aggression and hostility, accumulated when the individual is unable to handle stress, may drive infringing behaviour.[33]

Agnew's research indicates that women, much alike men, experience a variety of tensions but respond to them in radically different ways. Men are more likely to experience the kind of strain that will more probably induce them to commit crimes[34] as a way to reduce that strain.[35] In turn, women are more likely to accumulate negative emotions and are able to conceal tensions for longer periods, which is why stress and frustration usually manifest themselves at a later moment than is the case with men. Moreover, social control which "blocks" the release of tension through unlawful conduct is higher in the case of women. Women's emotional agitation tends to be more strongly determined by the accumulation of harmful, unjust or degrading behaviour that men normally do not allow. The concentrated sense of harm, threat, loneliness, and gender discrimination can lead women to commit a crime, but the motives behind women's criminal activity are usually different. They are linked to attempts to redress the social balance, upset through degrading behaviour, and the objective violation of justice.

Agnew observed that women who engage in conduct that goes against legal norms do so either for their own benefit, to eliminate the benefits to others or to compensate for the sense of harm or humiliation they have experienced. As a result, in order to minimise strain, women tend to engage in highly destructive behaviour,

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30 M. Cabalski, *supra* n. 21, p. 195.

31 Cf. L. Broidy, R. Agnew, *Gender and Crime: A General Strain Theory Perspective*, Journal of Research in Crime and Delinquency No. 3, 1997, pp. 275–306.

32 *Ibid*.

33 *Ibid*., pp. 283–284.

34 E. Habzda-Siwek, *Ogólna teoria napięcia Roberta Agnew: o możliwościach wyjaśniania zróżnicowania zachowań przestępczych kobiet i mężczyzn*, [in:] *Przestępczość kobiet. Wybrane aspekty*, Warszawa 2017, p. 196.

35 *Ibid*., p. 197.

which is greatly damaging to themselves (use of drugs, suicide attempts).[36] In turn, the reduction of strain through crime occurs in particular in three types of circumstances: when they have experienced sexual abuse, violence from their partner or gender discrimination. However, given that the tensions experienced by women are subject to social control and that females are more highly socialised, this, in Agnew's view, determines the lower frequency of tension being released through crime against third parties.[37] Importantly, after observing the manifestations of women's crimes, the author enumerated traits that make some women more capable of committing a crime. Those traits include: low ability to control impulsiveness, high threshold of emotional reactivity, poverty, poor social support, rejection of well-established beliefs about the importance of one's own social role.[38] At the same time, Agnew stated that females who react emotionally to strain are more likely to experience depression, sense of guilt, fear, anxiety and shame,[39] i.e. conditions that reduce the frequency of violent crime or property crimes.[40]

When confronting Agnew's aforementioned views on the theory of strain in women with the category of property crimes committed by female perpetrators in Poland in 1998–2008 (Figure 3), two key observations should be formulated. Firstly, the figures pertaining to 1998–2002 remain somewhat incomplete, making it difficult to draw generalised conclusions regarding the overall trends in women's crime during this period. However, it can be noted that, despite the deficit in the presented statistics, there was a continuing upward trend in the frequency of property crimes among female perpetrators (from 3,948 to 17,495 cases) until 2005. This was followed by a slight decrease in the number of such crimes committed by women (from 11% and 14%) between 2007 and 2008, but they still remained high.[41]

Thus, one cannot conclude that, in line with the theory discussed here, women experienced tensions related to their difficult financial situation in a way that would prevent them from undertaking criminal activity during the period concerned. Rather, it seems that "(…) Theft, burglary and robbery-related crimes (…) tend to represent desperate attempts to gain access to scarce financial resources."[42] Therefore, women's extremely complex living conditions drive their high criminal activity,[43] while they can compensate for the tensions arising from the shortage of material profits by resorting to quick, albeit illegal, methods of obtaining them (Figure 4).

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[36] R. Agnew, *Pressured into Crime: An Overview of General Strain Theory*, Los Angeles 2006, p. 134 et seq.

[37] E. Habzda-Siwek, *supra* n. 34, p.198.

[38] *Ibid*., p. 200.

[39] *Ibid*.

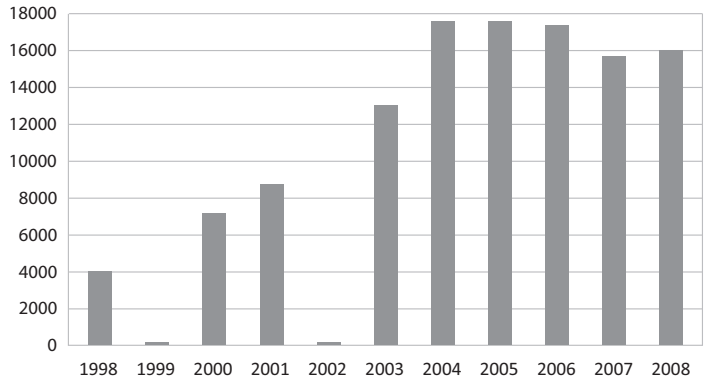
[40] L. Broidy, R. Agnew, *supra* n. 31, p. 284 et seq.

[41] Property offences are a category of offences that have an equally high frequency among juveniles as among adults. Compare J. Jasiński, *Przestępczość nieletnich w Polsce w latach 1961–1967 (rozmiary, struktura przestępczości, orzeczone środki)*, Archiwum Kryminologii Vol. IV, 1969, p. 179; A. Siemaszko, *Kogo biją, komu kradną? Przestępczość nierejestrowana w Polsce i na świecie*, Warszawa 2001, p. 28.

[42] M. Cabalski, *supra* n. 21, p. 178.

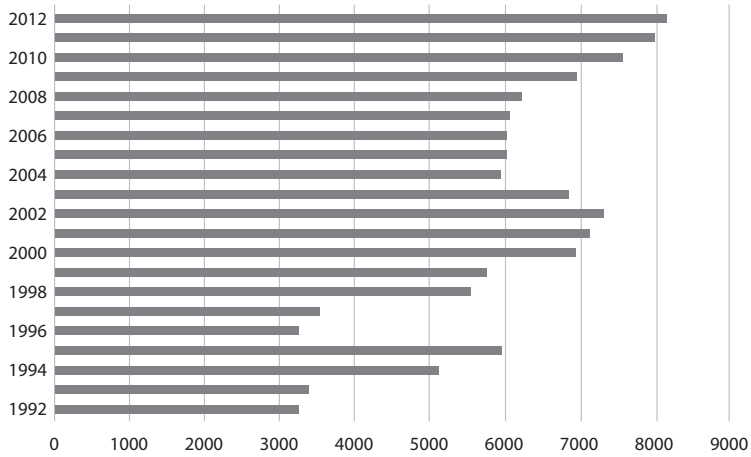
[43] A. Campbell, *supra* n. 8, p. 345.

Figure 3. Number of women sentenced in property crime cases (total) in 1998–2008



Source: the author's own analysis based on data from the Statistical Yearbooks issued by the Central Statistical Office of Poland (GUS) for 1998–2008

Figure 4. Number of women suspected of stealing someone else's property and burglary in 1992–2012



Source: http://www.statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-kobiet/50869,Przestepczosc-kobiet.html

It seems that women's advanced and fully conscious participation in all forms of social life justifies the belief that women have overcome taboos, especially in terms of crime. As Robert Agnew emphasises in his concept, the model of women's conduct still comprises the prevailing willingness to engage in defensive activities and to avoid crime, perceived as a confrontational event. However, according to the statistics presented here with regard to property crimes, the lack of skills or lack of the possibility to solve the resulting conflict of interest in a lawful manner does not prevent women from committing a crime, i.e. from entering criminal activity. In fact, this represents one of the stimuli that reinforce such aspirations.

2.3. SOCIAL STIGMATISATION THEORY

One of the numerous sociological theories that assist one in identifying a link between women and crime is the theory of social stigmatisation.[44] According to that theory, when the required behavioural norms are set, they are automatically enforced and the individuals who choose to oppose them are stigmatised. As a stable community, the society defines a catalogue of both desirable and negative conduct, and determines which of them are considered "bad" and which remain permissible.[45] A transgression of the accepted norms and guidelines with regard to required conduct entails far-reaching social consequences. This is true as the stigmatisation extends not only onto the transgression itself, but also, and sometimes above all, onto the perpetrator, which may entail social stigmatisation and, if such behaviour is perpetuated, this might even lead to individual deviations.[46] The process of "pejorative labelling" can, therefore, lead not only to serious distortions of the individuals' social position once they have transgressed the socially determined rules, but may also disrupt their self-esteem.[47] Importantly, the rules, norms and duties set out may be, and often are, redefined, which is why the authors of this concept point out[48] that conduct that is currently regarded as a violation or deviation from the required normative behaviour may become a norm in the future. The reactive evaluation in a social community is subject to constant modification, depending on the changing conditions in which the community lives, as well as a number of factors that primarily or secondarily relativise the fundamental assessment of the individuals that make up that community. The dynamism inherent in this theory can be clearly seen from this perspective.

Focusing on the assumptions of the aforementioned concept from the perspective of women's crime, one can conclude that this is one of the most fundamental and frequent ways of assessing this phenomenon. As a representative of the female sex, traditionally seen as synonymous with "the decent sex", a woman who transgresses the established rules and infringes the accepted norms will always arouse more surprise and shock than a man doing the same thing. There is still a strong public belief that a woman should not commit a crime, and if she does, this presumably results from some atypical or incidental circumstances.[49] Therefore, a woman is allowed to perform worse in the sphere of her gender-based duties (as a wife, mother or sister), but she is not permitted to take her social "infirmity" onto the normative plane. The social belief in the impeccability of the female sex has specific consequences on the grounds of the theory of social stigmatisation.

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[44] J. Chojecka, *Przestępczość kobiet – próba teoretycznego ujęcia zjawiska*, [in:] A. Matysiak-Błaszczyk, B. Jankowiak (eds), *Kontrowersje wokół socjalizacji dziewcząt i kobiet*, Poznań 2016, p. 92.

[45] *Ibid*.

[46] M. Konopczyński, *Współczesne kierunki zmian w pedagogice resocjalizacyjnej. Destygmatyzacja dewiantów i kreowanie alternatywnych tożsamości*, [in:] M. Konopczyński, B.M. Nowak (eds), *Resocjalizacja. Ciągłość i zmiana*, Warszawa 2008, p. 69 et seq.

[47] J. Chojecka, *supra* n. 44, p. 93.

[48] The following authors can be mentioned among the representatives of different approaches to the theory of social stigmatisation: E. Lemert, H. Saul Becker, E.M. Schur, D. Matzy.

[49] R. Siemieńska, *Płeć, zawód, polityka*, Warszawa 1990, p. 55 et seq.

Women who (regardless of the circumstances) have committed acts prohibited by law are treated in a "more spectacular" way, for instance in the media.[50] The media make attempts to find cruelty, drastic elements or cold calculation, which may stem from the erroneous belief that women are only capable of inflicting pain on their loved ones and that they can target criminal activity and emotions only at partners or children. Therefore, one reason why women's crime may seem spectacular is the specific circle of victims. This one-dimensional presentation of the analysed phenomenon leads to the belief that bad mothers, cruel wives or concubines deserve condemnation. As a result, stigmatisation of the perpetrators rather than their acts is more likely to occur in women than in men. As a consequence, this approach leads to "unhealthy" attention paid to female perpetrators, as well as to the consolidation of social stigma and perception of those women as deviants. In view of current research by criminologists and sociologists, the belief that crime is reserved exclusively for men has not been confirmed. Nowadays, women remain fully active in the area of crime and it is generally difficult to find categories of crime that remain an exclusive male domain. However, the theory of social stigma reveals a very important observation concerning the axiological aspects of crime. The gender-based assessment of criminal conduct remains significantly varied. Female offenders continue to be assessed more strictly than men[51] and their conduct is more heavily stigmatised.[52] Although research has shown[53] that women's crime is apparently on the rise, crime is still not considered to be a female type of conduct or one that is socially intertwined with the female gender.[54]

Invariably, infanticide is one of the crimes that arouses particular interest and triggers a shock in the society and the media, and involves the highest degree of social stigma for women. Given the vulnerability and age of the victim of such crime (an infant), and given the fact that the mother should guard the bond that binds her to her offspring, any conduct violating this bond becomes inexplicable. The drastic nature of infanticide is reflected not so much in the method or form of its execution, but in the very fact that it is carried out by the mother. In social perception, infanticide by a mother is viewed as an outraging act challenging the parental relationship, and it triggers a procedure to determine whether the woman who has been capable of committing such a crime shows signs of deviation. Below is a summary illustrating the number of infanticides detected in Poland in 1999–2016 (Figure 5).

Based on the presented statistics, it can be concluded that the number of infanticides in Poland has drastically declined within the last two decades, and the crime of infanticide has almost disappeared nowadays. At the same time, it

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[50] I. Desperak, *Złe dziewczynki i potworne kobiety – dlaczego media lubią je tak przedstawiać?*, [in:] *Zachowania dewiacyjne dziewcząt i kobiet*, Łódź 2007, pp. 45–56.

[51] R. Agnew, *supra* n. 34, p. 138; Z. Majchrzyk, *supra* n. 2, p. 72.

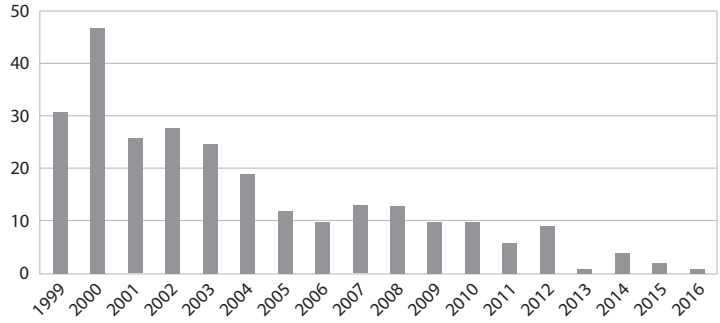
[52] *Ibid*.

[53] A. Siemaszko, B. Gruszczyńska, M. Mraczewski, *Atlas przestępczości w Polsce*, Vol. 4, Warszawa 2009, pp. 322–323; M. Cabalski, *supra* n. 21, http://www.gazetaprawna.pl/galerie/906025,duze-zdjecie,2,przestepczosc-kobiet.html; L. Lernell, *supra* n. 16, p. 262.

[54] K. Biel, *supra* n. 20, pp. 132–133.

should be clearly stressed that, although this crime is incidental, its strict axiological assessment does not change: it continues to entail particularly pejorative social stigmatisation of its perpetrators in the overall population of criminals. As Eleonora Zielińska points out, "(...) the Polish justice system has a history of punishing women particularly severely when they go beyond the stereotype of femininity or the role of a woman as a caregiver and mother."[55] Women who decide to carry out this crime must face the stigma of an infanticidal mother, and this particular stigma accompanies them not only during the time served but also after they have left prison, it often pushes them towards further deviations, especially within the mental structure of their personality. It is therefore clear that the society does not, and probably will not, agree to tolerate conduct that violates the bond between the mother and the child, especially if this bond is challenged by the person who is expected to support it under any circumstances.

Figure 5. Number of infanticides detected in 1999–2016



Source: http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63417,Dzieciobojstwo-art-149.html

3. CONCLUSIONS

The reflections presented above can be used to formulate several fundamental observations. First of all, the phenomenon of women's crime has attracted much more attention in contemporary criminological research than in the early 20th century. The increasing number of female offenders in the total number of convicts begs the question why women, previously depicted (although apparently wrongly) as promoters of "proper and positive" conduct decide to transgress certain boundaries and violate the law. When attempting to answer this question, a desire arises to identify the source(s) of women's criminogenic activity. The list of reasons underlying female crime embrace various factors, different and similar, determining the occurrence of this phenomenon. Due to their multiplicity, a comprehensive analysis goes beyond the scope of this paper. For this reason, a decision has been made to

[55] E. Zielińska, *Kobiety a wymiar sprawiedliwości*, Prawo i Płeć No. 3, 2001, pp. 1–4.

focus on a selected range of topics, i.e. the social determinants of the phenomenon of women's crime. In the context of the four concepts of crime presented here, the belief about the importance of the social perception of women's criminal activity remains fully valid. The number and the divergence of interactions driven by factors in the perpetrators' environment remains a common ground.

In conclusion, it should be noted that the confrontation of the theoretical concepts of the sociological underpinnings of women's crime with statistical data concerning the selected categories of crimes committed by Polish female perpetrators does not always confirm the assumptions adopted in those concepts. However, this does not mean that their elements are erroneous but rather proves that those concepts were developed on the basis of observations that are not always confirmed in Poland's realities. Moreover, it should be stressed that the variables underlying the presented concepts were observed by their authors in a different period (most of them were formulated in the first half of the 20th century) and in a different geographical area than those relevant to Polish female perpetrators. This fact makes it difficult, and impossible at times, to validate those assumptions on the basis of the presented statistics. Therefore, it seems that the sociological concepts concerning female crime need to be remodelled, taking into account the transformations taking place in the population under study (the category of female perpetrators), and placed in a specific socio-cultural context, as well as a specific local environment. Thus, the reference to this group of theories should be considered justified, especially if accompanied by comments as to their contextual explication of the phenomenon of women's crime, together with the need to consider the variability of such contexts with due consideration for factors underlying the observed social relations and connections.

The axiological context of the analysed illegal conduct displayed by women, challenging the crucial societal principles and norms, allows one to focus attention on the effectiveness of elucidation of women's crime. A cursory review of the above-mentioned sociological theories proves that they constitute only a fragmentary attempt to explain the phenomenon which occurs in almost innumerable varieties. The fundamental question arises as to why the chosen sociological context remains relevant when attempting to explicate female crime. This is mostly because what is highlighted from this perspective is not only the genuine context of the phenomenon but, above all, the multiplicity of its social consequences, as well as the personal and extra-personal relations it determines. Nevertheless, even if one sees the importance of the sociological perspective on women's crime, one cannot fail to acknowledge the need to consider the extra-sociological contexts that influence the phenomenon concerned. Thus, the multitude of problems focused around women's crime makes it possible to conclude that even the most complex single-factor concept or theory that elucidates the phenomenon (also a sociological one) remains too narrow to incorporate the contemporary contexts. Thus, it should be stressed that the findings made on the basis of sociological concepts of women's crime delineate only one of multiple areas that need to be addressed in order to study this phenomenon in a comprehensive way. This point of view guides the reflection towards a broader perspective on the underpinnings of the issue. Multi-factor theories, also known as integrated theories, are one of the methods that can help to unfold the complex nature of the analysed

criminal phenomenon. It seems that the use of those theories can render better results in the sense that they try to explain women's crime from many perspectives and on various levels, thus increasing the degree of objectivity in the analysis.

Likewise, modern criminology seeks to explain the causes of women's crime. Like the other approaches, this one has not only advantages but also some disadvantages. The novelty of this solution lies in the synchronisation of various factors and the accompanying conditions (biological, psychological and sociological). It also focuses on incorporating the interactions between the various variables and on unfolding the extent to which various factors determine the emergence of criminal conduct. The advantage of multi-factor theories over single-factor ones is manifested primarily on two levels. First of all, they enable a more comprehensive analysis of the phenomenon in question and, secondly, they help to adapt the explanation to a specific case, thus demonstrating category flexibility (a different number of factors, depending on the criminal case in question). Meanwhile, the most serious disadvantage of single- and multi-factor theories lies in the impossibility to extrapolate the findings made on their basis. Thus, they work well for the case-by-case analysis of a specific crime, but have visible deficiencies with regard to certain categories of crime (homicide, theft, fraud) and certainly with regard to attempts to identify and formulate universal causes of women's crime (for all such cases). At the same time, perhaps the scope of the phenomenon is so wide and so diverse that it is impossible to identify a universal catalogue of causes explaining the phenomenon of female crime, while single- or multi-factor situational interpretations of specific prohibited women's activities are more appropriate, depending on the degree of complexity and frequency.

A separate problem which is difficult to interpret but nevertheless worth addressing in the context of the above discussion is the phenomenon of "social masculinisation" of women in the context of the increasing total number of crimes they commit. In other words, it is interesting to ponder over the question as to whether crimes, reserved for men until recently, can only be committed by "masculine" women or also by "feminine" ones. There is virtually no doubt that a crime, perceived as a socially significant fact, can be carried out by any human being, regardless of their gender. However, the stereotypical and uninterrupted association between masculinity and crime has resulted in a situation where women who have committed crimes are suspected to have a higher, atypical degree of male elements in comparison with other women. It is worth noting that such an interpretation calls into question the gender stereotype which reinforces the gendered perception of specific categories of activities and their identifying characteristics. At the same time, the clear and permanent change in the social position of women today, associated with the fact that they acquire new skills, previously reserved for men, also leads to a changed perception of the female gender. A confrontation of the presented observations with the research conducted by a Polish author Renata Szczepanik[56] on a group of women imprisoned for a robbery did not confirm the well-established social perception that

[56] R. Szczepanik, *Teoretyczne perspektywy interpretacji przestępczości kobiet i mężczyzn*, [in:] M. Chomczyńska-Rubacha (ed.), *Teoretyczne perspektywy badań nad edukacją rodzajową*, Łódź 2007, pp. 158–164.

women who commit a robbery are sometimes considered more "masculine" than the perpetrators of other crimes, given the fact that a robbery requires the use of force, violence and a high level of brutality and aggression. The author is very sceptical about the results obtained. She stresses that if one assumed that only "masculine women" could commit a robbery, the prevailing phase in the development of their gender roles should be the phase of autonomy where a conflict situation is addressed by strengthening the characteristics of the opposite sex. Meanwhile, the studied female convicts scored highest on conscientiousness, with individuals acting in accordance with the stereotype of their own gender, which means that women involved in robbery remain highly feminine in their behaviour. However, this identification is not absolute and it should be added that the female perpetrators try to challenge the existing stereotypes that they have absorbed previously and experience a serious discrepancy between their own expectations, going beyond the duties of the female gender, and the social expectations towards them.

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WOMEN'S CRIME IN THE CONTEXT OF SELECTED SOCIOLOGICAL CONCEPTS OF CRIME

Summary

The aim of the study is to indicate the links between selected sociological theories of crime and the phenomenon of women's crime. The initial characteristics of the indicated category of theories makes it possible to define further those aspects which, in the context of general assumptions, determine their relations with a particular category of perpetrators: women. In attempt to confront theoretical considerations with the findings of empirical nature, the study indicates selected categories of crimes committed by women in Poland when the Criminal Code of 1997 was in force. Such an approach allows the final determination whether the assumptions of the analysed theoretical concepts have been confirmed by the presented research, or whether their potential remodelling is necessary. The structure of the study has determined the application of two research methods: dogmatic and empirical.

Keywords: female crime, theory of social bonds, theory of balance of control, theory of anomie, theory of social stigmatisation

PRZESTĘPCZOŚĆ KOBIET NA TLE WYBRANYCH SOCJOLOGICZNYCH KONCEPCJI PRZESTĘPCZOŚCI

Streszczenie

Celem opracowania jest wskazanie powiązań między wybranymi socjologicznymi teoriami przestępczości a zarysowanym na ich tle zjawiskiem przestępczości kobiet. Wstępna charakterystyka wskazanej kategorii teorii umożliwia w rezultacie określenie tych aspektów, które na tle ogólnych założeń wyznaczają ich relacje ze szczególną kategorią sprawców: kobiet. Ze względu na dążenie do skonfrontowania poczynionych rozważań teoretycznych z ustaleniami natury empirycznej, w opracowaniu wskazano wybrane kategorie przestępstw popełnionych przez kobiety w Polsce w okresie obowiązywania kodeksu karnego z 1997 r. Takie ujęcie pozwala na ustalenie, czy założenia analizowanych koncepcji teoretycznych znalazły potwierdzenie w przedstawionych badaniach, a także czy konieczne jest ich ewentualne przemodelowanie. Ponadto zasadniczym założeniem pracy jest także wykazanie, czy jednoczynnikowe teorie przestępczości w konfrontacji ze zjawiskiem przestępczości kobiet są w stanie kompleksowo określić jego istotę, czy też niezbędne jest sięgnięcie do teorii złożonych, by w pełni zrozumieć analizowany problem. Struktura opracowania wpłynęła na zastosowanie dwóch metod badawczych: dogmatycznej oraz empirycznej.

Słowa kluczowe: przestępczość kobiet, teoria więzi społecznej, teoria równowagi kontroli, teoria anomii, teoria naznaczenia społecznego

DELINCUENCIA FEMENINA DESDE EL PUNTO DE VISTA DE ALGUNOS CONCEPTOS DE LA DELINCUENCIA

Resumen

La presente obra tiene como fin demostrar vínculos entre el fenómeno de la delincuencia femenina y algunas teorías sociológicas de la delincuencia, así como determinar si exponen con acierto factores genéticos de esta delincuencia. Las características iniciales de la categoría indicada de teorías permite identificar aspectos que determinan sus relaciones con la categoría particular de delincuentes – mujeres. Se tiende a confrontar la teoría con la práctica, se señala categorías de delitos cometidos por las mujeres en Polonia durante la vigencia del código penal de 1997. Esto permite determinar finalmente, si los conceptos teoréticos se confirman en casos estudiados y si necesitan eventualmente una mejora. Además, la obra tiende a demostrar si teoría de un factor de la delincuencia contrastado con el fenómeno de delincuencia femenina será capaz determinar su naturaleza o bien habrá que apoyarse en teorías complejas para entender este fenómeno. La estructura de la obra ha exigido la aplicación de dos métodos de investigación: dogmática y empírica.

Palabras claves: delincuencia femenina, teoría de relación social y equilibrio de control, teoría de anomia, teoría de estigmatización social

ЖЕНСКАЯ ПРЕСТУПНОСТЬ С ТОЧКИ ЗРЕНИЯ ОТДЕЛЬНЫХ СОЦИОЛОГИЧЕСКИХ КОНЦЕПЦИЙ ПРЕСТУПНОСТИ

Резюме

Цель исследования – рассмотреть явление женской преступности с точки зрения отдельных социологических теорий преступности и определить, насколько точно эти теории раскрывают факторы возникновения такой преступности. Предварительная характеристика указанной группы теорий позволит в дальнейшем определить те их аспекты, которые на фоне общих теоретических положений относятся к конкретной категории правонарушителей, а именно к женщинам. Чтобы сопоставить теоретические соображения с эмпирическими наблюдениями, в работе будут рассмотрены отдельные категории преступлений, совершенных женщинами в Польше в период действия уголовного кодекса 1997 года. Такой подход позволит сделать надежные выводы относительно того, находят ли эмпирическое подтверждение анализируемые теоретические концепции, а также определить, следует ли ввести поправки в соответствующие модели. Еще одна из основных целей работы заключается в выяснении, способны ли однофакторные теории преступности предложить всестороннее объяснение сути явления женской преступности, или же для полного понимания анализируемой проблемы необходимо прибегнуть к более сложным теориям. План исследования предопределил использование двух исследовательских методов: догматического и эмпирического.

Ключевые слова: женская преступность, теория социальных связей и баланса контроля, теория аномии, теория социальной стигматизации

FRAUENVERBRECHEN MIT DEM HINTERGRUND DER AUSERWÄHLTEN SOZIOLOGISCHEN KRIMINALITÄTSKONZEPTE

Zusammenfassung

Ziel dieser Studie ist es, die Zusammenhänge zwischen dem Phänomen der Frauenkriminalität und ausgewählten soziologischen Kriminalitätskonzepte aufzuzeigen und festzustellen, wie zutreffend sie die genetischen Faktoren dieser Kriminalität aufdecken. Die vorläufigen Merkmale der angegebenen Kategorie und der Theorie werden weiter die Identifizierung dieser Aspekte ermöglichen, die auf dem Hintergrund allgemeiner Annahmen ihre Beziehung zu einer bestimmten Kategorie von Tätern – nämlich Frauen – bestimmen. Aufgrund des Strebens, die theoretischen Überlegungen mit empirischen Ergebnissen zu konfrontieren, wird die Studie ausgewählte Kategorien von Verbrechen aufzeigen, die Frauen in Polen während der Gültigkeitsdauerdes des Strafgesetzbuchs von 1997 begangen haben. Dieser Ansatz ermöglicht die endgültige Feststellung, ob die Annahmen der analysierten theoretischen Konzepte in der vorgestellten Forschung bestätigt wurden und ob es erforderlich ist, sie gegebenenfalls umzugestalten. Darüber hinaus besteht die Grundvoraussetzung der Studie darin, zu zeigen, ob Ein--Faktor-Theorien der Kriminalität in Konfrontation mit dem Phänomen der Frauenkriminalität in der Lage sind, ihr Wesen umfassend zu bestimmen, oder ob es notwendig ist, auf komplexe Theorien zurückzugreifen, um das analysierte Problem vollständig zu verstehen. Layout der Studie bestimmt die Verwendung von zwei Forschungsmethoden: dogmatisch und empirisch.

Schlüsselwörter: Frauenkriminalität, Theorie der sozialen Bindung und Kontrollgleichgewicht, Anomietheorie, Theorie der sozialen Kennzeichnung

LA CRIMINALITÉ DES FEMMES DANS LE CONTEXTE DE CERTAINS CONCEPTS SOCIOLOGIQUES DE LA CRIMINALITÉ

Résumé

L'objectif de l'étude est d'indiquer les liens entre le phénomène de la criminalité des femmes et certaines théories sociologiques de la criminalité et de déterminer avec quelle pertinence elles exposent les facteurs génétiques de cette délinquance. Les caractéristiques préliminaires de la catégorie de théorie indiquée permettront en outre d'identifier les aspects qui, dans le contexte des hypothèses générales, déterminent leurs relations avec une catégorie particulière d'auteurs – les femmes. En raison du désir de confronter les considérations théoriques formulées avec des résultats empiriques, l'étude indiquera des catégories sélectionnées de crimes commis par des femmes en Pologne pendant la période de validité du Code pénal de 1997. Cette approche permettra de déterminer définitivement si les hypothèses des concepts théoriques analysés ont été confirmées dans la recherche présentée, et si un remodelage est nécessaire. En outre, la prémisse de base du travail est également de montrer si les théories du crime à un facteur face au phénomène de la criminalité des femmes sont capables de déterminer de manière exhaustive son essence, ou s'il est nécessaire de recourir à des théories complexes pour comprendre pleinement le problème analysé. La présentation de l'étude a déterminé l'utilisation de deux méthodes de recherche: dogmatique et empirique.

Mots-clés: criminalité féminine, théorie du lien social et équilibre de contrôle, théorie de l'anomie, théorie de l'étiquetage social

LA CRIMINALITÀ FEMMINILE SULLO SFONDO DI CONCEZIONI SOCIOLOGICHE SCELTE DELLA CRIMINALITÀ

Sintesi

L'obiettivo dell'elaborato è quello di indicare i legami tra il fenomeno della criminalità femminile e alcune selezionale teorie sociologiche della criminalità, nonché stabilire quanto coglientemente esse espongano i fattori genetici di tale criminalità. La caratteristica preliminare della categoria indicata di teorie permette in misura ulteriore di determinare quegli aspetti che sullo sfondo dei presupposti generali mostrano la loro relazione con la particolare categoria di criminali, le donne. A motivo del tentativo di confronto delle riflessioni teoriche compiute con le determinazioni a carattere empirico, nell'elaborato vengono indicate categorie scelte di reati, compiuti dalle donne in Polonia nel periodo di validità del codice penale del 1997. Tale inquadramento permette di stabilire definitivamente se i presupposti dei concetti teorici analizzati trovino conferma o meno negli studi presentati, o se sia necessaria una loro eventuale rimodellazione. Inoltre un presupposto fondamentale del lavoro è quello di mostrare se le teorie monofattoriali della criminalità nei confronti della criminalità femminile siano in grado di definire in maniera completa la sua essenza, o se sia necessario attingere a teorie complesse per comprendere pienamente il problema analizzato. La struttura dell'elaborato ha determinato l'utilizzo di due metodi di studio: dogmatico ed empirico.

Parole chiave: criminalità femminile, teoria delle relazioni sociali dell'equilibrio del controllo, teoria dell'anomia, teoria della reazione sociale e dell'etichettamento

Cytuj jako:

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER IN THE FIELD OF SUBSTANTIVE CRIMINAL LAW FOR 2018

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1. NEGATIVE FACTOR FOR AWARDING AN AGGREGATED PENALTY (ARTICLE 85 § 3 CC)

The necessary condition for awarding an aggregated penalty is the fact that aggregated or joint penalties should be subject to execution. On the date of passing a sentence, a complete or partial execution of aggregated penalties must be possible in the way prescribed for a given penalty in the Penalty Execution Code.[1] In accordance with Article 85 § 3 of the Criminal Code (CC), if after the beginning and before the completion of serving a penalty or aggregated penalty a perpetrator commits an offence for which the same type of penalty or another penalty subject to aggregation was awarded, the given penalty is not subject to aggregation with the penalty being served at the time of the commission of an offence. The provision bans aggregation of the penalty being served at the time of the commission of a new offence with the penalty awarded for that new offence.

In the context of this provision, a problem arose whether the commission of an offence by a perpetrator at the time of probation established in connection with conditional release from serving the remaining part of the penalty of deprivation of liberty constitutes a negative factor, within the meaning of Article 85 § 3 CC, for awarding an aggregated penalty of deprivation of liberty that covers the penalty that

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[1] The Supreme Court judgment of 21 November 2018, III KK 626/18, LEX No. 2580208.

was subject to conditional release and a penalty awarded for the offence committed in the period of probation.

Solving the problem, the Supreme Court bench of seven judges passed a resolution on 25 January 2018, I KZP 11/17 (OSNKW 2018, No. 4, item 28), in which it presented their stand that: **"The commission of an offence by a perpetrator during the probation period established in the decision on conditional release from serving the remaining part of the penalty of deprivation of liberty does not constitute a negative factor prescribed in Article 85 § 3 CC for imposing an aggregated penalty covering the penalty (joint penalties) from the serving of which the perpetrator was conditionally released and the penalty (joint penalties) for the offence committed during the probation period."** The stand is right and has been approved of in literature[2] and adopted by the judicature[3]. The Court rightly noted that the basic condition for a negative factor under Article 85 § 3 CC is commission of a criminal act by the perpetrator at the time of serving the sentence, the execution of which started but was not concluded. Therefore, it is essential to understand the phrase "serving a penalty" (*odbycie kary*). It is essential because the phrases "penalty execution" (*wykonywanie kary*) and "serving a penalty" used to be treated as synonymous in the doctrine of law.[4] The word *odbycie* means "participation in something, being somewhere, taking part in an activity or given activities"[5], and *odbyć/odbywać* assumes being for some time or taking part in an activity or a process lasting for a fixed time.[6] The linguistic meaning of the word proves that serving a penalty of deprivation of liberty is connected with the perpetrator's submission to penitentiary influence typical of a particular type of penalty laid down in the sentence; however, serving the penalty of deprivation of liberty does not have to be connected only with imprisonment. The concept of a penalty being executed covers penalties subject to execution, i.e. penalties possible to be executed and not necessarily penalties being executed within the meaning of the provisions of Penalty Execution Code.[7]

Thus, the Supreme Court rightly assumed that the phrases "penalty execution" and "serving a penalty" are not synonymous.[8] Serving a penalty is a narrower concept

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[2] Glosses on the resolution by A. Nowosad, Palestra No. 9, 2018, pp. 88–94; M. Kaszubowicz, Palestra No. 11, 2018, pp. 86–93.

[3] The opinion was presented again in the resolution of seven judges of the Supreme Court of 25 January 2018, I KZP 11/16, OSNKW 2018, No. 4, item 28, LEX No. 2574094, with glosses of approval by P. Poniatowski, Ius Novum No. 4, 2018, pp. 160–176; M. Bielski, OSP 2018, No. 9, pp. 55–61; the Supreme Court judgment of 27 March 2018, III KK 353/17, LEX No. 2510661; the Supreme Court judgment of 10 April 2018, III KK 80/18, LEX No. 2515709.

[4] P. Kozłowska-Kalisz, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 289.

[5] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 25, Poznań 2000, p. 243.

[6] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 3, Warszawa 2003, p. 82.

[7] Judgment of the Court of Appeal in Szczecin of 24 March 2016, II AKa 27/16, LEX No. 2080917; judgment of the Court of Appeal in Wrocław of 30 March 2016, II AKa 69/16, LEX No. 2039680.

[8] D. Kala, M. Klubińska, *Kara łączna i wyrok łączny*, Kraków 2017, p. 76; M. Bielski, *Glosa do uchwały 7 sędziów SN z dnia 25 stycznia 2018 r., I KZP 11/17*, OSP No. 9, 2018, p. 59; *idem*, *Zakres zastosowania negatywnej przesłanki wymiaru kary łącznej z art. 85 § 3 i 3a k.k.*, Prokuratura i Prawo

than execution of a penalty and constitutes an element of the execution proceedings. Both terms in the Polish legal language express their own content and none of them can be treated *per non est*. Thus, the execution of a penalty is a concept superior in relation to serving.[9] A convict serves a penalty of deprivation of liberty also in the period when he/she is temporarily released from prison (Article 91(2)–(4) and (8), Article 92(2)–(5) and (9), Article 131 §§ 1 and 2, Article 138(7) and (8), Article 141a § 1, Article 165 § 2, Article 234 § 2 of the Criminal Procedure Code, henceforth CPC). It is confirmed by the fact that, based on the permissions listed, the time of staying outside prison is not deducted from the period of serving a penalty, unless a penitentiary court decides otherwise (Article 140 § 4 CPC).[10] The Supreme Court is right that "The convict who was given permission to leave prison without supervision for a period not exceeding 14 days at a time, in accordance with Article 138 § 1(8) CPC, continues to serve a penalty of deprivation of liberty within the meaning of Article 85 § 3 CC. The commission of an offence for which a penalty of the same type or another one that is subject to aggregation is awarded constitutes a negative factor for awarding an aggregated penalty in the aggregated sentence. A situation in which a convict commits an offence after the release period has ended, i.e. during the period of unlawful stay outside prison, should be assessed in the same way."[11] However, he/she does not serve a penalty in the case of a break in the penalty execution[12] or earlier release from serving the remaining part of the penalty.[13] In the latter case, in accordance with Article 77 § 1 CC, a convict does not serve a penalty because he/she is released from serving its remaining part. Logically, an offence committed during a probation period is not committed in the course of serving a penalty; a convict does not serve it since he/she has been released from serving it.[14]

The analysis of the provisions of the Criminal Code and the Penalty Execution Code that contain the phrase confirms that serving a penalty does not mean the same as execution of a penalty. The phrase "serving a penalty" is used in the

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No. 11, 2018, pp. 54–63; judgment of the Court of Appeal in Katowice of 20 April 2017, II AKa 64/17, LEX No. 2317640. Contrary and erroneous in: ruling of the Court of Appeal in Katowice of 3 November 2016, II AKz 558/16, LEX No. 2242141; judgment of the Court of Appeal in Katowice of 20 July 2017, II AKa 290/17, LEX No. 2382750.

[9] D. Kala, M. Klubińska, *supra* n. 8, p. 76.

[10] The Supreme Court ruling of 17 May 1990, V KZP 5/90, Przegląd Sądowy No. 9, 1990, p. 103 with a gloss of approval by R.A. Stefański, Orzecznictwo Sądów Polskich No. 1, item 16, 1991; the Supreme Court ruling of 14 September 2017, I KZP 6/17, OSNKW 2017, No. 11, item 62.

[11] The Supreme Court ruling of 19 January 2017, I KZP 12/16, OSNKW 2017, No. 2, item 8 with a gloss of approval by D. Krakowiak, LEX/el. 2017 and such comments by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego, prawa karnego wykonawczego, prawa karnego skarbowego i prawa wykroczeń za 2017 r.*, Ius Novum No. 1, 2019, pp. 73–74.

[12] Judgment of the Court of Appeal in Katowice of 13 October 2016, II AKa 388/16, Biuletyn SA w Katowicach 2016, No. 4, item 7; ruling of the Court of Appeal in Katowice of 13 April 2016, II AKz 156/16, Biuletyn SA w Katowicach 2016, No. 2, item 4; judgment of the Court of Appeal Szczecin of 1 June 2017, II AKa 65/17, LEX No. 2379122.

[13] V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 503.

[14] A. Nowosad, *Glosa do uchwały SN z dnia 25 stycznia 2018 r., I KZP 11/17*, Palestra No. 9, 2018, p. 91.

Criminal Code in relation to: deciding on the choice of prison and a therapeutic system (Article 62); relapse into crime (Article 64 §§ 1 and 2), grounds for conditional earlier release from serving the remaining part of a penalty (Article 77 § 1 CC), and recognition of a penalty as executed (Article 82 § 2). In the Penalty Execution Code it is used in the regulations concerning, inter alia, appealing against decisions in execution proceedings (Article 11 § 4), signalling recognition of unlawful deprivation of liberty (Article 34 § 4), initiating the execution of electronic tagging (Article 43k § 2), the place of a penitentiary court meeting to decide on the permission to serve the penalty of deprivation of liberty in the electronic tagging system in case a convict serves a penalty in prison (Article 43le), types of prisons for convicts serving a penalty of deprivation of liberty (Article 69(2) and (4)), a penitentiary commission tasks (Article 76 § 1(2), (6) and (10)(a)), aims and rules of classifying convicts (Article 82 § 2(3)), prisons for minors (Article 84 §§ 1 and 2), prisons for first-time convicts, second-time convicts and women (Articles 85, 86 and 87), imprisonment of perpetrators subject to the programmed influence system or serving a substitute penalty of deprivation of liberty or a penalty of detention (Article 88 §§ 1 and 2), serving a penalty within the programmed influence and therapeutic system (Article 95 §§ 1 and 4, Article 96 §§ 1 and 3), and prison features (Article 100 § 1). According to the content of those provisions, serving a penalty is connected with activities related to actual implementation of a sentence.

2. LIMITATION OF PENALTY IMPOSITION (ARTICLE 101 CC)

2.1. LIMITATION OF PENALTY IMPOSITION IN CASE OF CUMULATIVE LEGAL CLASSIFICATION OF AN ACT

Article 101 CC is formulated clearly and it might seem that its application does not pose any problems. However, it raises doubts as to what time limits should be applicable in the case of an act matching the features of two or more provisions of the Criminal Code (Article 11 § 2 CC), i.e. whether the time limit prescribed for an offence determined in the provision laying down the most severe penalty (Article 11 § 3 CC) and thus to the whole act is subject to cumulative legal classification or whether the time limit is calculated separately in relation to each provision within the cumulative classification, and the recognition of its expiry prevents making reference to this provision in the legal classification of the act attributed to the accused. The issue has led to discrepancies in the case law where the following stands are presented:

1) If an act matches the features of two or more provisions of the Criminal Code, limitation is determined in a provision laying down the most severe penalty (Article 11 § 3 CC) because, in accordance with Article 11 § 1 CC, the same act can constitute only one offence. On the other hand, Article 101 CC prescribes limitation in relation to an offence penalisation and not legal classification.[15]

[15] The Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 50; the Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1,

As a result of the application of cumulative legal classification of an act, a new type of a prohibited act comes into being that consists of all provisions being in real concurrence, which is sometimes called unavoidable concurrence.[16] Such offences carry a penalty determined in the provision prescribing the most severe penalty.[17] Due to the fact that limitation of penalty imposition concerns an act constituting one offence and not its legal classification,[18] the time limit is only one.[19] It should be related to an offence in its integral entirety, although various time limits concern individual types of offences subject to cumulative legal classification.[20]

2) In the case of concurrence of the Criminal Code provisions, making reference to all concurring provisions in the grounds for sentencing is admissible only when the time limits in relation to all of them have not expired because the principle of cumulative legal classification of an act cannot ignore other provisions that exclude sentencing a person committing a particular type of offence.[21] Sentencing based on all concurring provisions constitutes the expression of attributing

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item 1; ruling of 28 May 2015, II KK 131/15, Krakowskie Zeszyty Sądowe No. 9, item 9, 2015; the Supreme Court judgment of 29 October 2015, WA 13/15, LEX No. 1827149; the Supreme Court judgment of 29 October 2015, SDI 42/15, LEX No. 1938293; the Supreme Court ruling of 22 March 2016, V KK 345/15, LEX No. 2015139; the Supreme Court ruling of 19 October 2016, IV KK 333/16, LEX No. 2157282; the Supreme Court judgment of 23 November 2016, III KK 225/16, OSNKW 2017, No. 4, item 18; the Supreme Court ruling of 29 June 2017, IV KK 203/17, LEX No. 2342179; judgment of the Court of Appeal in Katowice of 24 May 2013, II AKa 563/12, Krakowskie Zeszyty Sądowe No. 10, item 70, 2013; judgment of the Court of Appeal in Katowice of 2 August 2013, II AKa 480/12, LEX No. 1422278; judgment of the Court of Appeal in Wrocław of 19 February 2015, II AKa 13/15, LEX No. 1661274; judgment of the Court of Appeal in Wrocław of 25 February 2016, II AKa 331/15, LEX No. 2023603; judgment of the Court of Appeal in Katowice of 30 May 2016, II AKa 71/16, LEX No. 2101695; judgment of the Court of Appeal in Katowice of 2 June 2016, II AKa 141/16, LEX No. 2101687; judgment of the Court of Appeal in Katowice of 22 June 2017, II AKa 150/17, LEX No. 2343421; judgment of the Court of Appeal in Warsaw of 20 October 2016, II AKa 233/16, LEX No. 2171226; judgment of the Court of Appeal in Wrocław of 22 December 2016, II AKa 337/16, LEX No. 2200278; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warszawa 2014, pp. 231–234; *idem*, *Glosa do wyroku Sądu Najwyższego z dnia 14 stycznia 2010 r., V KK 235/09*, LEX/el. 2011; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 566.

[16] W. Wolter, *Kumulatywny zbieg przepisów ustawy*, Warszawa 1960, pp. 48–49; the Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 50.

[17] The Supreme Court ruling of 29 June 2017, IV KK 203/17, LEX No. 2342179; judgment of the Court of Appeal in Katowice of 24 May 2013, II AKa 563/12, LEX No. 1378466.

[18] The Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1, item 1; the Supreme Court ruling of 28 May 2015, II KK 131/15, LEX No. 1786792; the Supreme Court ruling of 22 March 2016, V KK 345/15, LEX No. 2015139; the Supreme Court judgment of 23 November 2016, III KK 225/16, OSNKW 2017, No. 4, item 18.

[19] The Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 5.

[20] The Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1, item 1; the Supreme Court ruling of 22 March 2016, V KK 345/15, LEX No. 2015139; the Supreme Court ruling of 19 October 2016, IV KK 333/16, LEX No. 2157282.

[21] Judgment of the Court of Appeal in Białystok of 31 January 2013, II AKa 254/12, LEX No. 1298865; judgment of the Court of Appeal in Wrocław of 6 May 2015, II AKa 88/15, KZS 2016, No. 3, item 50.

conduct that matches the features of all types of prohibited acts laid down in those provisions, which means attributing guilt for an act classified this way and fulfilment of other conditions for sentencing that are related to substantive law and are formal in nature.[22] Thus, applying cumulative legal classification of an act, one cannot ignore other provisions that exclude the possibility of sentencing a person committing a particular type of offence.[23] Elements decisive for the unity of an act, classified cumulatively based on the concurrence of provisions, cannot neutralise negative procedural conditions concerning its individual fragments, e.g. limitation.[24]

Expressing its stand on the issue, the Supreme Court bench of seven judges passed a resolution on 20 September 2018, I KZP 7/18 (OSNK2018, No. 11, item 72), in which it stated that: **"In the case of an act that matches the features of two or more provisions of the Criminal Code and constitutes an offence subject to cumulative legal classification (Article 11 § 2 CC), the time limit for imposition of a penalty for it is determined in accordance with Article 101 CC, based on the penalty prescribed for this offence laid down in Article 11 § 3 CC or other factors listed in the provisions concerning limitation, and it is applicable to the whole act classified cumulatively."** The stand is not right and was criticised in the doctrine.[25] Justifying its stand, the Supreme Court stated that the interpretation of the term "offence" used in Article 101 CC and Article 11 § 2 CC is a key to solve the problem, i.e. whether the term refers to the type of offence established as a result of the application of cumulative classification and not to individual types of offences the features of which are matched by the same act, or to individual types of offences subject to cumulative legal classification. Concerning the same issue, the Court assumed that the concept of "offence" used in Article 101 CC refers to such human conduct that fulfils all elements of the offence structure that constitute conditions for criminal liability for the offence. Article 11 § 1 CC means *expressis verbis* that the same act can constitute only one offence and the large number of legal evaluations of an act does not lead to a large number of offences. Due to the fact that it concerns only one offence, there can only be one time limit for it. Since a penalty is determined based on the provision prescribing the most severe penalty, the time limit should also be determined based on this provision. The Supreme Court recognised limitation determined this way as basic but noted that an offence subject to cumulative legal classification can also fulfil the conditions important for the establishment of a longer imitation period than the one resulting from the

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[22] Judgment of the Court of Appeal in Wrocław of 19 June 2001, II AKa 218/01, OSA 2001, No. 10, item 63; judgment of the Court of Appeal in Katowice of 20 November 2014, II AKa 313/14, LEX No. 1665550.

[23] Judgment of the Court of Appeal in Wrocław of 19 June 2001, II AKa 218/01, OSA 2001, No. 10, item 63.

[24] Judgment of the Court of Appeal in Wrocław of 6 May 2015, II AKa 88/15, LEX No. 1755252; judgment of the Court of Appeal in Wrocław of 15 October 2015 r., II AKa 245/15, LEX No. 1927509; judgment of the Court of Appeal in Wrocław of 19 June 2001, II AKa 218/01, Orzecznictwo Sądów Apelacyjnych 2001, No. 10, item 63.

