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BRUNON HOŁYST*

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1. INTRODUCTION

The English term 'hate speech' refers to a phenomenon that consists in the use of language for the purpose of awaking, spreading or justifying hatred and discrimination as well as violence against particular individuals, groups of people, representatives of minorities or whatever other entities targeted by a given statement. Approval of hate speech in society leads to the establishment of stereotypes and prejudices and, resulting in lower acceptance of representatives of 'hated' groups, can cause the so-called hate crimes. Hate speech occurs in different forms and, that is why, it is difficult to unambiguously determine what it is. Although none of the many existing definitions of the phenomenon is commonly accepted and used, hate speech is unanimously understood in the way defined by the Council of Europe. This definition of hate speech covers expressions that spread, promote and justify racial hatred, xenophobia, anti-Semitism and other forms of intolerance undermining democratic security, cultural cohesion and pluralism.[1]

The term 'hate speech' is often used in Poland, however, the concept of hate speech does not exist in the Polish law. Persons who believe that they are victims of the so-called hate speech can take legal steps based on civil law. On the other hand, persons who are aggrieved as a result of any offences motivated by hatred can protect their rights in criminal proceedings. It is indicated that hate speech is an imprecise term that is difficult to define in the Polish law.[2] The basic provision concerning the phenomenon of hate speech in Poland is Article 256 of the Criminal Code (henceforth CC), which bans promoting a totalitarian political system and

* Prof., PhD hab., Dr.h.c., Director of the Institute of Forensic Science and Criminology, Faculty of Law and Administration of Lazarski University in Warsaw; e-mail: holyst.brunon@gmail.com; ORCID: 0000-0002-7321-163X

1 M. Kacprzak, *Pułapki poprawności politycznej*, Von Borowiecky, Radzymin 2012.

2 OSCE-ODIHR, Hate Crime Reporting, http://hatecrime.osce.org/ (accessed 20.12.2019).

inciting to hatred for national, ethnic, racial or religious reasons. However, such conduct can be also prosecuted based on other laws. The Criminal Code lists the following types of such conduct:
– praising an offensive war (Article 117 para. 3),
– insulting the Nation of the Republic of Poland (Article 133),
– insulting the President of the Republic of Poland (Article 135, para. 2),
– insulting the Polish or foreign flag (Article 137),
– offending religious feelings (Article 196),
– praising paedophilia (Article 200b),
– dissemination of pornographic material (Article 202),
– slander/libel (Article 212).

Activities that are connected with hate speech are also referred to in other statutes. They include, e.g. denying the commission of communist or Nazi crimes (Article 55 Act on the Institute of National Remembrance) and infringement of personality rights (Articles 23 and 24 Civil Code). In many cases, it is difficult to determine a borderline between serious and deserved criticism and an assault and spreading hatred. What is fundamental is to distinguish between a fact and an opinion. In Poland, courts rarely hear slander or libel cases, although the legal provisions clearly indicate that the commission of those offences is only possible by means of announcing untrue facts. For example, an Internet user called his former workplace 'a Polish labour camp'. The employer filed claims to a common court, which judged that the employee could use such an unpleasant description because it is not a statement about a fact but an expression of his opinion. The situation would have been different if he had stated that his employer was a thief or a bribe-taker. Such a statement, unless supported by evidence, is classified as slander or libel.

As it was signalled above, hate speech can lead to the commission of the 'hate crimes'. They are described as any criminal offences targeting people and their property in consequence of which a victim or another target of crime are selected with regard to their actual or alleged link or relationship with, affiliation to, membership of or support for a group distinguished based on its members' common characteristic features such as their actual or supposed race, nationality, ethnic origin, language, colour of skin, religion, gender, age, physical or mental impairment, sexual orientation or other similar features.[3] Attention is drawn to the fact that the number of hate crimes, including hate speech, is rising all over the world.[4] 1,449 proceedings concerning offences committed for racist, anti-Semitic or xenophobic reasons were registered in the common organisational units of the Public Prosecution in Poland

[3] J. Perry, *Evidencing the Case for Hate Crime*, [in:] J.N. Chakraborti, J. Garland (eds), *Responding to Hate Crime*, Policy Press, University of Bristol, Bristol 2015, pp. 71–84.

[4] National Public Prosecution Office, *Sprawozdanie dotyczące spraw o przestępstwa popełnione z pobudek rasistowskich w 2017 r.*, https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/wyciag-ze-sprawozdania-dot-spraw-o-przestepstwa-popelnione-z-pobudek-rasistowskich-antysemickich-lub-ksenofobicznych-prowadzonych-w-2017-roku-w-jednostkach-organizacyjnych-prokuratury/ (accessed 20.12.2019).

in 2017, which accounts for 0.1% of all reported cases.[5] Public prosecutors conducted 1,415 proceedings in the above-mentioned offences, of which 1,156 (with no refusal to instigate) proceedings were registered in this statistical period and 259 cases had been instigated in former periods and continued.

Public prosecutors supervised 278 cases, which accounts for 16.3% of the proceedings carried out in 2017. The largest number of supervised cases occurred in the Lublin region: 85 cases accounting for 72.6%, the Kracow region: 80 cases (57.6%) and the Szczecin region: 31 cases (39.2%). The smallest number of supervised cases occurred in the Katowice and Warsaw regions: three cases in each one. The proceedings registered in 2017 concerned acts legally classified in various ways, however, some of them occurred on their own, others were in cumulative concurrence. It should be indicated that in the case of cumulative concurrence, legal classification of acts with regard to the most severe punishment was registered and other classifications were not reported in the above-mentioned statistics.

Preventive measures were applied to 342 persons in 185 proceedings out of 1,708 cases registered in 2017. Courts remanded 77 offenders in temporary custody. Moreover, prosecutors applied various non-custodial preventive measures towards suspects, including:

– 281 probation orders,
– bail in 87 cases,
– ban on leaving the country in 84 cases,
– 43 other preventive measures.

In 121 cases 430 charges were brought against a total of 353 suspects. Preventive measures were applied to 253 perpetrators, including 66 cases of temporary custody, 77 cases of bail, 203 probation orders, 70 bans on leaving the country and 31 other measures. In 45 cases preventive measures were applied to 63 perpetrators, including five cases of temporary custody, nine cases of bail, 55 probation orders, 11 bans on leaving the country, and 12 other measures.

Among 1,415 proceedings conducted:

– 489 cases concerned offences committed with the use of the Internet,
– 220 cases concerned events connected with the use of violence against a person,
– 197 cases concerned threats issued against a person,
– 145 cases concerned racist inscriptions, the so-called graffiti on walls, buildings and fences,
– 33 cases concerned events connected with demonstrations, mass meetings and rallies,
– 10 cases concerned books and the press,
– 5 cases concerned offences connected with the conduct of sports fans and athletes during or in relation to sports competitions,
– 316 cases concerned other acts.

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[5] S. Spurek, *Mowa nienawiści: potrzebne są zmiany w prawie*, Gazeta Prawna.pl, https://prawo.gazetaprawna.pl/artykuly/1393498,mowa-nienawisci-i-hejt-a-przepisy-prawa.html (accessed 20.12.2019).

According to the information on proceedings collected in 2017, the motive behind the perpetrators' activities in those cases was a person's or a group's membership of the following national, racial, ethnic, political, religious or atheistic groups: Muslims in 328 cases, Ukrainians in 190 cases, Jews in 112 cases, Negroid in 98 cases, Romani in 96 cases, Poles in 95 cases, Catholics in 66 cases, and Syrians in 24 cases. 'Promotion of a fascist state system' was a motive for acts in 230 cases. In 469 cases the motive for acting was classified as 'other' than the above-mentioned. The motive was quite often specified as 'national hatred' or 'hatred for national-ethnic reasons'. In 2017, 258 indictments were placed in courts, in 30 cases there were motions to sentence without trial, in accordance with Article 335 § 1 of the Criminal Procedure Code (CPC), 27 motions to conditionally discontinue proceedings and five motions based on Article 324 CPC (a total of 320 decisions of this type), i.e. 21.7% of cases concluded in the period. In addition, prosecutors discontinued 421 cases in the period due to failure to detect perpetrators, which accounts for 28.6% of all the concluded cases. On the other hand, prosecutors suspended proceedings in 73 cases. In the period analysed, courts sentenced 420 persons, including 47 under Article 335 § 2 CPC, 59 persons under Article 335 § 1 CPC, 31 persons under Article 387 CPC, and conditionally suspended proceedings against 65 persons. 24 persons were acquitted; eight of these judgments were final.