[25] J. Lachowski's gloss on this resolution in Orzecznictwo Sądów Polskich No. 6, 2019, pp. 65–72.

penalty for this offence. For example, in the case of offences against life and health committed to the detriment of a minor carrying the highest penalty of more than five years of deprivation of liberty or offences laid down in Chapter XXV CC committed to the detriment of a minor, or when pornographic content involves participation of a minor, limitation of penalty imposition cannot be applicable before he/she reaches the age of 30 (Article 101 § 4 CC). Expressing this right reservation, the Supreme Court created a contradiction because the fundamental argument for the opinion that the cumulative legal classification should not take into account an offence for which the penalty imposition time limit has expired was a statement that Article 11 § 1 CC constitutes one offence. Consistently, one should not take into account those acts determined in the provisions that do not carry the most severe penalty and as a result do not constitute grounds for sentencing. Therefore, the Supreme Court reasoning is rightly criticised and it is urged that Article 11 § 2 CC does not create a new type of offence but only instructs a court to sentence a perpetrator based on all the concurring provisions. Thus, it only indicates the basis for sentencing and does not create a new offence type. In accordance with the principle *nullum crimen sine lege*, the catalogue of prohibited acts is closed and only the legislator and not actual circumstances can establish them. If an act matches the features described in more than one provision of the Criminal Code, a court sentences a perpetrator based on all the concurring provisions. Sanctions prescribed in particular provisions are also in concurrence and the most severe penalty is chosen in sentencing.

Contrary to the statement made in the doctrine,[26] Article 11 § 3 CC does not establish a new statutory penalty but only grounds for sentencing. It is rightly concluded that: "Since in the light of Article 101 CC, the sanctions laid down in a provision determining the type of a prohibited act indicate time limits for penalty imposition, in the case of cumulative concurrence of the statutory provisions, all concurring sanctions are important from the point of view of limitation."[27]

2.2. CONCEPT OF CONSEQUENCE AS A FEATURE OF A PROHIBITED ACT

The period of limitation runs from the moment an offence is committed (Article 101 § 1 CC), however, in the case the commission of an offence depends on the occurrence of a consequence specified in statute, the running of limitation starts at the moment when the consequence occurs (Article 101 § 3 CC). The latter provision raised doubts concerning the moment from which the running of the limitation should be counted in relation to an offence with the features of alternative consequences, i.e. whether it should be the first one chronologically or, in case a much later consequence occurs, the one that is graver. Alternative consequences constitute the features of an offence under Article 177 § 2 CC that take the form of another person's death or serious harm to their health.

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[26] P. Kardas, *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna*, Warszawa 2011, pp. 235–237.

[27] J. Lachowski, *Glosa do uchwały SN z dnia 20 września 2018 r., I KZP 7/18*, Orzecznictwo Sądów Polskich No. 6, 2019, pp. 66–68.

Explaining the issue in the ruling of 28 March 2018 (I KZP 15/17, OSNK2018, No. 6, item 43), the Supreme Court stated that: **"The concept of consequence as a feature of a prohibited act should be interpreted as a final (ultimate) consequence, i.e. necessary to the occurrence of a substantive offence in the form of commission and not an indirect (partial) consequence relating to the course of a causal relationship between a perpetrator's conduct and a final consequence."** The stand is justified and the arguments supporting it are convincing. The essence of the problem consists in the interpretation of a consequence referred to in Article 101 § 3 CC. Undoubtedly, it concerns a consequence that is a feature of an offence. The Supreme Court rightly assumed that it is a change in the external world that can be distinguished from a perpetrator's conduct and constitutes a feature of a prohibited act,[28] which can be different in nature, can be separated from a perpetrator's conduct and lasts for some, even short, time after its completion. In a situation when a consequence is implemented over a period of time, it should be treated as a whole. It is the right opinion expressed in the doctrine that the concept of consequence as a feature of a prohibited act should be understood as a final (ultimate) consequence, i.e. one that is necessary to the occurrence of a substantive offence in the form of commission and not an indirect (partial) consequence relating to the course of the causal relationship between a perpetrator's conduct and the final consequence.[29]

3. EVADING THE OBLIGATION OF MAINTENANCE (ARTICLE 209 § 1 CC)

In the Criminal Code, an offence of evading the obligation of maintenance originally consisted in persistent evasion of fulfilling the statutory obligation or a court's ruling to ensure care by failure to pay maintenance to the next of kin or another person and exposing them to inability to satisfy their basic life needs (Article 209 § 1 CC). The Act of 23 March 2017 amending the Act: Criminal Code and the Act on assistance to persons entitled to maintenance[30] amended the provision in such a way that criminalisation covers evading the fulfilment of the obligation of maintenance amount determined in a court ruling, an agreement entered into before a court or another state body or another agreement, provided that the total value of arrears constitutes the equivalent of at least three periodical payments, or if the delay in payment other than periodical is at least three-month long. The essence of the change consists in, inter alia, the elimination of two sources of the obligation to ensure care by payment of maintenance to the next of kin or another person, i.e. the statute and a court ruling. In accordance with the new regulation, the obligation

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[28] W. Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeksu karnego z 1969 r.*, Warszawa 1973, p. 65; K. Wiak, [in:] A. Grześkowiak (ed.), *Prawo karne*, Warszawa 2009, p. 95; Ł. Pohl, *Prawo karne. Zarys części ogólnej*, Warszawa 2012, p. 137; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, p. 196; M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa 2015, p. 180; L. Gardocki, *Prawo karne*, Warszawa 2017, p. 63.

[29] E. Hryniewicz, *Skutek w prawie karnym*, Prokuratura i Prawo No. 7–8, 2013, p. 111; M. Kulik, *Przedawnienie karalności*, *supra* n. 15, p. 300.

[30] Dz.U. of 2017, item 952.

amount must be determined in a court ruling, an agreement entered into before a court or another state body or another agreement. Therefore, a doubt is raised whether all types of conduct consisting in evading the obligation of maintenance resulting from the statute have been decriminalised.

In the ruling of 25 January 2018, I KZP 10/17 (OSNKW 2018, No. 3, item 24), the Supreme Court expressed its opinion that: **"Both before the amendment to Article 209 § 1 CC introduced by the Act of 23 March 2017 amending the Act: Criminal Code and the Act on assistance to persons entitled to maintenance (Dz.U. 2017, item 952), and after the amendment, the statute constitutes one of the sources of the obligation of maintenance, however, from 31 May 2017 the obligation amount shall be determined in a court ruling, an agreement entered into before a court or another state body or another agreement."** This is right and is confirmed in the current case law[31] and presented in literature.[32] Justifying it, the Supreme Court rightly emphasised that the elimination of evading the fulfilment of a statutory obligation from the features of this offence does not mean that all types of conduct consisting in the evasion of the obligation of maintenance that have their source in the statute are decriminalised. Partial decriminalisation takes place only in relation to such conduct of perpetrators obliged to pay maintenance to the next of kin based on the statute whose obligation of maintenance has not been determined with regard to its amount in a court ruling or an agreement.[33] On the other hand, situations in which an obligation of maintenance results from the statute and its amount has been determined in a court ruling or an agreement are subject to criminalisation.

4. MALICIOUS OR PERSISTENT INFRINGEMENT OF AN EMPLOYEE'S RIGHTS RESULTING FROM THE LABOUR RELATIONSHIP OR SOCIAL INSURANCE (ARTICLE 218 § 1A CC)

Article 218 § 1a CC specifies an offence of malicious or persistent infringement of an employee's rights resulting from the labour relationship or social insurance committed by a person performing activities related to the issues of labour and social insurance law. In the context of this provision, the following legal issue was referred to the Supreme Court for examination: "Should the term 'employee' used in Article 218 § 1a CC be interpreted as exclusively a person employed based on an employment contract, election, appointment or a cooperative employment contract

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[31] The Supreme Court ruling of 9 May 2018, IV KK 79/18, LEX No. 2499811; the Supreme Court ruling of 24 October 2018, IV KK 446/18, LEX No. 2583089; the Supreme Court ruling of 6 December 2018, IV KK 284/18, LEX No. 2593386; the Supreme Court ruling of 14 February 2019, IV KK 755/18 LEX No. 2633972; the Supreme Court ruling of 23.04.2019, IV KK 432/18, LEX No. 2657503; A. Partyk, *Nialimentacja dziecka w dalszym ciągu jest przestępstwem*, LEX/el. 2019.

[32] M. Borodziuk, *Zakres kryminalizacji przestępstwa niealimentacji po nowelizacji w 2017 r.*, Prokuratura i Prawo No. 4, 2018, p. 36.

[33] Ł. Pohl, *Zakres i skutki depenalizacji wywołanej nowelizacją przepisu określającego znamiona przestępstwa niealimentacji*, Ruch Prawniczy Ekonomiczny i Socjologiczny No. 4, 2017, p. 92.

or also as a person doing paid work based on a civil law contract, e.g. a specific task or service provision contract or a specific work contract, which under the pretence of a civil law contract is actually an employment contract within the labour relationship?"

The Supreme Court passed a resolution on 20 September 2018, I KZP 5/18 (OSNK2018, No. 11, item 74), in which it explained that: **"The scope of Article 218 § 1a CC covers only employees within the meaning of Article 2 LC and Article 22 § 1 and § 1(1) Labour Code, i.e. persons employed in conditions typical of the labour relationship, regardless of the name of a contract entered into by the parties; a court at its discretion determines this in a criminal trial in accordance with jurisdictional independence expressed in Article 8 § 1 CPC."** This way, the Supreme Court adopted a broad interpretation of the concept.[34] In the justification of the resolution, the Supreme Court referred to its former resolution in which it explained that: "The objects of protection under the norms laid down in Article 220 CC are the rights of a person being in the labour relationship within the meaning of Article 22 § 1 LC, i.e. in such a relationship that, taking into account factual features, is or should be entered into by performing one of the legal activities determined in Article 2 LC."[35] According to the Supreme Court, both types of offences use the same term and are placed in the same Chapter entitled "Offences against the rights of persons doing paid work", which is an argument for the possibility of using the interpretation included therein, although it does not concern this provision but Article 220 CC. Moreover, as concerns the term "employee", in both provisions it was necessary to refer to the definition of an employee laid down in the Labour Code. In accordance with Article 2 LC, an employee is a person hired based on an employment contract, nomination, election, appointment, or a cooperative employment contract. The status of an employee is acquired by entering into the labour relationship by the force of which, in accordance with Article 22 § 1 LC, an employee undertakes to do specified work for an employer and under his management, and in the place and time determined by the employer, and the employer undertakes to employ the employee for remuneration. It is rightly assumed in the Supreme Court judgments that: "Employment can be performed based on the civil law relationship (a specific task/service provision contract or a manager's contract) or labour relationship. If the features typical of the labour relationship determined in Article 22 § 1 LC (performance of specified work for

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[34] See J. Marciniak, *Pojęcie pracownika w rozumieniu art. 218 § 1 k.k.*, Wojskowy Przegląd Prawniczy No. 3, 2009, pp. 25–36.

[35] The Supreme Court resolution of 15 December 2005, I KZP 34/05, OSNKW 2006, No. 1, item 2 with glosses of approval by P. Daniluk, W. Witoszko, Orzecznictwo Sądów Polskich No. 7–8, item 93, 2006; A. Wróbel, Przegląd Prawa i Administracji No. 93, 2013, pp. 121–126 and a critical one by J. Jankowiak, A. Musiała, Prokuratura i Prawo No. 2, 2007, pp. 163–167 and comments of approval by R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego z zakresu prawa karnego materialnego, prawa karnego skarbowego i prawa wykroczeń za 2005 r.*, Wojskowy Przegląd Prawniczy No. 1, 2006, pp. 107–109; the Supreme Court ruling of 13 April 2005, III KK 23/05, OSNKW 2005, No. 7–8, item 69 with glosses of approval by J. Unterschütz, Gdańskie Studia Prawnicze-Przegląd Orzecznictwa No. 1, 2006, pp.123–134, A. Wróbel, Studia Iuridica Toruniensis No. 1, 2013, pp. 265–272.

remuneration for an employer and under his management, and in the place and time determined by the employer) dominate the content of the labour relationship between the parties (assessed not only from the point of view of the content of a contract but, first of all, the way of its performance), we deal with the labour relationship, regardless of the name of the contract the parties have entered into (Article 22 § 1^1 LC).[36] In Article 22 § 1^1 LC, the legislator established a specific principle of employment within the employment relationship, which means that every type of employment that has the features of the labour relationship is *ex lege* treated as employment within the labour relationship, regardless of the type of contract entered into by the parties.[37] A contract based on which work is done cannot be of a mixed nature, linking elements of an employment contract and a civil law contract.[38] The assessment of whether the characteristic features of the labour relationship are dominant is made based on all circumstances of the case, first of all, such as the parties' will, including that expressed in the name given to a contract by the parties.[39]

Taking into account the definition of an employee laid down in the Labour Code, based on Article 218 § 1a CC, is justified by the fact that the legal definition in the statute that is believed to be a basic one is binding also in the area of other statutes;[40]

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[36] The Supreme Court judgment of 25 November 2004, I PK 42/04, OSNP 2005, No. 14, item 209; the Supreme Court judgment of 16 January 1979, I CR 440/78, OSPiKA 1979, No. 9, item 168; the Supreme Court judgment of 2 December 1975, I PRN 42/75, Służba Pracownicza No. 2, 1976, p. 28; the Supreme Court judgment of 2 September 1998, I PKN 293/98, OSNAPiUS 1999, No. 18, item 582; the Supreme Court judgment of 14 September 1998, I PKN 334/98, OSNAPiUS 1999, No. 20, item 646; the Supreme Court judgment of 6 October 1998, I PKN 389/98, OSNAPiUS 1999, No. 22, item 718; the Supreme Court judgment of 22 December 1998, I PKN 517/98, OSNAPiUS 2000, No. 4, item 138; the Supreme Court judgment of 12 January 1999, I PKN 535/98, OSNAPiUS 2000, No. 5, item 175; the Supreme Court judgment of 9 February 1999, I PKN 562/98, OSNAPiUS 2000, No. 6, item 223; the Supreme Court judgment of 7 April 1999, I PKN 642/98, OSNAPiUS 2000, No. 11, item 417.

[37] P. Daniluk, W. Witoszko, *Glosa do uchwały SN z 15 grudnia 2005 r., I KZP 34/05*, OSP No. 7–8, 2006, p. 93.

[38] The Supreme Court judgment of 23 January 2002, I PKN 786/00, OSNP 2004, No. 2, item 30.

[39] The Supreme Court judgment of 5 September 1997, I PKN 229/97, OSNAPiUS 1998, No. 11, item 329; the Supreme Court judgment of 25 April 1997, II UKN 67/97, OSNAPiUS 1998, No. 2, item 57; the Supreme Court judgment of 28 January 1998, II UKN 479/97, OSNAPiUS 1999, No. 1, item 34; the Supreme Court judgment of 4 February 1998, II UKN 488/97, OSNAPiUS 1999, No. 2, item 68; the Supreme Court judgment of 17 February 1998, I PKN 532/97, OSNAPiUS 1999, No. 3, item 81, Monitor Prawniczy No. 1, 2000, p. 36 with a gloss by W. Cajsel; the Supreme Court judgment of 3 June 1998, I PKN 170/98, OSNAPiUS 1999, No. 11, item 369; the Supreme Court judgment of 18 June 1998, I PKN 191/98, OSNAPiUS 1999, No. 14, item 449; the Supreme Court judgment of 2 September 1998, I PKN 293/98, OSNAPiUS 1999, No. 18, item 582; the Supreme Court judgment of 23 September 1998, II UKN 229/98, OSNAPiUS 1999, No. 19, item 627; the Supreme Court judgment of 6 October 1998, I PKN 389/98, OSNAPiUS 1999, No. 22, item 718; the Supreme Court judgment of 4 March 1999, I PKN 616/98, OSNAPiUS 2000, No. 8, item 312; the Supreme Court judgment of 7 April 1999, I PKN 642/98, OSNAPiUS 2000, No. 11, item 417; the Supreme Court judgment of 9 December 1999, I PKN 432/99, OSNAPiUS 2001, No. 9, item 310; the Supreme Court judgment of 5 December 2000, I PKN 127/00, OSNAPiUS 2002, No. 15, item 356.

[40] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2010, p. 212.

moreover, the established definitions from other branches of law in general should not be modified in the process of decoding the features of offences.[41] Attributing a broader meaning to the concept of an employee used in Article 218 § 1a CC than the one functioning in labour law would constitute inadmissible interpretation to the detriment of the accused, which would be in conflict with the *nullum crimen sine lege* principle.[42]

5. TYPE OF DOMINANT ACTIVITY IN RETAIL TRADING JOINTLY IN NEWSPAPERS, PUBLIC TRANSPORT TICKESTS, TOBACCO PRODUCTS, AND LOTTERY AND BETTING TICKETS (ARTICLE 6 PARA. 1(6) ACT ON SUNDAY TRADING BAN)

In accordance with Article 5 of the Act of 10 January 2018 on the limitation of retail business on Sundays, public holidays and some other days,[43] on Sundays and public holidays shops are prohibited from retail trading and performing any activities connected with retail business as well as requesting employees or hired persons to do any jobs in retail business and perform activities connected with retail business. The ban does not apply to shops the key activity of which is retail trading in newspapers, public transport tickets, tobacco products, and lottery and betting tickets (Article 6 para. 1(6) of the Act on Sunday trading ban). The regulation raised doubts whether the dominant activity should consist in selling newspapers, public transport tickets, tobacco products, and lottery and betting tickets jointly or whether it is sufficient that the dominant activity consists in retail trading in only one of the products listed.

In the Supreme Court resolution of 19 December 2018, I KZP 13/18 (OSNK2019, No. 1, item 1), the Court stated that: **"The 'dominant activity', referred to in Article 6 para. 1(6) of the Act of 10 January 2018 on the limitation of retail business on Sundays, public holidays and some other days (Dz.U. of 2018, item 305), means retail trading in newspapers, public transport tickets, tobacco products, and lottery and betting tickets jointly as well as retailing only one of the products listed."** The opinion deserves approval. The Court rightly highlighted that the interpretation of Article 6 para. 1(6) of the statute from the linguistic point of view, especially the role of linguistic connectors and punctuation, does not allow unequivocal understanding of its content. Each type of retail activity is separated by a comma and the last one is preceded by the conjunction "and". In accordance

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[41] P. Wiatrowski, *Dyrektywy wykładni prawa materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013, pp. 123–134.

[42] J. Unterschűtz, *Glosa do postanowienia SN z 13 kwietnia 2005 r., III KK 23/05*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2006, pp. 123–134; *idem*, *Wybrane problemy orzecznictwa Sądu Najwyższego w sprawach przestępstw z rozdziału XXVIII k.k.*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 4, 2015, p. 167.

[43] Dz.U. of 2018, item 305 (Dz.U. of 2019, item 466).

with the rules of the legislative technique, a comma means a conjunction.[44] Thus, it should be assumed that, in order to obtain the status of a business exempt from the ban on operating on Sundays, a shop should refer to all the types of products listed in Article 6 para. 1(6) of the statute in its application to be entered into the registry and be given one Polish Business Classification (PKD) number corresponding to the type of its dominant activity. However, the Supreme Court rightly emphasises that the use of the conjunction "and" in Article 6 para. 1(6) of the statute weakens the conjunctive power of commas between the particular types of products. Therefore, the exemption of the ban on retail trading on Sundays, public holidays and some other days is justified by including at least one type of retail activity as dominant in the application to be entered in the National Business Register (KRS). This is also indicated in the reasons behind the introduction of the general prohibition on retail trading and performing any activities connected with retail business as well as requesting employees or hired persons to do any jobs in retail business and perform activities connected with retail business on Sundays and public holidays. It was to create better conditions for additional employees' protection, in particular from the point of view of the protection of tradition and family, and was not to limit retail trading in selected goods.

As far as the dominant activity is concerned, it is the type of activity indicated in the business's application to be entered into the National Business Register.

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[44] S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993, p. 153.

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER IN THE FIELD OF SUBSTANTIVE CRIMINAL LAW FOR 2018

Summary

The article presents an analysis of the Supreme Court Criminal Chamber resolutions and rulings adopted in the course of interpreting statutes or provisions that raised doubts and caused discrepancies in case law and were referred for examination to the Supreme Court by appellate courts or the First President of the Supreme Court. These concerned: a negative factor for awarding an aggregated penalty in the form of a penalty of deprivation of liberty for an offence committed in the course of serving a penalty (Article 85 § 3 CC); limitation of penalty imposition in the case of cumulative legal classification of an act (Article 101 § 1 CC); the concept of a consequence as a feature of a prohibited act from which the running of limitation starts (Article 110 § 3 CC); evasion of the obligation of maintenance in the context of a legal act that is more favourable to a perpetrator (Article 209 § 1 CC); a concept of an employee in the case of malicious and persistent infringement of an employee's rights resulting from the labour relationship or social insurance (Article 218 § 1a CC); and the type of dominant activity concerning retail trading jointly in newspapers, public transport tickets, tobacco products, and lottery and betting tickets (Article 6 para. 1(6) of the Act of 10 January 2018 on the limitation of retail business on Sundays, public holidays and some other days).

Keywords: retail business, aggregated penalty, serving a penalty, employee, limitation, evading the obligation of maintenance, consequence of an offence

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO MATERIALNEGO ZA 2018 R.

Streszczenie

W artykule została przeprowadzona analiza uchwał i postanowień Izby Karnej Sądu Najwyższego, podjętych w wyniku przestawienia przez sądy odwoławcze i Pierwszego Prezesa Sądu Najwyższego zagadnień prawnych wymagających zasadniczej wykładni ustawy lub interpretacji przepisów prawnych, które wywołały w orzecznictwie sądów rozbieżności w wykładni przepisów prawa będących podstawą ich orzekania. Dotyczyły one: negatywnej przesłanki orzeczenia kary łącznej w postaci kary pozbawienia wolności orzeczonej za przestępstwo popełnione w czasie odbywaną kary (art. 85 § 3 k.k.); przedawnienia karalności przy kumulatywnej kwalifikacji prawnej czynu (art. 101 § 1 k.k.); pojęcia skutku jako znamienia czynu zabronionego, od którego biegnie termin przedawnienia (art. 110 § 3 k.k.); uchylania się od obowiązku alimentacyjnego w kontekście ustawy względniejszej dla sprawcy (art. 209 § 1 k.k.); pojęcie pracownika w przestępstwie złośliwego lub uporczywego naruszania praw pracownika wynikających ze stosunku pracy lub ubezpieczenia społecznego (art. 218 § 1a k.k.) oraz rodzaju przeważającej działalności, dotyczącej handlu łącznie prasą, biletami komunikacji miejskiej, wyrobami tytoniowymi, kuponami gier losowych i zakładów wzajemnych (art. 6 ust. 1 pkt 6 ustawy z dnia 10 stycznia 2018 r. o ograniczeniu handlu w niedziele i święta oraz niektóre inne dni).

Słowa kluczowe: działalność handlowa, kara łączna, odbywanie kary, pracownik, przedawnienie, uchylanie się od obowiązku alimentacyjnego, skutek przestępstwa

REPASO DE ACUERDOS DEL TRIBUNAL SUPREMO, SALA DE LO PENAL, RELATIVOS AL DERECHO PENAL SUSTANTIVO, EMITIDOS EN 2018

Resumen

El artículo analiza acuerdos y autos del Tribunal Supremo, sala de lo Penal, adoptados previa presentación de cuestiones legales por tribunales de apelación y por el Primer Presidente del Tribunal Supremo que requerían la interpretación fundamental de la ley o la interpretación de normativa legal, ya que ocasionaron discrepancias en la jurisprudencia en cuanto a la interpretación de la norma que fundamentaba la resolución. Se trata de: requisito negativo para dictar la sentencia conjunta, consistente en la pena de privación de libertad impuesta por el delito cometido durante la ejecución de la pena (art. 85 § 3 del código penal); prescripción de delito en la calificación legal cumulativa del hecho (art. 101 § 1 del código penal); resultado como elemento de delito, a partir del cual corre el plazo de prescripción (art. 110 § 3 del código penal); evasión de la obligación alimenticia en cuanto a la ley más favorable para el autor (art. 209 § 1 del código penal); concepto del trabajador en el delito de infracción malvada o persistente de derechos del trabajador resultante de contrato laboral o seguro social (art. 218 § 1a del código penal) y el tipo de actividad dominante, relativa a comercio junto con prensa, billetes de transporte público, tabaco, cupones de loterías y de apuestas (art. 6 ap. 1 punto 6 de la ley de 10 de enero de 2018 sobre la reducción de comercio los domingos y festivos y algunos otros días).

Palabras claves: actividad comercial, pena conjunta, ejecución de la pena, trabajador, prescripción, evasión de la obligación alimenticia, resultado del delito

ОБЗОР ПОСТАНОВЛЕНИЙ УГОЛОВНОЙ ПАЛАТЫ ВЕРХОВНОГО СУДА В ОБЛАСТИ МАТЕРИАЛЬНОГО УГОЛОВНОГО ПРАВА ЗА 2018 Г.

Резюме

В статье содержится анализ резолюций и постановлений Уголовной палаты Верховного суда, принятых в ходе рассмотрения по представлению апелляционных судов и Председателя Верховного суда юридических вопросов, требующих фундаментального толкования закона или интерпретации правовых норм, которые вызвали расхождения в судебной практике, являясь основанием для вынесения решений. Резолюции и постановления касались: отрицательной предпосылки для назначения совокупного наказания в виде лишения свободы за преступление, совершенное во время отбытия наказания (ст. 85 § 3 УК); срока давности при кумулятивной квалификации деяния (ст. 101 § 1 УК); понятия результата как признака запрещенного деяния, от которого ведется отсчет срока давности (ст. 110 § 3 УК); уклонения от оплаты алиментов в контексте применения закона, более благоприятного для правонарушителя (ст. 209 § 1 УК); понятия «работника» в составе преступления, предусматривающем злонамеренное или постоянное нарушение прав работника по трудовым отношениям или социальному обеспечению (ст. 218 § 1a УК), а также понятия преобладающего вида деятельности, связанной с торговлей прессой, билетами на общественный транспорт, табачными изделиями, лотерейными билетами и купонами букмекерских ставок (ст. 6 § 1 п. 6 Закона от 10 января 2018 года «Об ограничении торговли по воскресеньям, а также в праздничные и некоторые другие дни»).

Ключевые слова: торговая деятельность, совокупное наказание, отбывание наказания, работник, срок давности, уклонение от оплаты алиментов, результат преступления

ÜBERSICHT ÜBER DIE BESCHLÜSSE DER STRAFKAMMER DES OBERSTEN GERICHTSHOFS IM BEREICH DES MATERIELLEN STRAFRECHTS FÜR DA JAHR 2018

Zusammenfassung

Der Artikel analysiert die Beschlüsse und Entscheidungen der Strafkammer des Obersten Gerichtshofs, die aufgrund der Vorlage von Rechtsfragen durch die Berufungsgerichte und den Ersten Präsidenten des Obersten Gerichtshofs erlassen wurden, die eine grundlegende Auslegung des Gesetzes oder eine Auslegung der gesetzlichen Bestimmungen erfordern, was zu Unstimmigkeiten in der Rechtsprechung der Gerichte bei der Auslegung ihrer Entscheidung zugrunde liegenden Rechtsbestimmungen geführt hat. Sie betrafen: eine negative Voraussetzung für eine Gesamtstrafe in Form einer Haftstrafe, die für eine Straftat verhängt wurde, die während der Vollstreckung der Strafe begangen wurde (Artikel 85 Absatz 3 des Strafgesetzbuchs); die Verjährungsfrist für die strafrechtliche Haftung für die kumulative rechtliche Qualifikation einer Handlung (Artikel 101 Absatz 1 des Strafgesetzbuchs); der Begriff der Wirkung als Zeichen einer verbotenen Handlung, von der die Verjährungsfrist abläuft (Artikel 110 § 3 des Strafgesetzbuches); Umgehung der Wartungsverpflichtung im Rahmen einer relativen Handlung für den Täter (Artikel 209 Absatz 1 desStrafgesetzbuchs); Das Konzept eines Arbeitnehmers in einer böswilligen oder anhaltenden Straftat verletzt die Rechte des Arbeitnehmers aus dem Arbeitsverhältnis oder der Sozialversicherung (Artikel 218 Absatz 1a des Strafgesetzbuchs) und die Art der vorherrschenden Tätigkeit, einschließlich des Handels mit der Presse, Fahrkarten für den öffentlichen Verkehr, Tabakerzeugnissen, Gutscheinen für Glücksspiele und Wetten (Artikel 6 Absatz 1 Nummer 6 des Gesetzes vom 10. Januar 2018 über die Beschränkung des Handels an Sonn- und Feiertagen und einige andere Tage).

Schlüsselwörter: Geschäftstätigkeit, Gesamtstrafe, Verbüßung einer Haftstrafe, Angestellter, Verjährung, Umgehung der Verpflichtung zur Zahlung von Unterhalt, Auswirkung des Verbrechens

REVUE DES RÉSOLUTIONS DE LA CHAMBRE CRIMINELLE DE LA COUR SUPRÊME DANS LE DOMAINE DU DROIT PÉNAL MATÉRIEL POUR 2018

Résumé

L'article analyse les résolutions et décisions de la Chambre pénale de la Cour suprême adoptées à la suite de la présentation par les cours d'appel et du Premier président de la Cour suprême des questions juridiques nécessitant une interprétation fondamentale de la loi ou une interprétation des dispositions légales, qui ont entraîné des divergences dans la jurisprudence des tribunaux dans l'interprétation des dispositions juridiques sous-jacentes à leur décision. Ils concernaient: une prémisse négative pour une peine totale sous la forme d'une peine d'emprisonnement prononcée pour une infraction commise en purgeant une peine (article 85 § 3 du code pénal); le délai de prescription de la responsabilité pénale pour la qualification juridique cumulative d'un acte (article 101 § 1 du code pénal); la notion d'effet en tant que signe d'un acte interdit à pratir duquel le délai de prescription court (article 110 § 3 du code pénal); la violation des obligations alimentaires dans le cadre de la loi plus favorable pour l'auteur (article 209 § 1 du code pénal); la notion de salarié dans une infraction malveillante ou persistante viole ses droits découlant d'une relation de travail ou d'une assurance sociale (article 218 § 1

bis du code pénal) et le type d'activité prédominante liée au commerce, y compris la vente de journaux, de billets de transports publics, de produits du tabac, de coupons de jeux de hasard et de paris (article 6, al. 1, point 6 de la loi du 10 janvier 2018 sur les restrictions commerciales les dimanches et jours fériés ainsi que certains autres jours).

Mots-clés: activité commerciale, peine totale, purge d'une peine, salarié, employé, prescription, soustraction à une obligation alimentaire, effets délictueux

RASSEGNA DELLE DELIBERE DEL 2018 DELLA CAMERA PENALE DELLA CORTE SUPREMA NELL'AMBITO DEL DIRITTO PENALE SOSTANZIALE

Sintesi

Nell'articolo è stata condotta un'analisi delle delibere e delle ordinanze della Camera Penale della Corte Suprema assunte in seguito alla presentazione, da parte delle corti di appello e del Presidente della Corte Suprema, di questioni giuridiche che richiedevano un'interpretazione fondamentale di leggi o di norme giuridiche, che hanno determinato nella giurisprudenza dei tribunali divergenze nell'interpretazione delle norme di legge che hanno costituito la base delle sentenze. Esse riguardavano: la condizione negativa per l'applicazione della pena cumulativa sotto forma di pena detentiva comminata per un reato compiuto durante l'esecuzione della pena (art. 85 § 3 del Codice penale); la prescrizione del reato in caso di classificazione giuridica cumulativa del reato (art. 101 § 1 del Codice penale); il concetto di effetto come elemento costitutivo del reato, dal quale decorre il termine di prescrizione (art. 110 § 3 del Codice penale); la sottrazione all'obbligo di mantenimento nel contesto di una legge più favorevole per il reo (art. 209 § 1 del Codice penale); il concetto di dipendente nel reato di violazione dolosa o continuata dei diritti del lavoratore derivanti dal rapporto di lavoro o dalla previdenza sociale (art. 218 § 1a del Codice penale) nonché il tipo di attività prevalente, riguardante il commercio di periodici, biglietti dei trasporti urbani, prodotti a base di tabacco, tagliandi di giochi e scommesse (art. 6 comma 1 punto 6 della legge del 10 gennaio 2018 sulla limitazione del commercio la domenica, nei giorni festivi e in altri giorni determinati).

Parole chiave: attività commerciale, pena cumulativa, esecuzione della pena, dipendente, prescrizione, sottrazione all'obbligo di mantenimento, effetto del reato

Cytuj jako:

Stefański R.A., *Review of resolutions of the Supreme Court Criminal Chamber in the field of substantive criminal law for 2018 [Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego za 2018 r.]*, „Ius Novum" 2020 (14) nr 1, s. 48–65. DOI: 10.26399/iusnovum.v14.1.2020.03/r.a.stefanski

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VICTIM'S LEGALLY PROTECTED INTERESTS IN CRIMINAL TRIAL UNDER THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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1. INTRODUCTORY REMARKS

De lege lata, although it was not obvious in the twentieth century, Article 2(1)(3) of the Criminal Procedure Code[1] expressly recognises the legally protected interests of the victim (also alternatively referred to as the "injured/aggrieved party" in legal texts), while respecting their dignity, as one of the objectives of the criminal trial.[2] The development of criminology in the twentieth century aroused interest in the victim, and in the second half of the twentieth century to the development of vic-

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1 Act of 6 June 1997: Criminal Procedure Code, Dz.U. No. 89, item 555, as amended, Dz.U. of 2017, item 1904; hereinafter CPC.

2 The previously applicable Criminal Procedure Code (Act of 19 April 1969: Criminal Procedure Code, Dz.U. No. 13, item 96, hereinafter: Former CPC) was silent as regards an analogous objective of criminal proceedings and, although the institution of an auxiliary prosecutor was envisaged, the list of the victim's rights was not very broad and the acquisition of the status of a party was contingent on the court issuing a decision to allow a person to participate as an auxiliary prosecutor, which had to be supported by the interests of the judiciary (Article 45 Former CPC). The introduction of the provision of Article 2(1)(3) in the presently binding Criminal Procedure Code was described in the literature as a sign of positive changes and democratisation of criminal law, and a symptom of its development from a restrictive model to a model more focused on eliminating the damage caused; cf. M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa 2013, p. 35.

timology, which made the victim the focus of research and led to the conclusion, obvious today, that a criminal event consists of three elements: the case, the act and its victim.[3] The Polish Criminal Procedure Code currently in force, shaped in the new social and economic reality, has recapitulated this view and, over the years, the position of the victim has been gradually and significantly strengthened. In the foreground of the considerations underway, it is necessary to decode the concept of legally protected interests of the victim used in Article 2(1)(3) CPC. It is surprising to note that commentators do not pay attention to this concept, focusing rather on specific rights which reflect the idea of strengthening the victim's position in the trial;[4] nor is the legislation on criminal procedure of any assistance as it, apart from Article 2, uses the concept of the victim's interest only on two occasions, i.e. in Article 11(1) CPC (which indicates that the victim's interest cannot be in conflict with discontinuance of proceedings in view of the penalty imposed for another offence) and Article 335(1) and (2) CPC (which provides that penalties and measures agreed upon by the public prosecutor with the suspect as part of a conviction without trial must also take into account the legally protected interests of the victim).

In the context of Article 2(1)(3) CPC, the literature has distinguished the victim's tangible interests (receiving a compensation from the perpetrator) and intangible interests (the victim's wish to punish the perpetrator of the offence or to protect the private sphere against threats resulting from their participation in the criminal proceedings) and general interests (that are, under the provisions of criminal procedure law, conferred on any victim in a given legal situation) and individual interests (with changing content, due to the factual situation and identified in specific proceedings).[5]

A legally protected interest must naturally originate from a specific legal norm. It may unquestionably derive from a norm of substantive criminal law, in particular from Article 46 of the Criminal Code,[6] which entitles the victim to apply to the court to order the perpetrator to remedy pecuniary damage or to redress any non-pecuniary injury. It may also derive from a norm of criminal procedure law.[7] For this purpose of the procedure to be achieved, not only a final judgment taking into account the victim's interests must be passed, but also the procedure must be carried out in a manner ensuring that the victim's procedural rights are respected

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[3] See W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym*, Kraków 2006, pp. 27–28; B. Gronowska, *Ochrona uprawnień pokrzywdzonego w postępowaniu przygotowawczym. Zagadnienia karnoprocesowe i wiktymologiczne,* Toruń 1989, p. 13.

[4] See e.g. A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, 8th edn, Warszawa 2018, pp. 18–20; J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, 3rd edn, Warszawa 2018, pp. 10–11.

[5] The first of these divisions was made by C. Kulesza, *Ewolucja uprawnień pokrzywdzonego w polskim procesie karnym*, [in:] L. Mazowiecka, W. Klaus, A. Tarwacka (eds), *Z problematyki wiktymologii. Księga dedykowana Profesor Ewie Bieńkowskiej*, Warszawa 2017, p. 84; general and individual interests are distinguished by M. Żbikowska, *Zasada lojalności w procesie karnym (odniesiona do pokrzywdzonego)*, Toruń 2015, pp. 96–109.

[6] Act of 6 June 1997: Criminal Code, Dz.U. No. 88, item 553, as amended, Dz.U. of 2017, item 2204; hereinafter CC.

[7] See S. Steinborn (ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el.

and secondary victimisation is prevented. Furthermore, a civil law norm may also, to a certain extent, constitute the source of the victim's legal interest, in the context of the reference contained in Article 46 CC. The legally protected interest of the victim can therefore be defined as the need for legal protection under substantive or procedural criminal law, possibly also under civil law. It should be added that, in administrative and civil law, when analysing the concept of legitimate interest, it is emphasised that, in order to meet the criterion of legitimate interest, the need for legal protection must be objective and genuinely existing.[8] As such, legitimate interest cannot be based on the subjective perception of a party but must, in the specific circumstances of the case, objectively derive from a given legal norm which applies directly to the situation of the individual concerned.[9] Similarly, in criminal proceedings, the existence of the victim's legal interest in obtaining a specific decision should be subject to an objective assessment from the point of view of the legal norm and not the subjective perception of the victim.

Having said that, it is necessary to proceed to a fundamental reflection on the question whether and to what extent the purpose of the trial, namely taking into account the legally protected interests of the victim in a criminal trial, is constitutionally and conventionally warranted. In other words, it should be considered whether the legislator is normally required by the Constitution and the Convention to establish norms of substantive and procedural law that protect the interests concerned. The second part of the purpose stemming from Article 2(1)(3) CPC, i.e. respect for the dignity of the victim, and the obligations of states to protect the interests of victims of offences, resulting from instruments of international law other than the ECHR, also functioning within the framework of the Council of Europe,[10] and instruments of the EU law, are left outside the framework of these considerations.

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[8] See, in the context of administrative law, the Supreme Administrative Court judgment of 26 October 1999, IV SA 1693/97, LEX No. 4870, and in the context of civil law the judgment of the Court of Appeal in Łódź of 20 June 2017, I ACa 1627/16, LEX No. 2369673. In the judgment of the Court of Appeal in Białystok of 27 February 2017, I ACa 829/16, LEX No. 2256822, the expression "must exist on the basis of a reasonable assessment of the situation" was even used. As regards the legally protected interests of the victim, cf. M. Żbikowska's considerations, see *supra* n. 5, pp. 96–109.

[9] A.S. Duda, *Interes prawny w polskim prawie administracyjnym,* Warszawa 2008, p. 107.

[10] In particular, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA; as well as the Council of Europe instruments concerning narrowly defined groups of victims, such as the European Convention on the Exercise of Children's Rights of 25 January 1996, Dz.U. of 2000, No. 107, item 1128; the Convention on Action against Trafficking in Human Beings of 16 May 2005, Dz.U. of 2009, No. 20, item 107; or the Convention on Cybercrime of the Council of Europe of 23 November 2001, Dz.U. of 2015, item 728.

2. INTERESTS OF THE VICTIM UNDER SUBSTANTIVE LAW

The commentators on constitutional law rightly assume that the obligation of the state to protect the rights and freedoms of the individual also implies the obligation to "put in place a system of procedures, legal orders and prohibitions to prevent any violation or risks to the rights and freedoms",[11] this obligation being confined by the constitutional principle of proportionality.[12] Accordingly, whenever the effective protection of the rights and freedoms of individuals requires criminal law intervention, there arises an obligation on the state to criminalise.[13] The introduction of legal norms protecting the victim's personal interests is therefore also linked to the protective role of criminal law. At the same time, the decision to criminalise confirms that the conduct concerned has been regarded as violating not only personal interests of other persons, but also common interests.[14]

The case law of the European Court of Human Rights (ECtHR) has also played an essential role in the context of deriving positive obligations for states to criminalise certain acts. The Convention enumerates the rights of each individual, including the right to life and freedom. The Contracting States agreed, in the first place, that they would not violate these rights themselves (negative obligations of the states). However, the Convention, which is rapidly evolving in the case law of the ECtHR, also imposes positive obligations on them, i.e. the obligation to take active measures to protect individuals against violations of the rights guaranteed by the Convention, not only if these violations are done by the state but also by other persons.[15] In order to effectively guarantee the right to life, it is necessary not only that the state does not deprive people of their lives, but also that it takes active measures to protect individuals against the deprivation of life by other persons, thus prohibiting killing and introducing appropriate sanctions and effective mechanisms for enforcing them. Otherwise, the rights provided for in the Convention would be rendered illusory. The ECtHR considers that positive obligations on the part of states derive from the subject matter and purpose of the Convention and that the case law distinguishes substantive and procedural obligations, the substantive obligations being exercised through the introduction of appropriate legislation and the procedural obligations through the practical application of law so as to give effect to the protection of human rights.[16] The literature also distinguishes positive obligations of states such

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[11] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warszawa 2012, p. 222.

[12] J. Kulesza, *Problemy teorii kryminalizacji. Studium z zakresu prawa karnego i konstytucyjnego*, Łódź 2017, pp. 35–56.

[13] L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990, p. 98; the Constitutional Tribunal judgment of 9 October 2001, SK 8/00, OTK ZU 2001/7/211.

[14] J. Kulesza, *supra* n. 12, pp. 77–78.

[15] See in this context the ECtHR judgment of 9 June 2009 in *Opuz v. Turkey*, Application no. 33401/02; and M. Wąsek-Wiaderek, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. I, part 2: *Zagadnienia ogólne*, Warszawa 2013, pp. 86–87.

[16] J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014, p. 40 and the case law referred to therein; D. Czerniak, *Obowiązki państwa wobec ofiar zgwałcenia na tle orzecznictwa strasburskiego*, Prokuratura i Prawo No. 6, 2016, p. 31.

as the obligation to protect rights and freedoms under the ECHR and the obligation to assist an individual by conducting an effective investigation in the event of a violation of Convention norms,[17] which will be discussed later in this paper.

In the context of substantive law, the state is therefore under an obligation stipulated by the Constitution and Convention to introduce criminal law norms protecting the most important individual interests. Neither the literature nor the case law question the non-pecuniary interest of the victim, which stems from these provisions and the general functions of criminal law, and which boils down to obtaining moral satisfaction resulting from the defendant being found guilty or from a specific sentence being imposed on the defendant.[18] This is supported by both the universally accepted compensatory function of criminal law, according to which criminal law should eliminate the conflict that has arisen between the perpetrator and the victim (and not only between the perpetrator and the state) as a result of a prohibited act being committed, but also by the closely related, fundamental function of justice, which consists in adequate retribution for the harm done and its stigmatisation.[19] Indeed, justice must be done to the society as a whole, but also to the victim. As Lech Gardocki points out, "the fulfilment of the function of justice (measured by humanitarianism) plays a very important role in discharging a certain mental condition caused by the commission of an offence, which is experienced by the victim and other persons who have become aware of this fact. This condition is a mixture of harm, frustration and intimidation, and its discharge is referred to, in short, as satisfaction of justice. Disregarding this function of criminal law can have significant adverse social consequences."[20] Axiologically, it is argued in the literature that a victim has a moral claim against the state for fair punishment of the perpetrator of a prohibited act, which is sometimes considered to be more important than the element of compensation.[21]

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[17] This distinction was proposed by A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights*, Oxford–Portland–Oregon 2004, pp. 225–227.

[18] See e.g. A. Gubiński, *Główne ogniwa reformy prawa karnego: ograniczenie punitywności i zadośćuczynienie pokrzywdzonemu*, Państwo i Prawo No. 7, 1981, p. 72; T. Hörle, *Distribution of Punishment – the Role of the Victim's Perspective*, Buffalo Criminal Law Review No. 3, 1999, p. 175 et seq.; W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji prawa karnego?*, Gdańsk 2006, p. 117; A. Kołodziejczyk, *Umorzenie absorpcyjne w polskim procesie karnym*, Warszawa 2013, p. 136 et seq.; A.T. Olszewski, *Umorzenie absorpcyjne*, Prokuratura i Prawo No. 1, 2008, p. 39. After all, auxiliary prosecutors often challenge court judgments with respect to the penalty and their gravamen is not questioned, considering it to be obvious and not requiring any further consideration, see W. Grzeszczyk, *Praktyczne aspekty gravamen w procesie karnym*, Prokuratura i Prawo No. 8, 2011, p. 11, pp. 17–18; judgment of the Court of Appeal in Wrocław of 10 March 2015, II AKa 40/15, LEX No. 1661287; judgment of the Court of Appeal in Wrocław of 16 December 2016, II AKa 325/16, LEX No. 2231122; judgment of the Court of Appeal in Warsaw of 3 June 2015, II AKa 89/15, LEX No. 1771183.

[19] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, p. 43, pp. 45–46; J. Giezek, [in:] M. Bojarski (ed.), *Prawo karne materialne. Część ogólna i szczególna*, 7th edn, Warszawa 2017, pp. 33–34.

[20] L. Gardocki, *Prawo karne*, 18th edn, Warszawa 2013, pp. 7–8.

[21] F. Ciepły, *Chrześcijańska koncepcja kary kryminalnej a współczesne poglądy na karę*, Lublin 2010, p. 110; M. Kulik, *O założeniach aksjologicznych kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy prawa karnego w perspektywie jego ewolucji*, Bydgoszcz 2017, pp. 104–105, 112–113. The latter of the authors notes that putting great emphasis on

Apart from the classifying provisions, Article 46 CC, which provides for a compensatory measure in the form of the obligation to redress the suffered damage or harm, is naturally the fundamental norm that constitutes the basis for establishing a specific legitimate interest of the victim. That provision ensures, *a priori*, that the victim's interest is taken into account since it is mandatory to order that damage be redressed, even in part, if the victim so requests. This interest may be satisfied by the victim in the manner and within the time limit specified in Article 49a CPC. While it would be difficult to infer a constitutional or conventional obligation to allow the victim to pursue their pecuniary claims in the context of criminal proceedings, without civil proceedings, the vast majority of European countries provide for such a mechanism, which is part of their obligation to ensure that the aggrieved parties can pursue their rights as effectively as practicable.[22] Undoubtedly, both the Constitution (Article 45(1) and Article 77(2)) and the Convention (Article 6(1)) require that the aggrieved parties be afforded an opportunity to pursue claims resulting from an offence at least in a civil trial.

The axiology of the constitutional and conventional order thus entails the obligation to provide the victim with adequate protection by establishing norms of substantive law that safeguard their legally protected interests and compensate them in both pecuniary and non-pecuniary aspects.

3. VICTIM'S PROCEDURAL INTERESTS

However, it should be borne in mind that, in addition to the creation of the victim's substantive-law interests, the legislator must put in place procedural measures for effectuating them, which largely implies the obligation to guarantee the victim's right to participate in and to obtain protection of their interests in criminal proceedings and, consequently, entails their right to court in criminal matters.

From a constitutional point of view, the right to court is apparently derived from Article 45(1) of the Constitution of the Republic of Poland which provides that "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". It is complemented and developed in detail from the negative side by Article 77(2) of the Constitution of the Republic of Poland which bars closing the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights.[23] On the one hand, that right is vested in everyone and, as such, in all natural persons and legal persons governed by private law, on the other hand, only if those persons have a specific

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compensation and reconciliation between the victim and the perpetrator somewhat depreciates the victim by putting them on an equal footing, while the victim did no harm and cannot, as such, be treated on an equal footing. However, this view does not prevail, see e.g. in the same monograph, *Założenia aksjologiczne systemu reakcji karnych na przestępstwo na tle kodeksu karnego z 1997 roku*, pp. 130–131, authored by Mirosława Melezini.

[22] M. Wąsek-Wiaderek, *supra* n. 15, p. 83.

[23] P. Grzegorczyk, K. Weitz, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86,* Warszawa 2016, pp. 1092–1093.

relationship with the subject-matter of the proceedings in that the subject-matter refers to the legal situation of the person concerned.[24] The right to court is not given effect until a case within the constitutional meaning is to be examined which case involves the entity concerned. The concept of a "case", although it is still subject to dynamic development in the case law of the Constitutional Tribunal, includes disputes – involving natural or legal persons – arising from administrative and civil-law relationships and the determination of the merits of criminal charges, or, as it has been recognised in subsequent case law, any situation where the rights of a specific person need be established.[25] The case law of the Constitutional Tribunal has repeatedly considered whether a criminal case is also the case of the victim or only that of the defendant, and the case law is not uniform in this respect.

For a long time a view, though unfavourable for the aggrieved parties, has prevailed according to which a criminal case is not *a priori* a case of the victim and the same has no standing to initiate court proceedings on their own, but they can exercise the right to court upon a bill of indictment being filed by the competent entity, as well as by initiating civil proceedings.[26] In one of the judgments, the Constitutional Tribunal made it clear that "the purpose of criminal proceedings conducted directly against the perpetrator does not immediately affect the rights and freedoms of the victim",[27] which does not seem to be entirely consistent with the wording of Article 2 CPC.