It is important that ca. 40% of acts are committed with the use of the Internet, which often serves as a means to spread prejudice, stereotypes and hatred. The events described are mainly offences of public incitement to hatred of national, ethnic or religious origin (i.e. offences under Article 256 para. 1 CC) or public insulting of a person or a group of people due to their membership (an offence under Article 257 CC). It is also worth mentioning Article 119 CC, i.e. the use of violence or illegal threat because of a victim's national, ethnic, racial, political, religious or atheistic orientation.

The Criminal Code protects people or groups facing such conduct because of their real or alleged national, ethnic or racial origin, and religious or atheistic beliefs. Impaired people, the elderly, and LGBT (non-heteronormative) persons, who are also vulnerable to hate speech, especially on the Internet, are deprived of such special protection. They can pursue justice following general regulations using the provisions of the Criminal Code that concern other offences, e.g. an offence of slander or libel that is subject to private indictment, but not an offence of hatred. Requests for an amendment to the Criminal Code have been made for a long time, inter alia, by the Ombudsman.

Attention is drawn to the fact that the reasons for poor efficiency of the fight against hate speech lie in the inappropriate application of the existing provisions of law as well as the lack of the relevant regulations. The Criminal Code does not protect all groups especially vulnerable to attacks on the Internet. As it has been emphasised above, there is a ban on insulting and inciting to hatred because of membership in a particular ethnic, national, racial or religious group, but not because of the sexual orientation, impairment or gender identity. Homosexuals who face incitement to hatred on the Internet cannot make use of the provisions of crimi-

nal law, and thus have fewer possibilities of protection. That is why, circles involved in the fight against discrimination have demanded for many years that the catalogue of the characteristic features of hate speech be extended.[6]

2. PSYCHOLOGICAL SOURCES OF HATE SPEECH

A deeper understanding of the occurrence of hate speech in social life requires that adequate psychological analyses should be conducted. Hatred is an emotion, and emotions constitute a considerable part of human existence and to a great extent are responsible for human behaviour.[7] It can be assumed that emotions are a constant and inseparable element of human experience and can be treated as human fundamental motivational system. Inherent in emotions are changes taking place in internal body organs that are manifested in stomach cramps, muscle tension, and accelerated heart beat; that is why, it should be emphasised that emotions are both psychological and somatic processes.[8] Research into emotions reports frequent somatic changes, although the coherence and specificity of the processes are not fully explained. Basic emotions include happiness and satisfaction, fear and scare, sadness, shame and the sense of guilt, disgust and anger.[9] Such emotions as happiness and satisfaction are perceived as pleasant; on the other hand, fear, scare and disgust are associated with displeasure.

2.1. EMOTIONS

The basic category in the description of emotions is their identity, i.e. valence. Emotions are defined as evaluative reactions to events, persons or objects.[10] The evaluation can be in the form of assessment with the use of categories of satisfaction-dissatisfaction in the case of events, approval-disapproval in the case of persons, and like-dislike in the case of objects. The distinguished types of evaluation include a general positive-negative dimension. It can be assumed that the valence of emotions also has clear motivational consequences in the sense that positive emotions are connected with a tendency 'towards', pursuing and approaching an object that is the source of emotions; on the other hand, negative emotions are connected with a tendency 'backwards', avoiding and departing from the object that raises emotions. Satisfaction and happiness are basic positive emotions with a positive identity that only differ with regard to intensity.[11]

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[6] S. Spurek, *Mowa nienawiści: potrzebne są zmiany w prawie*, Gazeta Prawna.pl, https://prawo.gazetaprawna.pl/artykuly/1393498,mowa-nienawisci-i-hejt-a-przepisy-prawa.html (accessed 20.12.2019).

[7] R.J. Davidson, S. Begley, *Życie emocjonalne mózgu*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2013.

[8] J. LeDoux, *Mózg emocjonalny*, Wydawnictwo Media Rodzina, Poznań 2000.

[9] N.H. Frijda, *Punkt widzenia psychologów*, [in:] M. Lewis, J.M. Haviland-Jones (eds), *Psychologia emocji*, Gdańskie Wydawnictwo Psychologiczne, Gdańsk 2005, pp. 88–107.

[10] R.J. Davidson, S. Begley, *supra* n. 7.

[11] N.H. Frijda, *supra* n. 9, pp. 88–107.

2.2. ANGER

Anger is one of fundamental emotions. Everyone can become angry if they are provoked. It is indicated that anger results from negative assessment of someone's blameworthy conduct and dissatisfaction caused by its undesired consequences.[12] Research shows that hot-tempered people are more vulnerable to increased blood pressure and heart attacks. Although men show anger more often than women, both verbally and physically, it is proved that the feeling is equally common among people regardless of gender. Women more often supress their anger, which results in a bigger number of depression cases among them than in men. Anger is a basic component of envy and jealousy. When one eats something awful, one feels disgust. A simple form of disgust can be observed when, e.g. a child is fed with something bitter. The emotion is inherent and develops with age as a result of the influence exerted by social and cultural surroundings. Common factors evoking disgust include, e.g. skin damage, unpleasant taste, poor personal hygiene, some secretions, excretions, death and some sexual practices.

At present, it is believed that there is no single separate system in the human brain that might be responsible for emotions. On the other hand, it is possible to separate some systems corresponding to particular fundamental emotions. Older, phylogenetic parts of the brain are involved in emotions to a different extent. This concerns the prefrontal and association cortex, hippocampus, hypothalamus, midbrain, amygdala, frontal thalamic nuclei and cingulate cortex.[13] The cerebral cortex also has some type of regulatory significance as thanks to it an individual becomes aware of the emotional states perceived. Due to activity of particular parts of the brain connected with emotions, a type of asymmetry can be noticed. Thus, positive emotions are perceived thanks to the activity of the left hemisphere, while negative emotions thanks to the right one. Neurotransmitters, chemical substances and hormones, also play a significant role in the work of the brain, modulating and generating emotional states. They include cortisol and testosterone, adrenaline, noradrenaline, dopamine, and serotonin.[14] As far as factors evoking emotions are concerned, there is a great variety. Some of them are universal in nature because they result from the establishment of some methods of responding to events important from the perspective of survival during the human evolution, e.g. the feeling of fear occurring at the sight of a dangerous animal. The second big group of factors result from individual experience. Four ways of generating emotional states are indicated. The first one is nerve-related and fundamental as it is present in the other ones. The emotion can be evoked, e.g. after the application of a certain chemical substance. The second one is sensomotoric in nature and occurs when the expression of an emotion is at the same time strengthened. The third way consists in a biological action of important stimuli such as smell, pain and taste. The fourth

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[12] E.A. Lemarise, K.A. Dodge, *Rozwój złości i wrogich interakcji*, [in:] M. Lewis, J.M. Haviland-Jones (eds), *Psychologia emocji*, Gdańskie Wydawnictwo Psychologiczne, Gdańsk 2005, pp. 745–760.

[13] J. LeDoux, *supra* n. 8.

[14] R.M. Sapolsky, *Dlaczego zebry nie mają wrzodów? Psychofizjologia stresu*, Wydawnictwo Naukowe PWN, Warszawa 2012.

one is based on cognitive identification and the development of factors that evoke emotions. Assessment, attribution and interpretation are cognitive processes that generate emotions.

2.3. HATRED

Negative feelings such as anger, hatred and desire of revenge are part of everyday life to the same extent as all the other positive feelings. Hatred is a dangerous feeling. Addressed externally, it has an effect different from the intended one: it does not harm a targeted person but damages the person who is filled with it. It is an addictive feeling, something like cancer or an infectious disease. Great humanity mentors of different eras warn of the power of hatred, which is capable of intensifying pain to the same extent as love is capable of alleviating it.[15] One should realise that human psyche also conceals dark sides. They must be accepted because they are part of an individual. It is not possible to push them to the subconscious, hide them, which results in, e.g. depression. Therefore, it is important to develop a possibility of controlling those dark sides of one's own psyche. A man can hate in a destructive way. When destructive hatred reaches a high level, such desire can change into wrongful conduct.