This position is set out at length in the Constitutional Tribunal judgment of 15 June 2004, SK 43/03.[28]

According to the Tribunal, the Constitution does not stipulate the right for citizens to initiate criminal proceedings against a person and a criminal case is the case of the defendant. However, since court proceedings underway are likely to affect the victim's interests in a number of ways, when a competent prosecutor files a bill of indictment, the case also becomes, in a sense, the victim's case. Accordingly, the victim becomes a specific entity covered by the safeguards resulting from the constitutional right to court, but only as regards three components of this right, namely: the right to shape criminal proceedings as per the requirements of justice;

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[24] The Constitutional Tribunal judgment of 9 June 1998, K 28/97, OTK 1998/4/50.

[25] L. Jamróz, *Prawo do sądu – zarys problematyki*, [in:] A. Jamróz, L. Jamróz, *Prawa jednostki w demokratycznym państwie prawa*, Białystok 2016, p. 167; the Constitutional Tribunal judgments: of 12 March 2005, K 35/04, OTK ZU 2005/3A/23; of 13 March 2012, P 39/10, OTK-A 2012/3/26; or of 22 October 2013, SK 18/11, OTK-A 2013/1/4.

[26] The Constitutional Tribunal judgment of 2 April 2001, SK 10/00, Dz.U. No. 32, item 384; the Constitutional Tribunal judgment of 12 May 2003, SK 38/02, Dz.U. No. 88, item 818.

[27] *Ibid*.

[28] Dz.U. no. 145, item 1545. See also the Constitutional Tribunal judgment of 25 September 2012, SK 28/10, Dz.U. item 1095, in which the Tribunal found the mandatory nature of a one-month time limit for filing a subsidiary bill of indictment by the victim to be in line with Article 45(1) of the Constitution of the Republic of Poland and confirmed the view reflected in the existing case law, according to which a criminal case become the case of the victim only when a bill of indictment is filed by the competent prosecutor. The mandatory nature of the time limit in question is criticised in the literature, see E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżenia uprawnionego oskarżyciela w polskim procesie karnym*, Lublin 2016, pp. 388–389. Cf. J. Głębocka, *Prawo pokrzywdzonego do sądu – wstęp do problematyki*, Przegląd Sądowy No. 11–12, 2012, pp. 87–102.

the right to obtain, without undue delay, a binding decision on a criminal case duly brought before a court by a competent prosecutor; and the right to have the court hearing the case to comply with the constitutional requirements of jurisdiction, independence, impartiality and autonomy. The victim's right to initiate court proceedings is exercised primarily in civil proceedings.

The Constitutional Tribunal took a different view in its judgment of 18 May 2004, SK 38/03, holding that the decision on criminal liability for an offence, in so far as it concerns an act which infringes the victim's legally protected interest, is at the same time a decision regarding the victim's legitimate interests and, as such, falls within the concept of a case.[29] The victim may exercise their right to court in both criminal and civil proceedings, and it is in criminal proceedings that the victim may seek protection that civil law will never provide them with, in the form of non-pecuniary compensation resulting from the conviction and the sentence. The existence of this type of the victim's interests is of a legally relevant nature, which is confirmed by the legal system affording the victim a specific procedural status in criminal and minor offence proceedings. The inability to give effect to the indicated interests of the victim in specific proceedings should therefore be assessed in the context of the safeguards set out in Article 45 of the Constitution.

In the subsequent case law, on two occasions the Constitutional Tribunal adopted a view unfavourable to the aggrieved parties (judgment of 25 September 2012, SK 28/10, and judgment of 19 May 2015, SK 1/14[30]), while in the judgment of 30 September 2014, SK 22/13, it once again held that a criminal case is, from the very beginning, the victim's case "in so far as it concerns an act that violates or compromises their legally protected interests", and only the victims themselves are entitled to opt for the procedural strategy to pursue their rights.[31] However, the view that a criminal case is not the victim's case until a bill of indictment is filed with the court by a competent entity and that the victim themselves cannot infer from the Constitution their right of access to a criminal court and the right to initiate criminal proceedings before the court, must still be regarded as prevailing.[32]

The above reasoning of the Tribunal has been criticised in the literature. It is specifically indicated that the scope of the guarantee of the right to court is subjectively broader in Article 45 of the Constitution of the Republic of Poland than in Article 6 ECHR. The provision of Article 6 ECHR is expressly, in its essential part, directed at the rights of "everyone charged with a criminal offence", while Article 45 of the Constitution of the Republic of Poland guarantees "everyone" the right to court.[33]

Undoubtedly, once the court procedure has been initiated by a competent prosecutor, the victim has, in the course of the proceedings, the other components of the constitutional right to court, i.e. the right to obtain a decision within a reasonable

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[29] Dz.U. No. 128, item 1351.

[30] OTK-A 2015/5/64.

[31] OTK-A 2014/8/96.

[32] See also M. Rogalski, *Procesowe gwarancje zasady legalizmu*, [in:] B. Dudzik, J. Kosowski, I. Nowikowski (eds), *Zasada legalizmu w procesie karnym*, Vol. I, Lublin 2015, p. 379.

[33] P. Wiliński, *Proces karny w świetle Konstytucji*, Warszawa 2011, pp. 138–139.

time, the right to court of proper jurisdiction and the right to a fair trial, and thus to have effective measures to protect their legitimate interests, the right to be heard, the right to ensure that the procedure is foreseeable, the procedural situation is foreseeable and that the decision is duly reasoned.[34] It seems that, as it stands now, the case law of the Constitutional Tribunal may lead to a conclusion that the legislator is required to ensure that the victim be afforded the status of a party to the court proceedings underway since the victim has the right to court in criminal cases at the time a bill of indictment is filed.

This is slightly different in the context of the European Convention on Human Rights. As regards the guarantees of a fair trial, Article 6 ECHR treats civil and criminal cases separately, with the guarantees of fairness of a criminal trial relating to "the determination of any criminal charge brought against him [D.C.'s note: the entitled person]" and, thus, only the defendant. As a consequence, the victim does not enjoy the conventional right to a fair trial in criminal matters, and in particular the right to have proceedings against another person instituted, since they are not a beneficiary of the right to court in criminal matters; however, this approach has been criticised by legal commentators who seek to imply that most elements of a fair trial can also be extended to the victim.[35] However, this does not change the fact that, in the context of Article 6 ECHR, national law may (but not necessarily has to) vest in the victim the right to be a party to a criminal trial entitled to seek pecuniary compensation for the damage and harm suffered. The refusal to allow such a victim to participate in criminal proceedings does not amount to an infringement of the right of access to a court, provided that the victim has the opportunity to take part in civil proceedings. Where national law provides for the participation of the victim in criminal proceedings as a party and in the context of these proceedings a decision concerning their interests, in particular civil claims, is to be rendered, or a defamation case is pending, only then do they benefit from the guarantees of Article 6 in view of the principle of equality of arms.[36] In particular, in such case the victim is then entitled to have the case heard: by an independent and impartial court or tribunal established by law, fairly (i.e. based on the right to a fair trial), publicly (openly) and within a reasonable time. It should be noted, however, that it is has been repeatedly indicated in the case law of Polish courts that a criminal trial should be fair not only to the defendant, but also to the victim. In turn, the

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[34] As regards the components of the constitutional right to court, see P. Wiliński, *supra* n. 32, p. 117; the Constitutional Tribunal judgment in case K 28/97 referred to above.

[35] A. Wróbel, P. Hofmański, [in:] L. Garlicki (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności*, Vol. I: *Komentarz do artykułów 1–18*, Warszawa 2010, p. 304. See the ECtHR judgment of 29 October 2001 in *Helmers v. Sweden*, Application no. 22/1990, § 28; the ECtHR decision of 29 March 2001 in *Asociacion de Victimas del Terrorismo v. Spain*, Application no. 54102/00; E. Kruk, *supra* n. 26, p. 271; P. Hofmański, *Europejska Konwencja Praw Człowieka i jej znaczenie dla prawa karnego*, Białystok 1993, p. 249. Cf. W. Gliniecki, *Przyspieszanie i usprawnianie postępowania karnego a ochrona interesów pokrzywdzonego*, Prokuratura i Prawo No. 2, 2007, p. 61.

[36] The ECtHR judgment of 28 October 1998 in *Assenov v. Bulgaria*, Application no. 90/1997, § 111; and the ECtHR judgment of 16 November 2006 in *Tsalkitzis v. Greece*, Application no. 11801/04, § 29; E. Bieńkowska, [in:] C. Kulesza (ed.), *System Prawa Karnego Procesowego*, Vol. VI: *Strony i inni uczestnicy postępowania karnego*, Warszawa 2016, p. 323; M. Wąsek-Wiaderek, *supra* n. 15, pp. 82–83.

literature also suggests that the Convention should be amended so as to include the victims' rights in the list of the rights expressly guaranteed by the Convention.[37]

However, Article 6 ECHR is not the only potential source of protection of victims' rights in criminal proceedings. As shown above, in the ECtHR's view, it is incumbent on the Contracting Parties to the Convention to effectively guarantee the rights that the Convention affords to individuals, including to provide effective procedural remedies in the event of those rights being infringed, even in horizontal relationships, i.e. not by the state but by another individual. Accordingly, when an offence is committed against an individual's personal interests, such as life, liberty or health, the state is under the conventional duty to ensure that an effective procedure is in place to identify the offender and to hold them liable. Under this procedure, states must protect the dignity of the victim and prevent secondary victimisation.[38] The fulfilment of substantive obligations by the state is therefore independent of its procedural obligations. Even if the state introduces appropriate substantive criminal law provisions, these must be supported by a "system of enforcement of justice to prevent and combat violations of these provisions".[39] Although initially the concept of effective investigation, i.e. the pre-trial stage of criminal proceedings, was primarily developed in this context in case law, currently these requirements tend to be applied to the criminal procedure as a whole, since the victim has the right to benefit from an effective administration of justice. A set of rights that the state has to provide as part of its positive procedural obligations is systematically developed in the case law and now includes, without limitation, access to the case files.[40]

4. CONCLUSION

In conclusion, procedural authorities are required to identify, of their own motion, the victim's legitimate interest under the norms of substantive and procedural law and to take it into account within the limits of those norms. These interests are to be taken into account and considered in a final ruling. The obligation to introduce substantive-law norms to protect the victim's interests is derived from both the constitutional and conventional obligation to genuinely guarantee the right of individuals to life, freedom, including sexual freedom, the right to privacy and other fundamental rights, also in horizontal relationships. In turn, providing victims with interests resulting from the substantive law entails the obligation to create an effective judicial remedy for pursuing them, which is related to the issue of a fair

[37] See, for example, the judgment of the Court of Appeal in Lublin of 12 August 1999, II AKa 98/99, Prokuratura i Prawo No. 1, 2000, item 27; cf. judgment of the Court of Appeal in Szczecin of 3 March 2016, II AKa 15/16, LEX No. 2044441. The above-mentioned suggestion is formulated by E. Bieńkowska, [in:] C. Kulesza (ed.), *supra* n. 36, pp. 324–325.

[38] See e.g. the ECtHR judgment of 28 May 2015 in *Y v. Slovenia*, Application no. 41107/10.

[39] The ECtHR judgment of 5 January 2010 in *Railean v. Moldova*, Application no. 23401/04, § 27. For more details, see D. Czerniak, *supra* n. 16, pp. 38–44.

[40] M. Wąsek-Wiaderek, *supra* n. 15, pp. 91–92; and the ECtHR judgment of 25 June 2009 in *Beganović v. Croatia*, Application no. 46423/06; the ECtHR judgment of 4 August 2001 in *Kelly and Others v. the United Kingdom*, Application no. 30054/96.

criminal trial and the victim's right to court. Although it has not been decided on constitutional grounds that a victim has the right of access to a court in criminal cases, and in the text of the Convention the guarantees of the fairness of the criminal trial are referred to the victim only in so far as they pursue civil claims, the evolving case law of the Constitutional Tribunal and of the European Court of Human Rights makes it possible to conclude that the purpose of the criminal trial in the form of the obligation to take into account the legally protected interests of victims has constitutional and conventional sources and that, consequently, the legislator and then the procedural authorities are required to give effect to them.

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VICTIM'S LEGALLY PROTECTED INTERESTS IN CRIMINAL TRIAL UNDER THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Summary

The paper considers the issue of constitutional and conventional sources of one of the objectives in criminal proceedings, namely taking into account the legally protected interests of the victim (injured party). The author defines the notion of legally protected interests of the victim and distinguishes substantive-law and procedural interests. Both have constitutional and conventional sources as proven by the analysis of the European Court of Human Rights and the Polish Constitutional Tribunal case law. Effective protection of human rights and freedoms requires establishing provisions of substantive law, including criminal law, while their implementation should be guaranteed by introducing appropriate procedural mechanisms, in particular the victim's right to court, including the right to a fair trial. The conclusion was therefore that the objective of criminal proceedings indicated in Article 2 § 1 para. 3 CPC is constitutionally and conventionally defined.

Keywords: injured party, objectives of criminal proceedings, right to court, states' positive obligations, fair trial, procedural fairness, legally protected interest

UWZGLĘDNIENIE PRAWNIE CHRONIONYCH INTERESÓW POKRZYWDZONEGO JAKO CEL PROCESU KARNEGO W ŚWIETLE KONSTYTUCJI RZECZPOSPOLITEJ POLSKIEJ I EUROPEJSKIEJ KONWENCJI PRAW CZŁOWIEKA

Streszczenie

W artykule rozważono zagadnienie istnienia konstytucyjnych i konwencyjnych źródeł celu procesu karnego w postaci uwzględnienia prawnie chronionych interesów pokrzywdzonego. Zdefiniowano pojęcie prawnie chronionych interesów pokrzywdzonego oraz wyróżniono interesy o charakterze materialnoprawnym i procesowym. Jedne i drugie mają źródła konstytucyjne i konwencyjne, co wynika z przeprowadzonej analizy orzecznictwa Trybunału Konstytucyjnego i Europejskiego Trybunału Praw Człowieka. Efektywna ochrona praw i wolności jednostki wymaga bowiem ustanowienia norm prawa materialnego, w tym karnego, a z kolei ich realizacja winna być zagwarantowana wprowadzeniem odpowiednich mechanizmów proceduralnych, w szczególności prawa pokrzywdzonego do sądu, w tym do sprawiedliwości proceduralnej. W konkluzji stwierdzono zatem, że cel procesu karnego wskazany w art. 2 § 1 pkt 3 k.p.k. jest konstytucyjnie i konwencyjnie określony.

Słowa kluczowe: pokrzywdzony, cele procesu karnego, prawo do sądu, pozytywne obowiązki państw, rzetelny proces karny, sprawiedliwość proceduralna, prawnie chroniony interes

ESTIMACIÓN DE INTERESES PROTEGIDOS LEGALMENTE DEL PERJUDICADO COMO LA FINALIDAD DEL PROCESO PENAL DESDE LA PERSPECTIVA DE LA CONSTITUCIÓN DE LA REPÚBLICA DE POLONIA Y DEL CONVENIO EUROPEO DE DERECHOS HUMANOS

Resumen

El artículo reflexiona sobre la existencia de fuentes constitucionales y convencionales de la finalidad del proceso penal que consiste en estimación de intereses protegidos legalmente del perjudicado. Se define el concepto de intereses protegidos legalmente del perjudicado y se diferencia intereses sustanciales y procesales. Ambos tienen fuentes constitucionales y convencionales, lo que resulta del análisis de la jurisprudencia del Tribunal Constitucional y del Tribunal Europeo de Derechos Humanos. La protección efectiva de derechos y libertades del individuo requiere establecer normas de derecho sustantivo, incluyendo derecho penal. Su ejecución ha de ser garantizada mediante mecanismos procesales, en particular el derecho del perjudicado a un juicio justo, incluyendo la justicia procesal. Como conclusión se determina que el la finalidad del proceso penal señalado en art. 2 § 1 punto 3 del código de procedimiento penal queda determinado constitucional y convencionalmente.

Palabras claves: perjudicado, finalidad de proceso penal, derecho a un juicio justo, obligaciones positivas de Estados, proceso penal justo, interés protegido legalmente

УЧЕТ ОХРАНЯЕМЫХ ЗАКОНОМ ИНТЕРЕСОВ ПОТЕРПЕВШЕГО КАК ЦЕЛЬ УГОЛОВНОГО ПРОЦЕССА В СВЕТЕ КОНСТИТУЦИИ РЕСПУБЛИКИ ПОЛЬША И ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ПРАВАХ ЧЕЛОВЕКА

Резюме

В статье рассматривается вопрос конституционных и конвенционных источников цели уголовного процесса, заключающейся в учете охраняемых законом интересов потерпевшего. Автор дает определение охраняемых законом интересов потерпевшего, а также выделяет материально-правовые и процессуальные интересы. Как следует из анализа судебной практики Конституционного суда и Европейского суда по правам человека, у обеих групп интересов имеются как конституционные, так и конвенционные источники. Дело в том, что для эффективной защиты прав и свобод человека требуется наличие норм материального (в том числе уголовного) права. В свою очередь, реализация этих норм должна быть обеспечена внедрением соответствующих процессуальных механизмов, в частности, права потерпевшего на защиту своих интересов в суде и на процессуальную справедливость. Таким образом, можно сделать вывод о том, что цель уголовного процесса, изложенная в ст. 2 § 1 п. 3 УПК, имеет конституционные и конвенционные основания.

Ключевые слова: потерпевший, цели уголовного процесса, право на суд, позитивные обязанности государств, справедливое судебное разбирательство, процессуальная справедливость, охраняемый законом интерес

BERÜCKSICHTIGUNG DER GESETZLICH GESCHÜTZTEN INTERESSEN DES OPFERS ALS ZWECK DES STRAFVERFAHRENS IM LICHTE DER POLNISCHEN VERFASSUNG UND DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION

Zusammenfassung

Der Artikel befasst sich mit der Frage der Existenz verfassungsmäßiger und konventioneller Quellen für den Zweck des Strafverfahrens in Form der Berücksichtigung der gesetzlich geschützten Interessen des Opfers. Das Konzept der gesetzlich geschützten Interessen des Opfers wurde definiert und zusätzlich wurden materielle und verfahrenstechnische Interessen ausgezeichnet. Beide haben verfassungsrechtliche und konventionelle Quellen, die sich aus der Analyse der Rechtsprechung des Verfassungsgerichts und des Europäischen Gerichtshofs für Menschenrechte ergeben. Ein wirksamer Schutz der Rechte und Freiheiten des Einzelnen erfordert die Festlegung materieller Rechtsstandards, einschließlich des Strafrechts, und deren Umsetzung sollte wiederum durch die Einführung geeigneter Verfahrensmechanismen gewährleistet werden, insbesondere durch das Recht des Opfers auf Gericht, einschließlich Verfahrensgerechtigkeit. Die Schlussfolgerung besagt daher, dass der Zweck des Strafverfahrens is angegeben in Artikel 2 § 1 Punkt 3 der Strafprozessordnung ist verfassungsrechtlich und konventionell festgelegt.

Schlüsselwörter: Opfer, Ziele des Strafverfahrens, Recht auf Gericht, positive Verpflichtungen der Staaten, faires Strafverfahren, Verfahrensgerechtigkeit, gesetzlich geschützte Interessen

CONSIDÉRER LES INTÉRÊTS LÉGALEMENT PROTÉGÉS DE LA VICTIME COMME OBJECTIF DE LA PROCÉDURE PÉNALE À LA LUMIÈRE DE LA CONSTITUTION POLONAISE ET DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

Résumé

L'article examine l'existence de sources constitutionnelles et conventionnelles de l'objet du procès pénal sous la forme de la prise en compte des intérêts légalement protégés de la victime. Le concept des intérêts légalement protégés de la victime a été défini et les intérêts matériels et procéduraux ont été distingués. Les deux ont des sources constitutionnelles et conventionnelles, ce qui résulte de l'analyse de la jurisprudence du Tribunal constitutionnel et de la Cour européenne des droits de l'homme. Une protection efficace des droits et libertés individuels nécessite l'établissement de normes de droit matériel, y compris le droit pénal, et leur mise en œuvre devrait à son tour être garantie par l'introduction de mécanismes procéduraux appropriés, en particulier le droit de la partie lésée à un procès, y compris à la justice procédurale. La conclusion indique donc que le but de la procédure pénale indiqué à l'art. 2 § 1 point 3 du code de procédure pénale est constitutionnellement et conventionnellement déterminé.

Mots-clés: victime, partie lésée, objectifs du procès pénal, droit à un procès, obligations positives des États, procès pénal équitable, justice procédurale, intérêt légalement protégé

PERSEGUIMENTO DEGLI INTERESSI GIURIDICAMENTE TUTELATI DELLA PARTE LESA COME OBIETTIVO DEL PROCESSO PENALE ALLA LUCE DELLA COSTITUZIONE DELLA REPUBBLICA DI POLONIA E DELLA CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI

Sintesi

Nell'articolo è stata trattata la questione dell'esistenza di fonti, nella Costituzione e nella Convenzione, dell'obiettivo del processo penale come perseguimento degli interessi giuridicamente tutelati della parte lesa. È stato definito il concetto giuridico di interessi giuridicamente tutelati della parte lesa e sono stati distinti gli interessi di natura sostanziale da quelli di natura procedurale. Entrambi trovano fondamento nella Costituzione e nella Convenzione, come deriva dall'analisi condotta della giurisprudenza della Corte Costituzionale e della Corte europea dei diritti dell'uomo. L'efficace tutela dei diritti e delle libertà dei singoli richiede infatti l'adozione di norme di diritto sostanziale, compreso quello penale, e d'altra parte la loro realizzazione deve essere garantita con l'introduzione di adeguati meccanismi procedurali, in particolare il diritto alla giustizia della parte lesa, che comprende l'equità procedurale. In conclusione è stato quindi affermato che l'obiettivo del processo penale indicato negli art. 2 § 1 punto 3 del codice di procedura penale è stabilito nella Costituzione e nella Convenzione.

Parole chiave: parte lesa, obiettivi del processo penale, diritto alla giustizia, obblighi positivi degli stati, processo penale equo, equità procedurale, interesse tutelato giuridicamente

Cytuj jako:

Czerwińska D., *Victim's legally protected interests in criminal trial under the Constitution of the Republic of Poland and the European Convention on Human Rights [Uwzględnienie prawnie chronionych interesów pokrzywdzonego jako cel procesu karnego w świetle Konstytucji Rzeczpospolitej Polskiej i Europejskiej Konwencji Praw Człowieka]*, „Ius Novum" 2020 (14) nr 1, s. 66–81. DOI: 10.26399/iusnovum.v14.1.2020.04/d.czerwinska

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THREATS TO THE INDIVIDUAL'S RIGHT TO PRIVACY IN RELATION TO PROCESSING OF PERSONAL DATA IN ORDER TO PREVENT AND COMBAT CRIME

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1. INTRODUCTION

In recent years, personal data protection authorities have faced major challenges in balancing the right to data protection with the responsibilities of the European Union and its member states to ensure the security of its citizens in the area of freedom, security and justice.[1] Maintaining a "just balance" between the fundamental rights and freedoms of individuals and the interests of public security and the national security of the member states has contributed to the discussion on the reform of the personal data protection system. Due to the fast pace of technological changes resulting in an increase in the amount of processed data, the need to ensure effective protection of the individual's rights has led to the development of legally binding mechanisms regulating the transfer and processing of data in a manner consistent with the law of the European Union, in particular allowing compliance with a high standard of protection of the rights of persons whose data are processed.[2]

The universality of personal data protection issues makes it possible for issues relating to this sphere of rights and interests of individuals to arise at the level of criminal proceedings.[3] The subject of the article is the analysis of legal grounds for

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1 Cf. Article 3(2) of the Treaty on European Union, Dz.U. of 2004 No. 90, item 864/30; hereinafter TEU.

2 M. Rojszczak, *Prywatność w epoce Wielkiego Brata: podstawy prowadzenia programów masowej inwigilacji w systemie prawnym Stanów Zjednoczonych*, Ius Novum No. 1, 2019, pp. 238–239.

3 A. Wolska-Bagińska, *Ochrona danych osobowych a zasady procesu karnego*, Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury No. 3(31), 2018, p. 23.

processing personal data in criminal proceedings, which undoubtedly constitute one of the fundamental issues in the practice of applying the law. This study analyses the regulatory framework for the protection of personal data processed in connection with the prevention of and fight against crime from the perspective of Directive 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences and the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA,[4] taking into account civil liberties. Evaluation of new assumptions ensuring transparency of data processing by the police and institutions combating crime requires undertaking discussion regarding the limits of data processing, making them available and their control by authorized bodies, including during the performance of operational and investigative activities by appropriately authorized services. Cases of processing information on persons in order to minimise threats to security and public order constitute a starting point for considerations on existing threats to the limitation of individual rights.

The admissibility of limiting the rights and freedoms of individuals in the course of criminal proceedings requires a precise defining in what situations and to what extent this is possible. As Joseph Cannataci, Special Rapporteur on Privacy, appointed by the UN Human Rights Council, rightly pointed out, effective protection of privacy implies "borderless safeguards and protection measures".[5] The adoption of common EU data protection rules is an important step towards more effective cooperation between law enforcement and judicial authorities, as well as trust-building and legal certainty. The strengthening of data subjects' rights and obligations of data subjects processing personal data, as well as their corresponding powers to monitor and enforce personal data protection rules in the member states, has prompted reflection on the legitimacy of the changes made to the legal grounds for personal data protection law in Europe.[6] The summary of the arguments will be concluded with an attempt to assess new assumptions ensuring transparency of data processing by the police and institutions fighting crime, from the point of view of confidentiality guarantees related to data processing in proceedings conducted by competent authorities in this area.

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[4] OJ EU L of 2016, No. 119, p. 89; hereinafter referred to as Directive 2016/680.

[5] The UN Human Rights Council, Report of the Special Rapporteur on the Right to Privacy, Joseph A. Cannataci, 27.02.2017, A/HRC/34/60, p. 34.

[6] W. Wiewiórowski, *Nowe ramy ochrony danych osobowych w Unii Europejskiej jako wyzwanie dla polskiego sądownictwa*, Kwartalnik Krajowej Rady Sądownictwa No. 1, 2013, p. 14.

2. EU LEGISLATION ON THE PROTECTION OF PERSONAL DATA IN CRIMINAL MATTERS

Achieving a fair balance between the need to safeguard the process of obtaining evidence and the right to respect for the family life of the individual[7] has led to a more effective protection of individuals' data in view of the rapid pace of technological changes contributing to an increase in the volume of data processed. The legal instruments so far have not been sufficient, putting individuals' personal data at increasing risk.[8] As underlined in the Stockholm Programme,[9] technological developments not only present new challenges for the protection of personal data but also offer new opportunities for better data protection that should be exploited.[10] In response to the necessary developments in the area of personal data protection, the EU institutions have started to ensure a high and consistent level of protection of individuals, while removing obstacles to the movement of personal data.

More than 15 years after the introduction of the first regulations in this area,[11] The European Commission presented a communication entitled "A Comprehensive Approach on Personal Data Protection in the European Union"[12]. The 2010 document identified specific challenges, including responding to the impact of new technologies, improving the internal market dimension of data protection, responding to globalisation and improving international data transfers, ensuring better institutional arrangements for effective enforcement of data protection rules, and enhancing the coherence of the legal framework for data protection. The Commission also signalled the need for specific rules in the area of police and judicial cooperation in criminal matters, given the specificities of these areas and the potential differences in the exercise by individuals of certain data protection rights and the need to prevent, investigate, detect or prosecute criminal offences in the enforcement of sanctions in a specific case.[13]

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[7] ECtHR judgments of: 19 May 2009 in *Kulikowski v. Poland*, Application no. 16831/07, point 77 *in fine*; 11 October 2005 in *Bagiński v. Poland*, Application no. 37444/97, point 94.

[8] See the Explanatory memorandum to the government's bill on the protection of personal data processed in connection with prevention and combating of crime, UC116, https://legislacja.rcl.gov.pl/projekt/12310605 (accessed 31.10.2019).

[9] The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ 2010, C 115, p. 1.

[10] https://www.prawo.pl/prawnicy-sady/zmiany-w-ochronie-danych-osobowych-dotycza-tez-postepowan-karnych,185770.html (accessed 31.10.2019).

[11] See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 1995, p. 31.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Comprehensive Approach on Personal Data Protection in the European Union, COM/2010/0609 *final*.

[13] An important reason for adopting such a solution was, on the one hand, the need to ensure a consistent and high level of protection of personal data of natural persons and, on the other hand, to facilitate the exchange of personal data between competent authorities of the member states in order to ensure efficient judicial co-operation in criminal matters and police co-operation, as well as the possibility to transfer data to a third country provided that the

As a result, on 25 January 2012 the European Commission presented a draft legislative package containing a new framework for the protection of personal data in the EU.[14] The package consisted of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC[15] and Directive (EU) 2016/680 of the European Parliament and of the Council. The draft act was adopted in March 2014 and is addressed to the Council of the European Union.[16] On 4 May 2016, the official texts of the legal instruments making up the data protection reform,[17] which introduced binding requirements for the protection of privacy and personal data, not only in vertical but also in horizontal relations, were published in the Official Journal of the European Union.[18]

Ensuring a consistent standard of protection of the freedoms and rights of persons by introducing a uniform and effective system of personal data protection was essential to guarantee effective judicial cooperation in criminal matters and police cooperation. Indeed, separate from the general system of protection, regulations were developed relating exclusively to the processing of data in specific aspects of criminal cases.[19] President Jean-Claude Juncker stated in his political guidelines: "The fight against cross-border crime and terrorism is a shared European responsibility".[20] The prevention, investigation, detection and prosecution of criminal offences requires that competent authorities process personal data collected in the context of the prevention, investigation, detection or prosecution of specific criminal offences in order to improve the understanding of criminal activities and to establish links between the various criminal offences detected,[21] nevertheless,

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purpose of such action is to prosecute criminal offences while ensuring an adequate level of data protection by the third country.

[14] http://eur–lex.europa.eu/legal–content/PL/TXT/?uri=CELEX:52012AR0625 (accessed 21.11.2017).

[15] OJ C 318, 30.12.2011, p. 1. OJ EU of 2016, L 119/1.

[16] http://orka.sejm.gov.pl/wydbas.nsf/0/aa1e06213f088c33c1257d0e00491563/$file/infos_173.pdf (accessed 31.10.2019).

[17] http://www.giodo.gov.pl/1520147/id_art/9278/j/pl/ (accessed 31.10.2019).

[18] For a more detailed discussion of the provisions of the general Regulation, see M. Krzysztofek, *Ochrona danych osobowych w Unii Europejskiej po reformie. Komentarz do rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679*, Warszawa 2016; D. Lubasz, E. Bielak-Jomaa (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa 2017.

[19] The European legislator deliberately excluded from the scope of application of Regulation 2016/679 the processing of personal data by competent authorities for the purpose of preventing crime, investigation, detection and prosecution of criminal offences or executing criminal penalties, including the protection against and prevention of threats to public security, by regulating these issues – due to the specific nature of such activities – in a legal act of a different rank, i.e. Directive 2016/680. The directive, as a legal act obliging the member states to establish a given legal order – in contrast to a regulation whose provisions are directly applicable – allows taking into account differences in national regulations on preventing and combating crime in the provisions prepared on its basis.

[20] A New Start for Europe: My Agenda for Jobs, Growth, Justice and Democratic Change – Political Guidelines for the next term of the European Commission, J.-C. Juncker, Strasbourg, 15.07.2014.

[21] See recital 27 of Directive 2016/680.

in accordance with recital 29 of the Directive, personal data must be collected for specified, explicit and legitimate purposes falling within the scope of application of the Union legal instrument and not processed for purposes incompatible with the prevention, investigation, detection and prosecution of criminal offences and the execution of criminal penalties, including the protection against and prevention of threats to public security.

In accordance with Directive 2016/680, Member States shall: (a) protect the fundamental rights and freedoms of natural persons, and in particular their right to the protection of personal data; and (b) ensure that, where provided for by Union or national law, the exchange of personal data by competent authorities within the Union is not restricted or prohibited on grounds relating to the protection of individuals with regard to the processing of personal data.[22] Although the member states have primary responsibility for safety, they cannot achieve this on their own. All relevant EU and national actors need to cooperate better in combating cross-border threats, while respecting national compliance obligations and safeguarding internal security.[23]

Law enforcement authorities, due to the nature of their activities, have a special access to the collection of data, the processing of which may involve the risk of infringement of rights and freedoms of individuals, such as economic and social harm, breach of professional secrecy or good name. This risk increases when data concerning, inter alia, racial origin, political opinions, beliefs, health, sexual orientation, genetic or biometric data are processed. As can be seen from recital 15 of Directive 2016/680, the basic objective of this instrument is to ensure an equivalent level of protection of individuals by ensuring effective data protection rights applicable throughout the Union, and to prevent divergences hampering the exchange of personal data between competent authorities. The approximation of member states' laws does not have the effect of weakening the protection of personal data they afford but, on the contrary, serves to ensure a high level of protection throughout the Union.[24] As a result, the European data protection model is now considered to be the most mature in the world and a model for the actions of other legislators.[25]

3. PROCESSING OF PERSONAL DATA IN ORDER TO PREVENT AND COMBAT CRIME IN THE LIGHT OF DIRECTIVE 2016/680/EU

The need to adopt a coherent, systemic solution at the national level, ensuring an efficient interaction of complementary elements of personal data protection stemming from the EU rules (Directive 2016/680 and Regulation 2016/679), while taking into account the multiplicity of public entities, has led to a broad definition of data

[22] See Article 1(2) of Directive 2016/680.

[23] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Security Agenda, European Commission, Strasbourg, 28.04.2015, COM(2015) 185 *final*.

[24] See recital 15 of Directive 2016/680.

[25] P. Schwartz, *The EU-U.S. Privacy Collision: a Turn to Institutions and Procedures*, Harvard Law Review Vol. 126, 2013, p. 1968.

processing consisting in the lack of a top-down definition of all activities falling within the scope of this concept. According to Article 4(2) of Regulation 2016/679, "processing" means the operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automatic means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, adaptation or combination, restriction, erasure or destruction.[26]

Translating the meaning of the term processing of personal data into a criminal-processing context, it should be recognised that any action taken within the framework of a criminal process involving personal information should be classified as processing of data.[27] A particular intensity of activities performed on personal data occurs during the pre-trial phase. During this stage of the process, law enforcement agencies process the largest amount of data in connection with the collection of evidence for the purposes of conducting criminal proceedings. At the stage of jurisdiction proceedings, due to the type and frequency of operations performed during this stage, there is also a significant intensity of operations on personal data. Taking into account the above-mentioned remarks, it should be concluded that the provisions of the Criminal Procedure Code[28] stipulate a number of regulations relating to operations on personal data, i.e. their processing.[29] It is therefore not surprising that the prevention, investigation, detection and prosecution of criminal offences require that competent authorities process personal data collected in the context of the prevention, investigation, detection or prosecution of specific criminal offences in order to better understand criminal activities and to establish links between the different criminal offences detected.[30]

In order to ensure the security of processing and to prevent processing in breach of the Directive, member states must ensure that personal data are: (a) lawfully and fairly processed; (b) collected for specified, explicit and legitimate purposes and not processed in a way incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are processed; (d) adequate and, where necessary, kept up to date; (f) processed in a way ensuring adequate security of personal data, including protection against unauthorised or unlawful processing and accidental loss, destruction or damage, by appropriate technical or organisational measures.[31] Any processing of personal data should include the protection of the vital interests of the data subject.

On the basis of Directive 2016/680, two levels of data categorisation were introduced, distinguishing between data by subject and data type. Categorisation by subject is linked to the introduction of categories of data subjects. Member states

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[26] The concept of data processing regulated by Directive 2016/680 is covered in the same way as in Article 4(2) of Regulation 2016/679.

[27] A. Wolska-Bagińska, *Podstawy prawne przetwarzania danych osobowych w postępowaniu karnym*, Prokuratura i Prawo No. 6, 2018, p. 48.

[28] Act of 6 June 1997: Criminal Procedure Code, Dz.U. of 2018, item 1987.

[29] A. Wolska-Bagińska, *supra* n. 27, p. 49.

[30] See recital 27 of Directive 2016/680.

[31] Article 4(1) of Directive 2016/680.

therefore must ensure that the controller, where appropriate and possible, clearly distinguishes between personal data of different categories of data subjects, such as the following: (a) persons in respect of whom there are serious grounds for believing that they have committed or are about to commit an offence; (b) persons convicted of an offence; (c) victims of an offence, or persons whose specific facts indicate that they may be liable to become victims of an offence; and (d) persons other than those who, in relation to the criminal offence, such as persons who may be called upon to testify in criminal investigations or at further stages of criminal proceedings, persons who can provide information about the criminal offence or persons who have any contacts or connections with one of the persons referred to in points (a) and (b). This should not prevent the application of the principle of the presumption of innocence guaranteed by the Charter of Fundamental Rights of the European Union and by the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted respectively by the case law of the Court of Justice and the European Court of Human Rights.[32]

The categorisation by type of data, on the other hand, involves the identification of data which, by their nature, are particularly sensitive in the light of fundamental rights and freedoms. Moreover, they require special protection since the context in which they are processed may give rise to a serious risk of infringing fundamental rights and freedoms. These data include information revealing: racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic and biometric data processed to identify a natural person unambiguously, health, sexuality and sexual orientation of a natural person.[33] In accordance with Article 29(1) of Directive 2016/680, these specific types of data should be covered by a higher standard of data security.

It should be borne in mind that, in any event, infringements of the rights or freedoms of natural persons with different degrees of probability and seriousness of threat can lead to physical, material or non-material damage, in particular: where processing may result in discrimination, identity theft or fraud, financial loss, damage to reputation, breach of confidentiality of data protected by professional secrecy, unauthorised reversal of pseudonymisation or any other substantial economic or social damage. The likelihood and seriousness of a breach is determined by taking into account the nature, extent, context and purposes of the processing. The risk of breach is assessed on the basis of an objective assessment of whether the processing operations present a serious risk.

In transposing these considerations into criminal law, it should be underlined that the nature of the processing of data in criminal matters is linked to the limitations of the right of access to these data. Member states may adopt legal instruments to limit in whole or in part the data subjects' right of access to the data to the extent and for the duration that such partial or total restriction is necessary and proportionate in a democratic society, with due regard for the fundamental rights and legitimate

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[32] Done at Rome, 4 November 1950, amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Dz.U. of 1993, No. 61, item 284.

[33] See Article 10 of Directive 2016/680.

interests of the individual concerned, in order to: (a) prevent obstruction of official or judicial proceedings, investigations or procedures; (b) prevent interference with the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties; (c) protect public security; (d) protect national security; (e) protect rights and freedoms.[34]

The obligation to inform the data subject of any refusal or restriction of access, together with the grounds for such refusal, shall lie with the controller.[35] Limitations, delays in the right of access or omission in providing of information to data subjects should be individually verified by the data controller in each case. However, the information may be omitted if its provision could undermine any of the purposes for which access to the data has been denied. In this case, however, the following requirements must be met: (a) the controller is required to document the factual and legal grounds on which that decision is based with a view to making them available to the supervisory authorities at a later stage; (b) the controller is obliged to inform the data subject of the possibility of filing a complaint to the supervisory authority or a judicial remedy.

4. TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

Directive 2016/680 regulates the exchange of information involving personal data between law enforcement authorities of member states and third countries. The existing regulations in this area in the repealed Directive 95/46/EC of the European Parliament and of the Council were applicable to all processing of personal data within member states, both in the public and private sectors, but they did not apply to the processing of personal data within the framework of activities beyond the scope of the Community law, such as activities in the framework of judicial cooperation in criminal matters and police cooperation. Similarly, the repealed Council Framework Decision 2008/977/JHA applied to judicial cooperation in criminal matters and police cooperation limited to the processing of personal data transmitted or made available only between member states. These rules proved to be insufficient due to the dynamic development of cross-border and international crime, largely due to technological developments in the exchange of information. With this in mind, it has become necessary to prepare a new legal instrument which would comprehensively implement the arrangements for the transfer of personal data in criminal matters to third countries or international organisations. However, it should be noted that the new Directive 2016/680 does not apply to the processing of personal data in the course of activities which fall outside the scope of the Union law, therefore activities in the field of national security, activities of agencies or entities dealing with national security, processing of personal data by member states

[34] See Article 15(1) of Directive 2016/680.
[35] *Ibid.*

in the course of activities which fall within the scope of Title V, Chapter 2 TEU, are not covered by the scope of the Directive.

For the purpose of implementing Article 63 of Directive 2016/680, member states provide that the transfer of personal data by competent authorities, which are or are to be processed after their transfer to a third country or an international organisation, including onward transfer to another third country or an international organisation, may be subject to compliance with national law only if the following conditions are met: (a) the transfer is necessary for the purpose of preventing, investigating, detecting and prosecuting criminal offences and enforcing penalties, including the prevention and protection against threats to public security; (b) personal data are transferred to a controller in a third country or an international organisation that is competent for the aforementioned purposes;[36] (d) the Commission has taken a conformity decision pursuant to Article 36 of the Directive or, in the absence of such a decision, adequate safeguards are provided or exist pursuant to Article 37 or in the absence of a conformity decision pursuant to Article 36 or securities in accordance with Article 37, exceptions to the special situations in accordance with Article 38 shall apply;[37] and (e) in the event of onward transfer to another third country or international organisation, the competent authority that has carried out the initial transfer or another competent authority of the same member state shall authorise the onward transfer after due consideration of all relevant factors, including the gravity of the criminal offence, the purpose for which the personal data were originally transferred and the degree of protection of personal data in the third country or international organisation to which the personal data are onward transferred.

By way of exception to the principle of transfer of personal data to a controller in a third country or an international organisation which is competent for the purposes of preventing, investigating, detecting and prosecuting criminal offences and enforcing penalties, including the prevention and protection against threats to public security, the Union law or a member state law may, subject to international agreements, provide that, on a case-by-case basis, competent authorities may transfer personal data directly to recipients established in third countries only if all of the

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[36] According to Article 35(2) of Directive 2016/680, member states should provide that the transfer of personal data without the prior authorization of another member state is only allowed if the transfer in question is necessary to prevent an immediate and serious threat to public security in a member state or a third country or to the important interests of a member state, and the prior consent cannot be obtained within a reasonable period of time.

[37] In the absence of a decision finding an adequate level of protection under Article 36 or of appropriate safeguards under Article 37, member states should provide that a transfer or a specific category of transfer of personal data to a third country or international organisation may take place only on condition that the transfer is necessary: (a) to protect the vital interests of the data subject or of another person; (b) in order to safeguard the legitimate interests of the data subject, if the law of the member state transmitting the personal data so provides; (c) to prevent an immediate and serious risk of a breach of public security of a member state or of a third country; (d) on a case-by-case basis, for the purposes of preventing, investigating, detecting and prosecuting criminal offences and enforcing penalties, including protecting against and preventing threats to public security; or (e) in an individual case, to identify, pursue or defend claims in relation to the above objectives.

following conditions are met: (a) the transfer is strictly necessary for the performance of the task of the competent transferring authority under the Union law or under the law of a member state for the purposes of the Directive; (b) the competent authority of the data exporter determines that the fundamental rights and freedoms of the data subject do not override the public interest served by the transfer in question; (c) the competent transferring authority considers that transmission to a competent authority for the purpose of preventing, investigating, detecting and prosecuting criminal offences and enforcing penalties, including protection against and preventing threats to public security, in a third country would be ineffective or inappropriate, in particular because the transmission cannot take place in a timely manner; (d) the authority which is competent for the aforementioned purposes in the third country is informed without undue delay, unless this would be ineffective or inappropriate; and (e) the communicating competent authority must inform the recipient of the specific purpose or purposes for which personal data are to be processed exclusively by the recipient, provided that such processing is necessary.[38]

The Commission and the member states take appropriate measures in favour of third countries and international organisations, i.e. they: (a) develop international cooperation mechanisms to facilitate effective enforcement of personal data protection rules; (b) ensure mutual international assistance in the enforcement of personal data protection rules, including through notification, complaint handling, investigative assistance and exchange of information, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms; (c) involve relevant stakeholders in discussions and activities aimed at promoting international cooperation in the field of personal data protection enforcement; (d) promote the exchange and documentation of personal data protection rules and practices, including on conflicts of jurisdiction with third countries.[39]

5. CONCLUSIONS

In the conditions of global crime and terrorism and organised crime crossing the borders, it is important to prevent threats whose occurrence may cause irreparable damage to legally protected rights.[40] It is not disputed that "the fight against serious crime, particularly organised crime and terrorism, is of paramount importance to guarantee public security and its effectiveness may depend to a large extent on the use of modern investigative techniques"[41]. In view of the above, it is necessary to facilitate the free movement of personal data between competent authorities for the purpose of preventing, investigating, detecting and prosecuting criminal offences and penalties, including for the purpose of preventing and protecting against

[38] Article 39 of Directive 2016/680.

[39] See Article 40 of Directive 2016/680.

[40] M. Zubik, J. Podkowik, R. Rybski, *Prywatność. Wolność u progu D-Day*, Gdańskie Studia Prawnicze Vol. XL, 2018, p. 395.

[41] See recital 51 of the CJEU judgment of 8 April 2014 in joined cases C-293/12 *Digital Rights Ireland Ltd* and C-594/12 *Kärntner Landesregierung and Others*.

threats to public security within the Union and transferring such personal data to third countries and international organisations, while ensuring a high level of protection of personal data. It is clear that the transfer of all data entrusted to public services, without any judicial control and without the possibility of supervising the correctness and legality of the measures taken, does not lead to an increase in confidence in the designated service providers. Protecting the rights of individuals against potential abuses by the police and secret services is becoming a problem.

For the protection of personal data in the member states to be effective, the rights of data subjects, the obligations of those who process personal data and the corresponding powers to monitor and enforce the rules on the protection of personal data in the member states need to be strengthened. Ensuring more effective protection of personal data requires a coordinated response at the European level. The assistance of the Union institutions to member states in further developing mutual trust, making full use of existing tools for exchanging information and strengthening cross-border operational cooperation between competent authorities has contributed to the development of certain standards and the adoption of new legal acts in the area of personal data protection and the right to privacy. The need to balance the right to data protection with the responsibilities of the European Union and the member states to ensure the security of citizens within an area of freedom, security and justice in order to maintain a "fair balance" between the fundamental rights and freedoms of individuals and the public security and national security interests of the member states has contributed to the reform of the system of protection of personal data. Directive 2016/680 is a novelty in the EU legal system, becoming a comprehensive regulation of personal data protection in the area of criminal law and cooperation between authorities whose task is to combat crime. Undoubtedly, the EU legal act has slightly revised the existing approach to the differentiation in the protection of individuals' privacy, strengthening the protection of fundamental rights and democratic control over the policy of the EU in the area of internal security.

The success of the tools put in place by the European Union in recent years is based primarily on shared responsibility, mutual trust and effective cooperation between all the actors involved: the EU institutions and agencies, the member states and national authorities. Such action leads to a stable and more coherent framework for the protection of personal data in the Union and to a strict enforcement of its rules. A good law covering both data protection and data security provisions is valuable not only for the individual citizen but also for the security of the whole country.[42] The protective function of the right must be connected with the possibility of its application.

[42] S. Gwoździewicz, K. Tomaszycki (eds), *Prawne i społeczne aspekty cyberbezpieczeństwa*, Warszawa 2017, p. 26.

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THREATS TO THE INDIVIDUAL'S RIGHT TO PRIVACY IN RELATION TO PROCESSING OF PERSONAL DATA IN ORDER TO PREVENT AND COMBAT CRIME

Summary

The article contains an analysis of the regulation concerning the protection of personal data processed in relation to the prevention and combating of crime from the perspective of solutions contained in Directive 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, p. 89), taking into account civil liberties. The EU regulation of personal data protection in the area of police and judicial cooperation in criminal matters raises the question of the scope of permissible interference of state authorities in the right to privacy. In this article, the author assesses the new assumptions ensuring transparency of data processing by the police and institutions fighting crime from the point of view of confidentiality guarantees related to data processing in proceedings conducted by competent authorities in this area.

Keywords: right to privacy, personal data, crime, police and judicial cooperation

ZAGROŻENIA DLA PRAWA DO PRYWATNOŚCI JEDNOSTKI W ZWIĄZKU Z PRZETWARZANIEM DANYCH OSOBOWYCH W CELU ZAPOBIEGANIA I ZWALCZANIA PRZESTĘPCZOŚCI

Streszczenie

Artykuł zawiera analizę regulacji dotyczącej ochrony danych osobowych przetwarzanych w związku z zapobieganiem i zwalczaniem przestępczości z perspektywy rozwiązań zawartych w dyrektywie Parlamentu Europejskiego i Rady (UE) 2016/680 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych przez właściwe organy do celów zapobiegania przestępczości, prowadzenia postępowań przygotowawczych, wykrywania i ścigania czynów zabronionych i wykonywania kar, w sprawie swobodnego przepływu takich danych oraz uchylającej decyzję ramową Rady 2008/977/WSiSW (Dz.Urz. UE L 119, s. 89), z uwzględnieniem swobód obywatelskich. Unijna regulacja ochrony danych osobowych w obszarze współpracy policyjnej i sądowej w sprawach karnych rodzi pytanie o zakres dopuszczalnej ingerencji organów państwa w prawo do prywatności (*right to privacy*). W niniejszym artykule autorka dokonuje oceny nowych założeń zapewniających transparentność przetwarzania danych przez policję i instytucje zwalczające przestępczość z punktu widzenia gwarancji poufności związanych z przetwarzaniem danych w postępowaniach prowadzonych przez właściwe w tym zakresie organy.

Słowa kluczowe: prawo do prywatności, dane osobowe, przestępczość, współpraca policyjna i sądowa

AMENAZAS AL DERECHO DE PRIVACIDAD DE INDIVIDUO EN RELACIÓN CON EL TRATAMIENTO DE DATOS PERSONALES CON EL FIN DE PREVENCIÓN Y LUCHA CONTRA LA DELINCUENCIA

Resumen

El artículo presenta un análisis de regulación sobre la protección de datos personales tratados con el fin de prevención y lucha contra la delincuencia desde la perspectiva de soluciones previstas en la Directiva (UE) 2016/680 del Parlamento Europeo y del Consejo, de 27 de abril de 2016, relativa a la protección de las personas físicas en lo que respecta al tratamiento de datos personales por parte de las autoridades competentes para fines de prevención, investigación, detección o enjuiciamiento de infracciones penales o de ejecución de sanciones penales, y a la libre circulación de dichos datos y por la que se deroga la Decisión Marco 2008/977/JAI del Consejo (Diario Oficial de la Unión Europea L 119, p. 89), teniendo en cuenta libertades de los ciudadanos. La regulación comunitaria de la protección de datos personales en el ámbito de cooperación policial y judicial en asuntos penales causa que nace la pregunta sobre el ámbito de la intervención admisible de los órganos estatales en el derecho a la privacidad (*right to privacy*). El autor en el presente artículo hace una valoración de nuevos principios que aseguran la transparencia del tratamiento de datos por policía e instituciones que luchen contra la delincuencia desde el punto de vista de garantía de confidencialidad relacionada con el tratamiento de datos en los procesos llevados por los órganos competentes.

Palabras claves: derecho a la privacidad, datos personales, delincuencia, cooperación policial y judicial

УГРОЗА НАРУШЕНИЯ ПРАВА НА НЕПРИКОСНОВЕННОСТЬ ЧАСТНОЙ ЖИЗНИ В СВЯЗИ С ОБРАБОТКОЙ ПЕРСОНАЛЬНЫХ ДАННЫХ В ЦЕЛЯХ ПРЕДУПРЕЖДЕНИЯ И БОРЬБЫ С ПРЕСТУПНОСТЬЮ

Резюме

В статье анализируются положения о защите персональных данных, обрабатываемых в связи с предупреждением и борьбой с преступностью, с точки зрения положений Директивы 2016/680 Европейского парламента и Совета (ЕС) от 27 апреля 2016 года о защите физических лиц в связи с обработкой персональных данных компетентными органами в целях предотвращения, расследования, выявления и преследования уголовных преступлений и исполнения наказаний и о свободном движении таких данных, отменившей Рамочное решение Совета 2008/977/JHA (OJEU L 119, стр. 89). Автор обращает особое внимание на проблему гражданских свобод. В связи с нормативными положениями ЕС, касающимися защиты персональных данных в ходе сотрудничества между полицией и судебными органами по расследованию уголовных дел, встает вопрос о границах допустимого нарушения государственными органами права на неприкосновенность частной жизни (*right to privacy*). В статье содержится оценка новых предложений по обеспечению транспарентности процесса обработки персональных данных полицией и другими правоохранительными институтами с точки зрения гарантий конфиденциальности при обработке персональных данных в ходе процессуальных действий, осуществляемых соответствующими органами.

Ключевые слова: право на неприкосновенность частной жизни, персональные данные, преступность, сотрудничество полиции и судебных органов

BEDROHUNG DES RECHTS DES EINZELNEN AUF PRIVATSPHÄRE IM ZUSAMMENHANG MIT DER VERARBEITUNG PERSONENBEZOGENER DATEN ZUR VERHÜTUNG UND BEKÄMPFUNG VON STRAFTATEN

Zusammenfassung

Der Artikel enthält eine Analyse der Vorschriften zum Schutz personenbezogener Daten, die im Zusammenhang mit der Verhütung und Bekämpfung von Straftaten verarbeitet werden, aus der Perspektive der Lösungen, die in der Richtlinie des Europäischen Parlaments und des Rates (EU) 2016/680 vom 27. April 2016 zum Schutz von Personen bei der Verarbeitung von Daten enthalten sind personenbezogene Daten von zuständigen Behörden zum Zwecke der Kriminalprävention, Ermittlung vor dem Prozess, Aufdeckung und Verfolgung verbotener Handlungen und Vollstreckung von Strafen, zum freien Datenverkehr und zur Aufhebung des Rahmenbeschlusses 2008/977 / JI des Rates (Amtsblatt EU L 119, S. 89) unter Berücksichtigung der bürgerlichen Freiheiten. Die EU-Verordnung zum Schutz personenbezogener Daten im Bereich der polizeilichen und justiziellen Zusammenarbeit in Strafsachen wirft die Frage nach dem Ausmaß der zulässigen Eingriffe staatlicher Behörden in das Recht auf Privatsphäre auf (*right to privacy*). In diesem Artikel bewertet der Autor neue Annahmen, die die Transparenz der Datenverarbeitung durch die Polizei und die Anti-Kriminalitäts-Institutionen gewährleisten, unter dem Gesichtspunkt der Vertraulichkeitsgarantien im Zusammenhang mit der Datenverarbeitung in Verfahren, die von den zuständigen Behörden durchgeführt werden.

Schlüsselwörter: Recht auf Privatsphäre, personenbezogene Daten, Kriminalität, polizeiliche und justizielle Zusammenarbeit

MENACES CONTRE LE DROIT DE L'INDIVIDU À LA VIE PRIVÉE EN RELATION AVEC LE TRAITEMENT DES DONNÉES À CARACTÈRE PERSONNEL AFIN DE PRÉVENIR ET DE COMBATTRE LA CRIMINALITÉ

Résumé

L'article contient une analyse de la réglementation relative à la protection des données à caractère personnel traitées dans le cadre de la prévention et de la lutte contre la criminalité, du point de vue des solutions contenues dans la directive (UE) 2016/680 du Parlement européen et du Conseil du 27 avril 2016 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel par les autorités compétentes à des fins de prévention et de détection des infractions pénales, d'enquêtes et de poursuites en la matière ou d'exécution de sanctions pénales, et à la libre circulation de ces données, et abrogeant la décision-cadre 2008/977/JAI du Conseil (Journal officiel UE L 119, p. 89), en tenant compte des libertés civiles. Le règlement de l'UE sur la protection des données à caractère personnel dans le domaine de la coopération policière et judiciaire en matière pénale soulève la question de l'étendue de l'ingérence autorisée des autorités de l'État dans le droit à la vie privée. Dans cet article, l'auteur évalue de nouvelles hypothèses garantissant la transparence du traitement des données par la police et les institutions anti-criminalité, du point de vue des garanties de confidentialité liées au traitement des données dans les procédures conduites par les autorités compétentes.

Mots-clés: droit à la vie privée, données personnelles, criminalité, coopération policière et judiciaire

RISCHI PER IL DIRITTO ALLA PRIVACY DEI SINGOLI IN RELAZIONE AL TRATTAMENTO DEI DATI PERSONALI PER LA PREVENZIONE E LA LOTTA AI REATI

Sintesi

L'articolo contiene un'analisi della disciplina riguardante la protezione dei dati personali trattati a fini di prevenzione e lotta ai reati, nella prospettiva delle soluzioni contenute nella direttiva 2016/680 del Parlamento europeo e del Consiglio del 27 aprile 2016 relativa alla protezione delle persone fisiche con riguardo al trattamento dei dati personali da parte delle autorità competenti a fini di prevenzione, indagine, accertamento e perseguimento di reati o esecuzione di sanzioni penali, nonché alla libera circolazione di tali dati e che abroga la decisione quadro 2008/977/GAI del Consiglio (Gazzetta ufficiale dell'Unione europea L 119/89), tenendo presenti le libertà civili. La disciplina comunitaria di protezione dei dati personali nel settore della collaborazione della polizia e dei tribunali nei procedimenti penali genera la domanda sull'ambito dell'ingerenza ammissibile delle autorità statali nel diritto alla privacy (*right to privacy*). Nel presente articolo l'autore compie una valutazione dei nuovi approcci che assicurano la trasparenza del trattamento dei dati da parte della polizia e delle istituzioni incaricate della lotta contro la criminalità, dal punto di vista delle garanzie di riservatezza legate al trattamento dei dati nei procedimenti condotti dalle autorità competenti in tale ambito.

Parole chiave: diritto alla privacy, dati personali, criminalità, collaborazione della polizia e dei tribunali

Cytuj jako:

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SUPERVISION OF CORRECTNESS OF APARTMENT OWNERS' RESOLUTIONS

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1. INTRODUCTION

The history of separate ownership of an apartment is relatively short because it was not until the 1930s that it was introduced to the Polish legal system.[1]

The Act on the ownership of apartments[2] defines a community of apartment owners as all the owners whose apartments are part of a given real property and the establishment of the community results from the separation of ownership of the first apartment. The owner of a separate apartment has the right to a share in common real property, which is connected with the ownership right to this apartment. Common real property consists in the land and part of the building as well as the facilities that serve the exclusive use of apartment owners. An apartment owner's share in common real property corresponds to the relation of an apartment useable area together with an area of auxiliary premises to the useable area of all the apartments with their auxiliary premises.

An apartment community does not have a legal personality but the Act on ownership of apartments gives it the right to acquire rights and to enter into financial commitments as well as to sue and to be sued. From the point of view of civil law, an apartment community is at present classified as an organisational unit that is not a legal entity but one that is granted legal capacity by statute.[3]

The statute introduces an alternative division of apartment communities into what is called small communities in which the number of separated apartments

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1 Regulation of the President of the Republic of Poland of 24 October 1934 on the ownership of apartments, Dz.U. of 1934, No. 94, item 848, as amended.

2 Act of 24 June 1994 on the ownership of apartments, Dz.U. of 2018, item 716, hereinafter AOA.

3 Act of 23 April 1964: Civil Code, Dz.U. of 2018, item 1025, Article 33^1.

and those not separated and still belonging to the former owner does not exceed seven, and communities with the number of apartments exceeding seven. The management of small communities is subject to relevant provisions of the Civil Code and the Code of Civil Procedure[4] concerning co-ownership. The common real property management takes place in the form of factual and legal activities performed by co-owners themselves, with no resolutions passed to give consent to those activities. In its resolution of 7 October 2009, the Supreme Court expressed an opinion that only a different mode of management determined in an agreement on establishing separate ownership of apartments or an agreement entered into later in the form of a notarised act makes it possible to determine the mode of management in accordance with statutory provisions, thus also to pass resolutions by the apartment owners.[5]

In communities composed of more than seven apartments, the mode of common real property management may be determined in an agreement between apartment owners; in particular, they can entrust management to a natural or legal person. In case there is no such an agreement, the provisions on common real estate management laid down in Chapter 4 AOA are in force. Then, apartment owners are obliged to pass a resolution on the selection of a single-person or many-person management that performs the standard management activities. In order to perform activities that go beyond the scope of standard management, apartment owners must pass a resolution giving consent to perform those activities and authorising the management to enter contracts consisting in activities going beyond the scope of standard management in the form laid down in law.

It should also be indicated that in literature and, in particular in case law, apartment owners' resolutions are commonly erroneously called resolutions of a real property community. Such a name might suggest that an apartment community is a body passing resolutions, while in fact passing resolutions is the exclusive right of apartment owners. An opinion that an apartment community meeting is a decision-making body of an apartment community is also erroneous because apartment owners can pass resolutions during the meeting as well as without convening it. The only body of an apartment community having the required rights is the apartment community management. However, the management body to which real property management has been entrusted in an agreement on establishing separated ownership of apartments or an agreement entered into later in the form of a notarised act does not have the features of an apartment community body. Thus, just the legal nature of an apartment community raises many controversies in the doctrine in the same way as the classification of incomplete legal persons.

The same discrepancies also occurred in case law and only the Supreme Court resolution of 21 December 2007,[6] which has the power of a legal rule, ended them. In the resolution, the Supreme Court included an apartment community in the category of incomplete legal persons and granted it the right to acquire rights and obligations

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[4] Act of 17 November 1964: Code of Civil Procedure, Dz.U. of 2018, item 1360, hereinafter CCP.

[5] The Supreme Court resolution of 7 October 2009, III CZP 60/09.

[6] The Supreme Court resolution of 21 December 2007, III CZP 65/07.

to its own property. The Supreme Court Judge Krzysztof Pietrzykowski dissented from the resolution and is against the recognition of an apartment community as an incomplete legal person, and denies it the right to acquire the rights and obligations to its own property. It is right to indicate the doubts related with the lack of consistence in the justification of the resolution in which the Supreme Court classifies an apartment community as an entity subject to civil law and at the same time indicates that it is entitled to legal capacity limited to the rights and obligations exclusively connected with common real property management.

2. APARTMENT OWNERS' RESOLUTIONS

The term "resolution" does not have its legal definition. In the Supreme Court case law, the dominating opinion is that resolutions resulting in legal consequences should be recognised as civil law acts.[7] In an apartment community, the apartment owners' consent that the management body undertakes activities going beyond the scope of standard management takes the form of a resolution.

An activity going beyond the scope of standard management is not defined, either. In general, it is assumed that an activity within the scope of standard management consists in dealing with current issues connected with normal use of a thing and maintaining it in a state not worsened as required by its current purpose. On the other hand, everything that is not included within this scope is classified as issues that go beyond the scope of standard management.[8]

In Article 22 para. 3 AOA, the legislator laid down the activities going beyond the scope of standard management as follows:

1) Establishment of the remuneration for a management body or a manager of common real property;
2) Adoption of an annual business plan;
3) Establishment of the amount of fees necessary to cover the cost of management;
4) Change of the purpose of parts of common real property;
5) Giving consent to build an extension to or rebuild common real property, the establishment of separate ownership of an apartment created as a result of building an extension to or rebuilding the real property and disposing of this apartment, and the change of shares resulting from the establishment of the separate ownership of an apartment built or rebuilt;
6) Giving consent to change the shares in co-ownership of common real property;
7) Division of common real property;
8) Acquisition of real property;
9) Joining two apartments constituting two separate parts of real property into single real property or dividing an apartment;

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[7] The Supreme Court judgment of 14 July 2006, II CSK 71/06.

[8] E. Skowrońska-Bocian, K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Vol. I, Warszawa 2018, p. 438.

10) Giving consent to divide land with more than one residential building and to change the shares in common real property as well as establishing shares in the newly created separate parts of common real property;

11) Taking legal action referred to in Article 16 of the statute, i.e. demanding that an apartment be sold by an auction if the apartment owner has long-term rent arrears or flagrantly or permanently violates the established domestic order, or makes the use of other apartments or the real property difficult due to their inappropriate conduct;

12) Establishing, in cases not regulated in legal provisions, some costs connected with the use of facilities or parts of the building serving the needs of particular apartment owners as well as to be used by at least two apartment owners, which are classified as costs of common real property management;

13) Determining the scope and method of extra-recordkeeping of the costs of common real estate management, advance payments to cover the costs and settlement of other payments for common real property by a management body or a manager.

The above catalogue of activities that go beyond the scope of standard management is not closed or exhaustive but only an example because the legislator preceded it with a phrase "in particular". However, it should be emphasised that the subject matter of an owners' resolution must concern issues connected with common real property management that do not go beyond the aims and tasks of an apartment community.[9]

The provision indicated above enumerates activities within the scope of common real property management that a management body performs on behalf of an apartment community by means of a declaration of intent with an effect on the owners of all apartments, thus in relation to all co-owners of common real property.[10] Indeed, it is assumed that Article 22 para. 2 AOA is decisive in relation to activities going beyond the scope of standard management, which justifies the statement that every activity going beyond the scope of standard management performed on the basis of a resolution is effective in relation to all apartment owners, also those who have voted against the resolution or have not voted.[11] The requirement of apartment owners' unanimity in big apartment communities might lead to decision-taking obstruction because in practice it would be impossible to obtain consent from all members of an apartment community.[12]

In accordance with Article 23 para. 1 AOA, apartment owners' resolutions are passed either during a meeting or by means of their individual collection by a management body; however, a resolution may result partly from votes cast at the meeting and partly those collected individually. The results of voting are calculated in accordance with the size of shares, unless it has been decided in an agreement or a resolution passed in this mode that every owner has one vote in particular matters. Voting in accordance with the rule that every apartment owner has one vote must

[9] R. Strzelczyk, A. Turlej, *Własność lokali. Komentarz*, 4th edn, Warszawa 2015, p. 569.

[10] E. Bończak-Kucharczyk, *Własność lokali i wspólnota mieszkaniowa*, Warszawa 2016, p. 568.

[11] M. Balwicka-Szczyrba, *Zarząd majątkiem wspólnym. Komentarz*, Warszawa 2016, pp. 191–192.

[12] The Supreme Court judgment of 14 June 2017, IV CSK 478/16.

also be introduced at the request of apartment owners who have at least one-fifth of shares in common real property if the sum of shares in common property does not equal one or the majority of shares is owned by one owner or when both conditions are met jointly. A resolution is passed when most of apartment owners have voted in favour. Passing an effective resolution requires absolute majority of votes.

Every apartment owner should be notified in writing about the content of a resolution passed partly by means of individual votes collection.

3. TYPES OF DEFECTS IN APARTMENT OWNERS' RESOLUTIONS

Apartment owners' resolutions can be defective in terms of their content or aim, or the defects can be connected with factual circumstances that take place in the course of passing resolutions and they can concern the formal aspect of the process.

The legislator indicated four defects concerning the content or aim of an apartment owners' resolution in Article 25 para. 1 AOA. These are as follows:

1) Inconsistence with the provisions of law;
2) Inconsistence with an apartment owners' agreement;
3) Infringement of the principle of appropriate management of common real property;
4) Infringement of the interests of an apartment owner who files a complaint in another way.

Inconsistence with the provisions of law consists mainly in the infringement of the AOA and Civil Code provisions, the application of which within the scope of the statute is laid down in Article 1 para. 2 AOA. Incompliance with the provisions of law also means a collision of the content of a resolution with other legal activities and activity implementing them if the norms are absolutely binding. It also occurs when a resolution aims to avoid the law or is in conflict with the principles of social coexistence.[13]

Although it is not precisely determined in AOA, it should be assumed that a plea of inconsistence of a resolution with an apartment owners' agreement concerns an agreement determining the mode of a real property management referred to in Article 18 para. 1 AOA.[14]

It is not possible to examine the conditions for appropriate common real property management without reference to the current situation of a particular apartment community, but it can be assumed that a decision expressed in a resolution should meet the criteria of scrupulousness, purposefulness and thriftiness.

Scrupulousness is most often interpreted in accordance with a dictionary definition stating that it means "honesty, conscientiousness, reliability".[15] Purposefulness means acting thoughtfully and in a way leading to an intended target from the point of view of the interest of an apartment community. The criterion of thriftiness

[13] R. Strzelczyk, A. Turlej, *supra* n. 9, p. 637.

[14] J. Pisuliński, [in:] E. Gniewek (ed.), *System Prawa Prywatnego*, Vol. 4, *Prawo rzeczowe*, Warszawa 2007, p. 313.

[15] M. Szymczak (ed.), *Słownik języka polskiego*, Vol. III, Warszawa 1985, p. 161.

concerns optimal use of financial and material resources in the course of common real property management.

Formal defects of owners' resolutions are connected with the procedure of passing them. Most frequent infringements of this type include voting in the mode of collecting individual votes by unauthorised persons and formal errors connected with convening general meetings as well as notifying about the content of resolutions passed. According to the established case law, those infringements have a limited impact on the recognition of a resolution as defective because it is assumed that excessive formalism is not binding in apartment communities and it is necessary to be rational in order to ensure effective common real property management when assessing the procedure of passing resolutions. Thus, it is assumed that passing an apartment owners' resolution by collecting votes individually, conducted by unauthorised persons, may constitute grounds for a court to overrule it if the infringement might have influenced its content. On the other hand, failure to meet the statutory obligation to notify every owner about the content of a resolution passed in this mode does not have impact on its becoming effective.[16]

Inexistent resolutions constitute a category that is different from defective resolutions, due to their content or purpose, or from formally defective ones. It is not a statutory term but a concept used in the doctrine and also adopted in case law. At the same time, it is unanimously emphasised that this concerns especially grave infringements committed in the course of passing resolutions, therefore it is in fact hard to state whether apartment owners have expressed their intent. A resolution passed without the required majority vote can be an example of such a resolution.[17] It should be emphasised that in the case of inexistent resolutions one cannot speak about their incompliance with law because such can be analysed only when a resolution exists.[18]

4. JUDICIAL SUPERVISION OF CORRECTNESS OF APARTMENT OWNERS' RESOLUTIONS

Substantive law as grounds for lodging an appeal against an apartment owners' resolution are laid down in Article 25 AOA. Legal action against an apartment community should be taken within six weeks from the date of passing a resolution at the general meeting or the date when a plaintiff was notified of the content of a resolution passed by individual collection of votes. Only an apartment owner or co-owner has the active procedural right to take legal action provided for under Article 25 AOA. A person who is not an owner, even if this person is a member of an apartment community management or a manager appointed based on a contract, cannot take legal action in this mode. A public prosecutor and the Ombudsman

[16] The Supreme Court judgment of 8 July 2004, IV CK 543/03.
[17] The Supreme Court judgment of 23 February 2006, I CK 336/05.
[18] The Supreme Court judgment of 26 November 2010, IV CSK 269/10.

also have an active procedural right to take legal action based on Article 7 CCP.[19] An apartment community represented by the management has a passive procedural right to appeal to a court to overrule a resolution.

Due to the fact that having closed the proceedings, a court issues a judgment taking into account the state of things at the moment of closing the proceedings (Article 316 § 1 CCP), a plaintiff must maintain their active procedural right throughout the whole course of the proceedings initiated by the appeal against a resolution until the proceedings are closed. If they sell an apartment in the course of the proceedings, they lose the status of apartment owners, thus they lose the interest that constitutes the grounds for appeal against a resolution because it no longer influences their rights and obligations. Such interest occurs only in case a resolution concerns property rights of an ex-owner in the period when they were still an apartment community member, it still regulated their legal situation and they had no other possibilities to protect their rights.[20]

The time limit for taking legal action under Article 25 para. 1 AOA is final. However, adjudication practice in the case of a deadline imposed by the statute of repose varies. Most often, it is assumed that statutory specification of a time limit for appealing against a resolution results in the application of the statute of repose in relation to the grounds for an appeal, i.e. after the time limit it is inadmissible to quote further grounds for appeal that have not been reported.[21] However, this approach is not uniform in case law and, according to another opinion, there are no grounds for ignoring successive grounds for appeal in order to justify effectiveness of an appeal to annul a resolution lodged in a statutory time limit.[22]

The existence of the provision of Article 25 para. 1 AOA does not exclude a possibility of challenging the defectiveness of a particular resolution or resolutions of an apartment community under Article 189 CCP as the so-called inexistent legal action. In accordance with the provision, a plaintiff can demand that a court determine the existence or inexistence of a legal relationship or a right if they have legal interest in it. The legal interest within the meaning of Article 189 CCP is an objective category and occurs when the final judgment provides a plaintiff with the protection of their legal interests, i.e. when they definitely finish an existing dispute or prevent the occurrence of such a dispute in the future, and at the same time, the interest is not subject to protection by means of another measure.[23] Taking

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[19] Act of 15 July 1987 on the Ombudsman, Dz.U. of 2018, item 2179, Article 14(4).

[20] Compare the Supreme Court judgment of 7 February 2006, IV CSK 41/05, where it was stated that a former shareholder maintains the right to appeal against the resolution of the Annual General Meeting in a public limited company that concerns his/her corporate or property rights, but loses the right to appeal against resolutions that do not concern his/her rights. It is necessary to recognise a common element in the resolution of an apartment owners' community and the resolution of the AGM of a public limited company, which is the activity of a plaintiff taking legal action against the resolution for the benefit of an organisational unit he/she belongs to or in his/her own interest.

[21] Judgment of the Court of Appeal in Kraków of 19 February 2004, I ACa 1297/03.

[22] Judgment of the Court of Appeal in Gdańsk of 26 January 2009, I ACa 1169/08.

[23] Compare the Supreme Court judgments of 4 October 2001, I CKN 425/00; of 8 May 2000, V CKN 29/00; of 9 February 2012, III CSK 181/11; of 14 March 2012, II CSK 252/11; and of 19 September 2013, I CSK 727/12.

such legal action is neither subjectively nor temporally limited, i.e. such action can be taken at any time.

Legal action taken in order to determine inexistence of a resolution under Article 189 CCP aims to obtain a judgment stating that the resolution does not exist because it has not been passed, e.g. as a result of a lack of the required majority of votes.[24]

Only exceptionally, is it admissible to take legal action in accordance with Article 58 Civil Code in conjunction with Article 189 CCP. It is because it is assumed that Article 25 AOA is special in nature in relation to the provision of Article 58 §§ 1 and 2 Civil Code. Thus, in the situation when an apartment owners' resolution is in conflict with law or the principles of social coexistence, Article 25 para. 1 AOA should constitute legal grounds for demanding its overruling as well as grounds for a judgment concerning a demand to overrule it.[25] This results from the legislator's intention to limit the possibility of challenging apartment owners' resolutions that are in conflict with law or their agreement by the introduction of a short final six weeks' time limit and the definite determination of entities that can take legal action. At the same time, there is no factual justification of the statement that legal action pursuant to Article 58 Civil Code in conjunction with Article 189 CCP cannot be taken in case a plaintiff has (or had) the right to take legal action pursuant to Article 25 AOA. It is the person that has the right to make claims who should have the right to decide about the choice of one of the claims they are entitled to.[26]

In accordance with Article 17(42) CCP, cases concerning overruling, recognition of invalidity or determination of inexistence of resolutions of legal persons' bodies or organisational units that are not legal persons who are granted legal capacity by statute are under the jurisdiction of district courts. A court competent in terms of location is one that has jurisdiction over the district where common real property is situated because this real property, managed by an apartment community, corresponds to the legal person's head office.[27]

A resolution appealed against is implemented, unless a court suspends its implementation until the proceedings concerning the overruling of a resolution are closed. It is unanimously assumed in literature that a court can rule suspension of the implementation of a resolution not only on a motion but also *ex officio*.[28]

A statement of claim to overrule a resolution of an apartment community is subject to a fixed court fee of PLN 200.[29] A legal adviser's minimum remuneration for representation in a case concerning overruling of an apartment community's

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[24] The Supreme Court judgment of 30 September 2015, I CSK 773/14.

[25] R. Dziczek, *Własność lokali. Komentarz, Wzory pozwów i wniosków sądowych*, Warszawa 2016, p. 188.

[26] K. Osajda (ed.), *Ustawa o własności lokali. Komentarz*, 5th edn, http://www.legalis.pl (accessed 11.3.2019).

[27] M. Nazar, *Własność lokali. Podstawowe zagadnienia cywilnoprawne*, Lublin 1995, p. 88.

[28] P. Pełczyński, *Zaskarżenie uchwał wspólnoty mieszkaniowej na gruncie ustawy o własności lokali*, Rejent No. 6, 2000, p. 119.

[29] Act of 28 July 2005 on court proceeding costs in civil law cases, Dz.U. of 2018, item 300, Article 27(9).

resolution is PLN 380.[30] A solicitor's minimum remuneration is the same amount.[31] In case one statement of claim concerns overruling of a few resolutions passed by the sued apartment community, the cost of procedural representation is based on the minimum charge, regardless of the number of resolutions appealed against.[32] The fees do not depend on the value of the object of dispute.

Apartment owners' resolutions may concern property rights of a community or an apartment owner or owners or their non-property rights. There is an established opinion in the Supreme Court case law that the subject matter of the challenged resolution is decisive for the assessment whether a case concerning overruling or determination of inexistence of a resolution of apartment owners is one concerning property rights or non-property rights.[33]

A case concerning overruling of an apartment owners' resolution can be subject to cassation if it concerns non-property rights, and in the cases concerning property rights when the value of the object of dispute is not lower than PLN 50,000.

5. CIVIL LAW SANCTIONS FOR DEFECTIVE RESOLUTIONS PASSED BY APARTMENT OWNERS

It is assumed that there is a sanction of absolute or relative invalidity in relation to resolutions of apartment owners. A sanction of absolute invalidity is the civil law sanction in the precise sense, and in general it means that a legal action does not result in the expected legal effects.[34] Absolute invalidity takes place *ex lege*, is recognised by a court *ex officio* and a court judgment issued is declarative in nature, i.e. it confirms a particular state of things.

The AOA provisions do not stipulate a sanction of absolute invalidity but only a right to appeal (relative invalidity) against apartment owners' resolutions, and only as a result of a court's constitutive judgment. The moment a judgment becomes final, a constitutive nature of the judgment overruling a resolution of apartment owners results in the overruling of the resolution *ex tunc*, i.e. as if the resolution had never been passed.[35]

At present, admissibility of overruling some parts of a resolution of apartment owners does not raise controversy. Pursuant to the provisions of the Commercial Companies Code, the Supreme Court stated that it is admissible to overrule some parts of a resolution of a general meeting of shareholders when the challenged part is autonomous and its content is not connected with the remaining decisions

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[30] Regulation of the Minister of Justice of 22 October 2015 on fees for activities performed by legal advisers, Dz.U. of 2018, item 265, § 8(1.1).

[31] Regulation of the Minister of Justice of 22 October 2015 on fees for activities performed by solicitors, Dz.U. of 2015, item 1800, § 8(1.1).

[32] The Supreme Court resolution of 25 June 2009, III CZP 40/09.

[33] The Supreme Court ruling of 27 February 2001, V CZ 4/01.

[34] A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1998, p. 328.

[35] M. Gutowski, *Wzruszalność czynności prawnej*, Warszawa 2010, p. 236.

of the resolution.[36] The issue was regulated in Article 58 § 3 Civil Code, which is applicable based on Article 1 para. 2 AOA. A resolution of apartment owners can also be overruled in the part in which the decisions do not comply with law, unless the content of the resolution or circumstances indicate that the resolution with no defective decisions would not have been passed at all.[37]

It should also be emphasised that the AOA provisions do not stipulate that a court can oblige apartment owners to pass a resolution with a particular content.[38] However, a management body or a manager can request a court to give consent to perform an activity going beyond the scope of standard management in case there is no consent of the majority of apartment owners. Proceedings before a court are initiated in a non-trial mode and all the apartment owners should be participants of the proceedings. A court adjudicates taking into account the objective of the planned activity and the interests of all the owners.

6. CONCLUSIONS

A court supervises the correctness of the content of or the procedure of passing a resolution by apartment owners in the course of judicial proceedings initiated as a result of legal action taken by an apartment owner. Depending on the type of sanction imposed on a defective resolution, an apartment owner has a choice of lodging a claim to overrule the resolution or to determine invalidity or inexistence of the resolution. The adopted principle that even a resolution appealed against should be implemented if a court does not suspend its implementation until the adjudication of a case protects an apartment community against misuse of the right to appeal against resolutions. At the same time, an apartment owner has sufficient legal measures to efficiently eliminate a defective resolution of apartment owners from legal transactions or obtain a judgment stating its invalidity or inexistence.

It should be noted that apartment owners not only have the right but also an obligation to cooperate in the area of management of common real property. Thus, particular interests of individual owners must be limited to some extent for the common benefit of all the apartment owners. It is justified by subjective and temporary limitation of the right to appeal against the resolutions that are only subject to a sanction of being challenged. Regardless of the statement of claim regulated in Article 25 AOA, an apartment owner, as well as any other entity, can take legal action to determine invalidity of a resolution based on Article 189m CCP in conjunction with Article 58 Civil Code. However, the necessity to prove a legal interest to take such action sufficiently prevents the abuse of the right.

Two fundamental rights of apartment owners: the right to pass resolutions and the right to appeal to a court against them regulate internal relationships in an apartment owners' community that give apartment owners a guarantee of certain, stable, legal and rational common real property management.

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[36] The Supreme Court judgment of 13 May 2004, V CK 452/03.

[37] Judgment of the Court of Appeal in Warsaw of 23 May 2014, I ACa 1757/13.

[38] The Supreme Court judgment of 7 February 2002, I CKN 489/00.

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SUPERVISION OF CORRECTNESS OF APARTMENT OWNERS' RESOLUTIONS

Summary

The article presents the issue of control of apartment owners' resolutions in terms of their correctness. In the author's opinion, the presently binding legal regulations guarantee apartment owners reliable, stable, legal and rational management of their common real property. In the most important matters that are beyond the standard management, there is a statutory obligation to adopt a resolution by the majority vote of apartment owners. Each owner is entitled to appeal against such resolution due to its non-compliance with the provisions of law or the owners' agreement, or if it breaches the principles of appropriate common real property management, or infringes the owners' interests. These statutory safeguards constitute sufficient protection against activities undertaken by the managing body that are in conflict with the interests of most owners or to the detriment of any of the owners.

Keywords: apartment ownership, owners' resolution, appeal, overruling, annulment, inexistence of the resolution

KONTROLA PRAWIDŁOWOŚCI UCHWAŁ WŁAŚCICIELI LOKALI

Streszczenie

W artykule przedstawiono problematykę kontroli prawidłowości uchwał właścicieli lokali. Zdaniem autora obecnie obowiązujące uregulowania prawne gwarantują właścicielom lokali pewne, stabilne, legalne i racjonalne zarządzanie nieruchomością wspólną. W najważniejszych sprawach wspólnot mieszkaniowych, stanowiących czynności przekraczające zakres zwykłego zarządu, obowiązuje ustawowy obowiązek podjęcia uchwały większością głosów właścicieli lokali. Każdy

z właścicieli jest uprawniony do jej zaskarżenia ze względu na niezgodność z przepisami prawa lub z umową właścicieli, albo jeśli narusza ona zasady prawidłowego zarządzania nieruchomością wspólną lub w inny sposób narusza interesy każdego. Te ustawowe gwarancje stanowią dostateczne zabezpieczenie przed podjęciem przez zarząd wspólnoty czynności sprzecznych z interesem większości właścicieli lub z pokrzywdzeniem któregokolwiek z właścicieli.

Słowa kluczowe: własność lokali, uchwała właścicieli, zaskarżenie, uchylenie, unieważnienie, nieistnienie uchwały

EL CONTROL DE LA REGULARIDAD DE LOS ACUERDOS DE PROPIETARIOS DE LOCALES

Resumen

El artículo presenta la problemática del control de la regularidad de los acuerdos de propietarios de locales. Según el autor, la regulación vigente garantiza a los propietarios de locales la gestión segura, estable, legal y racional del inmueble común. En los asuntos más importantes para la comunidad de vecinos que excedan la gestión corriente, existe la obligación legal de adoptar acuerdo mediante la mayoría de votos de propietarios de locales. Cada propietario está legitimado a impugnar el acuerdo debido a infracción de la ley o del contrato entre propietarios o bien cuando infrinja las reglas de gestión correcta del inmueble común o de otra forma infrinja intereses de cada uno. Estas garantías legales protegen suficientemente ante la adopción de acuerdo contrario a los intereses de la mayoría de propietarios o de acuerdo que perjudique a cualquier propietario.

Palabras claves: propiedad de locales, acuerdo de propietarios, impugnación, nulidad, anulabilidad, inexistencia de acuerdo

КОНТРОЛЬ ЗА ПРАВОМЕРНОСТЬЮ РЕЗОЛЮЦИЙ ПРИНИМАЕМЫХ ТОВАРИЩЕСТВАМИ СОБСТВЕННИКОВ

Резюме

В статье рассмотрена проблематика контроля за правомерностью резолюций, принимаемых товариществами собственников. По мнению автора, действующие правовые нормы предоставляют собственникам помещений все возможности для надежного, стабильного, основанного на законе и рационального управления общей собственностью. Согласно законодательству, по наиболее важным вопросам, находящимся в ведении товарищества собственников и выходящим за рамки повседневного управления, требуется принятие резолюции большинством голосов собственников помещений. Каждый из собственников имеет право оспорить такую резолюцию по причине ее несоответствия законодательству или уставу товарищества собственников, а также в случае, если она нарушает принципы правомерного управления общей собственностью либо иным образом ущемляет интересы собственника. Эти законодательные гарантии обеспечивают достаточную защиту от таких действий правления товариществ, которые противоречат интересам большинства собственников либо нарушают интересы любого из собственников.

Ключевые слова: право собственности на помещение, резолюция товарищества собственников, обжалование, отмена, аннулирование, отсутствие резолюции

ÜBERPRÜFUNG DER RICHTIGKEIT DER BESCHLÜSSE DER EIGENTÜMER DER GESCHÄFTSRÄUME

Zusammenfassung

Der Artikel befasst sich mit der Überprüfung der Richtigkeit der Beschlüsse von Eigentümern der Geschäftsräume. Nach Angaben des Autors garantieren die derzeit verbindlichen gesetzlichen Bestimmungen den Eigentümern von Geschäftsräumen eine zuverlässige, stabile, rechtliche und rationelle Verwaltung des gemeinsamen Eigentums. In den wichtigsten Angelegenheiten der Wohngemeinschaften, die Tätigkeiten darstellen, welche über die Rahmen der normalen Verwaltung hinausgehen, besteht die gesetzliche Verpflichtung, einen Beschluss zu fassen mit der Mehrheit der Stimmen der Eigentümer der Räumlichkeiten. Jeder Eigentümer hat das Recht, gegen den Beschluss eine Berufung einzulegen, wenn es gegen das Gesetz oder die Vereinbarung des Eigentümers verstößt oder wenn es gegen die Grundsätze der ordnungsgemäßen Verwaltung des gemeinsamen Eigentums verstößt oder auf andere Weise die Interessen eines jeden verletzt. Diese gesetzlichen Garantien bieten einen ausreichenden Schutz gegen Maßnahmen des Verwaltungsrates, die den Interessen der meisten Eigentümer zuwiderlaufen oder den Eigentümern Schaden zufügen.

Schlüsselwörter: Eigentum an Geschäftsräume, Beschluss der Eigentümer, Berufung, Aufhebung, Kündigung, Nichtvorhandensein des Beschlusses

VÉRIFICATION DE L'EXACTITUDE DES RÉSOLUTIONS DES PROPRIÉTAIRES DE LOCAUX

Résumé

L'article présente la question de la vérification de l'exactitude des résolutions des propriétaires de locaux. Selon l'auteur, les dispositions légales actuellement contraignantes garantissent aux propriétaires de locaux une gestion fiable, stable, légale et rationnelle des biens communs. Dans les questions les plus importantes des communautés de logement, constituant des activités dépassant le cadre de la gestion ordinaire, il existe une obligation légale de voter une résolution par la majorité des propriétaires des locaux. Chacun des propriétaires a le droit d'attaquer une résolution en raison du non-respect de la loi ou de l'accord des propriétaires, ou si elle viole les principes de bonne gestion du bien commun ou viole d'une autre manière les intérêts de chacun. Ces garanties légales assurent une protection suffisante contre toute action du conseil d'administration contraire aux intérêts de la majorité des propriétaires ou portant atteinte à l'un des propriétaires.

Mots-clés: propriété des locaux, résolution des propriétaires, recours, dérogation, annulation, inexistence de la résolution

CONTROLLO DELLA VALIDITÀ DELLE DELIBERE DEI CONDOMINI DEI LOCALI

Sintesi

Nell'articolo è stata presentata la problematica del controllo della validità delle delibere dei condomini dei locali. Secondo l'autore le norme giuridiche attualmente in vigore garantiscono ai proprietari dei locali una sicura, stabile, legale e razionale gestione delle parti comuni degli immobili. Nelle questioni più importanti della gestione condominiale, consistenti in atti eccedenti i limiti dell'ordinaria amministrazione, vige l'obbligo di legge di assumere una delibera con la maggioranza dei voti dei condomini dei locali. Ogni condomino ha il diritto di impugnarla a motivo della non conformità alle norme di legge o al contratto dei proprietari oppure se viola i principi di corretta gestione delle parti comuni degli immobili o in altro modo viola gli interessi di ognuno. Queste garanzie di legge costituiscono una sufficiente tutela contro il compimento, da parte degli amministratori del condominio, di atti contrari all'interesse della maggior parte dei condomini o lesivi nei confronti di uno dei condomini.

Parole chiave: proprietà dei locali, delibera dei condomini, impugnazione, abrogazione, annullamento, inesistenza della delibera

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COMMENTS ON STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

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1. ORIGIN OF FRAMEWORK PROVISIONS CONCERNING PECUNIARY ADMINISTRATIVE PENALTIES

The scope of administrative regulation has now reached the size in which, in general, there are no spheres of social life free from the state interference. Over years, the development of sanctioning solutions has been observed, especially within the range of broadly applied administrative penalties. Due to the repressive nature and painfulness for a party on which administrative penalties are imposed, there were calls for the regulation of general rules of their imposition taking into account conditions excluding a penalty or making it possible to differentiate its scope. The justification indicated legislative shortages leading to phenomena dangerous from the point of view of the protection of human rights and freedoms, in particular due to unequal treatment of entities to be punished based on different provisions.[1] There were opinions that entities that were to incur liability for an administrative tort were in a much worse situation than those who were accused of crime or misdemeanour.[2] The form of substantive and procedural guarantees of administrative penalty imposition was considerably influenced by the so-called "soft" international law, in particular Recommendation No. R (91) 1 of the Council of Ministers to Member States on administrative sanctions adopted on 13 February 1991, and Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities

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1 L. Staniszewska, *Materialne i proceduralne zasady stosowane przy wymierzaniu administracyjnych kar pieniężnych*, [in:] M. Błachucki (ed.) *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa: Biuro Rzecznika Praw Obywatelskich, 2015, pp. 28–29.

2 *Ibid.*, p. 35.

adopted on 28 September 1977.[3] For many years, it has not been possible to develop a coherent legislative conception of the method of establishing administrative sanctions.[4] Regulations concerning administrative sanctions were proposed in Chapter V of the bill entitled "General provisions of administrative law".[5] The bill did not enter the legal system. Another attempt to introduce general provisions concerning the imposition of pecuniary administrative penalties was made by way of the governmental bill entitled "Provisions implementing the Act: Law on business activities". The proposed solutions were to supplement the regulations laid down in the acts of substantive law and constitute *lex generalis* norms in nature. However, the bill was withdrawn from the Sejm. Some public administration bodies (e.g. the President of the Office of Competition and Consumer Protection), in order to influence the application of the provisions on pecuniary administrative penalties, started to apply the recommendations.[6] The next opportunity to introduce general provisions on pecuniary administrative penalties arose in the course of work on the amendment to the Code of Administrative Procedure, which entered into force on 1 June 2017.[7] As there was no better idea[8] for introducing such provisions, the Act of 7 April 2017[9] Part IVa entitled "Pecuniary administrative penalties" was added to the Act of 14 June 1960: Code of Administrative Procedure[10]. It included regulations concerning the rules of imposing pecuniary administrative sanctions, the possibility of withdrawing from their imposition, especially in justified circumstances, norms that were inter-temporal in nature, regulations concerning concurrence of sanctions as well as the limitation period for their establishment and execution. It should be highlighted that the introduction of substantive and formal normative solutions only within the scope of imposing pecuniary administrative penalties is insufficient. Indeed, one cannot forget about regulating also the rules of application of other administrative sanctions that are non-pecuniary, connected with the so-called negative regimentation (e.g. the withdrawal of a permission, the expiry of rights, the prohibition on applying for a permission or licence for a fixed period), which are not less painful than pecuniary administrative penalties.

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[3] T. Jasudowicz, *Administracja wobec praw człowieka,* Toruń: Dom Organizatora TNOiK, 1996, pp. 129–132.

[4] M. Błachucki, [in:] M. Błachucki (ed.), *supra* n. 1, p. 7.

[5] https://www.rpo.gov.pl/pliki/12059280660.pdf (accessed 7.7.2018).

[6] M. Błachucki, *Wytyczne w sprawie nakładania administracyjnych kar pieniężnych (na przykładzie wytycznych wydawanych przez prezesa UOKiK)*, [in:] M. Błachucki (ed.), *supra* n. 1, p. 43.

[7] It should be stipulated that in relation to the proceedings instigated and not concluded with a final decision or ruling before 1 June 2017, the provisions of the Code of Administrative Procedure in the former wording should be applied; however, the provisions concerning mediation should be applied in those proceedings (see Article 16 of the Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts).

[8] It can be considered whether it would be better to introduce the regulations concerning pecuniary administrative penalties into the Act of 27 August 2009 on public finance, consolidated text, Dz.U. of 2017, item 2077, as amended; hereinafter APF.

[9] Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts, Dz.U., item 935.

[10] Consolidated text, Dz.U. of 2017, item 1257, as amended; hereinafter CAP.

2. COMMENTS IN THE LIGHT OF STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

The concept of an administrative penalty often constitutes a shorthand, which is identified with a pecuniary administrative penalty. In fact, a pecuniary penalty is imposed, without adjudication of guilt, for objectively unlawful conduct for which liability is incurred *ex lege*. The study of administrative penalties in general looks for three elements that do not exclude one another: repression, compensation and compulsion.[11] The Constitutional Tribunal indicated that "the essence of pecuniary administrative penalties consists in stimulating entities to perform their duties towards the state timely and properly".[12] Taking into consideration the output of the doctrine and the practice of law application, the legislator introduced a legal definition of a pecuniary administrative penalty, which should be understood as "a pecuniary sanction determined in statute, imposed by a public administration body in the form of a decision as a result of the infringement of law consisting in failure to fulfil an obligation or the violation of a ban imposed on a natural person, a legal person or an organisational unit that does not have legal personality" (Article 189b CAP).

Before the amendment entered into force, the imposition of administrative penalties had been largely automatic. As a result of the introduction of Article 189f to the Code of Administrative Procedure, at the stage of imposing a penalty, administrative bodies are obliged to abandon it in certain circumstances. A party to the proceedings should not be punished in case the infringement of law results from force majeure (Article 189e CAP). If the infringement is of insignificant weight and a party stops violating law or the punishment might lead to a breach of the *ne bis in idem* principle, an administrative body is obliged to issue a decision on abandoning the imposition of a pecuniary administrative penalty and let a party off with a caution. Insignificance of the infringement can occur, e.g. when an act committed does not result in a threat to safety, health and life of other people, it does not cause damage or the protected legal interest (public roads, the environment, etc.) has not been harmed and, moreover, the party concerned has stopped violating law. In order to recognise the weight of the infringement of law as insignificant, it is necessary to consider the circumstances that have resulted in an administrative tort rather than the penalty amount.

In accordance with Article 189f § 1(2) CAP, a public administration body is obliged to abandon the imposition of a pecuniary administrative penalty and be satisfied with a caution, in a form of a decision, if "a final pecuniary administrative penalty was imposed on the party for the same conduct by another authorised public administration body or the party was punished for a misdemeanour or a fiscal misdemeanour, or was sentenced for an offence or a fiscal offence and the former penalty fulfils the aim for which a pecuniary administrative penalty

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[11] L. Klat-Wertelecka, *Sankcja egzekucyjna w administracji a kara administracyjna*, [in:] M. Stahl, R. Lewicka, M. Lewicki, *Sankcje administracyjne*, Warszawa: Wolters Kluwer Polska, 2011, p. 70.

[12] Judgment of the Constitutional Tribunal of 1 March 1994, U 7/93, LEX No. 25109.

would be imposed". The provision is to prevent double punishment for the same conduct (*ne bis in idem*), inter alia, in the case of the concurrence of a penal sanction and an administrative penalty. While the legislator's assumption in the area can be recognised as noble, individuals who tend to infringe law and circumvent its provisions use the provision to reduce a sanction for a prohibited act. Justifying the need to introduce the solutions laid down in Article 189f § 1(2) CAP, the authors stated that pecuniary administrative penalties are often higher than a fine that can be imposed for the same conduct. In case the same act carries both criminal and administrative liability, it happens that perpetrators of an act that is subject to a sanction calculate which liability, criminal or administrative, will be favourable. Then they self-denounce their violation to law enforcement agencies, request the highest possible penalty and then, if penal administrative proceedings are instigated, they refer to Article 189f § 1(2) CAP and provide evidence of their former punishment or conviction for the same conduct. It should be highlighted that the final part of the provision contains a condition according to which an administrative body should abandon the imposition of a penalty in situations specified therein if the former penalty fulfils the aims for which a pecuniary administrative penalty would be imposed. It should be noticed that the use of a general clause might raise problems in public administration bodies' adjudication practice.

It was also decided to introduce optional abandonment of the imposition of a penalty to the amended CAP. If it turns out that there are no circumstances necessary for obligatory abandonment of the imposition of the above-mentioned penalty (e.g. the weight of the infringement cannot be recognised as insignificant), an administrative body can request a party, in the form of a decision, to eliminate the infringement in a fixed time limit or to notify entities concerned of the infringement of law in a fixed mode and time limit. Optional abandonment of the imposition of a penalty requires the conviction that the elimination of the consequences of conduct infringing law will make it possible to fulfil the aims for which a pecuniary administrative penalty would be imposed. It cannot be ignored that the provisions on the abandonment of the imposition of a penalty can be applied regardless of whether a penalty is specified as a fixed one or based on a "from … to …" limit.

Abandoning the imposition of a penalty should be distinguished from concluding administrative proceedings in a situation when an infringement results from force majeure (Article 189e CAP) because the form of the proceedings is different. Abandonment of the imposition of a penalty takes place by way of an administrative decision which is issued in accordance with Article 189f § 1 or 3 CAP and is constitutive in nature,[13] while in case the infringement of law results from force majeure, administrative proceedings should not be initiated at all. However, when they start and the influence of force majeure is recognised, the proceedings concerning the imposition of an administrative penalty should be discontinued as

[13] M. Strączek, *Kary administracyjne – analiza prawnoporównawcza stanu prawnego sprzed i po nowelizacji Kodeksu postępowania administracyjnego z 2017 roku*, [in:] A. Gronkiewicz, A. Ziółkowska (eds), *Nowe instytucje procesowe w postępowaniu administracyjnym w świetle nowelizacji Kodeksu postępowania administracyjnego z dnia 7 kwietnia 2017 roku*, Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2017, p. 354.

irrelevant based on Article 105 § 1 in conjunction with Article 189e CAP. The concept of "force majeure" has no legal definition. It is interpreted in jurisprudence as an event that is random or natural, impossible to avoid, one that a human being cannot control. Most often, these are natural disasters as well as extraordinary disruptions of community life such as a war or civil riots.[14] In order to apply Article 189e CAP, there must be a causal relationship between force majeure and the infringement of law.