According to some psychoanalysts, hatred and bestiality, as a result, are immanent part of the human condition.[16] In order to understand the issue discussed, it is important what the course of development in the childhood was. For babies, love and hatred are separated. They perceive the world in two categories: either/or. A baby does not understand that a beloved person can be an enemy. On the other hand, an adult can treat love and hatred as things connected and occurring at the same time in the relations with another person. In the case of an adult, it is very important to address hatred properly. Inter alia, obsessive hatred is a form of improperly addressed hatred.[17] The characteristic features of such conduct include virulence, obstinacy, perversity or extreme pedantry. Virulent rituals are subtle ways of gaining dominance over a given person. Passive-aggressive hatred is the most sophisticated form of all. People who are overwhelmed by it cannot admit that they experience whatever negative, hostile feelings. Masochist hatred is another form. People who are overwhelmed by it often remain in inappropriate emotional relationships and prove that they are only innocent victims. They express their hatred in a perverted way taking the position of a person hated by another one. Psychosomatic hatred is the most serious form because it is addressed to one's self and one's own body. Some people do not want to admit that they feel hatred towards another person; that is why, they express it towards themselves. Such a person is inclined to express hatred by means of, e.g. a heart condition, asthma attacks and gastric disorders.[18] Schizophrenic hatred is also addressed to one's self, however, it

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15 E. Fromm, *O sztuce miłości*, Wydawnictwo Rebis, Poznań 2009.

16 H. Kohut, *The Kohut Seminars on Self Psychology and Psychotherapy with Adolescents and Young Adults*, W.W. Norton & Company, New York 1987.

17 J. Goldberg, *Ciemna strona miłości*, Wydawnictwo WAB, Warszawa 1994.

18 R.M. Sapolsky, *supra* n. 14.

is not targeted at the body but the brain. Such persons do not want to admit that they feel hatred and, that is why, they prefer to escape to the world of phantasy and destroy the integrity of their brain. They destroy themselves in order to protect others against their hatred. Depressive hatred is the last type; similarly to the two latest types, it is also addressed to one's self. Such people accuse themselves, have a constant sense of guilt and do not have self-respect.

Hatred becomes destructive to a person when one conceals it; thus, it is very important to find a non-destructive way of expressing it. Long-term concealed hatred causes most problems. The problem of narcissism as specific psychical disposition is sometimes connected with the issue of hatred.[19] In psychoanalytical literature, narcissism is described as a standard stage of one's development in the infancy and childhood. The term is also used to describe a certain mental disorder. Narcissism as a standard stage of human development is reflected in the fact that a baby notices the existence of other people when they satisfy his/her needs. A baby's narcissism gradually reduces with the growth of interest in the surrounding world. A baby realises that he/she is not the centre of the world. Attention is drawn to the fact that the course of mental processes is influenced by opposite powers: progressive and regressive ones. The former are conducive to maturing and the latter, on the other hand, act in the opposite direction. Progressive powers can stimulate an individual to responsible conduct, and regressive powers induce people to return to developmentally immature conduct. Narcissistic relationships are ones in which the source of the occurring conflicts can be found in the first years of life when the psychological birth of a human being takes place. Unlike the biological birth, which is a dramatic event, carefully observed and described, the mental birth is a slowly developing internal psychological process, which can be divided into three stages. In the first one, an infant experiences a fusion, a symbiotic union with the mother and the surrounding world. In the next stage, the baby acquires the feeling of separateness and the period is called a separation or individualisation phase. In the later period, having gained the skill of moving around, the baby starts to be interested in the experience of moving away from the mother and developing his/her own stable sense of identity of a separate person, however, with the possibility of returning to the mother if he/she wishes; the period is described as a phase of becoming closer again. In order to become psychologically mature, it is necessary to go through the three stages.

In the case of narcissism as a personality disorder, the characteristic feature of the people concerned is either a strong feeling of superiority or just the opposite – inferiority. In both cases, destructive hatred is its basis. Narcissistic superiority mania concerns a person who is egocentric, has a fixation with oneself like mythical Narcissus. Destructive hatred is hidden under the surface of love to oneself. Narcissistic inferiority mania concerns people who consciously hate themselves; who believe they are losers. They have often experienced traumatic events that deprived them of self-confidence. Hatred is neither a disease nor a disorder. It is a basic biological adaptation mechanism. It is necessary for us to be able to face threats, irritation and frustration. Hatred used in self-defence is a constructive feeling,

[19] A. Lowen, *Narcissism. Denial of the True Self*, Touchstone, New York 2004.

a fundamental reaction available to people that becomes pathological only when it blends with unsatisfied child needs. When it is translated into the language of acts, it becomes destructive.

Destructive desires often occur in dreams and fantasies. One can sense rage, hatred, and desire for revenge in them with no dangerous consequences whatsoever. An animal fighting against another animal, having realised that it will not win, applies a defensive manoeuvre of retreat. In the case of people, when it is recognised that open rebellion has no chance to succeed, the only way to express hatred is to escape into the world of fantasy. When it comes to emotional harm, betrayal, apart from hatred the desire of revenge occurs. Vindictiveness also serves as defence against the feeling of hopelessness and helplessness. Hope for successful revenge makes life more bearable and causes that people feel less helpless victims. Imagining the world they desire in their revenge fantasies, they escape from the real world. In fantasies one can control the surroundings, is able to give the invented story any ending, can kill all the villains. Nothing ensures such a positive image of oneself as a revenge fantasy. Having fantasies about revenge comes as a relief because it helps to contain destructive impulses. When one does not admit the feeling of hatred in real life, the dreams are violent nightmares. Such a person attributes hatred, destruction to other people and treats them as if they were something external and not what is in them.

A human body has its own way of experiencing hatred. Every healthy organism has its own immunity system. When an enemy appears, e.g. in the form of bacteria, the system feels hatred to it. It strives to detect and destroy it and this hatred restores health. Everyone is also equipped with a mental immunity system, which has the same task, i.e. to detect and destroy the enemy. The human psyche has its enemy in the form of destructive hatred, which originates from narcissism. Aggression covers a wide range of feelings: from light irritation to anger. A properly functioning mental immunity system is able to distinguish these subtle nuances, properly determines the source of aggression (in them or other people), mobilises protective measures, and does not let an individual become an easy target for destructive narcissist hatred. Constructive hatred, stimulating the mental immunity system, neutralises the destructive power of narcissism. The main problem that blocks the proper cognition of hatred is the low level of an individual's competence in the sphere of self-awareness. If people were ready to extend their competence in the sphere, there would be fewer hate crimes committed.

If a given state's legal system or inactivity of the state bodies let discriminatory mechanisms be established, it will result in violence and hate crimes. It is in particular dangerous if potential perpetrators of hate crimes strive to find people responsible for their personal and life failures (e.g. unemployment, low salary, etc.) at any price. Many European countries' experience shows that prosecution of hate crime is very difficult because judges as well as prosecutors find it difficult to assess perpetrators' conduct in criminal law terms.[20] We often deal with the conflict of

[20] K. Karsznicki, *Przestępstwa popełniane z pobudek rasistowskich lub ksenofobicznych*, Prokuratura i Prawo 2, 2012, pp. 16–42.

interests. On the one hand, there is an infringement of personality rights, e.g. as a result of slander or libel, and on the other hand, one deals with the limitation of the freedom of expression. Finding the borderline between lawful and unlawful conduct is often very difficult. The assessment of behaviour does not pose any problems for judges and prosecutors if an act is connected with the violation of a person's bodily integrity and injury. It is much more difficult to identify an offence if it is just a statement. Then, the whole context of the statement is important as well as the accompanying circumstances. Polish criminal law system does not use a definition of hate crime. However, it was formulated by the Organisation for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE – ODIHR) as presented above.[21]