Due to the protection of safety and stability of legal transactions, the legislator decided to introduce provisions regulating time limitation for the imposition of a penalty and its execution to the amended Code of Administrative Procedure. In accordance with Article 189g § 1 CAP: "A pecuniary administrative penalty cannot be imposed five years after the date of the infringement of law or the occurrence of the consequences of the infringement of law". "A pecuniary administrative penalty shall not be subject to execution after five years from the date when it should have been executed" (Article 189g § 3 CAP).

The statute of limitations concerning pecuniary administrative penalties (Article 189g § 1 CAP), interest rates for default in pecuniary administrative penalty payment (Article 189i CAP), and concessions in the execution of a pecuniary administrative penalty (Article 189k CAP) were regulated before the amendment to the Code of Administrative Procedure. Pecuniary administrative penalties are public resources constituting non-tax budgetary receivables within the meaning of the Act on public finance (Article 60 para. 6 APF).[15] There is a problem arising here connected with the relationship between regulating the statutory pecuniary administrative penalties and norms laid down in the Act on public finance. On the one hand, with the amendment of CAP, para. 2 was added to Article 67 APF, which stipulates: "The provisions of the Act of 14 June 1960: Code of Administrative Procedure shall be applicable to cases concerning pecuniary administrative penalties." On the other hand, Article 189a § 2 CAP provides for subsidiarity of code regulations, which is reflected in the application of the provisions of the Code when other regulations do not envisage solutions within the scope regulated in the CAP provisions. Moreover, the possibility of applying, by analogy to pecuniary administrative penalties, substantive law[16] provisions of Part III TL[17] (Article 67 para. 1 APF), where there are, inter alia, regulations concerning limitations (Chapter 8), interest for default (Chapter 6), and concessions (Chapter 7a), has not been outright excluded. Chapter 7a TL, however, is not applicable to pecuniary administrative penalties because the provisions of Part III TL are applicable by analogy only to cases concerning, inter alia, pecuniary administrative penalties that

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[14] A. Wyszomirska, *Siła wyższa*, http://www.gazetaprawna.pl/encyklopedia/prawo,hasla-,345402,sila-wyzsza.html (accessed 7.7.2018).

[15] See the Supreme Administrative Court judgment of 18 March 1999, I SA/Po 1565/98, LEX No. 37217; see the Supreme Administrative Court judgment of 18 August 2016, II OSK 2913/14, LEX No. 2142399.

[16] *Art. 67*, [in:] P. Walczak (ed.), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych*, 2017, https://legalis.pl (accessed 7.6.2018); M. Bitner, *Art. 67*, [in:] W. Misiąg, *Ustawa o finansach publicznych*, 2017, https://legalis.pl/ (accessed 7.6.2018).

[17] Act of 29 August 1997: Tax Law, consolidated text, Dz.U. of 2018, item 800, as amended; hereinafter TL.

are not regulated in APF (Article 67 para. 1 APF). However, Article 64 APF provides an independent basis for the same concessions that are regulated in the Code of Administrative Procedure.[18] Thus, within the scope of concessions, Article 64 APF has priority over Article 189k CAP. Comparing the provisions of the Tax Law, the Act on public finance and the Code of Administrative Procedure, one can notice that they are not identical. For example, unlike CAP, APF stipulates a possibility of cancelling an amount *ex officio* (Article 64 para. 1(1) APF). Taking into account the circumstances of the introduction of Article 67 para. 2 APF (the introduction of the provision together with the provisions on pecuniary administrative penalties to CAP), one can suppose that the legislator's intention was to exclude the application of the TL provisions to pecuniary administrative penalties, i.e. the TL provisions that have their counterparts in Part IVa CAP. However, the edition of Article 67 APF in conjunction with Article 189a § 2 CAP does not unequivocally allow stating that. Moreover, it is intriguing why the legislator decided to make a double reference to the application of the CAP provisions in relation to pecuniary administrative penalties: first in Article 67 para. 1 APF and second in Article 67 para. 2 APF. Reference to the application of CPA made in Article 67 para. 1 APF concerns proceedings, i.e. it means an obligation to apply provisions concerning instigation of proceedings, evidence taking, decisions, rulings, invalidation of final decisions, exclusion of an employee and exclusion of an administrative body in relation to pecuniary administrative penalties.[19] The question why there is a separate reference to the application of CAP to pecuniary administrative penalties made in Article 67 para. 1 APF remains without answer. Assuming that the legislator is rational, it is necessary to state that it was a thought-out decision. Thus, it was due to the consideration that the provisions of Part IVa CAP include substantive law regulations, thus the reference under Article 67 para. 1 APF to the application of CAP would not be applicable therein. It is possible to hypothesise that reference under Article 67 para. 2 APF concerns the substantive law issues. A question about the sense of introducing the CAP provisions on administrative penalties that correspond to the provisions of APF and TL still remains unanswered. If Article 189a § 2 CAP excludes the application of Part IVa CAP in relation to the issues regulated in separate provisions, i.e. the provisions of Part III TL and APF, the CAP provisions are not applied in this scope automatically. Thus, are these a dead letter? It is necessary to look for a rational solution to the presented problem in cases where the provisions of special acts ("trade-related" ones) exclude the application of TL,[20] do not exclude the application of Part IVa CAP and do not contain regulations analogous to the issues regulated in

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[18] See D. Gregorczyk, *Administracyjne kary pieniężne w nowelizacji Kodeksu postępowania administracyjnego,* [in:] A. Gronkiewicz, A. Ziółkowska (eds), *supra* n. 13, p. 388.

[19] *Art. 67*, [in:] P. Walczak (ed.), *supra* n. 16; M. Bitner, *Art. 67*, [in:], W. Misiąg, *supra* n. 16.

[20] In case the special provisions excluded the application of APF, they would also exclude the application of Part III TL by analogy to pecuniary administrative penalties because TL is applicable with the reference made in Article 67 para. 1 APF. It should be noted that the special provisions excluding the application of TL exclusively, not excluding the application of Part IVa CAP and not containing regulations concerning the issues regulated in Part IVa CAP, do not mean that all the provisions of Part IVa CAP are applicable. For example, Article 64 APF is applicable instead of Article 189k CAP.

Part IVa CAP. For example, one can quote Article 93 para. 7 and Article 94 para. 9 of the Act of 6 September 2001 on road transport,[21] and Article 281 para. 3 of the Law on environment protection[22].

One can take different stands. First, Article 67 para. 2 APF is a provision excluding the application of not only the TL provisions but also the APF provisions in relation to pecuniary administrative penalties. However, the opinion seems to be too far-reaching, in particular, because of the subsidiary nature of the provisions of Part IVa CAP. Second, only those TL provisions that have no counterparts in CAP should be applied to pecuniary administrative penalties. The CAP provisions are, in fact, better adjusted to pecuniary administrative penalties and they can be directly applied, while the TL provisions are developed for the purpose of tax dues and not administrative penalties. That is why, their application by analogy is difficult. Moreover, taking into account the circumstances of adding Article 67 para. 2 APF (together with the introduction of the provisions on administrative penalties to CAP) as well as the edition of Article 67 para. 1 and Article 67 para. 2 APF, one can consider a possibility of giving primacy to the application of Part IVa CAP in relation to administrative penalties. Article 67 para. 1 APF concerns "dues referred to in Article 60 APF", i.e. inter alia revenue obtained by the state and self-government budgetary units based on separate provisions (Article 60(7) APF), which contain pecuniary administrative penalties. Article 67 para. 2 APF refers directly to pecuniary penalties. Such justification, however, seems to be insufficient to unequivocally state that the TL provisions should give primacy to the CAP provisions.

Attention should still be drawn to the fact that Part III TL covers regulations that have no counterparts in Part IVa CAP. In those cases, there are no doubts concerning the possibility of applying the provisions of Part III TL. The doubts can arise only in connection with the interpretation of the application by analogy of those provisions in relation to pecuniary administrative penalties.

Taking the above into account, one can state with no doubt only that in the collision between the provisions concerning administrative penalties laid down in CAP, TL and APF, the Code of Administrative Procedure should give primacy to the provisions of the Act on public finance concerning concessions (Article 189k CAP should give primacy to Article 64 APF). It seems that in the case of limitation of the imposition and execution of an administrative penalty, the CAP provisions (Article 189g CAP) should be applied and not the TL or APF provisions. In case the running of the limitation period is suspended (Articles 189h and 189j CAP), the provisions of Part III TL applied by analogy should be given primacy. The interest for default should be calculated in accordance with Article 189i APF. The above-presented statements require justification.

The statute of limitations was regulated in the Tax Law before the introduction of Part IVa to the Code of Administrative Procedure. In the adjudication practice and literature of the time, there were different stands on the possibility of applying

[21] Consolidated text, Dz.U. of 2017, item 2200, as amended.

[22] Act of 27 April 2001: Law on environment protection, consolidated text, Dz.U. of 2018, item 799, as amended.

the limitation applicable to the imposition of tax dues to administrative penalties. According to the dominating approach, the provisions were not applicable; thus, there were no cases of limitation to the imposition of administrative penalties. The current legal state leaves no doubt that the possibility of imposing administrative penalties is subject to the statute of limitations. Therefore, it cannot be recognised that after the CAP amendment, the solution to the collision between the TL and CAP provisions concerning limitation is primacy given to the former. This is so because they have never been applied to administrative penalties. Therefore, Article 189g § 1 CAP constitutes the legal basis for limitation to the imposition of administrative penalties (in the absence of special regulations). The correctness of this stand can be supported by an explanation that by introducing the provisions on pecuniary administrative penalties to CAP, the legislator took into account the fact that an individual and his/her legal situation in the field of relationships with administrative bodies constitute the main and also central point of the whole study of administration. Solutions prescribed in the Code of Administrative Procedure were introduced, inter alia, because of the necessity to soften the harmfulness resulting from administrative penalties. Declaring the application of primarily the TL provisions to calculate the limitation period would result in the adoption of a solution less favourable for a party. This is due to Article 70 § 1 TL,[23] which stipulates: "Due tax is subject to limitation after five years from the end of calendar year when the payment deadline expired." On the other hand, the provision of Article 189g CAP stipulates: "A pecuniary administrative penalty cannot be imposed in case the time of five years has passed from the date of the infringement of law or the occurrence of the consequences of the occurrence of law." Thus, it is more favourable for a party. The so-called zero-year is not laid down. Taking into account the *in dubio pro libertate* principle (doubts interpreted to the benefit of a party) and the fact that the TL provisions concerning limitation are strictly adjusted to tax dues, while administrative penalties are absolutely not such ones, it should be recognised that in the case the issues of limitation are not regulated in trade-related acts, Article 189g CAP (and not analogous TL provisions) should be applied. The situation with limitation in administrative penalties execution is similar. Article 189g § 3 CAP should be applied.

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[23] Recognising that the TL provisions should be given primacy in respect of pecuniary administrative penalties, only Article 70 § 1 TL in conjunction with Article 67 para. 1 APF in conjunction with Article 189g § 3 CAP might be applicable. It should be noted that there is an opposite opinion, according to which limitation of the penalty for the occupation of a road lane should be based on Article 68 § 1 TL in conjunction with Article 67 para. 1 APF; compare M. Węgrzyn, *Przedawnienie administracyjnej kary pieniężnej za zajęcie pasa drogowego bez zezwolenia*, Nowe Zeszyty Samorządowe Opinie Prawne No. 6, 2016, p. 75. However, it should be noted that Article 189g § 1 CAP can be compared to the solutions adopted in Article 68 § 1 TL and Article 70 § 1 TL. The statute of limitations concerning the right to determine tax dues (Article 68 § 1 TL) is binding only for the dues that come into being as a result of a delivered tax decision (Article 21 § 1(2) TL). The statute of limitations in relation to tax dues (Article 70 § 1 TL) is applicable not only to those dues (Article 21 § 1(2) TL), but also to liabilities that come into being as a result of an event to which Tax Law links the liability (Article 21 § 1(1) TL). Thus, the regulation adopted in Article 189g § 1 corresponds to the regulation in Article 70 § 1 TL.

The Code of Administrative Procedure regulates the limitation period (Article 189g CAP) as well as interruption or suspension of the running of limitation (Article 189h and Article 189j CAP). The issues are also reflected in the TL provisions (Article 70 §§ 2–8 and Article 70a–Article 70d TL). It is justified to ask a question about primacy concerning the application of the provisions on interruption or suspension of the running of limitation. Taking into account that the solutions adopted in Part III TL are different from and more detailed than those in CAP, one should assume the primacy of TL (not CAP) provisions.

Since the CAP amendment, introducing inter alia Article 189i CAP, entered into force, in the absence of different regulations, interest for default should be calculated. The introduction of this provision causes that even if the provisions of other statutes do not stipulate the necessity of calculating interest, at present it is obligatory. Thus, a problem arises with the interpretation of transitional provisions. In accordance with them, the CAP provisions in the wording before the amendment entered into force should be applied in administrative proceedings instigated and not concluded with the issue of a final decision or ruling before the date the amendment entered into force. There are no doubts that if proceedings concerning the imposition of an administrative penalty had been instigated and concluded before the amendment to CAP entered into force (1 June 2017), interest for default in penalty payment should not be calculated (unless special provisions stipulate otherwise). However, it is not clear whether the transitional provision is also applicable to execution proceedings. It seems that it is not. Thus, in case of failure to timely pay an administrative penalty due before the CAP amendment entered into force, the creditor is obliged to calculate interest from the moment the CAP amendment entered into force until the due amount is paid.

Before the CAP amendment, pecuniary administrative penalties amount did not depend on the circumstances of the conduct for which the statute stipulated a sanction. This changed on 1 June 2017. Now, a public administration body imposing a pecuniary administrative penalty is obliged to take into account a series of factors that might have a softening or aggravating influence on the amount of penalty pursuant to Article 189d CAP. The directives on a penalty amount that make it possible to weigh the painfulness of a sanction to a perpetrator cannot be applied in every case. Such body can take the decision on the amount of penalty when the provisions regulate the size of penalties as relatively fixed (framework ones, not exactly fixed). This concerns the phrasing like "An administrative penalty shall be from PLN 100 to PLN 50,000".

In comparison with the solutions known in criminal law, the new transitional provision was introduced to CAP, in accordance with which: "If in the course of issuing a decision concerning a pecuniary administrative penalty, a statute in force is different from the one in force at the time of the infringement of law for which a penalty is to be imposed, the new statute shall be applied; however, the statute that was in force before shall be applied if it is favourable to a party" (Article 189c CAP).

The imposition of an administrative penalty, regardless of whether it was before the amendment or takes place now, does not depend on guilt; it is objective in nature.[24] It does not depend on a perpetrator's awareness, either.[25]

In order to protect entities against negative consequences of prompt and single payment of a pecuniary administrative penalty that is too high in relation to their current financial resources, Article 189k CAP was introduced which lays down a possibility of granting pecuniary administrative penalty concessions. It is based on an arbitrary decision and its application requires that the party concerned should file a respective motion. The granting of a concession requires that it must be justified by a grave public interest or a grave interest of a party. It should be highlighted that an administrative body that has imposed a pecuniary administrative penalty can grant a concession at the stage of its execution and not in the course of taking a decision on its imposition. Article 189k CAP is applicable to administrative penalties that are not subject to the Act on public finance or the Tax Law. Developing the provision, the legislator assumed that granting concessions should not constitute interest-free credit.[26]

3. LEGAL NATURE OF A PENALTY FOR THE OCCUPATION OF A ROAD LANE AFTER THE CAP AMENDMENT

The occupation of a road lane for the purpose that is not related to the road construction, reconstruction, repair, maintenance and protection requires a permission issued by the road manager in the form of an administrative decision. The permission is not required in case an adequate civil law contract referred to in Article 22 paras 2, 2a and 2c APR[27] has been entered into.

The prohibited interference into a road lane is connected with the necessity of raising a penalty for the occupation of a road lane (Article 40 para. 12 APR). The time limit for its payment is 14 days from the date when the decision establishing the amount acquires validity in law (Article 40 para. 12 APR). The penalty is ten times higher than the fee for the occupation of a road lane. The fee for the occupation of a road lane is a calculation of the number of square metres of the occupied area multiplied by the rate per 1 m² of a road lane and the number of days of the

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[24] M. Jabłoński, *Komentarz do art. 189b k.p.a.*, [in:] M. Wierzbowski, A. Wiktorowska (eds), *Kodeks postępowania administracyjnego. Komentarz*, https://legalis.pl/ (accessed 7.6.2018); compare D. Gregorczyk, *supra* n. 18, p. 385: the author, commenting on Article 189f CAP, states that in this case the basis for administrative liability is changed from an objective into subjective one.

[25] Judgment of the Voivodeship Administrative Court in Gliwice of 14 May 2015, II SA/Gl 117/15, LEX No. 1733621; compare the judgment of the Voivodeship Administrative Court in Szczecin of 26 May 2011, II SA/Sz 89/11, LEX No. 1607058.

[26] M. Niezgódka-Medek, M. Szubiakowski, *Przepisy dotyczące kar administracyjnych (art. 260g–260n)*, [in:] Z. Kmieciak (ed.), *Raport zespołu eksperckiego z prac w latach 2012–2016. Reforma prawa o postępowaniu administracyjnym*, Warszawa, Naczelny Sąd Administracyjny, 2017, p. 240.

[27] Act of 21 March 1985 on public roads, consolidated text, Dz.U. of 2017, item 2222, as amended; hereinafter APR.

occupation.[28] The fee for the occupation of 1 m² of a road lane is determined by the Minister of Transport in the form of a regulation concerning roads managed by the General Director for National Roads and Motorways (Article 40 para. 7 APR). For roads managed by the local self-government units, the rate per 1 m² of the road lane occupation is determined by the decision-making body of the self-government unit in the form of a resolution (Article 40 para. 8 APR). A penalty for occupation of a road lane is fixed (it is definitely determined).

It is hard to ignore the aspect of continuity of a permit to occupy a road lane, which is temporary in nature. When a party wants to prolong the period, a new successive application is required. The law does not prescribe the possibility of renewing the former permit.[29] In fact, when the permit expires and a party awaits a new one, the occupation of the road lane is not allowed. Remaining within the area, a party commits a prohibited act. Before the introduction of general provisions on pecuniary administrative penalties to the Code of Administrative Procedure, an administrative body was obliged to impose a penalty covering the period. At present, an administrative body should consider the possibility of abandoning the imposition of a pecuniary administrative penalty for the occupation of a road lane, in accordance with Article 189f § 1(1) or Article 189f § 2 CAP. Although in fact a party occupies a road lane illegally at the time between the expiry of the former permit and the issue of a new one, obtaining a new permit can be recognised as stopping the infringement of law, which allows the application of the above-mentioned CAP provisions. The regulations can also be applied to factual situations taking place before the introduction of the general provisions on administrative penalties to the Code of Administrative Procedure. In accordance with the transitional provision, in relation to administrative proceedings instigated and not concluded with a final decision or ruling before 1 June 2017, the provisions of the Code of Administrative Procedure in the former wording are applied; however, the provisions on mediation are applied to those proceedings.[30] Thus, the date of instigating penal administrative proceedings is decisive. Therefore, although the infringement of law and the taking of evidence took place before the CAP amendment, in case penal administrative proceedings started after that date, it is possible to apply Article 189f § 1(1) or Article 189f § 2 CAP.

There is no doubt that Articles 189c, 189e and 189f CAP are applicable to a penalty for the occupation of a road lane.

Making comments on Article 189c CAP, attention should be drawn to the fact that adopting the criminal law principle of applying a new statute or the one that is more favourable to a perpetrator laid down in Article 4 § 1 CC,[31] and not taking

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[28] The detailed method of calculating the amount of the fee for the occupation of a road lane is laid down in Article 40 paras 4–6 APR.

[29] Judgment of the Voivodeship Administrative Court in Warsaw of 17 April 2008, VI SA/Wa 1290/07, LEX No. 511411.

[30] Article 16 of the Act of 7 April 2017 amending the Act: Code of Administrative Procedure and some other acts, Dz.U., item 935.

[31] Act of 6 June 1997: Criminal Code, consolidated text, Dz.U. of 2017, item 2204, as amended; hereinafter CC; the principle is also expressed in Article 24 para. 1 of the Act of

into account the specifics of administrative law, the legislator confined themselves to the statute-like legal acts and did not recognise that the wording of legal acts of a different rank is decisive when determining the amount of an administrative penalty, e.g. it can be a resolution or a regulation establishing the rates for the occupation of a road lane. Based on the literal interpretation of the provision, it should be recognised that the change of the rate per 1 m² of a road lane in the course of the proceedings concerning the imposition of a penalty for the occupation of a road lane continues to result in the application of the rates that were binding on the date of issuing the decision, even if they were higher than the rates at the time of the infringement of law.[32] In accordance with case law, the concept of "statute" should be interpreted as the whole legal state within the sense of substantive law that determines the legal situation of a perpetrator.[33] In conclusion, it should be assumed that a resolution (or a regulation) determining the rates for the occupation of 1 m² of a road lane is included under Article 189c CAP.

The introduction of Article 189e CAP should be recognised as the legislator's good move. In the legal state before the amendment, there were bizarre situations in which, e.g. as a result of a strong wind, a house roof was blown onto a road lane. What is natural, a party did not have a permission to exclusively occupy a road lane, thus an administrative body was obliged to impose an administrative penalty for the occupation of the road lane. In the current legal state, if an administrative body has evidence confirming the occurrence of force majeure before the instigation of penal administrative proceedings, it should not instigate the proceedings at all. In case a body establishes that a road lane was unlawfully occupied as a result of force majeure in the course of penal administrative proceedings, the whole administrative proceedings should be discontinued, in accordance with Article 105 in conjunction with Article 189e CAP.

The provision of Article 189f can be applied, e.g. to frequent cases of real property sale. It happens that sellers of real property have a permit to occupy a road lane, e.g. for the purpose of placing technical infrastructure devices there, although these are not connected with the need to manage roads or traffic needs. The buyer who does not apply for an adequate permit occupies the road lane illegally. Before the introduction of the provision, the abandonment of the imposition of a penalty for the occupation of a road lane was not possible. In the current legal state, if it is evident that a party is unaware, this can constitute grounds for such a decision. Moreover, in doubtful situations, first-instance bodies taking a decision on imposing a penalty for the occupation of a road lane should justify it by explaining that

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17 December 2004 on liability for the infringement of public finance discipline, consolidated text, Dz.U. of 2017, item 1311, as amended.

[32] Compare the judgment of the Voivodeship Administrative Court in Warsaw of 10 October 2014, VI SA/Wa 1203/14, LEX No. 1553865, where the Court noted that the application of the new law introducing higher rates for the occupation of a road lane in relation to the plaintiff, in the absence of adequate transitional provisions, constituted the violation of the *tempus regit actum* principle.

[33] See the Supreme Court judgment of 1 July 2004, II KO 1/04, LEX No. 121666; the Supreme Court judgment of 4 July 2001, V KKN 346/99, LEX No. 51679; the decision of the Court of Appeal in Katowice of 16 October 2013, II AKa 607/13, LEX No. 1422457.

they considered the possibility of abandoning the imposition of a penalty but they did not find grounds for that. In case of a dispute concerning the lawfulness of an administrative decision before a higher-instance body, such an element of justification can strengthen the stand adopted by the first-instance body. If the first-instance body imposed an administrative penalty in a doubtful situation and did not present the above-mentioned justification, the second-instance body could quash the decision and refer it for re-examination, due to the fact that the first-instance body did not examine whether there were grounds for abandoning the imposition of a penalty.

Because of the subsidiary nature of the regulation included in Part IVa CAP, not all the provisions of the Code are applicable to the penalty for the occupation of a road lane. Article 40d para. 3 of the Act on public roads stipulates a five-year limitation period for the obligation to pay a penalty for the occupation of a road lane starting from the end of a calendar year when the penalty should be paid. This norm constitutes a separate provision within the meaning of Article 189a § 2 CAP, which decides on non-application of Article 189g § 3 CAP in this respect. On the other hand, the Act on public roads does not contain a special provision determining the time limit for adjudicating in the case concerning the imposition of a penalty. Therefore, for reason of general comments on administrative penalties already made, it should be recognised that the application of Article 189g § 1 CAP is possible in this case. Article 189i CAP cannot be applied because of the separate regulation of the issue of interest for default in the payment of a due administrative penalty in Article 40d(1) APR. Article 189k CAP is not applicable to a penalty for the occupation of a road lane, either, because of the regulation of the issue of concessions in the execution of a pecuniary administrative penalty in Article 64 APF. Due to the fact that a penalty for the occupation of a road lane is a definitely fixed penalty, the provisions on determining pecuniary administrative penalties (Article 189d CAP) cannot be applied to it. The only possibility to be considered is the application of Articles 189h and 189j CAP. It seems that in the case of the interruption of the running of the limitation period (Articles 189h and 189j CAP), primacy should be given to the provisions of Part III TL applied by analogy.

4. CONCLUSIONS

Evaluating the introduction of the regulation concerning pecuniary administrative penalties to the Code of Administrative Procedure, one can have mixed feelings. On the one hand, the legislator decided to add Part IVa CAP in order to limit automatic and excessively rigorous imposition of pecuniary administrative penalties by the introduction of grounds for moderation of the liability of an individual who commits an administrative tort unintentionally. From this point of view, the regulation should be recognised as accurate. However, the phrasing of the provisions that, in some circumstances, allow evading penal administrative liability carries a risk of abuse of the solutions by entities that tend to infringe and evade law. Parties often

consciously calculate the profitability of violating law with a chance of evading penal administrative liability.

The sphere of the statutory regulation that cannot be evaluated positively is the lack of clarity concerning the application of Part IVa CAP in relation to the regulation of the same matter in separate provisions, in particular in the Tax Law. Based on the literal interpretation of just Article 67 para. 2 APF, one can have an impression that the legislator only aimed at applying the TL provisions to pecuniary administrative penalties because of the introduction of a general solution to CAP. A systemic approach, especially the comparison of the APF and TL provisions with Article 189a § 2 CAP, does not allow unequivocal adoption of such a solution. It indicates a possibility of using a rating based on which a substantive law regulation concerning administrative penalties included in trade-related statutes should be applied first. Next, attention should be drawn to the Act on public finance. Then, it is necessary to take into account the Tax Law provisions. The provisions of the Code of Administrative Procedure should be applied last in the rating. This solution finds support in the course of reasoning based on the criterion of the chronological order of passing legal acts. As the APF and TL provisions had entered into force before the provisions of Part IVa CAP, and taking into account that the CAP provisions are subsidiary, the TL and APF provisions should be given priority. If the criterion of hierarchy of legal acts is adopted as the basis of reasoning, then it turns out that both APF and TL are at the same level.

The adjustment of the provisions of Part IVa CAP precisely to the issue of pecuniary administrative penalties would support the recognition of the Code of Administrative Procedure (not the Tax Law) as a basic act in relation to pecuniary administrative penalties.

The issue of the relation between the statutory regulation of pecuniary administrative penalties and the TL and APF provisions will undoubtedly become the subject matter of administrative and judicial adjudication and a discussion in the doctrine. Article 67 APF in conjunction with Article 189a § 2 CAP are so unclear that it seems that the right solution would be a normative change of Article 67 APF by indicating *expressis verbis* non-application of the TL provisions, and possibly APF (if we assume that the legislator did not want the TL and APF provisions to be applied to pecuniary administrative penalties), to pecuniary administrative penalties, or listing which TL provisions should be granted primacy in the field of administrative penalties. Otherwise, there will probably be considerable adjudicating discrepancies, which may result in the necessity of the Supreme Administrative Court's passing an abstract resolution in the matter. It seems that the solution consisting in the exclusion of application of Part III TL provisions that correspond to the provisions of Part IVa CAP would facilitate the application of law in the field, first of all, because of the adjustment of the Part IVa CAP provisions to the specifics of pecuniary administrative penalties.

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COMMENTS ON STATUTORY REGULATION OF ADMINISTRATIVE PENALTIES

Summary

Due to the repressive nature and painfulness of pecuniary administrative penalties, the legislator decided to regulate general rules of their imposition. The framework regulations in the field were introduced to the Act of 14 June 1960: Code of Administrative Procedure. These are applicable only when separate provisions do not contain special solutions. This causes a critical practical problem concerning the relationship between the general provisions of Part IVa CAP and the provisions of special statutes. The article aims to present the origin of the general provisions concerning pecuniary administrative penalties, to draw attention to the most important aspects of the application of new regulations with the use of examples illustrating a penalty for the occupation of a road lane, and to propose a solution to the conflict in the relationship between the application of the Act on public finance, the Tax Law and the Code of Administrative Procedure in relation to administrative penalties. The phrasing of the provisions is unclear and poses a risk of considerable adjudicating discrepancies, which will create a necessity to pass an abstract resolution concerning this issue by the Supreme Administrative Court. The author uses an analytic-dogmatic and empiric-legal research method in the article.

Keywords: application of penalties, *res iudicata*, amendment to the Code of Administrative Procedure, sanction, obligation

REFLEKSJE NA TEMAT KODEKSOWEJ REGULACJI KAR ADMINISTRACYJNYCH

Streszczenie

Ze względu na represyjny charakter i dolegliwość administracyjnych kar pieniężnych, ustawodawca zdecydował się na unormowanie zasad ogólnych ich wymierzania. Regulacje ramowe w tym zakresie zostały wprowadzone do ustawy z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego. Są one stosowane jedynie wówczas, gdy przepisy odrębne nie zawierają szczególnych rozwiązań. Rodzi to doniosły problem praktyczny, dotyczący relacji między przepisami ogólnymi Działu IVa k.p.a. a unormowaniami ustaw szczególnych. Celem artykułu jest nakreślenie genezy wprowadzenia przepisów ogólnych z zakresu administracyjnych kar pieniężnych, zwrócenie uwagi na najistotniejsze aspekty stosowania nowych regulacji z wykorzystaniem przykładów dotyczących kary za zajęcie pasa drogowego, a także przedstawienie propozycji rozwiązania konfliktu w relacjach między stosowaniem wobec kar administracyjnych ustawy o finansach publicznych, ordynacji podatkowej oraz kodeksu postępowania administracyjnego. Niejasny sposób redakcji przepisów rodzi ryzyko, że dojdzie do rozbieżności orzeczniczych dużych rozmiarów, co spowoduje konieczność podjęcia uchwały abstrakcyjnej w tym zakresie przez NSA. W artykule zastosowano analityczno-dogmatyczną oraz empiryczno-prawną metodę badawczą.

Słowa kluczowe: stosowanie kar, powaga rzeczy osądzonej, nowelizacja kodeksu postępowania administracyjnego, sankcja, obowiązek

REFLEXIONES SOBRE LA REGULACIÓN LEGAL DE SANCIONES ADMINISTRATIVAS

Resumen

Dado el carácter represivo y molesto de sanciones pecuniarias administrativas, el legislador ha decidido establecer reglas generales de su imposición. La regulación marco en este ámbito fue introducida a la ley de 14 de junio de 1960 – Código de procedimiento administrativo. Se aplica sólo cuando las leyes especiales no prevén soluciones particulares. Esto crea un grave problema en la práctica que versa sobre la relación entre la normativa general de la Sección IVa del código de proceso administrativo y la regulación de leyes especiales. El objetivo del artículo consiste en abordar la génesis de la introducción de la normativa general relativa a sanciones pecuniarias administrativas, aspectos más importantes de aplicación de nueva regulación utilizando ejemplos de sanciones por haber ocupado un carril, así como una propuesta de solución del conflicto entre aplicación a las sanciones administrativas de la ley sobre finanzas públicas, ley tributaria y el código de procedimiento administrativo. La forma poco clara de la redacción de las normas crea el riesgo de que habrán discrepancias importantes en la jurisprudencia, lo que causará la necesidad de adoptar acuerdo abstracto en este ámbito por el Tribunal General Administrativo. En el artículo se ha utilizado como el método de investigación el método analítico-dogmático y empírico-legal.

Palabras claves: aplicación de sanciones, cosa juzgada, reforma del código de procedimiento administrativo, sanción, obligación

РАЗМЫШЛЕНИЯ О ПРАВОВОМ РЕГУЛИРОВАНИИ АДМИНИСТРАТИВНЫХ ШТРАФОВ В АДМИНИСТРАТИВНО-ПРОЦЕССУАЛЬНОМ КОДЕКСЕ

Резюме

Принимая во внимания репрессивный характер и потенциально тяжелые последствия административных штрафов, законодатель решил упорядочить общие принципы их наложения. Соответствующие рамочные положение были введены в административно-процессуальный кодекс от 14 июня 1960 г. Положения эти применяются только в том случае, если в других законах не предусмотрены особенные решения. В связи с этим возникает серьезная практическая проблема, касающаяся взаимосвязи между общими положениями раздела IVa административно-процессуального кодекса и особенными положениями других законов. В статье рассматриваются причины принятия общих положений об административных штрафах, обращается внимание на наиболее важные аспекты применения новых положений на примере штрафов за занятие полосы движения, а также формулируются предложения по устранению коллизий, возникающих при применении к административным штрафам Закона «О государственных финансах», налогового кодекса и административно-процессуального кодекса. Неясности в изложении предписаний закона повышают риск возникновения значительных расхождений в судебной практике, что потребует принятия Высшим административным судом абстрактного разъяснения по этому вопросу. В работе использован аналитико-догматический и эмпирико-правовой методы исследования.

Ключевые слова: применение штрафных санкций, принцип *res iudicata*, внесение изменений в административно-процессуальный кодекс, санкции, обязанность

REFLEXIONEN ZUR KODEXREGELUNG VON VERWALTUNGSSTRAFEN

Zusammenfassung

Aufgrund des repressiven Charakters und der administrativen Geldbußen beschloss der Gesetzgeber, die allgemeinen Grundsätze für ihre Anwendung zu normalisieren. Diesbezügliche Rahmenbestimmungen wurden in das Gesetzbuch vom 14. Juni 1960 aufgenommen – Verwaltungsgerichtsordnung. Sie werden nur verwendet, wenn separate Bestimmungen keine speziellen Lösungen enthalten. Dies ist ein wichtiges praktisches Problem in Bezug auf das Verhältnis zwischen den allgemeinen Bestimmungen vom Abschnitt IVa der Zivilprozessordnung und die Bestimmungen spezifischer Gesetze. Ziel des Artikels ist es, die Entstehung der Einführung allgemeiner Bestimmungen im Bereich der Geldbußen zu skizzieren, anhand von Bestrafungsbeispielen für die Besetzung der Fahrspur auf die wichtigsten Aspekte der Anwendung neuer Vorschriften aufmerksam zu machen und Vorschläge zur Lösung des Konflikts im Verhältnis zwischen der Anwendung des Gesetzes über die öffentlichen Finanzen der Verordnung vorzulegen Steuer- und Verwaltungsverfahrenscode. Die unklare Art und Weise der Ausarbeitung von Vorschriften erhöht das Risiko, dass es zu großen Unstimmigkeiten kommt, die eine diesbezügliche abstrakte Entschließung des Obersten Verwaltungsgerichts erforderlich machen. Der Artikel verwendet eine analytisch-dogmatische und empirisch-rechtliche Forschungsmethode.

Schlüsselwörter: Anwendung von Strafen, Ernsthaftigkeit der Beurteilung, Änderung der Verwaltungsverfahrensordnung, Sanktion, Verpflichtung

RÉFLEXIONS SUR LA RÉGLEMENTATION DES SANCTIONS ADMINISTRATIVES DANS LES LOIS

Résumé

En raison du caractère répressif et de la pénalité des amendes administratives, le législateur a décidé de normaliser les principes généraux de leur imposition. Un règlement-cadre à cet égard a été introduit dans la loi du 14 juin 1960 – Code de procédure administrative. Il n'est utilisé que si des dispositions distinctes ne contiennent pas de solutions spéciales. Cela soulève un problème pratique important concernant la relation entre les dispositions générales de la section IVa du Code de procédure administrative et les dispositions de lois spécifiques. L'article a pour objet de retracer la genèse de l'introduction de dispositions générales dans le domaine des amendes administratives, d'attirer l'attention sur les aspects les plus importants de l'application de la nouvelle réglementation en utilisant des exemples de sanctions pour l'occupation de la voie et de présenter des propositions pour résoudre le conflit dans la relation entre l'application de la loi sur les finances publiques, du code des impôts et du code de procédure administrative aux sanctions administratives. La manière peu claire de rédiger le règlement augmente le risque que des divergences à grande échelle se produisent, ce qui nécessitera l'adoption d'une résolution abstraite à cet égard par la Cour administrative suprême. L'article utilise une méthode de recherche analytique-dogmatique et empirico-juridique.

Mots-clés: application de sanctions, chose jugée, modification du code de procédure administrative, sanction, obligation

RIFLESSIONI SULLA DISCIPLINA DELLE SANZIONI AMMINISTRATIVE NEL CODICE

Sintesi

A motivo del carattere repressivo e della gravosità delle sanzioni amministrative pecuniarie, il legislatore ha deciso di disciplinare i principi generali della loro comminazione. Il quadro giuridico in tale ambito è stato introdotto nella legge del 14 giugno 1960 Codice di procedura amministrativa. Viene applicato solamente quando le norme di legge particolari non contengono soluzioni dettagliate. Questo genera un significativo problema pratico, riguardante la relazione tra le norme generali della Sezione IVa del codice di procedura amministrativa e quanto stabilito nelle leggi particolari. L'obiettivo dell'articolo è tratteggiare le genesi dell'introduzione delle norme generali nell'ambito delle sanzioni amministrative pecuniarie, far notare gli aspetti più importanti dell'applicazione delle nuove regolamentazioni utilizzando esempi riguardanti la sanzione per l'occupazione della carreggiata, e anche presentare proposte per la soluzione del conflitto nei rapporti tra l'applicazione, nei confronti delle sanzioni amministrative pecuniarie, della legge sulle finanze pubbliche, il Codice tributario, e del codice di procedura amministrativa. La modalità confusa di redazione delle norme di legge genera il rischio di giungere a divergenze giurisprudenziali di ampia portata, provocando la necessità di una delibera astratta in tale ambito da parte della Corte Suprema Amministrativa. Nell'articolo è stato utilizzata la metodologia di studio analitico-dogmatica ed empirico-giuridica.

Parole chiave: applicazione delle sanzione, autorità di cosa giudicata, riforma del codice di procedura amministrativa, sanzione, obbligo

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OFFENCE OF REBELLION IN THE SPANISH CRIMINAL LAW

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1. INTRODUCTION

The offence of rebellion is an original legal construction in the Spanish criminal law because, as it is rightly stated in literature, when rebels achieve their aims, the legal system in which this type of crime occurs undergoes a total change.[1] Rebels aim to adopt a new constitution and introduce a new political and legal system in which they will rule. No other offence classified in the Spanish Criminal Code causes so devastating consequences for the legal basis of coexistence and thus this results in the extraordinariness of this crime. There is an opinion presented in literature that, although the offence is subject to regulation in the Criminal Code, from the historic point of view, in practice it concerned army command.[2]

2. DEVELOPMENT OF THE OFFENCE OF REBELLION IN THE SPANISH CRIMINAL LAW

The first common criminal code in Spain that classified the offence of rebellion was the Criminal Code of 1848.[3] In accordance with its Article 167, it consisted in public and hostile uprising against the government in order to: (1) dethrone the King or deprive him of liberty; (2) change the line of succession to the throne or prevent entitled persons from governing; (3) remove the Regent or the members of

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1 N. García Rivas, [in:] F. Javier Álvarez García (dir.), A. Manjón-Cabeza Olmeda, A. Ventura Püschel, *Tratado de derecho penal español, parte especial*, Vol. IV, *Delitos contra la Constitución*, Valencia 2016, p. 39.

2 *Ibid*., p. 39.

3 Código penal de 19 de marzo de 1848, Gaceta de 28 de marzo de 1848, núm. 4944.

the Regency from the Kingdom or deprive them of liberty; (4) use on one's own or strip the King, the Regent or the members of the Regency of the prerogatives they were granted by the Constitution, or prevent them from using those prerogatives freely; (5) declare independence of the Kingdom or any part of it or army or navy forces' disobedience to the Government; (6) exercise on one's own or deprive ministers of their constitutional powers or prevent them from exercising their powers freely; (7) prevent holding parliamentary elections freely in the whole Kingdom or organise illegal parliamentary elections; (8) dissolve the parliament or prevent meetings of any community representative assemblies from proceeding or force them to adopt resolutions.

The Criminal Code of 1870[4] slightly changed the objectives perpetrators wanted to achieve. Namely, they aimed to: (1) dethrone the King, remove the Regent or the members of Regency from the Kingdom or deprive them of liberty, or force them to perform acts contrary to their will; (2) prevent parliamentary election in the whole Kingdom or conduct illegal elections; (3) dissolve the parliament or prevent collective bodies from proceeding and force them to adopt resolutions; (4) commit whatever offence envisaged in Article 165 (prevent governing in the interregnum; or prevent the election of a minor King's guardian: the Regent); (5) separate the kingdom or its part, or army or navy corps from the supreme power; (6) use and exercise on their own or deprive ministers of their constitutional powers, or prevent their independent exercising.

The Criminal Code of 1932[5] required that the offence classified in Article 238, i.e. a coup, should be against a constitutional government. The aims were similar to the former regulations; however, some terms were changed because the state was declared to be a republic. Thus, it used the following phrases to: (1) remove the head of state or force him to act against his will; (2) prevent parliamentary election in the whole Spanish Republic or its announcement; (3) dissolve the parliament or prevent it from proceeding, or deprive it of the right to adopt resolutions; (4) separate the country or its part, or army or navy or whatever other corps from subjection and refuse obedience to the government; (5) independently perform or deprive ministers of their constitutional powers or prevent them from exercising them freely.

In accordance with the Decree 3096/1973 of 14 September 1973 on publishing a consolidated text of the Criminal Code pursuant to the Act 44/1971 of 15 November 1971, Article 238 was changed into Article 214 and the terms used therein were changed due to the collapse of the republic, i.e. the constitutional government was changed into the government, elections to public posts were used instead of elections to the *Cortes*, and the ministers of the republic were changed into ministers.

As a result of an attempted coup d'état on 23 February 1981,[6] the Act 2/1981 of 4 May 1981 amending and adding some articles to the Criminal Code and

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[4] Código penal de 17 de junio de 1870, Gaceta de 31 de agosto de 1870, suplemento al núm. 243.

[5] Código penal de 27 de octubre de 1932, Gaceta de 5 de noviembre de 1932, núm. 310.

[6] On 23 February 1981, a group of soldiers entered the Parliament and attempted a coup, which eventually failed. It aimed to disrupt democratic changes that started after General Franco's death.

the Military Criminal Code[7] introduced the overruling, suspension or change of the whole or part of the Spanish Constitution as the main aim of perpetrators' activities.

The Act 14/1985 of 9 December 1985 amending the Criminal Code and the Act 8/1984 of 26 December 1984 on the correlation with the Military Criminal Code[8] envisaged the offence of rebellion only in the common Criminal Code even in the case of its military nature and preserved the offence of rebellion at the time of war in the Military Criminal Code.[9] The amendment covered autonomous institutions. Coups against the Autonomous Communities Governing Councils or Assemblies were to be penalised in the same way as coups against the State of the Nation.

The binding Spanish Criminal Code of 1995[10] (SCC) classifies the offence of rebellion in Article 472. In accordance with this provision, the conviction of rebellion should be handed down to those who publicly or violently commit acts of defiance for any of the following purposes:

1) to fully or partially repeal, suspend or amend the Constitution;
2) to fully or partially strip the King or the Queen, the Regent or members of the Regency of all or part of their prerogatives and powers, or to oblige them to execute an act contrary to their will;
3) to prevent holding free elections to public offices;
4) to dissolve the *Cortes*, the Congress of Deputies, the Senate or any other Legislative Assembly of an Autonomous Community, to prevent them from meeting, discussing or resolving, to force them to pass any resolution, or to strip them of any of their prerogatives or powers;
5) to declare independence of any part of the national territory;
6) to replace the Government of the Nation or the Governing Council of an Autonomous Community with another, or to use or exercise oneself, or to strip the Government or Governing Council of an Autonomous Community, or its members, of their powers, or to prevent or limit the free exercise thereof, or to force any of them to carry out acts against their will;
7) to make the armed forces refuse obedience to the Government.

3. OBJECT OF PROTECTION

The offence of rebellion is classified in Book II "Felonies and their penalties", Title XXI "On felonies against the Constitution", Chapter I "Rebellion". The objects of protection are basic rights of an individual and organisation of the state of law

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[7] Ley Orgánica 2/1981, de 4 de mayo, que modifica y adiciona determinados artículos del Código Penal y del de Justicia Militar, BOE núm. 107, de 5 de mayo de 1981.

[8] Ley Orgánica 14/1985, de 9 de diciembre, de modificación del Código Penal y de la Ley Orgánica 8/1984, de 26 de diciembre, en correlación con el Código Penal Militar, B.O.E. núm. 296, de 11 de diciembre de 1985.

[9] J. Tamarit Sumalla, [in:] G. Quintero Olivares (dir.), F. Morales Prats (coord.), *Comentarios a la parte especial del derecho penal*, Pampeluna 2016, p. 1918.

[10] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE núm. 281 de 24 de noviembre de 1995; hereinafter SCC.

defined in the Constitution.[11] The offence is a menace to the Constitution and basic institutions of a democratic state. It is assumed in the doctrine that the object of protection includes public order or the constitutional system; the offence undermines the foundations of the state of law. It is the only offence that directly breaches the Constitution as a legal norm.[12] The provision classifying rebellion is the first in the Chapter, which means that it is the most dangerous assault on the constitutional system.[13] This legislative decision means that rebellion is excluded from the group of offences against public order because it protects more than just public order, namely the constitutional order, i.e. the constitutional principles and institutions.[14] The offence that undermines the foundations of the constitutional system constitutes an attack on public peace and public order.[15]

4. OBJECTIVE ASPECT

The offence of rebellion is a crime of special structure. It is committed before rebels achieve their aim. It is indicated that the experience of the civil war shows that the rebels' victory can mean the transformation of the legal order.[16] Former determination of the liability limit is understandable because if the rebels' aim to change the constitutional order, their victory makes it impossible to prosecute them pursuant to the abolished constitutional order.[17]

It is an offence of the so-called former perpetration type, an offence with an interrupted effect; to commit the offence, it is not required that the perpetrators' aim should materialise.[18] It is enough that the perpetrators revolt in order to fulfil any of the above-mentioned aims.[19] The lawmaker moves the limit of protection for obvious reasons of criminal policy, taking into account difficulties in suppressing a successful rebellion.[20]

It is a formal offence since its commission does not require that the planned aim should be achieved. It is essential for the sedition to be capable of achieving it.[21] The offence of rebellion can be committed at the time of peace and it is not important whether it is civil or military in nature.[22]

The causative conduct consists in public and violent sedition that aims to achieve whichever of the aims laid down in Article 472 SCC.

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11 A. Calderón, J.A. Choclán, *Código penal comentado*, Barcelona 2005, p. 997.

12 N. García Rivas, *supra* n. 1, p. 53; F. Muñoz Conde, *Derecho penal, parte especial*, Valencia 2015, p. 687.

13 J. Tamarit Sumalla, *supra* n. 9, p. 1918.

14 *Ibid*.

15 F. Muñoz Conde, *supra* n. 12, p. 686.

16 N. García Rivas, *supra* n. 1, p. 56.

17 J. Tamarit Sumalla, *supra* n. 9, p. 1919.

18 *Ibid*., p. 1918.

19 F. Muñoz Conde, *supra* n. 12, p. 689.

20 A. Calderón, J.A. Choclán, *supra* n. 11, p. 998.

21 N. García Rivas, *supra* n. 1, p. 56.

22 A. Calderón, J.A. Choclán, *supra* n. 11, p. 997.

4.1. SEDITION

It is assumed in literature that sedition is a revolt, insurrection or uprising against the established state power.[23] Sedition is recognised as equal to an uprising against, lack of obedience or collective resistance to the authorities.[24] However, the classification of resistance or collective disobedience as sedition has been rightly criticised because the verbal feature requires action that is not contained in the concept of resistance as it can be passive.[25] The concept of sedition within the offence should be assessed from the point of view of its potential to achieve the planned aims.[26]

The intensity of sedition depends on the planned aim that the rebels want to achieve. A different intensity is required, e.g. in order to prevent the Legislative Assembly of an Autonomous Community from proceeding, and a different intensity in order to overthrow the Government of the Nation.[27]

4.2. PUBLIC NATURE OF SEDITION

Sedition is public in nature. In the doctrine, the public nature is interpreted as overt or obvious.[28] It is recognised that sedition is public in case rebels publicly express their *animus hostilis* (hostile intent) with the use of convincing acts, which can be active deeds or words.[29]

4.3. SEDITION AND VIOLENCE

Sedition is to be violent. In the doctrine, the term raises doubts, in particular concerning whether its scope can cover the possibility of committing the act under mental pressure (*vis compulsiva*).[30] Sedition is violent in case it is accompanied by direct physical violence against persons or when specific acts threaten constitutional authorities.[31] Violence means application of violent acts openly, in the way disturbing the order and peace of the citizens.[32]

It is assumed that physical violence is not required in case uprising forces are so powerful that their propaganda threatens the state armed forces to such an extent that they do not take any steps.[33]

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[23] N. García Rivas, *supra* n. 1, p. 57.
[24] F. Muñoz Conde, *supra* n. 12, p. 687.
[25] N. García Rivas, *supra* n. 1, p. 57.
[26] *Ibid*., p. 56.
[27] *Ibid*., p. 62.
[28] *Ibid*., p. 59.
[29] J. Tamarit Sumalla, *supra* n. 9, p. 1920.
[30] N. García Rivas, *supra* n. 1, p. 60.
[31] J. Tamarit Sumalla, *supra* n. 9, p. 1920.
[32] F. Muñoz Conde, *supra* n. 12, p. 687.
[33] N. García Rivas, *supra* n. 1, p. 60.

5. SUBJECT OF THE OFFENCE

The subject of the offence cannot be a single person, but a group. It is a multi-person offence. For its existence, it is essential that perpetrators enter an agreement before a rebellion.[34] Article 471 *in principio* SCC stipulates that "a conviction for the offence of rebellion shall be handed down to those who". The use of the plural form to refer to the subject does not raise doubts that there must be a number of perpetrators. It is not possible to determine this number. It depends on the aim. There should be as many as necessary to achieve the aim.[35] The number does not matter, unless it is sufficient to achieve the aim.[36]

There is no offence of individual rebellion committed by a single person.

6. SUBJECTIVE ASPECT

It is an intentional offence committed with specific direct intent (*cum dolo directo colorato*). Perpetrators have one of the aims determined in the statute. All of them are equally dangerous to the object of protection, however to a different extent, e.g. repealing the Constitution has a different dimension than preventing a representative to the Legislative Assembly of an Autonomous Community from freely exercising their rights. The lawmaker determines alternative aims and it is not important which of them perpetrators want to achieve. In literature, it is called a multi-purpose offence because it requires the wilful agreement to achieve a common aim.[37]

6.1. FULL OR PARTIAL REPEAL OR SUSPENSION OF OR AMENDMENT TO THE CONSTITUTION

The aim, as it has been mentioned above, was determined after an attempted coup on 23 December 1981. It is emphasised in literature that even the Criminal Code bill of 1980 developed after the 1978 Constitution was passed envisaged such an aim of a rebellion and there was a plan to introduce a legal response to an attempted coup.[38] The purpose of it is to protect the Constitution as *Carta Magna* and fundamental rights and liberties that are guaranteed in it. Its interpretation in literature is narrow and reference is made to the principle of legalism. It is also stated that it concerns the protection of two basic aspects of the Constitution, i.e. its legal and fundamental nature. It is indicated that it concerns its direct and absolute binding force and changelessness; amendments are possible only in the mode that is laid down therein.[39]

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[34] F. Muñoz Conde, *supra* n. 12, p. 687.
[35] *Ibid*., p. 687.
[36] J. Tamarit Sumalla, *supra* n. 9, p. 1918.
[37] N. García Rivas, *supra* n. 1, p. 61.
[38] *Ibid*., p. 62.
[39] *Ibid*.

There is a minority opinion that the aim covers also the statutes of the Autonomous Communities. It is argued that the Constitution itself recognises the right to autonomy of nationalities and regions of which the state is composed (Article 2 Constitution). Moreover, the statutes grant legislative power to bodies they appointed and they are legal acts that constitute the highest norm in each Autonomous Community. It is said that a sudden change that goes beyond the procedure established in a given autonomous statute means at least a partial amendment to the Constitution. The arguments are based on systemic interpretation; it would be inadmissible to protect autonomous bodies established in statutes, ignoring a legal act that establishes them.[40] And one of the aims of a rebellion is to dissolve a Legislative Assembly of an Autonomous Community.

The suspension of the Constitution should be interpreted as the suspension of its essential elements and not a given provision because the object of protection is to maintain the principle of constitutionality and proportionality. It is recognised in the doctrine that public and violent sedition in order to suspend fundamental rights and other essential normative elements such as the autonomy of nationalities and regions, or the provisions determining the mode of amending the Constitution would undoubtedly be such a situation. Such sedition would result in deformation of the democratic system in force.[41]

6.2. DETHRONING OR FULLY OR PARTIALLY DEPRIVING THE KING OR QUEEN, OR THE REGENT OR A MEMBER OF THE REGENCY OF THEIR PREROGATIVES AND POWERS, OR OBLIGING THEM TO EXECUTE AN ACT CONTRARY TO THEIR WILL

This aim is connected with special protection of the King.[42] The system of parliamentary monarchy laid down in the Constitution recognises the King as the head of state and "a symbol of its unity and permanence" (Article 56 para. 1 Constitution). The inheritable nature of the throne prevents a ruler's election. The successor to the throne is the monarch's close or remote relative (Article 57 para. 1 Constitution).

The King's of Spain function is to formally approve decisions and these include, inter alia, to promulgate the laws, to summon and dissolve the *Cortes Generales*, to call elections and referendums, to appoint members of the government, to award honours and distinctions, to grant pardons, and to declare war. Performing his functions, the King acts as a mediator, an arbitrator or a moderator, and is not accountable.[43] According to the representatives of the doctrine, the lawmaker introduced this aim in order to protect the implementation of political decisions taken by the constitutional bodies, i.e. the Government or the *Cortes*.[44] The same occurs in the case of the judiciary because, in accordance with Article 117 para. 1

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40 *Ibid*., p. 63.
41 *Ibid*.
42 A. Calderón, J.A. Choclán, *supra* n. 11, p. 998.
43 N. García Rivas, *supra* n. 1, p. 65.
44 *Ibid*., p. 64.

Constitution, judges and magistrates of the judiciary administer justice on behalf of the King.

As far as obliging the King to execute an act contrary to his will is concerned, taking into account his function and the fact that a rebellion is aimed at acting to the detriment of the binding constitutional and democratic order, for example, forcing the King to give up visiting an Autonomous Community cannot be classified as the offence of rebellion because such an activity is not connected with the King's exercise of an important constitutional function.[45]

The Act 1/2015 of 30 March 2015 amending the Act 10/1995 of 23 November 1995: Criminal Code[46] made the Queen equal to the King. The change is binding only in the case a woman is the successor to the throne and does not concern the King's wife because she does not have any significant constitutional functions.[47]

6.3. PREVENTING ELECTIONS TO PUBLIC POSTS

Elections are a reflection of the nation's sovereignty and constitute the only method known to the Spanish Constitution of taking up posts in state institutions as well as autonomous and local posts. In literature, a possibility of committing rebellion in the case of elections in a commune is excluded because the act is classified as public disorder (Articles 557–561 SCC) or coercion (Article 172 SCC), or election-related offences (Articles 146 and 147 Act 5/1985 of 19 June 1985 on the general electoral system[48]). The argument for this stance is that, taking into account the purposefulness of the provision, the lawmaker wanted to protect the State and Autonomous Communities' institutions provided that sedition is committed to the detriment of the object of protection in the form of the constitutional and democratic system, and is not a common street disorder that is occasional in nature.[49]

A doubt is raised whether the aim covers indirect elections to public posts, e.g. the President of the Constitutional Court and the President of the General Judicial Council, performed by the already elected representatives to collective bodies. In literature, authors opt for the narrow interpretation because based on it the basic assault on the binding force and maintenance of the constitutional order does not occur.[50]

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

[46] Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la L.O. 10/1995, de 23 de noviembre, del Código Penal, B.O.E núm. 77 de 31 de Marzo de 2015.

[47] N. García Rivas, *supra* n. 1, p. 65.

[48] Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General, B.O.E. núm. 147, de 20 de junio de 1985.

[49] N. García Rivas, *supra* n. 1, p. 66.

[50] J. Tamarit Sumalla, *supra* n. 9, p. 1921.

6.4. DISSOLUTION OF THE *CORTES*, THE SENATE OR ANY LEGISLATIVE ASSEMBLY OF AN AUTONOMOUS COMMUNITY, PREVENTING THEM FROM MEETING, DISCUSSING OR RESOLVING, DEPRIVING THEM OF THE RIGHT TO PASS RESOLUTIONS OR EXERCISE THEIR PREROGATIVES OR POWERS

This aim is to act to the detriment of the bicameral system of the *Cortes* and Legislative Assemblies of Autonomous Communities.[51]

The Constitution regulates the dissolution of the *Cortes*, the Congress and the Senate. This is the competence of the President of the Government, however, he cannot do this in the course of the vote of no-confidence proceedings or before a year has passed from the time of the former vote of no-confidence. If the vote on the appointment of the President of the Government is ineffective within two months, the King must take a decision to dissolve both chambers of the parliament, following the endorsement by the Speaker of the Congress (Article 115 and Article 99 para. 5 Constitution).

In accordance with Article 115 para. 1 Constitution, the decree dissolving the parliament must establish the date of elections. If this requirement is not met because the President of the Government is taking part in violent and public sedition, according to some authors, the aim analysed herein is achieved. In fact, it is connected with preventing elections.[52]

Autonomous Communities have a different system, i.e. only the Presidents of the Government can dissolve a given legislative assembly; unlawful dissolution is to the detriment of the statutory principle of self-organisation.

It is rightly indicated in literature that preventing legislative bodies from meeting, discussing and adopting resolutions should not be confused with organising protests in front of the Congress, the Senate and the Autonomous Community Legislative Assembly, even if it leads to disorder or the use of violence.[53] The offence of rebellion requires that an operation be organised to block a legislative body in order to threaten a democratic constitutional system. The attempted coup of 23 February 1981 consisted in entering the Congress by the Civil Guard unit and detaining the representatives kidnapped for 20 hours. In this case, there was no attempt but the aim was achieved in the form of preventing the meeting and blocking the election of the President of the Government.[54] The offence of rebellion must be an operation organised in order to block a legislative body, and to threaten a democratic constitutional system. In the attempted coup of 23 February 1981, the Civil Guard officers entered the Congress and held the parliamentarians hostage for 20 hours. In this case, it was not only the rebels' attempt but they achieved the aim of preventing them from meeting and of blocking the vote for the President of the Government.

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51 F. Muñoz Conde, *supra* n. 12, p. 687.
52 N. García Rivas, *supra* n. 1, p. 67.
53 *Ibid*.
54 *Ibid*.

The provision also refers to "depriving them of the right to adopt any resolutions" or "stripping them of any of their prerogatives or powers". The former phrase concerns resolutions that particular bodies are competent to pass because if an incompetent body is forced to adopt a resolution, in some authors' opinion, it is an ineffective attempt.[55]

Stripping of any prerogatives or powers should be narrowly interpreted and it should be analysed whether a given case changes the constitutional system. Article 92 para. 2 Constitution, which stipulates that a referendum should be proposed by the President of the Government and authorised by the Congress, is an example. Holding a referendum without authorisation of the Congress is illegal; however, it is necessary to assess whether depriving the Congress of this power results in a threat to the democratic system, e.g. a referendum on the separation of a part of the national territory poses such a threat but that on legalising the purchase of hashish does not.[56]

6.5. DECLARATION OF INDEPENDENCE OF PART OF NATIONAL TERRITORY

The perpetrators have a separatist aim.[57] Statements made by some members of the public who would like to separate from the state do not match the feature. Citizens expressing the will to form their own state exercise their fundamental right of the freedom of speech. Their political pluralism is protected and the only limit to it is an offence against the form of the state laid down in the Constitution.[58] Analysing the case of the "Ibarretxe Plan",[59] the High Court of Justice of the Basque Country did not recognise it as inciting to rebellion and stated that the "statements made by the *Lehendari*[60] cannot be interpreted differently from an expression of wishes and an announcement of a political intention, uncertain in the future. As the prosecutor indicates, and we agree, at the present stage, the State has mechanisms that go beyond the scope of criminal law to block any political proposals that are not adjusted to the procedure as well as statutory and constitutionally established paths".[61]

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[55] *Ibid*., p. 68.

[56] *Ibid*.

[57] F. Muñoz Conde, *supra* n. 12, p. 688.

[58] N. García Rivas, *supra* n. 1, p. 68.

[59] After the victory of socialists in the national elections in 2004, the President of the Governing Council of the Basque Country proposed a new statute of the Autonomous Community. He proposed far-reaching decentralisation of the Spanish State and the introduction of the right to self-determination to the statute of the Basque Country. Obtaining the approval by the *Cortes* would require the amendment to the Constitution. Thus, the Parliament of the Nation refused to proceed with the Basque project. The civil servants' trade unions "Clean Hands" reported that the President had committed, inter alia, an offence of rebellion.

[60] It is the Basque name of the President of the Governing Council of the Basque Country.

[61] Auto del Tribunal Superior de Justicia del País Vasco núm. 25/2007 de 27 de noviembre, http://www.poderjudicial.es/search/indexAN.jsp (accessed 5.2.2020).

6.6. REPLACING THE GOVERNMENT OF THE NATION OR THE GOVERNING COUNCIL OF AN AUTONOMOUS COMMUNITY WITH ANOTHER, OR STRIPPING THE GOVERNMENT OR THE GOVERNING COUNCIL OF AN AUTONOMOUS COMMUNITY OR ANY OF THEIR MEMBERS OF THEIR POWERS, OR PREVENTING OR LIMITING THE FREE EXERCISE THEREOF, OR FORCING ANY OF THEM TO CARRY OUT ACTS AGAINST THEIR WILL

This aim of a rebellion focuses on the protection of the executive power in the same way as the former aim related to the protection of the legislative power. Article 98 para. 1 Constitution stipulates that the Government consists of the President, Vice-Presidents, Ministers and other members as prescribed in the statute. The composition was not extended in the Act 50/1997 of 27 November 1997 on the Government,[62] in accordance with which undersecretaries were given the status of auxiliary and cooperative bodies and are not members of the Government (Article 7 Act 50/1997). Governing Councils of Autonomous Communities consist of their President and counsellors.

Both in the national system and autonomous communities, there are norms regulating a change of the government. After the government resigns in the cases laid down in the Constitution (Article 101 para. 1) and the election process starts, the President of the Government of the Nation and the Presidents of the Autonomous Communities are elected.

Public and violent sedition aimed at changing the Government of the Nation or a Governing Council of an Autonomous Community means a change of the existing procedure of government replacement that is unconstitutional or in conflict with the provisions of an autonomous statute.

In literature, "the exercise on one's own, or stripping the Government or the Governing Council of an Autonomous Community or any of their members of their powers" is called usurpation,[63] which involves a collective body as well as its individual members.

6.7. BREAKING AN OATH OF OBEDIENCE TO THE GOVERNMENT BY ANY TYPE OF ARMED FORCES

The Preamble to the Act 5/2005 of 18 November 2005 on national defence[64] stipulates that: "the organisation of the armed forces integrated into the Ministry of Defence shall correspond to the principles of hierarchy, discipline, unity and effectiveness". The Constitution assigns to them the task "to guarantee the sovereignty

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[62] Ley 50/1997, de 27 de noviembre, del Gobierno, B.O.E. núm. 285, de 28 de noviembre de 1997.

[63] N. García Rivas, *supra* n. 1, p. 71.

[64] Ley Orgánica 5/2005, de 17 de noviembre, de la Defensa Nacional, BOE núm. 276 de 18 de noviembre de 2005.

and independence of Spain and to defend its territorial integrity and the constitutional order" (Article 8).

The phrase "any type of armed forces" means the type of armed forces of a sufficient structural and operational size that can pose a threat to the authorities. It is emphasised in literature that broad interpretation of this phrase might lead to recognition of simple disobedience as a rebellion, which has nothing to do with the object of protection and the significance of this offence.[65] It concerns sedition aimed at making a part of armed forces stop being obedient to the Government.

It is rightly indicated in the doctrine that this does not only concern the Government of the Nation but also Governing Councils of Autonomous Communities, and it may happen that a section of armed forces stops being obedient to the Governing Council of an Autonomous Community that was authorised to wield authority over the given armed force section.[66]

7. AGGRAVATED TYPES OF THE OFFENCE OF REBELLION

Article 473 para. 2 SCC, according to the legal doctrine, contains a series of circumstances aggravating the offence of rebellion, which have very different forms.[67] These are as follows:

1) withdrawing weapons or combat between rebels and "the sectors loyal to the lawful authority". The concept of weapons does not differ from the concept of weapons used in the provisions determining aggravated offences causing bodily harm (Article 148 para. 3 SCC) and robbery (Article 242 para. 3 SCC). Weapons means firearms, cold weapons such as knives, flick knives, daggers, machetes and axes.[68] Firearms, in accordance with Article 2 para. 1 of the King's Decree 137/1993 of 29 January 1993 laying down regulation of firearms,[69] includes all portable weapons having a barrel that throws, is constructed to throw or may be easily converted to throw pellets, bullets or rounds of ammunition with the use of a deflagration mechanism. An object that can be converted to throw pellets, bullets or rounds of ammunition with the use of a deflagration mechanism is an object that looks like firearms because of its construction or material from which it is made, and can be converted in such a way.
   Withdrawing weapons includes their use, not just carrying them, provided no combat with lawful forces occurs. Grounding arms before their use constitutes an extenuating circumstance laid down in Article 480 para. 2 SCC, and this is why, aggravating penalties for carrying weapons would not be logical.[70]

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[65] N. García Rivas, *supra* n. 1, p. 72.
[66] J. Tamarit Sumalla, *supra* n. 9, p. 1921.
[67] N. García Rivas, *supra* n. 1, p. 73.
[68] J. Tamarit Sumalla, *supra* n. 9, pp. 101 and 1923.
[69] Real Decreto 137/1993, de 29 de enero, por el que se aprueba el Reglamento de Armas, B.O.E. núm. 55, de 5 de marzo de 1993.
[70] N. García Rivas, *supra* n. 1, p. 73.

It is rightly stated in the legal doctrine that the circumstance of combat between rebels and the authorities concerns only cases when rebels start combat.[71] There are opinions presented in literature that the terms used are appropriate in relation to former centuries because at present technological war is prevalent.[72]

2) causing havoc as a result of rebellion. The offence of havoc is classified in Article 346 SCC and it is necessary to refer to this term. Havoc means causing explosions or using any other means with a similar destructive power, which results in the destruction of airports, ports, stations, buildings, public premises, deposits containing flammable or explosive materials, means of communication, mass transport resources, or sinking or running a ship around, flooding or explosion of a mine or industrial facility, tearing up a rail of a railway, maliciously changing the signals used in such service for the safety of transportation resources, blowing up a bridge or damaging a pipeline, destroying public highways, serious disturbance of any kind or means of communication, disturbance or interruption of the water or electricity supply, or any other fundamental natural resource. It endangers the life or integrity of persons. This endangerment is essential because otherwise the provisions concerning causing damage are applicable (Articles 263–266 SCC).
3) cutting off telegraphic and telephone lines, the airwaves, railways or any other kind of communications. It is an open list and the means of communication listed are examples, which the phrase "or any other kind" used in the provision confirms. However, the regulation is questioned in the legal doctrine and there are opinions that it originates from another epoch and demands adding new means of communication, e.g. the Internet, provided they can facilitate the commission of the offence of rebellion.[73]
4) using serious violence against persons. The standard type consists in violent sedition, thus in the case of this circumstance, violence is graded; it concerns higher-level violence. However, this is an element based on evaluation. In literature, this violence is described as one that causes at least such grave body damage as is foreseen in the case of the offence of causing severe body harm, i.e. one causing the loss of or inability to use a major organ or limb, or a sense, or sexual impotence, sterility, serious deformity or serious physical or mental illness, a genital mutilation in any form (Article 149 SCC), loss of or inability to use a non-major organ or limb (Article 150 SCC).
5) demanding contributions or diverting the public funds from their lawful investment. It is indicated in the doctrine that this concerns the offence of embezzlement and appropriation of funds.[74] This conduct means that the rebellion reached an advanced stage, which makes it possible to perform functions typical of the overthrown authorities.[75]

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71 J. Tamarit Sumalla, *supra* n. 9, p. 1923.
72 N. García Rivas, *supra* n. 1, p. 73.
73 *Ibid*., pp. 73–74.
74 *Ibid*., p. 74.
75 J. Tamarit Sumalla, *supra* n. 9, p. 1923.

Article 478 SCC[76] contains another aggravating circumstance, depending on what type of authority the perpetrator is in the overthrown legal order. The aggravation consists in the substitution of the penalty of barring by the penalty of the absolute barring from exercising their rights. It concerns "mere participants" of the rebellion because Article 473 para. 1 SCC stipulates that those who act as commanders and induce rebels, and subaltern commanders are subject to the penalty of absolute barring; they are a different type of perpetrators of the offence of rebellion.

There is a dispute in literature concerning the conformity of the provision with the principle of proportionality. Imposition of the same penalty for all acts committed, regardless of the size of damage caused, is against this principle. Other authors assume that just the fact of holding the position of authority means that the person has a special duty to protect the Constitution, and that is why, a more severe penalty is justified if a person cooperates in the violation of the Constitution. There are demands for the application of aggravation to all participants in the offence commission because the application of the provision only to "mere performers" discriminates against them as they contribute the least to the violation of the Constitution.[77]

8. OTHER REBELLION-RELATED OFFENCES

The Spanish lawmaker classifies conduct that can be conducive to the success of rebellion or is related to it, although the perpetrators do not take part in the rebellion.

Article 476 SCC classifies the conduct of a serviceperson who does not use the means available to him to contain a rebellion by the forces under his command, or having knowledge of an attempt to commit the offence of rebellion does not immediately report this to his superiors, or authorities or officers who, due to their office, are obliged to pursue offences. It is an offence of omission in servicepersons' duties. It is assumed in literature that "means available to him" are all human and material resources available that can really help to contain a rebellion.[78] There is also a concern expressed that a common court can be unable to assess what resources are available to a serviceperson.[79]

It is an offence resulting from omission. As far as the subject is considered, it is typically an individual offence; it is inadmissible to recognise a foreigner as a perpetrator of the offence.[80] Omitting to use the means concerns a serviceperson

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[76] Article 478 SCC stipulates that in the case a perpetrator of any offence classified in this Chapter holds office, the penalty of barring from exercising rights prescribed in a given case should be changed into absolute barring from exercising rights for a period from fifteen to twenty years, unless this penalty is prescribed for a given offence.

[77] N. García Rivas, *supra* n. 1, p. 75.

[78] *Ibid*., p. 83.

[79] J. Tamarit Sumalla, *supra* n. 9, p. 1925.

[80] N. García Rivas, *supra* n. 1, p. 84.

who has forces under his command.[81] These are soldiers of the armed forces of any unit, centre, body or base of the army, the navy or air force.[82]

The punishment for omission consisting in failure to report a rebellion is justified by the transcendent nature of the offence and the possibility of preventing a rebellion by reporting it.[83] It concerns cases when a perpetrator has the knowledge of a conspiracy before the offence of rebellion is committed, because the political-criminal aim of the provision related to this offence is not to delay a rebellion, but only to prevent it.[84] Thus, any soldier can be a perpetrator of the offence in this form.

Article 482 SCC classifies an offence consisting in the infringement of the authorities' general obligation to counteract the rebellion. The obligation results not only from the provisions of Criminal Code but also from the oath of office to respect the Constitution.[85] Thus, it is an offence resulting from omission. The omission is deliberate and has an advantageous impact on the success of the rebellion by failing to fulfil duties that should help to contain it.[86]

Continuing to carry out civil servants' duties of office under the command of the rebels or their resignation from office without acceptance when there is a danger of rebellion also constitutes an offence (Article 483 SCC). Such a civil servant fails to fulfil a duty of loyalty to the legal and political system in which he has been appointed. It concerns a situation when a civil servant abandons the post because of the danger of rebellion or continues to hold the post, regardless of the rebellion success.[87]

Recognition of abandoning a post because of the danger of rebellion results in complex evidence-related problems, which makes the application of this provision difficult in practice.[88] There is criticism that the provision is imprecisely formulated.[89]

Article 484 SCC stipulates an offence of accepting employment from the rebels. What justifies the criminalisation of such conduct in the doctrine is the fact that a perpetrator abuses his function because he is obliged to be loyal to a democratic constitutional system that is not accepted by the rebels.[90] In literature, it is emphasised that punishment *in abstracto* of any type of cooperation with rebels with the use of barring from the exercise of rights is understandable, however, it is noted there is a problem that courts may encounter cases where sentencing a person cooperating with rebels leads to conflicts with other interests that are subject to protection, e.g. employment law.[91] The offence is formal, thus it does not generate any consequences.[92]

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81 A. Calderón, J.A. Choclán, *supra* n. 11, p. 1000.
82 J. Tamarit Sumalla, *supra* n. 9, p. 1926.
83 *Ibid.*
84 *Ibid*.
85 *Ibid*., p. 1931.
86 A. Calderón, J.A. Choclán, *supra* n. 11, p. 1002.
87 N. García Rivas, *supra* n. 1, pp. 84–85.
88 J. Tamarit Sumalla, *supra* n. 9, p. 1930.
89 A. Calderón, J.A. Choclán, *supra* n. 11, p. 1003.
90 N. García Rivas, *supra* n. 1, p. 86.
91 J. Tamarit Sumalla, *supra* n. 9, p. 1932.
92 A. Calderón, J.A. Choclán, *supra* n. 11, p. 1003.

9. PENALTIES

The legislative technique in the case of the offence of rebellion differs from the standard one because the provision classifying it does not lay down a penalty it carries. Penalties are laid down in the following Article.

The Spanish lawmaker distinguishes three types of penal liability for the standard and aggravated types of rebellion depending on the role of the perpetrator, i.e. commanders or ringleaders promoting rebellion, subaltern commanders and mere participants. The regulation lays down a special norm and abolishes general rules concerning perpetration, and aiding and abetting. The sense of the regulation is justified by the fact that military courts treated the offence of rebellion in a traditional way because the offence was committed within the structure of authority organised hierarchically.[93] The form of "cascade" punishment is typical of the offence of rebellion.[94] The severity of penalty depends on the level of commitment to the rebellion.[95]

The penalties for the standard type are as follows:

1) for commanders or ringleaders inciting rebellion: the penalty of imprisonment from ten to twenty five years and absolute barring from exercising rights for the same period;
2) for subaltern commanders: the penalty of imprisonment from ten to fifteen years and absolute barring from exercising rights from ten to fifteen years;
3) for mere participants: the penalty of imprisonment from five to ten years and barring from exercising the right to public employment and office for a term from six to ten years (Article 473 para. 1 SCC).

It is assumed in literature that the lawmaker recognises the offence of rebellion as an organised movement in which the persons mainly responsible are sometimes people who have not taken part in it but have been the brains of the operation.[96] There is a distinction between main commanders and subaltern commanders; the latter are persons having lower authority.[97]

In the aggravated types, penalties are more severe in the field of imprisonment and barring from exercising rights is for the same period. For commanders or ringleaders inciting rebellion it is: the penalty of imprisonment from twenty five to thirty years; for subaltern commanders: the penalty of imprisonment from fifteen to twenty five years; and for mere participants: the penalty of imprisonment from ten to fifteen years (Article 473 para. 2 SCC).

The offence classified in Article 476 SCC carries the penalty of imprisonment from two to five years and absolute barring from exercising rights from six to ten years.

The offence classified in Article 482 SCC carries the penalty of absolute barring from exercising rights from twelve to twenty years.

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93 J. Tamarit Sumalla, *supra* n. 9, p. 1922.
94 F. Muñoz Conde, *supra* n. 12, p. 689.
95 A. Calderón, J.A. Choclán, *supra* n. 11, p. 998.
96 N. García Rivas, *supra* n. 1, p. 82.
97 J. Tamarit Sumalla, *supra* n. 9, p. 1922.

The penalty of special barring from public employment and office for a civil servant is a sanction for the offence stipulated in Article 483 SCC.

The offence under Article 484 SCC carries the penalty of absolute barring from exercising rights from six to twelve years.

10. CONCLUSIONS

1) In Spain, the offence of rebellion has a long history because it was classified in all Spanish Criminal Codes (of 1848, 1870, 1932 and 1995).
2) The offence of rebellion is one with a special structure. It consists in public sedition in a violent way, which aims to achieve any of seven goals specified in Article 472 SCC, which include fully or partially repealing, suspending or amending the Constitution; and fully or partially stripping the King, the Regent or members of the Regency of all or part of their prerogatives and powers, or obliging them to execute an act contrary to their will (paras 1 and 2). It also occurs in an aggravated form due to various circumstances, e.g. using weapons, causing havoc or using serious violence against persons (Article 473 para. 2 SCC).
3) The offence breaches the Constitution and fundamental institutions of a democratic state; it undermines the foundations of the state of law. Article 472 SCC protects the constitutional order, thus the rules and constitutional institutions that must be recognised.
4) It is a collective offence. The subject cannot be a single person, but a group. The statute does not determine the number of people involved, but there must be the number sufficient to achieve their aim.
5) The offence is intentional in nature; it can be committed with specific direct intent (*cum dolo directo colorato*). Perpetrators should aim to achieve one of the aims classified in the statute.
6) The standard as well as aggravated type of the offence carries penalties that are "cascade-like" in nature because the penalty severity depends on the level of involvement in the rebellion. For the standard offence: (a) the penalty for commanders and ringleaders inciting to rebellion is imprisonment for a period from fifteen to twenty five years and absolute barring from exercising rights for the same period; (b) the penalty for subaltern commanders is imprisonment for a period from ten to fifteen years and absolute barring from exercising rights from ten to fifteen years; (c) the penalty for mere participants is imprisonment for a period from five to ten years and barring from exercising the right to public employment and office for a term from six to ten years (Article 473 para. 1 SCC). In the aggravated cases, the offence carries imprisonment and barring from exercising rights for the same period. The penalty for commanders and ringleaders inciting to rebellion is imprisonment for a period from twenty five to thirty years, for subaltern commanders: imprisonment for a period from eleven to twenty five years, and for mere participants: imprisonment for a period from ten to fifteen years (Article 473 para. 2 SCC).

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OFFENCE OF REBELLION IN THE SPANISH CRIMINAL LAW

Summary

The article presents the offence of rebellion classified in the Spanish Criminal Code (Article 472 SCC of 1995), which has a long history because it was referred to in all former Spanish Criminal Codes (of 1848, 1870 and 1932). The offence consists in public and violent sedition aimed at achieving any of the seven objectives listed in Article 472 SCC, which include fully or partially repealing, suspending or amending the Constitution, and fully or partially stripping the King, the Regent, or members of the Regency of all or part of their prerogatives and powers, or obliging them to execute an act contrary to their will (Article 472 paras 1 and 2 SCC). It also occurs in an aggravated form due to various circumstances, e.g. using weapons, causing havoc or serious violence against persons (Article 473 para. 2 SCC). It breaches the Constitution and harms the fundamental institutions of a democratic state, and undermines the foundations of a state of law. Article 472 SCC protects the constitutional order, thus the rules and constitutional institutions that must be recognised. It is a collective offence. Its subject cannot be a single person but a group of people. The statute does not determine the number of people involved but there must be a number sufficient to achieve their aim. The offence can be committed with specific direct intent, and perpetrators should aim to achieve one of the objectives listed in the statute. Standard as well as aggravated types of the offence are "cascade-like" in nature because and the penalty severity depends on the level of involvement in the rebellion (Article 473 para. 1 SCC).

Keywords: member of the Regency, Constitution, *Cortes*, King, Queen, independence, stripping of prerogatives and powers, rebellion, Regent, Senate, armed forces, office, Government of the Nation, Governing Council of the Autonomous Community, election, Legislative Assembly of the Autonomous Community

PRZESTĘPSTWO REBELII W HISZPAŃSKIM PRAWIE KARNYM

Streszczenie

Przedmiotem artykułu jest stypizowane w hiszpańskim kodeksie karnym przestępstwo rebelii (art. 472 h.k.k. z 1995 r.), które ma długą tradycję, bowiem występowało w prawie wszystkich hiszpańskich kodeksach karnych (z 1848 r., 1870 r., 1932 r.). Przestępstwo to polega na publicznym buncie w sposób gwałtowny, którego celem jest realizacja któregokolwiek z siedmiu celów określonych w art. 472 h.k.k., obejmujących uchylenie, zawieszenie lub zmiana

w całości lub w części konstytucji oraz pozbawienie urzędu albo odebranie w całości lub w części prerogatyw i uprawnień królowi lub królowej lub regentowi, lub członkom regencji, lub zmuszenie ich do wykonania czynności wbrew ich woli (art. 472 pkt 1 i 2 h.k.k.). Występuje także w typie kwalifikowanym ze względu na różne okoliczności, np. wyciągnięcie broni, spowodowanie spustoszenia, stosowanie ciężkiego gwałtu wobec osób (art. 473 ust. 2 h.k.k.). Godzi ono w konstytucję i podstawowe instytucje demokratycznego państwa oraz w fundamenty państwa prawa. Artykuł 472 h.k.k. chroni porządek konstytucyjny, a więc obowiązywanie zasad i instytucji konstytucyjnych. Jest przestępstwem wieloosobowym. Jego podmiotem nie może być pojedyncza osoba, ale grupa osób. Ustawa nie określa ich liczby, ale ma być ich tyle, ile jest wystarczające do osiągnięcia zamierzonego celu. Może być popełnione z zamiarem bezpośrednim zabarwionym, a sprawcy powinni dążyć do realizacji któregoś ze stypizowanych w ustawie celów. Zagrożenie zarówno przestępstwa w typie podstawowym, jak i kwalifikowanym ma charakter „kaskadowy", bowiem surowość kary zależy od stopnia uczestnictwa w rebelii (art. 473 ust. 1 h.k.k.).

Słowa kluczowe: członek regencji, konstytucja, kortezy, król, królowa, niepodległość, odebranie prerogatyw i uprawnień, rebelia, regent, senat, siły zbrojne, urząd, rząd państwowy, rząd wspólnoty autonomicznej, wybory, zgromadzenie ustawodawcze wspólnoty autonomicznej

DELITO DE REBELIÓN EN EL DERECHO PENAL ESPAÑOL

Resumen

El articulo versa sobre el delito de rebelión previsto en el código penal español (art. 472 CP de 1995 r.), que tiene una larga tradición, ya que fue previsto en casi todos los códigos penales españoles (de 1848, de 1870, de 1932). El delito consiste en alzamiento violento y público para cualesquiera de los 7 fines previstos en art. 472 CP, dentro de los cuales está la derogación, suspensión o modificación total o parcial de la Constitución; destitución o despoje en todo o en parte de sus prerrogativas y facultades del Rey o Reina o del Regente o miembros de la Regencia, causación que ejecute un acto contrario a su voluntad (art. 472 punto 1 y 2 CP). El tipo tiene sus circunstancias agravantes debido a, p. ej. esgrime de armas, estragos, ejercicio de violencias graves contra las personas (art. 473 ap. 2 CP). Este delito ataca la Constitución e instituciones básicas del Estado democrático de derecho; afecta los fundamentos del Estado de derecho. Art. 472 CP protege el orden constitucional, o sea, la vigencia de principios e instituciones constitucionales. Es un delito pluripersonal. No puede cometerlo una persona, sino un grupo de personas. La ley no fija el número de personas, ha de ser suficiente para conseguir el objetivo. Se comete *cum dolo directo colorato*; los autores deben de intentar conseguir alguno de los objetivos establecidos por la ley. Las penas previstas tanto por el delito básico o agravado se configuran en cascada, ya que la severidad de la sanción depende del grado de participación en la rebelión (art. 473 ap. 1 CP).

Palabras claves: miembro de la Regencia, las Cortes, el Rey, la Reina, independencia, privación de prerrogativas y facultades, rebelión, el Regente, el Senado, Fuerzas Armadas, Gobierno de la Nación, Gobierno de la Comunidad Autónoma, elecciones, Asamblea Legislativa de una Comunidad Autónoma

ПРЕСТУПЛЕНИЕ ВОССТАНИЯ В УГОЛОВНОМ ПРАВЕ ИСПАНИИ

Резюме

Статья посвящена преступлению восстания, предусмотренному испанским уголовным кодексом (ст. 472 УК Испании от 1995 г.). Криминализация восстания в испанском законодательстве имеет давние традиции, поскольку соответствующий состав преступления предусматривался почти всеми уголовными кодексами Испании (кодексы от 1848, 1870 и 1932 гг.). Данное преступление состоит в публичном мятеже с применением насилия, направленном на достижение любой из семи целей, перечисленных в ст. 472 УК Испании, которые включают в себя отмену, приостановление или изменение, полностью или частично, конституции и смещение с должности либо лишение, полностью или частично, прерогатив и полномочий короля или королевы, регента или членов регентства, а также принуждение их к совершению действий против их воли (ст. 472 пп. 1 и 2 УК Испании). Преступление может быть квалифицировано различными отягчающими обстоятельствами, такими как: демонстрирование оружия, причинение серьезного материального ущерба, применение тяжкого насилия (ст. 473 § 2 УК Испании). Данное деяние покушается на конституцию, главные институты демократического государства и основы правового государства. Статья 472 УК Испании защищает конституционный порядок, то есть функционирование конституционных принципов и институтов. Субъектом преступления не может быть одно единственное лицо, так как преступление по определению совершается группой лиц. Закон не уточняет их количество, но оно должно быть достаточным для достижения намеченной цели. Преступление может быть совершено с направленным непосредственным умыслом (*dolus directus coloratus*), преступники должны стремиться к достижению одной из целей, перечисленных в законе. Мера наказания за основной состав преступления и за преступление, квалифицированное отягчающими обстоятельствами, носит «каскадный» характер, так как строгость наказания зависит от степени участия в восстании (ст. 473 § 1 УК Испании).

Ключевые слова: член регентства, конституция, кортесы, король, королева, независимость, лишение прерогатив и полномочий, восстание, регент, сенат, командование вооруженных сил, центральное правительство, правительство автономной области, выборы, законодательное собрание автономной области

DAS AUFSTANDSVERBRECHEN IN DEM SPANISCHEN STRAFRECHT

Zusammenfassung

Gegenstand des Artikels ist das im spanischen Strafgesetzbuch (Artikel 472 der Strafprozessordnung von 1995) festgelegte Aufstandsverbrechen, das eine lange Tradition hat, da es in fast allen spanischen Strafgesetzbüchern (ab 1848, 1870, 1932) vorkommt. Dieses Verbrechen ist eine gewaltsame öffentliche Rebellion, deren Ziel ist es die Realisation eines der sieben im Artikel 472 des Strafgesetzbuches genanten Ziele, die die Aufhebung, Aussetzung oder Änderung der Verfassung ganz oder teilweise und den Entzug des Amtes oder die Abberufung ganz oder teilweise der Vorrechte und Befugnisse des Königs oder der Königin oder des Regenten oder der Regentschaftsmitglieder umfassen oder sie zwingen, Handlungen gegen ihren Willen durchzuführen (Artikel 472 Punkte 1 und 2 des Strafgesetzbuches). Es tritt auch bei dem qualifizierten Typ aufgrund verschiedener Umstände auf, z. B. beim Ziehen einer Waffe, Chaos verursachen, bei schwerer Vergewaltigung von Personen (Artikel 473 Absatz 2 des Strafgesetzbuches). Es verstößt gegen die Verfassung und die grundlegenden Institutionen

eines demokratischen Staates; es verstößt gegen die Grundlagen der Rechtsstaatlichkeit. Artikel 472 des Strafgesetzbuches schützt die verfassungsmäßige Ordnung, d. h. die verfassungsrechtlichen Grundsätze und Institutionen. Es ist ein Mehrpersonenverbrechen. Sein Thema kann nicht eine einzelne Person sein, sondern eine Gruppe von Menschen. Das Gesetz legt die Anzahl der Menschen nicht fest, es mussen jedoch so viele wie möglich sein, um den beabsichtigten Zweck zu erreichen. Es kann mit einer direkten Absicht begangen werden; Die Täter sollten sich bemühen, eines der im Gesetz festgelegten Ziele zu erreichen. Die Androhung sowohl grundlegender als auch qualifizierter Straftaten ist von Natur aus „kaskadierend", da die Schwere des Urteils vom Grad der Beteiligung an der Rebellion abhängt (Artikel 473 Absatz 1 des Strafgesetzbuches).

Schlüsselwörter: Regentschaftsmitglied, Verfassung, Cortesia, König, Königin, Unabhängigkeit, Entzug von Vorrechten und Befugnissen, Rebellion, Regent, Senat, Büro der Streitkräfte, Landesregierung, autonome Gemeinschaftsregierung, Wahlen, autonome gesetzgebende Versammlung der Gemeinschaft

CRIME DE RÉBELLION EN DROIT PÉNAL ESPAGNOL

Résumé

Le sujet de l'article est le crime de rébellion inclus dans le Code pénal espagnol (article 472 du Code pénale espagnol de 1995), qui a une longue tradition, comme il est apparu dans presque tous les codes pénaux espagnols (de 1848, 1870, 1932). Ce crime est une rébellion publique violente, dont le but est d'atteindre l'un des 7 objectifs énoncés à l'art. 472 du c.p.e., qui incluent l'abrogation, la suspension ou l'amendement en tout ou en partie de la constitution et la privation de fonction ou la destitution en tout ou en partie des prérogatives et pouvoirs du roi ou de la reine ou du régent, ou des membres de la régence, ou les forcer à accomplir des actes contre leur volonté (Article 472 points 1 et 2 du c.p.e.). Ce crime se produit également dans le type qualifié en raison de diverses circonstances, telles que le fait de tirer une arme, de causer des ravages et des viols graves contre des personnes (article 473, paragraphe 2 du c.p.e.). Ce crime porte atteinte à la constitution et les institutions fondamentales d'un État démocratique; il porte atteinte aux fondements de l'État de droit. Art. 472 du c.p.e. protège l'ordre constitutionnel, c'est-à-dire les principes et institutions constitutionnels. Est un crime impliquant plusieurs personnes. Son sujet ne peut pas être une seule personne, mais un groupe de personnes. La loi ne précise pas leur nombre, mais il doit être suffisant pour atteindre le but recherché. Il peut être commis avec une intention colorée directe; les auteurs devraient s'efforcer d'atteindre l'un des objectifs stipulés dans la loi. L'importance de la peine pour les infractions fondamentales et qualifiées est de nature «de cascade», car la sévérité de la peine dépend du degré de participation à la rébellion (article 473, paragraphe 1, du c.p.e.).

Mots-clés: membre de la régence, constitution, les Cortes, roi, reine, indépendance, retrait des prérogatives et des pouvoirs, rébellion, régent, sénat, bureau des forces armées, gouvernement de l'État, gouvernement de la communauté autonome, élections, assemblée législative de la communauté autonome

REATO DI RIBELLIONE NEL CODICE PENALE SPAGNOLO

Sintesi

L'oggetto dell'articolo è la definizione del reato di ribellione nel codice penale spagnolo (art. 472 del codice penale spagnolo del 1995), che ha una lunga tradizione ed è infatti presente in quasi tutti i codici penali spagnoli (del 1848, del 1870, del 1932). Tale reato consiste nella rivolta pubblica in modo violento, avente per scopo la realizzazione di uno dei 7 obiettivi stabiliti nell'art. 472 nel codice penale spagnolo, tra cui vi è l'abrogazione, la sospensione o la modifica integrale o parziale della costituzione nonché la privazione del re del suo ufficio o la revoca integrale o parziale delle prerogative e dei diritti del re o della regina o del reggente, o dei membri della reggenza, o la loro costrizione a compiere atti contro la loro volontà (art. 472 punti 1 e 2 del codice penale spagnolo). È presente anche nella forma qualificata, a motivo di diverse circostanze, ad esempio uso delle armi, devastazione delle proprietà, uso della violenza contro le persone (art. 473 comma 2 del codice penale spagnolo). Lede la costituzione e le istituzioni fondamentali dello stato democratico, lede i fondamenti dello stato di diritto. L'art. 472 del codice penale spagnolo tutela l'ordine costituzionale, e quindi l'applicazione dei principi e delle istituzioni costituzionali. È un reato collettivo. Il suo soggetto non può essere una singola persona, ma un gruppo di persone. La legge non stabilisce il loro numero, ma devono essere in numero sufficiente a raggiungere lo scopo mirato. Deve essere compiuto con intento diretto, gli autori del reato devono puntare alla realizzazione di uno degli obiettivi definiti nella legge. La minaccia sia del reato nella forma di base che in quella qualificata ha un carattere "a cascata", infatti la severità della pena dipende dal grado di partecipazione alla ribellione (art. 473 comma 1 del codice penale spagnolo).

Parole chiave: membro della reggenza, costituzione, *Cortes*, re, regina, indipendenza, revoca delle prerogative e dei diritti, ribellione, reggente, senato, forze armate, ufficio, governo statale, governo della comunità autonoma, elezioni, assemblea legislativa della comunità autonoma

Cytuj jako:

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ADJUDICATION OF DISPUTES IN THE ICELANDIC COMMONWEALTH

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1. INTRODUCTION

The Medieval Iceland of the era of the Icelandic Commonwealth (ca. 930–1264)[1] is a relatively well-documented pre-state society based on the chieftaincy model, which featured a developed legislative and judicial apparatus but no organized executive system.[2]

Iceland was settled in the time of the Viking Age which, based on extensive source material, is now considered a period of increased violence, chaos and lawlessness.[3] However, on this uninhabited island, located in the far north of the Atlantic Ocean, the "land taking" (*landnám*) was relatively peaceful.[4] The diverse

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1 "Free Commonwealth", a free translation of the Icelandic *Þjóðveldið*, is one of the several terms present in the literature to define the system of government of medieval Iceland. It is an anachronism. The Icelanders themselves simply called it "our law" (*var lög*). For a discussion on naming conventions applying to Medieval Iceland and the ensuing problems, see S. Nordal, *Icelandic Culture*, Ithaca 1990, p. 76 and K. Hastrup, *Culture and History in Medieval Iceland. An Anthropological Analysis of Structure and Change*, Oxford 1985, p. 249.

2 For a general description of the legal and political system of the Free Commonwealth, see J.L. Byock, *Governmental Order in Early Medieval Iceland*, Viator: Medieval and Renaissance Studies 17, 1986, pp. 19–34. For a discussion on the development of medieval Icelandic institutions, see B.Þ. Runolfsson Solvason, *Institutional Evolution in the Icelandic Commonwealth*, Constitutional Political Economy Vol. 4, No. 1, 1993, pp. 97–125.

3 For a general discussion on the Viking Age, see the works compiled in S. Brink, N. Price (eds), *The Viking World*, London 2008.

4 For more information about the settlement of Iceland, see K.P. Smith, *Landnám: The Settlement of Iceland in Archaeological and Historical Perspective*, World Archaeology Vol. 26, No. 3, 1995, pp. 319–347.

ethnic origin of the settlers,[5] the absence of a unified legal culture[6] and competition for scarce resources[7] inevitably led to a number of tensions and conflicts occurring in a relatively short period of time, which needed to be addressed in a formalised manner. Spontaneous public assemblies, called *þing*, became the forum for settling these disputes. These assemblies were initiated by local chieftains (*goðar*, singular *goði*) who were recruited from among the leadership of the settlement expeditions and held a *primus inter pares* position among the colonists.[8] At the period of the colonisation of Iceland (ca. 870–ca. 930), these assemblies most likely did not have a strictly formalised nature. However, in the first decades of the 10th century, a centralised assembly structure began to emerge, comprising 13 local assemblies (*héraðsþing*) and one General Assembly (*Alþingi*) with the associated Law Council (*lögrétta*).[9]

According to the extant sources, each Icelandic local assembly was led by three *goðar*, and the obligation to attend its meetings was incumbent on all affiliated householders (*bændr*, singular *bóndi*).[10] The chieftains convening at the same assembly were called *samþingisgoðar* (literally, "the *goðar* of the same *þing*") and, together with their householder followers attending an assembly (*þingmenn*), formed what was known as "the assembly triad" (*þriðjungr*). The meetings of the General Assembly were obligatorily attended by all *goðar*. Furthermore, each of them was legally obliged to appear in the assembly site (*Þingvellir*), with at least one-ninth of their *þingmenn*.

Icelandic assemblies were largely judicial in nature.[11] Each local assembly had a court (*dómar*, singular *dómr*) attached. The courts adjudicated disputes

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[5] For a more extensive explanation of the ethnicity of the settlers, see P. Urbańczyk, *Ethnic Aspects of the Settlement of Iceland*, Collegium Medieavale 15, 2002, pp. 155–165; and O. Vésteinsson, *Ethnicity and Class in Settlement-Period Iceland*, [in:] J. Sheehan, D.Ó. Corráin (eds), *The Viking Age: Ireland and the West. Papers from the Proceedings of the Fifteenth Viking Congress*, Dublin 2010, pp. 494–510.

[6] For a discussion on the legal traditions of the home regions of major Icelandic settlers, see S. Brink, *Law and Legal Customs in Viking Age Scandinavia*, [in:] J. Jesch (ed.), *Scandinavians from the Vendel Period to the Tenth Century*, San Marino 2002, pp. 87–117; *idem*, *Law and Society: Polities and Legal Customs in Viking Scandinavia*, [in:] S. Brink, N. Price (eds), *The Viking*, *supra* n. 3, pp. 23–31; G. Sandvik, J.V. Sigurðsson, *Laws*, [in:] R. McTurk (ed.), *A Companion to Old Norse-Icelandic Literature*, Oxford 2005, pp. 223–244.

[7] Þ. Eggertsson, *Sources of Risk, Institutions for Survival, and a Game Against Nature in Premodern Iceland*, Explorations in Economic History 35, 1998, pp. 1–30.

[8] For more information about the status and authority of the Icelandic chieftains, see J.V. Sigurðsson, *Chieftains and Power in the Icelandic Commowealth*, Odense 1999, *passim*; and the remarks in O. Vésteinsson, *Review: Jón Viðar Sigurðsson: Chieftains and Power in the Icelandic Commonwealth*, Saga Book 26, 2002, pp. 128–131.

[9] For a discussion on public assemblies, see G. Karlsson, *Iceland's 1100 Years. History of a Marginal Society*, London 2000, pp. 20–27; and J. Jóhannesson, *Íslendinga Saga. A History of the Old Icelandic Commonwealth*, Manitoba 2006, pp. 35–83.

[10] For a discussion on the social structure of the Free Commonwealth and the relationship between the householders and the chieftains, see W. Gogłoza, *Anarchistyczne wizje bezpaństwowego ładu społeczno-politycznego średniowiecznej Islandii – zarys krytyki*, Krakowskie Studia z Historii Państwa i Prawa Vol. 10, No. 2, 2017, pp. 241–261.