3. SOCIOLOGICAL SOURCES OF HATE CRIME

In hate crimes, their common denominator is that they are motivated by prejudice and concern victims perceived as representatives of a particular group, and they are an announcement addressed to the group the victim belongs to. It should be emphasised that perpetrators of hate crimes harm representatives of the group against which they are prejudiced and not particular persons to whom they raise claims. Thus, the object of a perpetrator's conduct is not an individually defined person but this feature that specifies a victim as a different, alien member of a group hostile towards the perpetrator. It is worth emphasising that only the conduct resulting from hatred that is a prohibited act carrying a statutory penalty, i.e. is a classified offence, remains in the sphere of a prosecutor's or a judge's interest. In the field of criminal law, the conduct that does not match the features of any offences classified in the Criminal Code and other statutes stipulating penal provisions is legally irrelevant. However, such conduct will not be irrelevant in the field of other branches of law protecting particular groups against discrimination. There is a close relation between hate crimes and discrimination.[22] Discrimination, unlike hate crimes, is passive in nature and is reflected in refusing a representative of the group discriminated against access to particular rights, interests and social positions. A perpetrator of a hate crime, on the other hand, behaves in an active way attacking a victim by publicly insulting or depriving them of property, health or life. Therefore, in the case of victims of crime, there will be a response of criminal law, and in the case of people discriminated against, the provisions of other branches of law will play the protective role, e.g. labour law, business law, administrative law, civil law, family law and inheritance law. The problem of discrimination, racism and xenophobia is addressed in international law as well as the Polish legal system.

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21 *Preventing and Responding to Hate Crimes*, OSCE-ODIHR, Warsaw 2009, p. 15.

22 J. Levin, S. McDevitt, S. Bennet, *Hate and Bias Crime*, Routledge, London 2003.

3.1. STEREOTYPES

Stereotypes are a phenomenon that has been fascinating to psychologists, sociologists and other researchers into social issues for years. This interest is not accidental; stereotypes express significant features of a human way of thinking about social life. Common knowledge of society is to a great extent composed of stereotypes, i.e. simplified opinions about social groups, categories and institutions. Stereotypes say which social information that reaches one from the surroundings should be noticed and which should be ignored. A stereotype can be positive, however, most often it consists in the attribution of features perceived as undesired.[23] The concept of a stereotype in sociology as well as social psychology is most often used in a narrowed meaning, i.e. in relation to people belonging to a particular social group (e.g. an ethnic, religious or sexual minority). Sometimes, minorities can also develop stereotypes concerning the majority, and feel unjustified antipathy towards its representatives. Usually, when people speak about stereotypes, they have in mind typical, simplified beliefs of one group in relation to the members of another 'alien group'. Stereotypes are specific types of schemata concerning persons or social groups, include poor content that is inconsistent with reality, and they are resistant to change. A schema is a certain separate component of human knowledge that is a simplified picture of a particular area of reality. If it is activated, i.e. one has access to the information contained in it, a schema starts to influence the processing of incoming information. A schema makes it possible to understand the sense of incoming information and organise it.[24]

Different definitions of prejudice can be found in literature. It is sometimes defined as unjustified negative attitude (aversion, antipathy) towards a group and its members.[25] The meaning of sexism, which refers to stereotypes, prejudice and discrimination against people based on gender, is similar. Prejudice is believed to be a hostile or negative attitude towards a certain group that can be distinguished based on generalisations resulting from false or incomplete information. A deeply prejudiced person is insensitive to information inconsistent with stereotypes. Prejudice is a strong negative feeling towards a person resulting from generalisation about a group to which this person belongs. It is described as an emotional attitude, an approach, a predisposition or a system of emotional beliefs that prescribes 'being against', 'anticipating something negative'. It can be said that social (ethnic, religious, age-related, etc.) prejudice is an aversion towards others assumed in advance only because they belong to a separate social group. This antipathy is a basis and a generalised premise of a reaction to that group or its representatives. It can be demonstrated in three ways.[26] The first one is aggressive prejudice: developed on the basis of strong negative emotions (fear, disgust, hatred). A similar mechanism

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[23] M. Kofta, *Wprowadzenie do psychologii stereotypów i uprzedzeń*, [in:] M. Marody, E. Gucwa-Leśny (eds), *Podstawy życia społecznego w Polsce*, Warszawa 1996.