[11] M. Ułas, *Rola thingów w prawie karnym średniowiecznej Skandynawii na przykładzie Norwegii i Islandii*, [in:] M. Mikuła (ed.), *Culpa et poena. Z dziejów prawa karnego*, Kraków 2009, pp. 57–62 and the literature referred to therein.

that involved violations of then-applicable legal norms. The official structure of the Icelandic judiciary consisted of 13 courts associated with the springtime local assemblies (*sóknarþing*) and five courts linked to the *Alþingi*: four Quarter Courts (*fjórðungsdómar*) and the "Fifth Court" (*fimtardómr*).[12] The *sóknarþing* operated as courts of the first instance for minor cases punishable by a fine, the *fjórðungsdómar* heard appeals against decisions of the *sóknarþing* and served as the first instance courts for offences punishable by outlawry,[13] whereas the *fimtardómr* operated as the court of appeal in respect of decisions of the Quarter Courts, and also the court of the first instance in several types of cases exhaustively enumerated in law (e.g. bribing jurors, giving false testimony and assisting individuals sentenced to full outlawry).

Each assembly court was composed of 36 jurors appointed ad hoc by *goðar* from among their *þingmenn*. According to the Old Icelandic sources, *fimtardómr* were the courts of fact, which decided whether or not the accused party was guilty of the imputed transgression. The law itself determined the type and severity of the penalty for a given violation. Despite being composed of non-professional judges, these courts operated in a strictly formalised manner. They had a specific geographical, subject-matter and functional jurisdiction and followed a very complex procedure. This paper attempts to reconstruct this procedure on the basis of the preserved 13th-century private lawbooks of the Icelandic Commonwealth, called *Grágás*.[14]

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[12] Moreover, the Free Commonwealth had a number of ad hoc courts with the very narrow subject-matter jurisdiction, which operated outside the framework of assemblies. These included the *engidómar* (meadow courts), *afréttardómar* (pasture courts), *skuladómar* (inheritance debts courts), *hreppadómar* (commonwealth courts) and *féránsdómar* (enforcement courts). See G. Karlsson, *Social Institutions*, [in:] R. McTurk (ed.), *A Companion*, *supra* n. 6, pp. 507–508.

[13] The Old Icelandic Law provided for two main types of sanctions: fines, imposable in the three amounts of 3, 6 and 12 marks, and three types of outlawry: full outlawry without the right to leave the country (*skóggangr*), full outlawry with the right to leave the country (the editors of the extant Old Icelandic lawbooks – see below – called this type of outlawry "lesser outlawry with the added condition of no right of return" – *fjörbaugs secþ at hann scyli eigi eiga fört vt hingat*), and lesser outlawry (*fjörbaugsgarðr*), i.e. temporary three-year outlawry which obliged the outlaw to leave Iceland.

[14] *Grágás, Islændernes lovbog i fristatens tid, udgivet efter det kongelige Bibliotheks Haandskrift og oversat af Vilhjálmur Finsen, for det nordiske Literatur-Samfund*, Kjøbenhavn 1852. See also P.E. Ólason, *The Codex Reguis of Grágás: Ms. no. 1157 in the Old Royal Collection of The Royal Library Copenhagen, Corpus Codicum Islandicorum Medii Ævi*, Vol. 3, Copenhagen 1932; and Ó. Lárusson, *Staðarhólsbók: The Ancient Lawbooks Grágás and Járnsíða: MS. no. 334 fol. in the Arna-Magnaean Collection in the University Library of Copenhagen. Corpus Codicum Islandicorum Medii Ævi*, Vol. 9, Copenhagen 1936. For a discussion on the nature of the source in question, circumstances surrounding its creation and its scientific value, see especially Ó. Lárusson, *On Grágás. The Oldest Icelandic Code of Law*, [in:] K. Eldjárn (ed.), *Þriðji víkingafundur. Third Viking Congress*, Reykjavík 1958, pp. 77–89; G. Karlsson, *Goðamenning. Staða og áhrif goðorðsmanna í þjóðveldi Íslendinga*, Reykjavík 2004, pp. 28–59; P. Foote, *Reflections on Landabrigðisþáttr and Rekaþáttr in Grágás*, [in:] K. Hastrup, P.M. Sørensen (eds), *Tradition og historieskrivning. Kilderne til Nordens ældste historie*, Arhus 1987, pp. 58–59; M. Stein-Wilkeshuis, *Laws in Medieval Iceland*, Journal of Medieval History No. 12, 1986, pp. 37–53. All further references to *Grágás* concern the edition published in A. Dennis, P. Foote, R. Perkins (eds), *Laws of Early Iceland: Grágás, the Codex Regius of Grágás, with Material from Other Manuscripts*, Vol. I & II, Winnipeg 1980. In order to make it more convenient for readers to find the relevant passages in the text, I use the following notation style: a Roman number indicates the volume, an Arabic number indicates the section, and the subscripted Arabic number points to the page

2. *GRÁGÁS*-BASED ADJUDICATION PROCEDURE

The first step towards the launch of the *Grágás* proceedings for the judicial adjudication of a dispute was the "publication" of the alleged offence (*lýsa*). Any attacks against the immunity of an individual (*helgi*) gave rise to an obligation to formally announce the occurrence of the relevant incident to the appropriate group of qualified persons. This obligation was essentially imposed on the injured party. Exceptionally, if the injured party died as a result of the suffered injuries, the obligation would pass on the attacker. The Old Icelandic law provided that the injured party should report the incident to five non-involved householders living nearest to the site of the incident. The notification of the injuries could be communicated to the public in both daytime and night-time and could be made during a fast day, but it had to occur before the third sunrise that followed the separation of the contesting parties (*GI* $86_{142–143}$).

If the assaulted victim was attacked by a group and they were unable to determine which of the attackers was responsible for the harm or damage they suffered, the victim could identify all members of the group that violated the victim's immunity as the perpetrators. However, any wounds suffered by the victim needed to be attributed to specific perpetrators. The victim was allowed to identify no more than three perpetrators (*GI* 88_{143}). If the injuries suffered by the injured party prevented them from publishing the offence on their own, a duly authorised third party could comply with this obligation for the injured party.

In turn, when "only one of the parties survived the encounter", the duty to publish the incident was incumbent on the killer (*GI* 87_{146}). Within twelve hours from inflicting a mortal blow to their opponent (or, if the encounter or attack occurred on a fjord or a mountain, within twelve hours from the killer's descent), the perpetrator had to go to the first household where he would be safe from reprisals from the victim's relatives and made the offence known to at least one adult household member. Moreover, the perpetrator of the killing was obliged to protect the victim's body from birds and wild animals, as well as to inform the household member before whom the publication was made about the place where the body was hidden. The perpetrator's failure to comply with these obligations made them a murderer in the eyes of the law, which resulted in their losing the right to rely on self-defence in the course of subsequent judicial proceedings (*GI* 87_{146}).

Persons to whom the offence was published could later appear before the assembly courts as witnesses to the incident. However, they also had to be summoned to attend the relevant assembly. A valid summons had to be made at least two weeks before the inauguration of an assembly at which the case was to be heard (*GI* 32_{69}). If the person summoned as a witness was not legally required to attend the assembly, the party who intended to rely on their testimony before the court was obliged to pay the costs of their travel and attendance in the assembly (*GI* 33_{69}).

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on which the passage is found. For example, *GII* 255_{222} indicates section 255 published in the second volume of *Grágás* on page 222. The "‡" symbol preceding the paragraph number denotes an addition originating from outside of the Codex Reguis, which is the basis for the edition cited in this paper.

The medieval Icelandic judicial proceedings were adversarial in nature. The extant lawbooks use the term "principals" (*aðilar*, singular *aðili*) with reference to the person whose rights have been infringed and the infringer. Furthermore, principals were usually parties to judicial proceedings arising out of a feud between them. Each principal was entitled to "transfer" (*selja*) the accuser's or defendant's case to a third party, referred to as "transferee" in literature.[15]

The *selja* constituted a specific form of the procedural power of attorney which did not authorise the transferee to represent the grantor (principal) but rather allowed the transferee to step into the rights of the principal. The transfer was made in the presence of at least two witnesses by means of a formal agreement (*handsal*) which clearly defined the powers of the transferee, including in particular whether or not they were entitled to enter into an out-of-court settlement with the principal's adversary (*GI* 74_{219}, see also the *Brennu-Njáls saga*, chapter 138, describing a transfer of this kind).[16] Depending on who the principal was and the subject-matter of the transferred case, the transfer could be effected voluntarily, mandatorily or by operation of law.

The voluntary transfer of a case was usually motivated by a principal's desire to increase the prospects of prevailing in litigation. In most cases, the transferees were chieftains or other prominent householders with extensive legal knowledge and the ability to mobilise supporters. The latter agreed to pursue principals' cases for profit (e.g. in exchange for the compensation they would recover from the opposing litigant), because of the opportunity to consolidate their position against the principal or the opposing party, or because of previously assumed obligations.[17]

The terms of the transfer, including in particular the consideration received by the person who took control of the case on behalf of a principal, were laid down in a contract (see e.g. the *Brennu-Njáls saga*, chapter 138, the *Droplaugarsona saga*, chapters 4–5). The consideration did not have to take a tangible form. It could also take the form of the principal's commitment to actively assist the transferee in future disputes or to take a specific action.

The possibility of transferring accusers' and defendants' cases to third parties was instrumental in protecting the rights of the Icelanders occupying lower positions in the social hierarchy. Thanks to the transfer option, an individual with a low social status was not doomed to fail in a dispute with a more powerful, better-connected or more affluent litigant. The availability of transferring the accuser's case to a more powerful social actor was, therefore, an important factor in preventing attacks on

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[15] W.I. Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland*, Chicago 1990, pp. 239–240.

[16] Unless otherwise specified, all references to the Old Icelandic sagas refer to the versions published in the series *Íslenzk fornrit*, *I-XXXV*, Reykjavík 1933–2003. For a general discussion on the Old Icelandic narrative sources, see the texts compiled in J. Morawiec, Ł. Neubauer (eds), *Sagi islandzkie. Zarys dziejów literatury staronordyckiej*, Warszawa 2015. For an overview of the sagas as a source of knowledge about the legal system of the Icelandic Commonwealth, see T. Tulejski, V. Mandrik, *Instytucje i prawo w islandzkich sagach XII i XIII wieku*, Czasopismo Prawno-Historyczne Vol. 58, No. 1, 2006, pp. 165–182.

[17] W.I. Miller, *Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland*, The American Journal of Legal History Vol. 28, No. 2, 1984, p. 104.

those who would otherwise be seen as "easy targets" with no capacity to resist violence. When completed, a transfer offered the original accusers an opportunity to obtain their rightful compensation and to have the perpetrator punished. All that was achievable because the victim of an infringement was usually able to find a person with the social standing of the level at least comparable to that of the perpetrator who would be willing to take over the accusation from the victim in exchange for some kind of a benefit. Consequently, the admissibility of case transfers meant that virtually no Icelander was completely defenceless but also that nobody could feel completely immune from the legal consequences of their actions.[18]

On the other hand, the fact that cases were transferred between individuals at different levels of the social hierarchy meant that relatively weak principals usually transferred their cases to more powerful transferees on conditions that were more favourable to the latter. Judging by the content of the preserved narrative sources, transfer agreements were almost always concluded on terms dictated by the stronger party. Also, Icelanders' sagas sometimes illustrate principals violently pressured to transfer their rights to third parties.[19]

Under *Grágás*, the transfer of the defendant's case was mandatory for those perpetrators who had seriously wounded or killed their opponent. This obligation resulted from a rule of the Old Icelandic law which prohibited them from participating in the officially initiated public assemblies (*GI* 99_{162}, *GI* 105_{167}). When they violated the above prohibition, they would lose all their cases pending during the assembly at which they appeared in contravention of the law, also cases that they had initiated and that were unconnected to the attack that prevented them from attending the assembly (*GI* 99_{162}).

The obligation to transfer the accuser's case was, in turn, incumbent on women. The Old Icelandic law exempted single women above 20 years of age and widows (regardless of their age) from the above rule. Under *Grágás* these women retained "control of the court cases relating to assault and minor injuries" but had to be represented in the proceedings by a male member of the household who was legally domiciled there (*GI* 94_{158}).

Moreover, judicial proceedings could not be initiated by principals who were men "whose mental limitations prevent them from managing their own property" and boys under the age of 16. In the two cases mentioned above, the case was transferred by operation of law. The principals of mentally disabled men and underage boys were their legal guardians and relatives, respectively, who would have the right to avenge the minor if the latter had died as a result of the attack (*GI* 94_{158}).[20]

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[18] D.D. Friedman, *Private Creation and Enforcement of Law: A Historical Case*, The Journal of Legal Studies Vol. 8, No. 2, 1979, pp. 406–407.

[19] W.I. Miller, *supra* n. 15, pp. 240–241.

[20] According to the wording of the extant lawbooks of the Free Commonwealth, a person who was wounded or otherwise injured in an attack, lost consciousness or was knocked down by a blow below the waist had the right to retaliate against the perpetrator (*GI* $86_{140–142}$). This right was also exercisable by the injured party's companions accompanying him during the incident, from the moment the perpetrator committed the act until the inauguration of the next General Assembly (*GI* 86_{141}). Persons who did not eyewitness the attack resulting in legally defined

The right to initiate judicial proceedings was also transferred by operation of law in the event of the victim's death. In such cases, the role of the principal was assumed by a person legally competent to avenge the victim. Here, the priority was given to an adult, legitimate son of the victim, in each case provided that he was born free and had sufficient intellectual capacity to accept and administer the estate. If the victim did not have a son, or their son did not satisfy the intellectual capacity requirement, the status of the principal was conferred on the victim's father or, in the case of a fatherless victim, on the victim's brothers (*GI* 94_{156}). If none of the above persons was alive, the obligation to bring judicial proceedings against the perpetrator was incumbent on one of the victim's relatives of illegitimate birth or, in their absence, any adult male relative residing in Iceland who had the right to inherit from the victim (*GI* 94_{157}). Where none of the persons legally designated as potential principals was alive, the chieftain, with whom the victim was affiliated, could initiate judicial proceedings against the perpetrator. If the chieftain did not exercise this right, it would pass on to any other free man of age (*GI* 97_{161}).

The transferee was obliged to pursue the case on their own because, once transferred, the case could not be further transferred to another person. The only exception to this rule applied to the transferees who fell ill or were injured on their way to or during the assembly where their case was to be heard. In such a situation, an ill or wounded transferee could transfer the case to a third party, but in all other circumstances – including when a transferee died – the case could only revert to the original principal (*GI* 77_{123}).

The transferee was obliged to conduct the case with due care and involvement. Specific requirements were attached to the acceptance of transfers of the accuser's cases. A person who formally agreed to bring an accusation against the principal's opponent before the court but failed to comply with this obligation for culpable reasons was subject to the penalty of lesser outlawry. On the other hand, if a transferee's failure to initiate the proceedings was caused by objective factors, the principal had the right to take over the case and initiate the judicial proceedings in the subsequent summer, without prejudice to the applicable prescription periods (see below, *GI* ǂ74_{219}).

Upon the completion of the official transfer, the transferee assumed the role of the principal in the dispute. However, any disqualification from the adjudicating panel and neighbours' panels (see below), effected in consequence of a personal relationship that posed doubts as to the impartiality of a juror or panellist (*GI* 25_{60} and *GI* 35_{72}, respectively), was based on the relationship with the original principal, not the transferee (*GI* $77_{124,}$ see also *Brennu-Njáls saga*, chapter 142).

The judicial proceedings had to be initiated within a legally prescribed period. For the most offences listed in *Grágás*, the proceedings had to start at the beginning of the first proper assembly held after the day when the principal became aware of the violation. If the offence imputed to the opponent was punishable by a fine,

injuries could only avenge the injured party within twenty-four hours of the incident (*GI* 86_{141}). If the perpetrator's blows did not leave any traces on the injured party's body, the revenge could only be carried out by the latter, and only immediately after the incident, before the perpetrator left the scene.

the case had to be brought before the court during the subsequent springtime local assembly. Cases involving offences carrying the penalty of outlawry had to be initiated at the beginning of the next General Assembly. The Old Icelandic law provided for two exceptions from that rule. First, there were the matters known as the "three-assembly cases" (*þrigia þinga mal*), which could be initiated before the end of the third General Assembly held after becoming aware of the violation concerned. Second, there was a category of cases that were subject to no prescription period (*söc fyrniz eigi*, literally "the cases that never grow old"). The first category comprised incest, adultery (*GII* 156_{73}), slander (*GII* 237_{196}), composing and reciting offensive poems (*GII* 238_{197}), as well as trespass on someone else's land causing damage worth at least five legal ounces[21] (*GII* ‡317_{301}). The second category comprised cases of "hidden theft" (i.e. theft that has not come to the attention of the injured party, *GII* 227_{178}), the payment of a debt (*GII* 259_{229}), and the establishment of paternity (*GII* 158_{74}, *GII* ‡251_{258}, *GII* ‡271_{288}).

The initiation of judicial proceedings had to be preceded by a formal summons to appear before the competent court, issued to the opposing party. In all cases which the editors of *Grágás* referred to as "summoning cases" (*stefnusök*), the summons had to be made "locally" (*heiman*) and during a "summoning day" (*stefnudagr*). The first of the above requirements meant that the summons was to be made at the household where the opposing party was legally domiciled, or as close to it as possible without being exposed to danger. If the principal initiating the proceedings did not know where the opponent lived and was unable to obtain this information directly from the opponent, the principal could issue the summons at the household that was the last known legal domicile of the opposing party (*GI* 80_{129}). The second requirement referred to the time limit for issuing the summons. In this respect, the Old Icelandic law laid down a general rule according to which the length of the "summoning days" period depended on the subject-matter jurisdiction of the court. If a dispute was to be settled by a court sitting at a springtime assembly, the summons had to be made no later than two weeks before the inauguration of the assembly. However, if the dispute fell within the jurisdiction of a court associated with the *Alþingi*, the summons had to be issued at least one month prior to the beginning of the General Assembly (*GI* $56_{98–99}$). A summons issued "locally" had to clearly define the person summoned, the offence charged, the type and amount or term of the imposable penalty and the court before which the summoned person was to appear (*GI* 31_{65}).

In the cases which *Grágás* editors did not explicitly refer to as *stefnusök*, namely minor cases and in disputes that occurred at a date closer to the beginning of the relevant assembly, after the expiry of the "summoning days" period, the opponent

[21] In the Free Commonwealth, several means of payment were used in parallel, most notably silver and homespun cloth (*vaðmál*, woollen fabric woven on a hand loom). The common denominator for the different forms of commodity money was the legal ounce (*lögeyrir*, plural *lögaurar*). One legal ounce was equal to six ells of homespun cloth. *In extenso*, S.H. Gullbekk, *Money and its Use in the Saga Society: Silver, Coins and Commodity Money*, [in:] S. Sigmundsson (ed.), *Viking Settlements and Viking Society Papers from the Proceedings of the Sixteenth Viking Congress*, Reykjavík 2011, pp. 176–188.

could be summoned, without the above locality and timing requirements being complied with, to the venue of the assembly where both parties appeared and where the court having the subject-matter jurisdiction over the case had a sitting (*GI* 105_{166}). All summonses, whether made locally or at an assembly, had to be made in the presence of at least two witnesses.

At first instance, disputes between Icelanders were resolved by three types of permanent courts: courts sitting at the springtime local assemblies (*sóknarþing*), the Quarter Courts associated with the *Alþingi* (*fjórðungsdómar*), and the "Fifth Court" (*fimtardómr*). Pursuant to the norms of *Grágás*, if the litigants were members of the same local assembly, and the violation that caused their conflict was punishable by a fine, the dispute between them had to be resolved before their common *sóknarþing* (*GI* 57_{101}). All other disputes were to be resolved at the discretion of the principal initiating the proceedings, by either a local court or a Quarter Court, unless a dispute fell within the exclusive subject-matter jurisdiction of the Fifth Court.

The *fimtardómr* exercised the subject-matter jurisdiction in first instance cases concerning (*GI* 44_{84}) false testimony and verdicts (see below), perjury, bribery of jurors and members of neighbours' panels, assisting persons convicted to full outlawry, and harbouring and/or employing of fugitive slaves and "domestic priests" (*heimilisprestar*)[22]. In the light of the preserved narrative sources, it is clear that the vast majority of cases involving violations punishable by outlawry were adjudicated by the courts associated with the General Assembly, although in law this sanction could also be imposed by the *sóknarþing*.

Under the Old Icelandic law, the court's geographical jurisdiction was, in turn, determined by the relationship between the principal and the *goðar.* If the litigants belonged to the same assembly triad, disputes between them were resolved by their common local court or Quarter Court. On the other hand, if, during an assembly, the principals followed chieftains leading different local assemblies, then the geographical jurisdiction was exercised by the court whose jurors were appointed by the chieftain of the summoned party (*GI* 22_{55}).

Pursuant to the norms of *Grágás*, any Icelander summoned to appear before a court whose composition was not influenced by the *goði* followed by the summonsee was entitled to exercise "chieftain's veto" (*goðalýritr*). In order to do so, the summoned litigant needed to request the chieftain whom he followed during the assembly, in the presence of at least two witnesses, for the transfer of the right to veto the jurors' authority to adjudicate the case he was a party to. The *goði* who denied an affiliated householder's veto request would face the penalty of lesser outlawry (*GI* $58_{104–105}$).

If the party summoned to appear before a "foreign" court invoked the *goðalýritr*, the dispute between the principals was referred to the *fjórðungsdómr* for the Quarter in which the vetoed court was located (*GI* 59_{106}). The above means that disputes

[22] This term denotes priests trained and ordained at the expense of a householder who provided them with room and board. In return, the *heimilisprestar* incurred the lifetime obligation to hold a legally determined, annual number of masses for the householder (*GI* 4_{34}). Domestic priests were only released from this obligation if they found someone to replace them or if they were unable to perform their ministry because of bad health (*GI* 4_{35}). If a domestic priest left the household without the patron's permission, he was treated as an outlaw.

between the parties following the chieftains presiding over different local assemblies could only be adjudicated by the court having jurisdiction over the initiating principal if the opposing litigant had not exercised the "chieftain's veto".

Given the opposing party's ability to invoke the *goðalýritr*, a principal who initiated proceedings had to know the identity of the chieftain followed by the opposing party. The principal could ask a "legal asking" (*lögspurning*), either to the opposing party or to all chieftains of the *Alþingi*. If the opposing litigant refused to disclose information about the chieftain whom he followed during the assembly, he was liable to a fine of three marks and forfeited the right to invoke "chieftain's veto" in the case. The same sanction was imposed on the chieftain who failed to publicly admit his relationship with a principal or falsely declared that a principal was one of his followers during an assembly. If, despite appropriate steps taken by the initiating party, it was impossible for that party to determine which *goðar* the opposing party followed, the case would be brought before the Quarter Court local to the initiating party (*GI* $22_{55–57}$ read in conjunction with *GI* $59_{106–107}$).

The editors of *Grágás* also foresaw a situation where the party initiating the proceedings summoned the opponent to appear before a court that had no geographical jurisdiction over either of them. In such a situation, under the Old Icelandic law, the court seized to hear the dispute had to dismiss the case and impose a fine of three marks on the principal who erred in establishing geographical jurisdiction (*GI* 59_{107}).

The Old Icelandic law provided for one fundamental exception to the general rule on the geographical jurisdiction of assembly courts. The feuds caused by killing or inflicting serious injuries were to be compulsorily adjudicated by the *fjórðungsdómr* for the Quarter relevant for the "site of the incident". And if the clash happened in the area close to the border of several Quarters, the jurisdiction was vested in the court of the home Quarter of the majority of the householders officially notified of the incident (*GI* 99_{163}).

Following the formal inauguration of the relevant assembly, the party initiating the proceedings was obliged to present a charge against the opponent to all assembly participants. For cases to be decided by the courts associated with the *Alþingi*, the public announcement of the harm suffered was to take place on Friday or Saturday following the start of the assembly. The initiating principal, accompanied by at least three witnesses, was then required to appear at the foot of the Law Rock (*Lögberg*)[23] at the time when both the Lawspeaker[24] and the majority of chieftains gathered there. The initiating principal had to identify out loud the person who had infringed the law, provide a detailed account of the offences imputed to the infringer, define

[23] The central area of the assembly site where the General Assembly convened. Unfortunately, despite the multiple references made to the Law Rock in *Grágás* and the narrative sources, it is uncertain which of the many rocks in the area performed this honourable function. E.Ó. Sveinsson, *Þingvellir – the Place and its History*, [in:] K. Eldjárn (ed.), *Þriðji Víkingafundur*, Reykjavík 1958, pp. 74–76.

[24] Lawspeaker (*lögsögumaðr*) was the only public official of the Free Commonwealth. His responsibilities included reciting universally applicable laws from the Law Rock, presiding over the Law Council and answering legal questions asked by private individuals. J. Jóhannesson, *supra* n. 9, pp. 47–49.

the penalty for those offences under the Icelandic law, and indicate whether the matter was yet to be brought before the court or it had already been tried but had not yet been resolved (the assembly courts first heard the cases initiated during the previous assembly that had not been concluded with a judgment for the lack of time, see below; *GI* 21_{54}).

The public presentation of cases submitted to the assembly courts for adjudication was followed by the appointment of jurors. Each permanent medieval Icelandic court consisted of 36 men appointed on an ad hoc basis (*GI* 20_{54}). Pursuant to the *Grágás* norms, the jurors were selected from among the rightful participants in a given assembly. A juror had to be a free person aged 12 or more, capable of being held liable for their own acts, with a legal domicile and fluent in the Norse language. In order to satisfy the latter requirement, a non-Icelander by birth had to live in Iceland for at least three years (*GI* 20_{53}).

Principals whose cases were to be adjudicated during the assembly were disqualified by operation of law from serving on a jury panel. The sole exception to this rule applied to the jurors of the Fifth Court who could be chosen from among all rightful participants of the General Assembly (*GI* 75_{121}). A party could challenge any juror whose personal relationship with the principal raised reasonable doubt as to the juror's impartiality. A challenge request would be granted against jurors related to one of the principals by the lineal or collateral consanguinity, in the first or second degree, as well as those entitled to collect the "kindred payment",[25] the principal sister's, daughter's or mother's spouse and his godfather or a confirmation sponsor (*GI* 25_{60}).

The chieftain who appointed a juror disqualified from the bench by the party's successful challenge was required to designate another eligible man from among his followers in the disqualified juror's place. If the chieftain's followers at the assembly did not include anyone who would be eligible to sit on the adjudicating panel and could not be disqualified, either by law or by the party's challenge, the *goði* had to ask the chieftains from the same assembly triad for help in filling the vacancy. The failure to appoint a sufficient number of jurors or causing delays in the procedure of establishing the adjudicating panel was punishable by a fine and the loss of chieftaincy (*GI* $25_{62–63}$).

Any non-principal participant in an assembly who failed to disclose circumstances preventing him from sitting on the assembly court was liable to a fine of three marks. If a principal first transferred the accusation or defence case to a third party and subsequently deceitfully appointed himself to the assembly court (other than the Fifth Court) hearing the case originally brought against him, then all the court

[25] *Niðgjöld*, or blood money payable to the kinsmen of a person killed (*GI* 113_{175}), as well as to the relatives of the four "men who are called corpses even though they are alive" (*menn ero er náir ero kallaþir þott lifi*), namely the injured victims of an attempted hanging, drowning or those who were left to die on a mountain or a skerry and survived (*GI* 113_{182}). The *niðgjöld* was paid by the perpetrator's kinsmen to the victim's kinsmen; the former contributed according to the degree of their relationship to the perpetrator; the payment was then distributed accordingly among the victim's relatives (the perpetrator's brother paid compensation to the victim's brother, the perpetrator's father to the victim's father, etc.). The perpetrator had to compensate the victim's family or the injured party on their own only if the perpetrator had no relatives (*GI* 113_{180}).

proceedings related to the principal pending during the assembly were invalidated by law, and a fine was imposed on the principal (*GI* 20_{53}). In a situation where a party demonstrated the legally defined circumstances giving rise to concerns about a juror's impartiality, the juror's refusal to comply with the party's challenge was considered to constitute "assembly balking" (*þingsafglöpun*), i.e. a disruption of the assembly punishable by lesser outlawry (*GI* 25_{61}).

Once the assembly courts had been formed, the courts determined the priority of cases on their dockets. To that end, the parties initiating the proceedings were required to appear at the place of the court's sitting to draw lots among themselves, which needed to be done in the presence of at least six jurors. The order of the hearings was determined by the sequence of the lots drawn (see the *Brennu-Njáls saga*, chapter 142). There was no draw for those cases which had not been adjudicated at the previous assembly session (provided that there were not more than four such cases) and disputes which occurred following the inauguration of the assembly. The priority was always given to the cases falling into the last two categories. The principal who failed to appear in time for the vote had to pay a fine of three marks and his case was processed as the last one during the assembly (*GI* $29_{64–65}$).

All cases litigated before the courts associated with local assemblies and Quarter Courts were subject to the same procedure (*GI* $57–59_{101–109}$). Hearings were probably held during night time, after midnight (*GI* 35_{75}, in Iceland, during the spring-summer period, the proceedings could take place in the late hours because of the bright nights).[26] Pursuant to the *Grágás* norms, a party was allowed to appear at the site of the proceedings accompanied by no more than ten persons who were not participants in the proceedings. Anyone who appeared before the court in a larger group was liable to a penalty (*GI* 28_{64}). However, the preserved narrative sources suggest that this penalty's preventive impact was insignificant. Given the extensive number of examples of that prohibition having been violated without any legal consequences shown in the Old Icelandic sagas, one may consider that this rule was violated as a matter of routine.

The audience watching the proceedings was neither allowed to approach too close to the place of the proceedings nor permitted to otherwise interfere with the proceedings. If the jurors considered that the behaviour of the bystanders compromised the course of the trial, they could ask the chieftains who took part in the forming of the adjudicating panel for protection. If the jurors made such a request, the relevant *goðar* were obliged to assign three men to secure the court. Failure to do so was punishable by a fine and the loss of chieftaincy. These men were to separate the audience from the litigants by two ropes and then prevent unauthorised persons from entering in the litigant-only area. Anyone who entered that area and failed to step behind the ropes when requested by the "guards" to do so was liable to a fine of three marks (*GI* 41_{80}).

The initiating party was the first to speak at any trial in Iceland. As part of the "presentation of the case" (*framsaga*), the plaintiff was to state under oath whether they appeared before the court as the principal or the transferee, to name

[26] J. Jóhannesson, *supra* n. 9, p. 68.

the person who had violated their rights, to define the offence charged and the penalty it carried under the Old Icelandic law, and then to designate the court before which the plaintiff summoned the opposing party (*GI* $31_{65–66}$). Evidence was then presented to show that the opposing party had been properly summoned. This was done by the testimony of at least one witness to the incident in question who was sworn in to confirm the veracity of the plaintiff's statements as to the time, place and content of the summons (see e.g. the *Brennu-Njáls saga*, chapter 142). In the event that none of the witnesses to the summoning appeared at the assembly, despite being required to do so, each witness was liable to the penalty of lesser outlawry (*GI* $32_{66–67}$).

After the case was presented and the witnesses confirmed that the opposite party had been duly summoned, the "formal means of proof" were produced. These means of proof were called *gögn;* the editors of *Grágás* also use the terms *sóknargögn* and *varnargögn*, while referring to the evidence produced against and for the summoned party, respectively. Under the Old Icelandic law, the formal means of proof could take the form of witness testimony, verdicts of neighbours' panels, judicial ordeals and the word of honour (the latter could be produced only before the Fifth Court).

A person could only stand as a witness before an assembly court if they had been formally designated (*nefna i þat vætti,* literally, "named") by the principals, and later duly summoned to appear at the relevant assembly. Designation of a witness involved the performance of an action in the witness' presence; alternatively, a witness could be designated through the publication of an offence (*lýsa*), which involved presentation of the course or consequences of a specific event to the witness in order to be able to refer to their testimony at a later date. For example, pursuant to the *Grágás* norms, a person who sustained an injury was to "name two or more witnesses to testify that 'I, [the injured party], publish the offence of assault under law committed by [XY]' and to identify the assailant and those towards whom the assault is published" (*GI* 88_{148}).

In the majority of cases specified by law, at least two witnesses had to be designated. *Grágás* occasionally establishes the requirement that certain facts or events should be demonstrated by the testimony of at least three or five persons (see *GI* 21_{54} and *GI* ǂ50_{210}, respectively). As a rule, each principal designated witnesses "for himself", which meant that if anyone else wanted to rely on the testimony of the same witness, the other person relying on the testimony had to separately designate the witness in the manner prescribed by law. The witnesses who were duly designated and timely summoned were legally obliged to attend the relevant assembly and give testimony under the penalty of lesser outlawry (*GI* 32_{66}). If a witness was unable to attend the assembly because of a serious illness or injury, such witness was obliged to make a formal "transfer" of their testimony to two substitutes who were to appear at the assembly in the witness' place (*GI* 32_{69}). The penalty of lesser outlawry was also imposed on anyone who summoned a person to testify during an assembly but failed to designate this person as a witness. The person that was summoned but not designated nevertheless had to appear at the relevant assembly; only then could they "resign" (*segjask ór*) from testifying as a witness (*GI* 32_{68}).

By testifying before the assembly courts, witnesses were not supposed to give an individual account of the events in which they took part or of which they had knowledge. Instead, the witnesses were expected to faithfully recreate the words spoken by the principal at the moment when he formally designated them as witnesses. As the editors of *Grágás* put it, "If someone brings a case in which witnesses' testimony is needed, he must ask them to determine what to say and say it [before the court]. Witnesses are first to take an oath and then testify. They will give their testimony correctly if they speak all the words they have been designated [to repeat] as witnesses. If they correctly repeat the words [that they have been supposed to testify to] but omit a few that are relevant to the case, then it is false testimony [*ljúgvitni*]. [Similarly,] if one correctly pronounces words they have been summoned to repeat but adds a few words relevant to the case that they have not been designated [to testify] as a witness, then it is [also] false testimony. If one does not repeat all the words they have been summoned to repeat as a witness in the exact same way [as the principal has done], then the testimony is correct despite not being faithful as long as this does not affect the case" (*GI* 32_{68}).

The content of the testimony was to be agreed upon by all witnesses designated by the principal and then publicly pronounced by one of the witnesses with the approval of the others. If witnesses were unable to agree on a common wording for their testimony, they held a vote among themselves. The version of the testimony approved by the majority of the voting witnesses was then pronounced before the court. In the event of a split vote, the court accepted the testimony with a more elaborate content, unless it was considered *ljúgvitni*. In a situation where two testimonies contained the same number of words, then the court was bound to consider the testimony favourable to the principal who designated the witnesses concerned "for himself" (*GI* 32_{68}).

False testimony was punishable by lesser outlawry which was imposed on all witnesses who spoke out in favour of the version of the testimony that did not correspond faithfully to the words of the principal who designated the witnesses concerned. Moreover, a witness could not avoid the penalty by simply voting against a testimony that they considered to be false. In order to exonerate themselves, the witnesses also needed to give the testimony they voted for before the court (*GI* 32_{68}).

Another formal means of proof under the Old Icelandic law was the verdicts of neighbours' panels (*búakviðr*). These panels consisted of the householders capable of paying assembly attendance dues (*þingfararkaupsbændr*)[27] or their duly authorised deputies, residing closest to the "the site of the incident", the household of the legal domicile of a principal or another place specified by law, depending on the

[27] The status of *þingfararkaupsbændr* was enjoyed by those of the householders who had not less than one unencumbered cow, fishing boat or their financial equivalent for each member of their household and "everything else necessary for a household to function" (*GI* 89_{150}). The assembly attendance dues (*þingfararkaup*) were the tribute collected by the chieftain from those of the affiliated householders who were entitled to attend the General Assembly yet decided not to participate in a given year (*GI* 23_{58}). For a more detailed discussion about the Icelandic *bændr*, see J.L. Byock, *Bóndi*, [in:] P. Pulsiano, K. Wolf (eds), *Medieval Scandinavia. An Encyclopedia*, New York 1993, pp. 51–52 and the literature referred to therein.

subject-matter of the case. Cases of violations punishable by a fine were heard and decided by a five-person panel. A panel of nine householders heard cases of offences punishable by any form of outlawry (*GI* 17_{50}). A 12-person panel was required to adjudicate cases of considerable importance, above all those involving any form of theft (*GII* 199_{128}, *GII* 224_{167}, *GII* 227_{177}, *GII* ǂ378_{323}), spells, witchcraft or magic (*GI* 7_{39}, *GI* 17_{50}), aiding full outlaws (*GI* 73_{121}) and those in which a chieftain acted as a principal (*GI* 36_{76}), as well as those concerning events that occurred outside Iceland (*GII* 218_{149}, *GII* ǂ163_{246}, *GII* ǂ205_{260}).

As a rule, the obligation to establish a neighbours' panel was on the party who wished to present its verdict as evidence in a court case (*GI* $27_{63–64}$). Only in the case of a 12-person panel, was this duty incumbent on the chieftain of the principal summoned to appear before the court (*GI* 26_{63} read in conjunction with *GI* 36_{75}). Householders duly summoned to sit on a neighbours' panel were legally obliged to attend the relevant assembly. Non-compliance was punishable by the same penalty as the one carried by the offence they were supposed to give their verdict on (*GI* 34_{70}).

The party that established the panel was obliged to invite the opposing party to challenge the panel's composition. Under the Old Icelandic law, the party summoned to appear before the court had the right to seek the disqualification (*ryðja*) of a member of the neighbours' panels, either because, contrary to what had been determined by the principal initiating the proceedings, they did not live closest to a location specified by law, or because there were circumstances which called their impartiality into question. In the latter case, the rules governing the challenge of jurors applied. Moreover, as shown in the preserved narrative sources, a challenge could effectively be made against those panel members who were economically incapable of paying assembly attendance dues and those householders who were forced to run their households unassisted by other household members (cf. the *Brennu-Njáls saga*, chapter 142). The party that established the neighbours' panel was required to replace the successfully challenged members with other householders complying with the relevant legal requirements (*GI* $35_{71–73}$).

Once the composition of the neighbours' panel was accepted by the opposing litigant, the establishing party called on the panellists to give a verdict on the issue submitted for their consideration. Alike witnesses, members of the panel were supposed to reach a verdict (*kviðr*) based on consensus. If they were unable to reach a common ground, the verdict was taken by voting. Verdicts were always announced under oath and with the approval of all panel members (including those who voted against it, *GI* 35_{73}).

The difference between a witness testimony and a verdict of the neighbours' panel was that the witnesses gave account of what they had seen and heard from the principal that had designated them, while the neighbours stated whether, to their knowledge, the person summoned by the principal to appear before the court was or was not guilty of the offence as charged (see e.g. the *Brennu-Njáls saga*, chapter 56). Moreover, the panel's decision did not determine the outcome of the proceedings as the panel's verdicts could be challenged. The summoned party could request the panel to confirm the existence of circumstances in favour of his case, which was done through the issuance of "clearing verdict" (*bjargkviðr*).

The clearing verdict had to be approved by five members of the neighbours' panel. If the summoned party was found guilty by the five-person panel, all the members designated by the party who established the panel had to express their opinion on the circumstances favourable to the party (*GI* 35_{74}). If a nine- or twelve-person panel was involved, the party found guilty was to designate from among the members of the *búakviðr* the five householders living closest to the site of the event (*GI* 38_{77}) or the five closest neighbours (*GI* 35_{75}), respectively, and then ask them to confirm the existence of circumstances relied on in the party's defence. Each argument of the defence was separately examined by the panellists.

Pursuant to the *Grágás* norms, the witness testimony had a higher probative value than the verdicts of neighbours' panels, and the latter could not contradict the former (*GI* $37_{76–77}$). Accordingly, if one of the parties wished to rely on the testimony of witnesses to prove a certain fact and the other did so by producing a *búakviðr* verdict, the former could submit a special type of veto to prevent the members of the panel from proceeding. However, if the panel gave its verdict after the veto had been filed, its members would be liable to a fine. Moreover, if such a verdict proved to contradict the reliable testimony of witnesses (as described above), the panellists could be held further liable for *ljúgkviðr* (literally, "false verdict"), an offence punishable by full outlawry (*GI* 25_{60}, *GI* 44_{84}, *GI* $58_{101–102}$). In view of the above, neighbours' panels actually issued verdicts only in matters in which no witness testimony was given. Hence, if a party to the proceedings wished to challenge the testimony of witnesses called by the opposing litigant, the challenging party could only do so by bringing a false testimony (*ljúgvitni*) case against the witnesses before the Fifth Court.

Apart from witness testimony and verdicts of neighbours' panels, the Old Icelandic law accepted judicial ordeals (*skírsla*) as a formal means of proof.[28] However, ordeals could only be used in paternity cases, instead of a verdict of a neighbours' panel or as a means of challenging such verdict (*GII* 143_{49}). An ordeal could be requested either by a woman alleging the man's paternity of her child (to confirm that she told the truth) or by a man summoned to appear before the court to prove his innocence. For women, an ordeal involved putting a hand in a vessel with boiling water and pulling out a sunken stone. Men, on the other hand, had to take a red-hot iron rod in the hand and carry it over a certain distance. Once the ordeal was finished, the person's hand was bandaged and, after the lapse of a fixed time period, inspected in the presence of a clergyman. The clean healing of the wound was considered to be evidence in favour of a person who had undergone the ordeal.[29] If the results of the inspection were inconclusive, the bishop for the Quarter in question could decree to repeat the ordeal (*GII* 264_{233}).

Judging by the accounts contained in the preserved narrative sources, ordeals in Iceland were very rare: the whole corpus of Old Icelandic sagas describes only nine cases of ordeals, some of which happened outside the judicial context and were often associated with considerable controversy (see e.g. the *Hrafns saga Sveinbjarnarsonar*,

[28] W.I. Miller, *Ordeal in Iceland*, Scandinavian Studies No. 60, 1988, pp. 189–218.

[29] T.M. Andersson, W.I. Miller, *Law and Literature in Medieval Iceland*, Stanford 1989, pp. 35–36.

chapter 15). After 1215, when the Fourth Lateran Council banned clergy from taking part in "God's judgments", ordeals probably ceased to be used as a formal means of proof. They were ultimately abolished at an unknown date (the literature mentions the years of 1248, 1253 or 1275).[30]

In proceedings before the Fifth Court, the word of honour was used as another formal means of proof. The party summoned to appear before the *fimtardómr* was required to designate two householders who, "putting their honour and integrity at stake" (*leggja undir þegnskap sinn*), were to publicly swear that the person for whom they vouched was, to their knowledge, innocent of the offence charged and would defend themselves only by invoking the truth and in accordance with the law and that they would not receive any remuneration for supporting the summoned party before the court (*GI* $47_{86–87}$).

Once both parties had used the formal means of proof, the "summing up" (*reifing*) took place. To that end, each party asked a juror of its choice to recapitulate their arguments. If the jurors approached by the parties declined to do so, the entire jury was obliged to participate in a draw under the penalty of lesser outlawry (*GI* 40_{79}). Two persons selected by the draw were then to provide a public summary of the party's arguments, naming the party for whom they gave evidence (*GI* $41_{79–80}$).

The final stage of the judicial proceedings was the jurors' verdict on the guilt or innocence of the person summoned to appear before the court. Pursuant to the *Grágás* norms, verdicts (*dómr*) of courts associated with local assemblies and the Quarter Courts were to be given by the unanimous consent of the entire jury panel. Consent was deemed to be unanimous if a given verdict was opposed by not more than five out of 36 jurors. If a majority verdict was opposed by at least six members of the adjudicating panel, the procedure of "divided judgment" (*véfang*) was initiated. The initial phase of the *véfang* involved an attempt to have the controversy resolved amicably by the jurors. They were to be divided into two groups based on their vote and then each group was to present to the other a version of the verdict they considered just and equitable. Having done so, each group was to "invite" the other "to join in the verdict they want to give" (*þeir bioða samneyti sitt at þvi sem þeir villia dema*).

If the conciliation attempt failed (i.e. neither group was joined by at least 31 jurors), the members of both groups made a solemn declaration that they acted in good faith and in accordance with the law. Thereafter, the representatives of both groups delivered two verdicts, one declaring the party summoned to appear before the court guilty of the charged offence and the other one releasing the party from legal responsibility. Subsequently, each party to the proceedings appealed against the verdict to a higher court (a Quarter Court, if the verdict was given by a local court or the Fifth Court if the verdict was given by a Quarter Court), seeking the reversal of the verdict and summoning the jurors who ruled against the appellant to appear before the higher court. The penalty for delivering an "unsafe judgment" (i.e. a judgment reversed by a higher court) was a fine of three marks (*GI* $42_{82–83}$).

[30] A. Dennis, P. Foote, R. Perkins (eds), *supra* n. 14, p. 49, end note 126.

Pursuant to *Grágás*, the Fifth Court was the only permanent Icelandic court which did not follow the principle of unanimity. Under *GI* 47_{88}, jurors of the *fimtardómr* should seek to reach a consensus, but if they failed to do so, they decided by a simple majority. In the event of a split vote, the prevailing opinion was the one expressed by those members of the adjudicating panel who were in favour of declaring the party summoned to appear before the court guilty. However, the Old Icelandic law provided for one exception from the above rule. If a split vote occurred in a case heard by the Fifth Court in the second instance (i.e. on appeal against a "divided judgment"), the final decision was to be made by drawing lots.

In their verdicts, the Icelandic jurors did not essentially rule on the perpetrator's intent. The perpetrator's liability was based on the very fact of them inflicting the damage or harm, regardless of the perpetrator's intent. According to the editors of the extant copies of *Grágás*, "It is decreed [in law] that there shall be no accidents" (*þat er mælt. at engi scolo verða vaða verc*, *GI* 92_{155}). Only in a few cases, enumerated in the Old Icelandic lawbooks, could the party summoned to appear before the court rely on a defence of unintentional fault. These exceptions applied to inflicting injuries during wrestling matches and other forms of sporting competition (to the exclusion of those resulting in death or serious injury, *GI* 92_{156}), "bloodletting" and other therapeutic procedures that did not improve the patient's health, despite the good intentions of the person administering a given procedure (*GI* ǂ119_{230}), harbouring an outlaw for a period longer than three days in ignorance of the fact that the person harboured was, in fact, outlawed (*GI* 77_{124}), cutting trees in a jointly-owned private forest with the consent of only one of the co-owners, if the person who was summoned to appear before the court was convinced that the consenting owner was the sole owner of the forest (*GII* 199_{128}, *GII* ǂ351_{313}), incorrect marking of a farm animal as one's own, provided that the neighbours' panel determined that the perpetrator could have reasons to believe that they owned the animal (*GII* 225_{68}), unintentionally starving someone else's horse to death if the death was caused solely in an attempt to prevent the horse from grazing on the perpetrator's own meadow (*GII* 268_{285}), and using commune's resources to provide room and board for a person from a different commune provided that the perpetrator was convinced that the recipient had legal domicile in the territory of the same *hreppr*[31] (*GII* 234_{189}, *GII* 235_{193}).

A special type of an exception to the principle of strict liability applied to persons who were found by a neighbours' panel to have committed "a deed of insanity" (*ora verk*). However, the defence of insanity could only be invoked before the court by people with a previous history of self-inflicted, life-threating injuries. These persons could receive limited assistance after the case brought against them was published and before the verdict was handed down. It was also possible to reach a settlement with them without obtaining prior consent of the Law Council (*GI* 93_{156}).

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[31] Neighbours' communes (*hreppar*, singular *hreppr*) were self-governing associations of at least twenty householders capable of paying assembly attendance dues. Their main objective was to assist vulnerable commune members and to operate a specific mutual insurance system offering coverage against the effects of livestock epidemics and fires. See W. Gogłoza, *supra* n. 10, pp. 252–254.

However, persons under the age of 12 were completely exempt from liability for all offences, intentional or otherwise. If they caused someone else's death, the obligation to pay the "kindred payment" fell on their relatives. If a person under the age of 12 committed any other infringement of the immunity of a third party, they could only to be restrained in a way preventing them from suffering a permanent injury. Any more aggressive measures aimed at ensuring their compliance constituted an infringement of their own immunity under the Old Icelandic law (*GI* 91_{155}).

When handing down a guilty verdict against a summoned person, the Icelandic courts did not decide on the type and severity of the penalty. The penalty was strictly defined by law and could only be modified with the consent of the Law Council.[32] Consequently, the party initiating the court proceedings had to know (and explicitly define) the legal penalty for the offence imputed to the opposing party. In the event that the opposing principal was convicted, the initiating party was also obliged to enforce the appropriate sanction against the defendant.[33]

3. CONCLUSION

This paper presents a summary compilation of the procedural rules applicable to the assembly courts based on the private lawbooks of the Icelandic Commonwealth, from time to time supplemented by information included in the Old Icelandic sagas. However, the exploratory value of these sources is, in any case, limited. The version of *Grágás* used for the purposes of this paper was created based on two manuscripts drafted between ca. 1260 and ca. 1280. In that period, after the Free Commonwealth collapsed and Iceland became a tributary land of Norway, the Icelandic population awaited the introduction of institutional reforms promised by the Norwegian monarch.[34] Accordingly, certain contemporary researchers argue that the extant copies of *Grágás*, in addition to expressing the laws actually in force in the Icelandic Commonwealth, may also contain passages anticipating the upcoming changes or constituting petitions for the Norwegian monarch.[35] It cannot be ruled

[32] The Law Council (*lögrétta*) was the legislative body arm of the General Assembly. It comprised 48 *goðar,* two Icelandic bishops and the Lawspeaker. Apart from enacting new legal norms, the *lögrétta* answered questions on the points of law referred by the courts and issued individual legal exemptions, such as permissions to impose a penalty different from that prescribed by law.

[33] For a discussion on the enforcement of decisions made by assembly courts, see W.I. Miller, *supra* n. 15, p. 235 et seq.

[34] For a discussion on the declining period of the Þjóðveldið, the Icelanders' gradual submission to the authority of the Norwegian king and the consequences of the loss of Iceland's independence, see J.V. Sigurðsson, *Becoming a Scat Land: The Skattgjafir Process Between the Kings of Norway and the Icelanders c. 1250–1300*, [in:] S. Imsen (ed.), *Taxes, Tributes and Tributary Lands in the Making of the Scandinavian Kingdoms in the Middle Ages*, Trondheim 2011, pp. 115–131; and *idem*, *The Making of a "Skattland". Iceland 1247–1450*, [in:] S. Imsen (ed.), *Rex Insularum. The King of Norway and his "Skattlands" as a Political System c. 1260–c. 1450*, Bergen 2014, pp. 182–191.

[35] See W. Gogłoza, *The Social Status of Women in the Old Icelandic Laws*, a paper accepted for publication in: R. Gogosz, T. Zielińska (eds), *Grettir's Little Sword. Constructing Masculinity in Old Norse Society*, Rzeszów 2019 and the literature referred to therein.

out that the judicial procedure presented above reflects not so much the actual rules of procedure applicable in the Free Commonwealth but rather the anonymous *Grágás* editors' views on the desired shape of the laws concerned.[36]

Although the Old Icelandic narrative sources contain numerous descriptions of disputes resolved by assembly courts,[37] these descriptions do not provide any guidance on the resolution of the above dilemma. The sagas did not start to appear as a more common written source in Iceland until in the early 13th century.[38] However, they depict much earlier events, taking place between the beginning of the 10th century and the middle of the 11th century (the period now called the *söguöld*, or the Saga Age). The passage of time between the moment when the editors compiled the sagas and the time when the described events took place raises a number of serious concerns as to the reliability of their accounts.[39] A number of differences can be observed between the dispute adjudication procedure presented in *Grágás* and that described in the sagas referring to events occurring during the *söguöld*, mainly due to the much lower degree of complexity of the latter. However, given the absence of reliable Old Icelandic legal sources dating from before the second half of the 12th century,[40] it is impossible to say whether these differences resulted from the changes to the applicable rules of procedure made over the passing centuries or rather were a consequence of the sagas editors' errors caused by ignorance or intentional simplifications designed to improve the narrative flow. In turn, the plot of those sagas which refer to the late 12th and early 13th century (nowadays called the "contemporary" *samtíðarsögur*)[41] unfolds at a time of a growing internal conflict, when the Icelandic assembly system was already in decline and the most powerful chieftains openly ignored the law and settled disputes by violent means rather than through courts.[42] Consequently, the practices described in those sagas cannot

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[36] It should be noted, however, that whenever the literature expresses doubts concerning the applicability of the norms recorded in *Grágás*, such doubts pertain to constitutional issues and possibly the status of free householders. See, in particular, T.J. McSweeney, *Fiction in the Code: Reading Legislation as Literature*, Georgia State University Law Review Vol. 34, No. 3, 2018, pp. 581–629.

[37] See examples discussed in K.A. Kapitan, *Z mieczem na wiec. Konflikt i metody jego rozwiązywania w wybranych sagach islandzkich*, Wrocław 2012.

[38] See T.M. Andersson, *The Growth of the Medieval Icelandic Sagas (1180–1280)*, Ithaca 2006.

[39] This issue is discussed in detail in W. Gogłoza, *Spór o historyczność sag Islandczyków w perspektywie antropologii prawa*, [in:] Z. Władek, J. Stelmasiak W. Gogłoza, K. Kukuryk (eds), *Księga życia i twórczości. Księga pamiątkowa dedykowana Romanowi A. Tokarczykowi*, Vol. V, Lublin 2013, pp. 64–89.

[40] The oldest and genuinely authentic medieval source of Icelandic law is a short section of *Grágás* on the ownership of land and rules governing conveyances (*Landbrigðarþáttur*), which constitutes a part of manuscript AM 315 D. fol, dated back to ca. 1150–1175.

[41] This name refers to a relatively short period that passed before the occurrence and recording of the reported events. As opposed to the sources referring to the *söguöld*, the majority of the accounts recorded in contemporary sagas do not raise serious doubts among researchers (concerns are raised only in respect of the impartiality of editors of these sagas). That subject is discussed in greater detail in Ú. Bragason, *Sagas of Contemporary History (Sturlunga saga): Texts and Research*, [in:] R. McTurk (ed.), *A Companion*, *supra* n. 6, pp. 440–442; and D. Skrzypek, *Sagi współczesne (Samtíðarsögur)*, [in:] J. Morawiec, Ł. Neubauer (eds), *Sagi*, *supra* n. 16, pp. 113–115.

[42] See, in particular, E.Ó. Sveinsson, *The Age of the Sturlungs. Icelandic Civilization in the 13th Century*, Ithaca 1953; and J.L. Byock, *The Age of the Sturlungs*, [in:] E. Vestergaard (ed.),

constitute a basis for assessment of the Old Icelandic procedural rules of judicial dispute adjudication.

However, even if one assumed that the procedural norms contained in the known copies of *Grágás* are specific proposals of what the law should be, they still remain a valuable source of knowledge about the views of medieval Icelandic "learned jurists" (*lögmenn*) on the requirements of a fair trial, the extent of involvement of local community members in the adjudication of disputes, the admissible means of proof or the ways in which guilt can be determined. A re-discovery of such norms can provide a basis for further comparative analyses and studies of the impact of the continental law culture in the medieval period.

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ADJUDICATION OF DISPUTES IN THE ICELANDIC COMMONWEALTH

Summary

The Icelandic Commonwealth (ca. 930–1264) is a relatively well documented pre-state society based on chieftaincy. The Free Commonwealth institutional structure was based on a number of public assemblies (*þing*), which provided a meeting place for the local chieftains (*goðar*) and their followers recruited from the householders class (*bændr*). The assemblies had judicial functions and were often used to adjudicate legal disputes. The aim of this article is to reconstruct the assembly court proceedings using the extant private Old Icelandic lawbooks known as *Grágás*. In particular, special consideration is given to the case initiation process, the geographical, subject-matter and functional jurisdiction of various assembly courts, as well as to the formal means of proof, and the rules for convictions.

Keywords: Icelandic Commonwealth, assembly courts, court proceedings, *Grágás*

SĄDOWE ROZSTRZYGANIE SPORÓW W ISLANDZKIEJ WOLNEJ WSPÓLNOCIE

Streszczenie

Islandzka Wolna Wspólnota (~930–1264) jest relatywnie dobrze udokumentowaną źródłowo przedpaństwową społecznością funkcjonującą w tzw. modelu wodzowskim. Ustrój Wolnej Wspólnoty zorganizowany był wokół szeregu wieców publicznych (*þing*), na których regularnie spotykali się lokalni wodzowie (*goðar*) wraz ze stowarzyszonymi z nimi wolnymi gospodarzami (*bændr*). Wiece te miały w dużej mierze sądowy charakter i służyły rozstrzyganiu sporów powstałych na gruncie naruszeń prawa. Celem niniejszego artykułu jest zrekonstruowanie procedury sądowej obowiązującej w postępowaniach przed sądami wiecowymi w oparciu o treść prywatnych zbiorów staroislandzkiego prawa, zwanych *Grágás*. Szczegółowej analizie została w nim poddana kwestia inicjowania postępowań sądowych, właściwości miejscowej, rzeczowej i funkcjonalnej poszczególnych sądów wiecowych, dopuszczalnych środków dowodowych oraz sposobów wydawania orzeczeń.

Słowa kluczowe: Islandzka Wolna Wspólnota, sądy wiecowe, procedura sądowa, *Grágás*

SOLUCIÓN JUDICIAL DE LITIGIOS EN LA COMUNIDAD LIBRE ISLANDESA

Resumen

La Comunidad Libre islandesa (~930–1264) queda relativamente bien documentada en los fuentes como sociedad pre-estatal que funcionaba en el llamado modelo de líder. El régimen de la Comunidad Libre estaba organizado en numerosos mítines públicos (*þing*), en los cuales se reunían regularmente los jefes locales (*goðar*) junto con libres dueños asociados con ellos (*bændr*). Estos mítines tenían en su mayor parte carácter judicial y servían para resolver litigios resultantes de infracciones de derecho. El objetivo del presente artículo consiste en reconstruir proceso judicial existente en procesos ante tribunales de mítines en virtud del contenido de colección privada de antiguo derecho islandés llamada *Grágás*. Se analiza en particular la cuestión de incoación de procesos judiciales, competencia territorial, objetiva, funcional de los tribunales de mítines, admisibilidad de medios de prueba y formas de expedición de resoluciones.

Palabras claves: Comunidad Libre islandesa, tribunales de mítines, proceso judicial, *Grágás*

СУДЕБНОЕ РАЗРЕШЕНИЕ СПОРОВ В ИСЛАНДСКОМ СОДРУЖЕСТВЕ ЭПОХИ НАРОДОВЛАСТИЯ

Резюме

Исландское содружество эпохи народовластия (~930–1264) являлось относительно хорошо документированным догосударственным сообществом, функционировавшим в рамках так называемой вождистской модели. Строй Содружества был основан на народных вечах (*þing*), на которые регулярно собирались местные вожди (*goðar*), а также связанные с ними свободные общинники (*bændr*). Эти веча носили в значительной степени судебный характер и служили

для разрешения споров, возникших в связи с нарушениями закона. Целью статьи является реконструкция судебной процедуры, применявшейся в ходе разбирательств на вечевых судах, на основе текстов древнеисландского судебника «Серый гусь» (*Grágás*). Подробно проанализированы вопросы возбуждения судебных разбирательств, территориальной, материальной и функциональной юрисдикции вечевых судов, допустимых средств доказывания и способов вынесения судебных решений.

Ключевые слова: Исландское содружество, вечевые суды, судебная процедура, судебник «Серый гусь» (*Grágás*)

STREITBEILEGUNG IN DER ISLÄNDISCHEN FREIEN GEMEINSCHAFT

Zusammenfassung

Die isländische freie Gemeinschaft (~930–1264) ist eine relativ gut dokumentierte Quelle für das Funktionieren der vorstaatlichen Gemeinschaft im sogenannten Modell des Führers. Das System der Freien Gemeinschaft wurde um eine Reihe von öffentlichen Kundgebungen (*þing*) organisiert, bei denen sich lokale Führer (*goðar*) zusammen trafen mit den mit ihnen assoziierten freien Gastgebern (*bændr*). Diese Kundgebungen waren größtenteils gerichtlicher Natur und dienten der Beilegung von Streitigkeiten aufgrund von Gesetzesverstößen. Der Zweck dieses Artikels ist die Rekonstruktion des Gerichtsverfahrens angewendet im Verfahren vor Kundgebungen auf der Grundlage des Inhalts privater Sammlungen des altisländischen Rechts bekannt als *Grágás*. Die Frage der Initialisierung eines Gerichtsverfahrens, der örtlichen, materiellen und funktionalen Zuständigkeit einzelner Versammlungsgerichte, der zulässigen Beweismittel und der Methoden zur Erteilung von Entscheidungen wurde darin einer eingehenden Analyse ausgesetzt.

Schlüsselwörter: Isländische Freie Gemeinschaft, Versammlungsgerichte, Gerichtsverfahren, *Grágás*

RÈGLEMENT JUDICIAIRE DES DIFFÉRENDS AU SEIN DE LA COMMUNAUTÉ LIBRE ISLANDAISE

Résumé

La communauté libre islandaise (~930–1264) est une communauté pré-étatique relativement bien documentée dan sle sources fonctionnant dans le soi-disant modèle du commandant. Le système de la communauté libre était organisé autour d'une série de réunions publiques (*þing*) au cours desquelles les chefs locaux (*goðar*) et leurs hôtes libres associés (*bændr*) se rencontraient régulièrement. Ces réunions étaient en grande partie de nature judiciaire et ont permis de résoudre des différends résultant de violations de la loi. Le but de cet article est de reconstituer la procédure judiciaire contraignante devant les assemblées judiciaires sur la base du contenu des collections privées de l'ancienne loi islandaise appelées *Grágás*. Il a analysé en détail la question de l'ouverture d'une procédure judiciaire, la compétence locale, matérielle et fonctionnelle des assemblées judiciaires individuelles, les moyens de preuve admissibles et les moyens de rendre des décisions.

Mots-clés: Communauté libre islandaise, assemblées judiciaires, procédure judiciaire, *Grágás*

LA RISOLUZIONE GIURISDIZIONALE DELLE CONTROVERSIE NELLO STATO LIBERO D'ISLANDA

Sintesi

Lo Stato libero d'Islanda (~930–1264) è una fonte ben documentata di società pre-statale che funzionava con il cosiddetto modello del leader. Il governo dello Stato libero era organizzato attorno a una serie di assemblee pubbliche (*þing*), nelle quale si incontravano regolarmente i capi locali (*goðar*) con i liberi proprietari terrieri a loro associati (*bændr*). Tali assemblee avevano in larga misura un carattere di tribunale e servivano a risolvere le controversie derivanti dalle violazioni del diritto. L'obiettivo del presente articolo è la ricostruzione della procedura giudiziaria in vigore nelle cause presso tali tribunali assembleari, sulla base del contenuto delle raccolte dell'antico diritto islandese detto *Grágás*. Sono state sottoposte ad analisi dettagliata le questioni dell'avvio dei procedimenti giuridici, della competenza per territorio, per materia e per funzione dei singoli tribunali assembleari, dei mezzi di prova ammissibili e delle modalità di emissione delle sentenze.

Parole chiave: Stato libero d'Islanda, tribunali assembleari, procedura giudiziaria, *Grágás*

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PIOTR SADOWSKI*

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Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018, II OSK 2552/16

"Fundamental values and public order cannot justify the rejection of transcribing a foreign birth certificate to the Polish civil registry in case of a Pole born in another EU Member State by a Polish mother, even if the foreign records indicate that the child has same-sex parents"

FACTS OF THE CASE

The applicant (I.Z.) asked the Head of the Registry Office in Kraków, Poland (Kierownik Urzędu Stanu Cywilnego, hereinafter the HRO) to transcribe the birth certificate of her son who was born in the United Kingdom and obtained Polish citizenship by law.[1] The British document indicated that the child has a mother (I.Z.) and the other parent who is also a woman. The HRO claimed that, according to Polish law, a child always has two parents: "a mother" – a woman who gave birth to the child and another "parent" who is always a man. Hence, the transcription cannot be made as it would infringe Polish law and introduce misleading data to the Polish civil register.

I.Z. appealed to the Voivode indicating discrimination, infringement of the right to respect for private and family life, as well as rights specified by the EU law, in particular the right to freedom of movement[2] and Articles 7, 9, 21 and 24 of the

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1 All of the Polish rulings are available at: http://orzeczenia.nsa.gov.pl (accessed 31.7.2019).

2 Provided for by Article 3(2) of the Treaty on European Union, Article 21 of the Treaty on the Functioning of the European Union (both amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed

Charter of Fundamental Rights of the European Union. The Voivode followed the HRO's view that the transcription would be contrary to the Polish law, because Article 18 of the Constitution of the Republic of Poland (hereinafter Constitution)[3] defines "parents" as persons of the opposite sex.

The applicant submitted an appeal to the Voivodeship Administrative Court in Kraków (henceforth "VAC"). The Commissioner for Human Rights presented his views to the case claiming, *inter alia*, that "the refusal of a transcription and, consequently, failure to issue a Polish identity document (…) could make the child *de facto* stateless, what violates public order, namely, the child's rights".[4] Nevertheless, the VAC stressed that the Polish civil registry forms refer to the mother and "a parent" who is always a person of the opposite sex to the mother.[5] Hence, the VAC relied on a public policy clause to keep in force the decision of the Voivode. The Court in Kraków decided that international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the ECHR)[6] developed by the European Court of Human Rights (hereinafter the ECtHR),[7] does not impose an obligation to regulate a legal situation of same-sex parents. Judges indicated that the rights of the child are secured because in Poland I.Z. and her son can always refer to the British birth certificate. The VAC also claimed that the reference to the freedom of movement was irrelevant as the case focused on the transcription of the birth certificate and not on the execution of that freedom.

Finally, on 10 October 2018, the Polish Supreme Administrative Court (hereinafter SAC) revoked the VAC judgment and stressed that the HRO has to transcribe the British birth certificate to the Polish civil register. The Court decided that the case focused only on the birth certificate. Consequently, the judges indicated that Polish law stipulates an obligation to make the transcript of a foreign birth certificate. This interpretation, however, changed the previous views expressed in the SAC ruling of 17 December 2014, II OSK 1298/13.

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at Lisbon, OJ C 306 of 17.12.2007) and Article 45 of the Charter of Fundamental Rights of the European Union (consolidated version OJ C 202 of 7.6.2016).

[3] Consolidated text, Dz.U. of 1997, No. 78, item 483.

[4] Rzecznik Praw Obywatelskich, *NSA uchylił odmowę wpisania do polskich akt stanu cywilnego aktu urodzenia dziecka urodzonego w Londynie w małżeństwie dwóch kobiet*, press note of 10 October 2018, available at: https://www.rpo.gov.pl/pl/content/nsa-uchylil-odmowe-wpisania-do-polskich-akt-stanu-cywilnego-aktu-urodzenia-dziecka-urodzonego-w-Londynie-z-malzenstwa-jednoplciowego (accessed 31.7.2019). The Helsinki Foundation for Human Rights also joined the case.

[5] Ruling of the Voivodeship Administrative Court in Kraków of 10 May 2016, III SA/Kr 1400/15.

[6] Dz.U. of 1993, No. 61, item 284, as amended.

[7] All of the ECtHR judgments are available at: https://hudoc.echr.coe.int (accessed 31.7.2019).

COMMENTARY

The above-presented ruling gives rise to many controversies. Nevertheless, this commentary would be limited to reflections on the "margin of appreciation", a "right to ask a court to submit a request for a preliminary ruling", and the rights of the child. The selection of topics is justified by the fact that they are raised by the opponents and the proponents of the wide discretion left to member states of the European Union and the Council of Europe (hereinafter the CoE).

Unquestionably, relations between parents and children are covered by the right to respect for private and family life as the child is *ipso facto* a family member.[8] Likewise, it is undisputable that the states enjoy a wide margin of discretion in family issues. This is the case, both in the CoE, the oldest and the most advanced system of protection of human rights, as well as in the EU, an organisation which shows increased interest in fundamental rights.[9] A question should, however, be asked if the sovereign power of a state is still truly unlimited in family matters.

Although family law is not within the EU competence, the EU law touches upon that area of law as it regulates, *inter alia*, enforceability of the authentic legal instruments.[10] Poland and Hungary were, however, afraid that this expansion of the EU law on issues primarily related to, e.g. matrimonial property regimes, would be used as a loophole to support an introduction of homosexual marriages to domestic legislations.[11] These views referred to the declaration of the government of the Netherlands which, according to Piotr Mostowik, was interested in making that kind of a promotion.[12] Still, such campaigns would be only a political pressure. Poland and Hungary managed to persuade the EU to rely on the "enhanced cooperation" in matrimonial property issues,[13] but they would be facing increasing difficulties in defeating their position. This is because "In 2018, (…) Three EU countries offer no

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[8] Cf. case of *Gül v. Switzerland* (the ECtHR judgment of 19 February 1996, Application no. 23218/94), § 32 and the ruling of Polish Constitutional Tribunal of 12 April 2011, SK 62/08, Dz.U. of 2011, No. 87, item 492.

[9] More in: R. Smith, *Textbook on International Human Rights*, 6th edn, Oxford 2014, pp. 97–112.

[10] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8.7.2016, and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8.7.2016.

[11] More in: P. Mostowik, *Rozdział VIII. O uzasadnionych powodach nieprzystąpienia Polski do rozporządzeń UE Nr 2016/1103 i 2016/1104 dotyczących wewnętrznych i zewnętrznych relacji małżonków i rejestrowanych partnerów*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019, pp. 109–111. Polish political debates focusing on this aspect of the Charter lead to the Polish signature under the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 115 of 9.5.2008. Cf. R. Wieruszewski, *Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka*, Przegląd Sejmowy No. 2, 2008, pp. 57–59.

[12] P. Mostowik, *supra* n. 12, pp. 106–107.

[13] These regulations do not impose an obligation to introduce registration of same-sex couples to domestic legislation. M. Pazdan, *Rozdział X. Współczesne wyzwania prawa prywatnego międzynarodowego w zakresie prawa rodzinnego*, [in:] W. Popiołek, *Kolizyjne i procesowe aspekty prawa rodzinnego*, Warszawa 2019, p. 129.

recognition of (…) [same-sex marriages] (Italy, Slovakia, Romania), and four even explicitly forbid them (Poland, Bulgaria, Latvia, Lithuania) (…) [, but] In total, 27 countries on the continent, of which 21 belong to the EU, offer a legal framework for same-sex couples."[14]

Bearing in mind the fact that Poland ratified the ECHR, stressing an importance of the ECHR to the EU member states (owing to the equivalent protection doctrine[15] and the still intended accession of the EU to that Convention), one should emphasize that thanks to "the living instrument doctrine"[16] an interpretation of the ECHR should take into account, *inter alia*, social changes in Europe. However, the judicial activity which expands the application of the ECHR to an ever widening range of contexts is limited by the identification of the "general trend" in European countries.[17] Recognition of that trend is a difficult task, what has been especially proven in the ECtHR judgments which were decided by a marginal majority.[18] Although the lack of the Europe-wide consensus cannot be seen as an obstacle to an evolutionary interpretation of the ECHR, the Strasbourg Court is reluctant towards imposing a "foreign morality". Hence, the states benefit from a wide margin of appreciation as regards, e.g. legalisation of same-sex relationships and, consequently, they can enact laws which take into account a domestic morality.

Nonetheless, the increasing number of the CoE countries which provide a legal possibility to register homosexual relationship would affect not only the European family law but also other areas of law. The above-mentioned enforceability of authentic instruments perfectly exemplifies this reasoning. Other issues, including the respect of rights of children of same-sex couples would, therefore, be an increasing challenge for national legislators of those countries which do not recognise a possibility to register that kind of relationships. This is clearly visible in the ruling II OSK 2552/16, which – interestingly – is focused on decisions made in two countries which intended to keep a wide margin of appreciation in, *inter alia*, family matters by signing the Protocol No. 30 to the Charter.

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[14] EHNE, *Same-Sex Marriage in Europe*, available at: https://ehne.fr/en/article/gender-and-europe/civil-law-tool-masculine-domination/same-sex-marriage-europe (accessed 31.7.2019).

[15] Case of *Bosphorus v. Ireland* (the ECtHR judgment of 30 June 2005, Application no. 45036/98), §§ 155–157.

[16] Starting from the case of *Tyrer v. the United Kingdom* (the ECtHR judgment of 25 April 1978, Application no. 5856/72), § 31. More in: A. Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review Vol. 5, Issue 1, 2005, pp. 60–71; B. Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki*, Toruń 2011, pp. 189–209.

[17] Cf. case of *Tyrer v. the United Kingdom* (the ECtHR judgment of 25 April 1978, Application no. 5856/72), § 38. More in: G. Letsas, *Strasbourg Interpretive Ethic: Lessons for the International Lawyer*, European Journal of International Law Vol. 21, No. 3, 2010, pp. 527–529. The evaluative interpretation has been questioned by some states parties to the ECHR. More in: F. de Londras, K. Dzehtsiarou, *Managing Judicial Innovation in the European Court of Human Rights*, Human Rights Law Review Vol. 15, Issue 3, 2015, p. 523.

[18] Cf. case of *Frette v. France* (the ECtHR judgment of 26 February 2002, Application no. 36515/97).

The Supreme Administrative Court judges clearly indicated that Polish law[19] differentiates between an obligation to transcribe a foreign birth certificate to the Polish civil registers and a possibility to make such a transcription. As the SAC put it, "this aspect of the [analysed] case (…) is, according to the Supreme Administrative Court [and] contrary to the Voivodeship Administrative Court in Kraków, essential" to decide upon the matters of the case. The mere fact that a rational legislator introduced such a differentiation implies that administration cannot reject making the transcript if this would deprive a Polish citizen of his/her right to obtain the Polish identity document or passport. However, Article 104(2) of the Registry Records Act prohibits making changes during the transcription,[20] so the administration may face a problem of incoherency of the Polish birth certificate form with its foreign counterpart.

Nevertheless, in the I.Z.'s son case the SAC limited itself to the literal interpretation of the law. Contrary to the judgment of 17 December 2014 and to other decision-making bodies which expressed their opinions at the earlier stages of this case, the SAC did not try to define the term "parent". This approach is well-justified in the *ratione decidendi* as judges referred to the most important national (the Constitution and the Registry Records Act) and international law (the Convention of the Rights of the Child, hereinafter the CRC[21] and the ECHR).

Unsurprisingly, the decision not to refer to public morality in the commented case has already been declared as "making a small loophole which would introduce a possibility to recognize in Poland homorelationships and homoadoptions".[22] That language has to be condemned.[23] However, the author of the above-cited text correctly identified the European-wide trend to secure rights of children of the same-sex parents, but he expects that the Polish legislator would make it impossible to issue subsequent similar rulings.[24] The views of the HRO, the Voivode, and the VAC are close to that reasoning and they followed the judgment of 17 December 2014. They used the Family and Guardianship Code[25] and Article 18 of the Constitution to indicate that the transcription of a foreign birth certificate in which both parents are of the same sex would be misleading and manifestly contradictory to Polish law.

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[19] Article 104 of the Registry Records Act [Prawo o aktach stanu cywilnego] of 28 November 2014, Consolidated text, Dz.U. of 2018, item 2224.

[20] Cf. the SAC ruling of 17 December 2014, II OSK 1298/13.

[21] Adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20 November 1989, Dz.U. of 1991, No. 120, item 526, as amended.

[22] List Prezesa Zarządu Stowarzyszenia Europa Tradycja Pana Ryszarda Skotnicznego z dnia 26 listopada 2018 roku, available at: https://www.europatradycja.pl/download/List%20Stowarzyszenia%20Europa%20Tradycja%2026.11.2018r.pdf (accessed 31.7.2019). Similar views were presented in the comments to the article by E. Świętochowska, *Ojcem i matką w dokumentach mogą być dwie kobiety*, 11 October 2018, available at: https://prawo.gazetaprawna.pl/artykuly/1296853,para-jednoplciowa-rodzicami-dziecka-wyrok-nsa.html (accessed 31.7.2019).

[23] The language of some comments to the article by E. Świętochowska, see *supra* n. 23, was homophobic.

[24] List Prezesa Zarządu Stowarzyszenia, *supra* n. 23.

[25] Kodeks rodzinny i opiekuńczy z 25 lutego 1964 r., consolidated text, Dz.U. of 2017, item 682.

According to the Polish Constitution, international agreements which have been ratified by Poland in a qualified way should be favoured during the interpretation of national legislation if this did not infringe the Constitution. This concerns treaties, which meet prerequisites specified in, *inter alia*, Article 89(1) of the Constitution. Thus, international agreements concerning, among others, freedoms, rights or obligations of citizens, as specified in the Constitution, have a higher rank than "ordinary" acts of the Polish Parliament. However, Article 18 of the Constitution (and Article 7 of the Private International Law Act[26]) can be used to contest the application of foreign law as incompliant with the constitutional values and axiology. Nevertheless, the SAC changed its interpretation presented in the judgment of 17 December 2014 and opposed the VAC in Kraków ruling of 10 May 2016, III SA/Kr 1400/15. According to the judges, the case was not focused on "motherhood" or "parenthood", especially as nobody contested the right of the applicant who (according to the British birth certificate) was the mother of the child, to take care of her son.

The Supreme Administrative Court stressed that the HRO, the Voivode, and the VAC ignored the fact that the decision not to transcribe the birth certificate infringes the rights of the child. Personally, I agree with the SAC. However, its justification lacks reference to Article 72 of the Constitution which concerns "the rights of the child", so it has to be understood as the rights of "every child". Consequently, no child can be discriminated owing to, *inter alia*, the marital status of the child's parents or their sex. Hence, contrary to the SAC judgment of 17 December 2014, I think that the application of law in force may be called a discrimination if the law itself is discriminatory.

The relevant international law, including the CRC and the ECHR formed an important part of the SAC's reasoning. The relevant ECtHR judgments were also cited.[27] These arguments correctly brought judges to the conclusion that the decision to deny making the transcription would expose the child to the situation of uncertainty regarding his/her legal status. As the best interest of the child should be a priority to all administrative bodies, decisions rejecting the transcription cannot be approved of. The HRO, the Voivode and, especially, the VAC unquestionably based their reasoning on the letter of law and historical interpretation. Hence, the omission of reference to the Polish involvement in the works on the CRC is really surprising.

Secondly, the commented case dealt with the right to obtain the Polish transcription of the birth certificate which was issued by British bodies in accordance with the British law to a Polish citizen. Polish bodies *de facto* asked I.Z., who stays in a homosexual marriage legally recognized by the British law, to indicate to the British civil registry that the other parent is a man in order to obtain a British document which would be in line with the Polish law and, maybe, with the biological facts. However, this approach of the HRO, the Voivode and the VAC

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[26] Prawo prywatne międzynarodowe z dnia 4 lutego 2011 r., consolidated text, Dz.U. of 2015, item 1792. See the SAC ruling of 17 December 2014.

[27] References to the ECtHR case law without an indication of names of the cited cases are a regular practice of, e.g. the CJEU. P. Sadowski, *A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments*, European Journal of Legal Studies Vol. 11, Issue 2, 2019, pp. 29–64.

goes far beyond their powers as a decision on the transcription cannot contest the facts, which are unveiled in the source document. The VAC expressly indicated that "policy-making is not under its cognition". Thus, it cannot amend the law as regards definitions of "parents", "family" and "marriage". Bearing in mind that, according to the VAC, the changes in the interpretation of the above-mentioned phrases were needed to transcribe the birth certificate of the child of same-sex parents, judges rejected the option of making such transcription.[28] Nevertheless, this interpretation shows that the VAC was not applying law objectively, but it looked for law which could support it in relying on Article 104(2) of the Registry Records Act. Hence, Article 18 of the Constitution was overused, ignoring Article 72 of the Constitution.

The VAC's reasoning is also internally inconsistent. The judges reiterated on the SAC judgment of 17 December 2014 that the British birth certificate is "legally valid in the United Kingdom", but I.Z. can rely on it in Poland. This would, however, result in verification of the validity of the British certificate each time in the case of I.Z.'s son.[29] Was this the VAC's attempt to hinder an inflow of similar cases? If this was an issue, the "freezing effect" was not achieved as other cases have been raised by same-sex parents who relied on the Registry Records Act.[30]

Certainly, one could say that I.Z. should be aware that in Poland homosexual couples cannot obtain birth certificates of their children. Still, "the margin of appreciation" should recognize the consequences of the Polish bodies' decisions on the child's rights.[31] I think that the I.Z.'s son was discriminated against his personal features which are out of his control. Even if we adopt the view that Article 18 of the Constitution as well as the Family and Guardianship Code limit the right to get married to persons of the opposite sex, homosexual relationships are not prohibited by Polish law, including criminal law. Moreover, the commented case did not focus on the transcription of a same-sex couple marriage certificate, but on the transcription of the birth certificate. Thus, the HRO, the Voivode, and the VAC discriminated against the child due to the decisions which were made by his parents, and, in practice, made it impossible to solve the child's case in Poland. Hence, these verdicts infringed the rights of the child and, consequently, the Constitution and the CRC. They may also infringe the ECHR and (albeit not cited by the SAC) Article 24(1) of the International Covenant on Civil and Political Rights.[32]

Thirdly, an unquestionable preference given to the public order over rights of individuals would undermine the whole concept of human rights. The SAC correctly stressed that the phrase "public order" (as defined by the Court of Justice

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[28] The VAC followed, e.g. the SAC judgment of 17 December 2014.

[29] This was also stressed by the Voivodeship Administrative Court in Łódź in the ruling of 14 February 2013, III SA/Łd 1100/12. The SAC in its judgment of 17 December 2014 decided that this issue goes beyond the merits of the case.

[30] The child has the Polish citizenship. This makes that case different from the case of a child born by an American surrogate to a Pole staying in a homosexual relationship (the SAC judgment of 30 October 2018, II OSK 1868/16).

[31] This was indicated by the SAC judge in his oral presentation of the judgment. See Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5. Regrettably, this interpretation cannot be found in the judgment.

[32] Dz.U. of 1977, No. 38, item 167.

of the European Union, hereinafter the CJEU) has to be interpreted narrowly, and the decision to rely on *ordre public* must be made after an in-depth analysis of the facts of the case, taking into account its real impact on the interests of an individual who asked for the transcription.[33] The Court's views clearly address the need to take administrative decisions on an individual basis in order to avoid arbitrariness. Hence, the judges followed the ECtHR interpretation.[34] This approach has to be supported as it ensures that individuals' rights are – to rephrase the case *Airey v. Ireland* (the ECtHR judgment of 9 October 1979, Application no. 6289/73) – protected "in a real and practical way". The SAC stressed that the law-implementing bodies have to differentiate between the possibility of making the transcription and the obligation to make it, if the legislator differentiates these institutions in law. As we deal with the obligation imposed by law, we must assume that it is in line with the Constitution, and this dependency cannot be questioned by administrative courts, what was correctly stressed by the VAC. Therefore, the SAC could not agree with the HRO, the Voivode, and the VAC that the decision to make the transcript of the birth certificate would infringe fundamental Constitutional values.

Finally, the SAC judges relied on the *Acte éclairé* to justify their rejection of submitting a request for a preliminary ruling, but they did not name the EU law which was clear to them. This approach can be disputed. The SAC did not indicate a close link between the Polish citizenship and the EU citizenship.[35] Can we assume that judges took the view that an organisation of civil registers is the EU member states' competence, so there was no need to cite the EU law and, subsequently, to ask a preliminary question? This could, however, indicate that the Court thought that the EU law does not apply to the EU citizens who stay in the country of their nationality. This opinion should be rejected because the decision not to make the transcription precludes the execution of other rights of Polish citizens, *inter alia*, the freedom of movement, which is unconditionally guaranteed by the Treaty on European Union to all EU citizens.[36] That right was used by Tribunal du travail de Bruxelles to ask the CJEU if the right of the child who holds the Belgian citizenship would not be infringed if the child's father were expelled from the EU.[37] Hence, I agree with the Commissioner for Human Rights that in the I.Z.'s case the SAC should have asked the preliminary question if a decision which *de facto* hinders the EU citizen's right to benefit from the freedom of movement can be based only on national law.[38]

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[33] They followed the SAC judgment of 17 December 2014. A similar argumentation (without citations of the CJEU judgments) was made by the VAC.

[34] Cf. *R.R. v. Poland* (the ECtHR judgment of 26 May 2011, Application no. 27617/04), § 183.

[35] The link was raised in Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5.

[36] CJEU Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* of 17 September 2002, ECLI:EU:C:2002:493.

[37] CJEU Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* of 8 March 2011, ECLI:EU:C:2011:124.

[38] Rzecznik Praw Obywatelskich, *NSA uchylił odmowę*, *supra* n. 5.

Moreover, the decision not to submit a preliminary question has to be convincingly substantiated.[39] This guaranties that the applicants' rights are adequately secured as she/he can only ask a national court to consider making such a request. However, the decision of a national court not to follow that request may be questioned by the ECtHR.[40] Hence, insufficient justification to that decision is a serious omission in the commented judgment.

Finally, the request for a preliminary ruling could be an inspiration for judges serving in lower-instance national courts to consider if their cases fall "within the EU law". This is because the phrase "within the EU law" should always be interpreted broadly as "rights conferred by EU law have to be effectively protected by domestic legislation, as the Member States will clearly be acting within the scope of EU law when they implement, enforce, or interpret EU secondary legislation".[41] This view was stressed recently in the CJEU case C-560/14 *M. v. Minister for Justice and Equality, Ireland, and the Attorney General* of 9 February 2017 (in § 25 of the judgment) in which it was explicitly indicated that "acting within the EU law" also covers an indirect application of the EU law, so an indirect effect of national authorities' decisions has to be analysed. Hence, I am convinced that the submission of the request for a preliminary ruling (or a more elaborated reasoning not to submit that request) could contribute to the national horizontal judicial dialogue. It could also be a guide for advocates and barristers as, e.g. the VAC in its ruling of 10 May 2016 repeatedly stressed that the representative of the applicant did not justify his arguments sufficiently (hence, we can ask if the 2016 ruling could be different if the applicant's argumentation was more comprehensive).

To conclude, the commented case concerned the rights of the child who, according to the British birth certificate, was the son of his mother and the other parent who was also a woman. However, I agree with the SAC that this case did not focus on the rights of the child's parents but on the legal situation of the child. As the legislator differentiated between the possibility to transcribe foreign birth certificates and the obligation to transcribe them, recalling that none of the bodies making a decision in the commented case could question the coherency of that law with the Constitution, I support the SAC that the HRO, the Voivode and the VAC should not try to interpret the term "a parent" but they should transcribe the British certificate. That kind of a decision would also satisfy the standard of protecting the best interest of the child, which is explicitly provided for in the Constitution, as well as international and national law. It may, certainly, be raised that this interpretation can be used as a loophole for expanding the rights of same-sex couples in Poland. However, the HRO, the Voivode, the VAC and the SAC are not policy-making bodies, so they should limit themselves to the application of the law in force in individual cases.

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[39] Starting with case of *Bakker v. Austria*, the ECtHR judgment of 10 April 2003, Application no. 43454/98.

[40] Case of *Dhabi v. Italy*, the ECtHR judgment of 8 April 2014, Application no. 17120/09.

[41] P. Sadowski, *supra* n. 28, pp. 52–53.

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GLOSS ON THE JUDGMENT OF THE POLISH SUPREME ADMINISTRATIVE COURT OF 10 OCTOBER 2018, II OSK 2552/16

Summary

The gloss deals with Polish Supreme Administrative Court's judgment of 10 October 2018 concerning a right to transcribe a British birth certificate (issued to the child holding the Polish citizenship by birth who was born in the United Kingdom) to the Polish civil register. The

Polish administration bodies and the Voivodeship Administrative Court in Kraków refused to make the transcript. They claimed that, according to the British document, the child has a mother and "a parent" who is also a woman, hence the transcript would infringe Polish law, provide misleading information, and be against public order. The Supreme Administrative Court changed its previous interpretation by citing the Constitution of the Republic of Poland, as well as international law, which has been ratified by Poland: the Convention of the Rights of the Child, the European Convention of Human Rights and judgments of the European Court of Human Rights. However, the judges did not find the case to be "within the EU law", and they did not submit a request for a preliminary ruling. This judgment exemplifies the clash between "a wide margin of appreciation" and the right of individuals to "translate" decisions issued in other European states into their national legal systems. Thus, the gloss contributes to the discussions on an extent of a state sovereign power in private and family life matters.

Keywords: margin of appreciation, preliminary question, private and family life, best interest of the child, EU citizenship

GLOSA DO WYROKU NACZELNEGO SĄDU ADMINISTRACYJNEGO Z DNIA 10 PAŹDZIERNIKA 2018 R., II OSK 2552/16

Streszczenie

Glosa dotyczy wyroku polskiego Sądu Najwyższego z 10 października 2018 r. w sprawie prawa do sporządzenia transkrypcji brytyjskiego aktu urodzenia wydanego obywatelowi polskiemu z urodzenia, urodzonemu w Wielkiej Brytanii. Kierownik Urzędu Stanu Cywilnego, wojewoda i Wojewódzki Sąd Administracyjny w Krakowie odmówiły sporządzenia takiego zapisu. W ich ocenie brytyjski dokument stwierdzający, że dziecko ma matkę i „rodzica", który także jest kobietą, naruszałby prawo polskie, zawierał informacje wprowadzające w błąd i byłby sprzeczny z porządkiem publicznym. Sąd Najwyższy odstąpił od swojej wcześniejszej linii orzeczniczej i odrzucił tę argumentację. Powołał się przy tym na Konstytucję Rzeczypospolitej Polskiej i na ratyfikowane przez Polskę umowy międzynarodowe: Konwencję o prawach dziecka, Europejską Konwencję Praw Człowieka i na właściwe wyroki Europejskiego Trybunału Praw Człowieka. Nie odwołał się jednak do prawa UE (nie zbadał też, czy sprawa pozostaje „w zakresie prawa UE") i odmówił zadania pytania prejudycjalnego. Glosowany wyrok unaocznia więc praktyczne trudności wynikające ze zderzenia doktryny „szerokiego marginesu oceny" z prawami osób, które próbują „przetłumaczyć" decyzje wydane w innych krajach Europejskich do krajowego systemu prawnego. Stanowi on więc interesujący wkład do dyskusji o zakresie suwerennej władzy państwa w kształtowaniu krajowych regulacji dotyczących prawa do poszanowania życia prywatnego i rodzinnego.

Słowa kluczowe: margines swobody oceny, pytanie prejudycjalne, życie prywatne i rodzinne, najlepszy interes dziecka, obywatelstwo UE

COMENTARIO A LA SENTENCIA DEL TRIBUNAL GENERAL ADMINISTRATIVO DE 10 DE OCTUBRE DE 2018, II OSK 2552/16

Resumen

El cometario se refiere a la sentencia del Tribunal General Administrativo polaco de 10 de octubre de 2018 sobre el derecho a transcribir el acta de nacimiento británica expedida al ciudadano polaco por nacimiento, nacido en Gran Bretaña. El jefe de la Oficina de Estado Civil, el jefe de la región y el Tribunal Regional Administrativo se negaron a efectuar tal inscripción. Según ellos, el documento británico, constando que el niño tiene la madre y el "progenitor" que también es una mujer, infringiría el derecho polaco, ya que contenía la información que inducía al error y sería contrario al orden público. El Tribunal General Administrativo ha desistido de su anterior línea jurisprudencial y ha desestimado tales argumentos. Alegó la Constitución de la República de Polonia y tratados internacionales ratificados por Polonia: Convenio sobre los derechos del niño, Convención Europea de Derechos Humanos y sentencias pertinentes del Tribunal Europeo de Derechos Humanos. Sin embargo, no alegó el derecho comunitario (tampoco revisó si la causa queda "en el marco del derecho comunitario") y denegó la cuestión prejudicial. La sentencia comentada demuestra las dificultades prácticas resultantes de choque de la doctrina del "amplio margen de valoración" con derechos de personas que intentan "traducir" los actos expedidos en otros países europeos al sistema jurídico nacional. Es una aportación interesante al debate sobre la soberanía del poder del Estado en la formulación de regulación nacional relativa al respeto de vida privada y familiar.

Palabras claves: margen de valoración libre, cuestión prejudicial, vida privada y familiar, el mejor interés del niño, ciudadanía comunitaria

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЫСШЕГО АДМИНИСТРАТИВНОГО СУДА ОТ 10 ОКТЯБРЯ 2018 ГОДА, II OSK 2552/16

Резюме

Комментарий касается решения Верховного суда Польши от 10 октября 2018 г. по делу о праве на предоставление выписки из британского свидетельства о рождении, выданного родившемуся в Великобритании гражданину Польши по рождению. В составлении такой выписки отказали начальник органа записей актов гражданского состояния, воевода и воеводский административный суд в Кракове. По их мнению, британский документ, в котором указано, что у ребенка есть мать и «родитель», также являющийся женщиной, нарушает польское законодательство, содержит вводящую в заблуждение информацию и противоречит общественному порядку. Верховный суд пересмотрел свой прежний подход и отклонил эту аргументацию. При этом он сослался на Конституцию Республики Польша и на ратифицированные Польшей международные соглашения: Конвенцию о правах ребенка, Европейскую конвенцию о правах человека и на соответствующие решения Европейского суда по правам человека. Однако, суд не сослался на законодательство ЕС (а также не рассмотрел вопрос о том, находится ли данное дело «в рамках законодательства ЕС»), а также отказался направить преюдициальный запрос в Суд ЕС. Таким образом, рассматриваемое решение иллюстрирует практические трудности, возникающие в результате столкновения между доктриной «широкой свободы усмотрения» и правами тех, кто пытается «перевести» решения, принятые в других странах Евросоюза, в национальные правовые системы. По этой причине

оно представляет большой интерес для обсуждения границ суверенной власти государства при формировании национальных норм, касающихся права на уважение частной и семейной жизни.

Ключевые слова: пределы свободы усмотрения, преюдициальный запрос, частная и семейная жизнь, наилучшие интересы ребенка, гражданство ЕС

GLOSSAR ZUM URTEIL DES OBERSTEN VERWALTUNGSGERICHTS VOM 10. OKTOBER 2018, II OSK 2552/16

Zusammenfassung

Der Glossar betrifft das Urteil des polnischen Obersten Gerichtshofs vom 10. Oktober 2018 über das Recht, eine britische Geburtsurkunde zu transkribieren, die einem in Großbritannien geborenen polnischen Staatsbürger ausgestellt wurde. Der Betriebsleiter des Standesamtes, der Woiwode und das Provinzverwaltungsgericht in Krakau lehnte eine solche Einreise ab. Ihrer Ansicht nach würde ein britisches Dokument, das besagt, dass ein Kind eine Mutter und einen „Elternteil" hat, der auch eine Frau ist, gegen das polnische Recht verstoßen, es enthält irreführende Informationen und verstößt gegen die öffentliche Ordnung. Der Oberste Gerichtshof ist von seiner bisherigen Rechtsprechung abgewichen und hat dieses Argument zurückgewiesen. Er verwies auf die Verfassung der Republik Polen und die von Polen ratifizierten internationalen Abkommen: Konvention über die Rechte der Kinder, die Europäische Menschenrechtskonvention und die Urteile des Europäischen Gerichtshofs für Menschenrechte. Er bezog sich jedoch nicht auf das EU-Recht (er prüfte nicht, ob der Fall „im Rahmen des EU-Rechts" bleibt) und lehnte es ab, die Frage zur Vorabentscheidung zu stellen. Das Urteil hob somit die praktischen Schwierigkeiten hervor, die sich aus dem Zusammenprall der Doktrin des „breiten Ermessensspielraums" mit den Rechten von Personen ergeben, die versuchen, in anderen europäischen Ländern erlassene Entscheidungen in das nationale Rechtssystem zu „übersetzen". Somit ist es ein interessanter Beitrag zur Diskussion über den Umfang der souveränen Macht des Staates bei der Gestaltung nationaler Vorschriften über das Recht auf Achtung des Privat- und Familienlebens.

Schlüsselwörter: Ermessensspielraum, Vorabentscheidung, Privat- und Familienleben, Wohl des Kindes, Unionsbürgerschaft

COMMENTAIRE À L'ARRÊT DE LA COUR ADMINISTRATIVE SUPRÊME DU 10 OCTOBRE 2018, II OSK 2552/16

Résumé

Le commentaire concerne l'arrêt de la Cour suprême polonaise du 10 octobre 2018 concernant le droit de transcrire un acte de naissance britannique délivré à un citoyen polonais de naissance né en Grande-Bretagne. Le chef du greffe, le voïvode et le tribunal administratif provincial de Cracovie ont refusé de faire une telle entrée. Selon eux, un document britannique déclarant qu'un enfant a une mère et un «parent» qui est aussi une femme, violerait la loi polonaise, contiendrait des informations trompeuses et serait contraire à l'ordre public. La Cour suprême s'est écartée de sa jurisprudence antérieure et a rejeté cet argument. Il a évoqué la Constitution de la République de Pologne et les accords internationaux ratifiés par la Pologne: la Convention

relative aux droits de l'enfant, la Convention européenne des droits de l'homme et les arrêts pertinents de la Cour européenne des droits de l'homme. Cependant, il n'a pas fait référence au droit de l'UE (il n'a pas examiné si l'affaire reste «dans le champ d'application du droit de l'UE») et a refusé de poser la question préjudicielle. L'arrêt commenté révèle ainsi les difficultés pratiques résultant du conflit de la doctrine de la «large marge d'appréciation» avec les droits des personnes qui tentent de «traduire» les décisions rendues dans d'autres pays européens en système juridique national. Il s'agit donc d'une contribution intéressante à la discussion sur l'étendue du pouvoir souverain de l'État dans l'élaboration des réglementations nationales concernant le droit au respect de la vie privée et familiale.

Mots-clés: marge d'appréciation, question préjudicielle, vie privée et familiale, intérêt supérieur de l'enfant, citoyenneté de l'UE

COMMENTO ALLA SENTENZA DELLA CORTE SUPREMA AMMINISTRATIVA DEL 10 OTTOBRE 2018, II OSK 2552/16

Sintesi

Il commento riguarda la sentenza della Corte Suprema polacca del 10 ottobre 2018 sul diritto alla trascrizione dell'atto di nascita britannico rilasciato a un cittadino polacco nato in Gran Bretagna. Il direttore dell'Ufficio di Stato Civile, il voivoda e la Corte Amministrativa del Voivodato di Cracovia si erano rifiutati di effettuare di tale trascrizione. Secondo la loro valutazione il documento britannico che affermava che il bambino ha una madre e un altro "genitore" che è donna, sarebbe in violazione del diritto polacco, contenendo informazioni ingannevoli e in contrasto con l'ordine pubblico. La Corte Suprema si è discostata dalla sua precedente linea giurisprudenziale e ha rigettato tale argomentazione. In questo ha fatto riferimento alla Costituzione della Repubblica di Polonia e agli accordi internazionali ratificati dalla Polonia: la Convenzione internazionale sui diritti dell'infanzia, la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e alle sentenze pertinenti della Corte europea dei diritti dell'uomo. Non ha fatto tuttavia riferimento al diritto dell'UE (non ha neanche esaminato se la questione fosse "nell'ambito del diritto dell'UE") e non ha formulato la questione pregiudiziale. La sentenza commentata mette quindi in evidenza le difficoltà pratiche derivanti dal conflitto della dottrina dell'"ampio margine di valutazione" con i diritti delle persone che tentano di "tradurre" decisioni emesse in altri paesi europei nel sistema giuridico nazionale. Costituisce quindi un interessante contributo alla discussione sull'ambito dell'autorità sovrana dello stato nella formazione della disciplina nazionale riguardante il diritto al rispetto della vita privata e familiare.

Parole chiave: margine di libertà della valutazione, questione pregiudiziale, vita privata e familiare, interesse del bambino, cittadinanza dell'UE

Cytuj jako:

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