[24] B. Weigl, *Stereotypy i uprzedzenia*, [in:] J. Strelau (ed.), *Psychologia*, Vol. 3, Gdańsk 2000, p. 223.

[25] C. Macrae, Ch. Stangor, M. Hewston, *Stereotypy i uprzedzenia*, Gdańsk 1999.

[26] B. Weigl, *supra* n. 24, pp. 214–215.

can be applied to, e.g. animals (dogs, spiders), and is similar to phobias. This type of emotions leads to avoiding direct contact with the representatives of a given group. Contact with people treated this way is perceived as a potential and unavoidable threat. This type of prejudice rarely changes into an attack. Due to the fact that the persons or groups towards which this prejudice occurs evoke fear and are perceived as strong, different actions are taken against them; demonic features, hidden intentions, conspiracy, etc. are attributed to them. The second form is dominative prejudice that is based on contempt, the belief of one's own superiority or the superiority of one's group over others, or a belief that the dissimilarity of others offends human dignity. Representatives of this group subject to prejudice do not pose threat because they are perceived as weaker, so they constitute a source of discomfort or distress. This type of prejudice is most often a premise of attack or search for a scapegoat, etc. An attack is a source of pleasure or an award for those who stigmatise. The third form consists in internally contradictory prejudices connected with the conflict of emotions or ambivalence. It is prejudice resulting from vagueness. On the one hand, recognition or even admiration can occur and, on the other hand, antipathy, aversion, envy, jealousy and rivalry are observed. Such a conflict eventually results in a reaction consisting in the increase in distance because with the process of getting closer, the gradient of avoidance is stronger than the gradient of pursuit.

Stereotypes and prejudice are united in an indissoluble relationship. The feelings connected with prejudice invariably accompany stereotypical beliefs concerning alien groups, and acceptance of stereotypes usually results in a negative effect and unfavourable evaluation of a given group. The relation between developing stereotypes and prejudices exists almost always, because there are situations in which a given person is not prejudiced against a given group, although knows stereotypes concerning it. Due to the fact that most authors treat a stereotype as a method of describing reality, its relation to action is poorly accentuated, i.e. it is believed that stereotypical perception of a given object does not necessarily have to result in specific conduct with regard to it. However, it can be predicted that the more emotionally saturated a stereotype is, the stronger the readiness to particular conduct (the so-called behavioural intention).

Stereotypes let an observer promptly assess another person; thus, they serve to achieve one of the most important cognitive objectives: to judge as quickly as possible with the involvement of the smallest cognitive effort possible. Stereotypes are useful as tools that make it possible to quickly assess a person noticed and, that is why, it is so difficult to abandon them. Providing a simplified picture of the social world, they make it possible to realise what is going on, to make subjective judgments on others and to take unambiguous decisions and perform social activities. The above-mentioned features of stereotypes occur especially clearly in situations when there is little information and there is poor knowledge about someone. The information in a stereotype allows a person to easily fill gaps in their knowledge of themselves, although the content supplied can sometimes be far from the truth. The features of stereotypes also manifest themselves in situations when one is overloaded with information. Then, by simplifying the reality and suggesting certain interpretation, stereotypes let one ignore some data as insignificant and focus on others.

Once a stereotype is established, it shows a tendency to persist. Stereotypes have a tendency to live in one's memory even when one receives information evidently inconsistent with their content. There are many controversies over the origin of stereotypes and prejudices; however, there is no doubt that they are created at an early age. Abundant research shows that even a few years old children develop clear stereotypes of women's roles, stereotypes about age, stereotypes of national minorities, etc. Various factors can be conducive to the creation and maintenance of stereotypes such as 'culture of remembrance' of the relations between groups (e.g. memories of wars and other conflicts, intolerance and discrimination), ideologies dominating in a given period, migration making certain nationalities or people with a different skin colour a minority in their new country, and eventually various economic, political (e.g. electoral struggle) or civilizational (e.g. spread of television) processes. Stereotypical perception of people constitutes a basis of intolerance in social relations. Intolerance or lack of respect for the rights of others and diversity generated the biggest crimes in history. Putting it more precisely, intolerance is the conduct that is addressed against people, phenomena or values, regardless of the fact that their existence is justified by the laws of nature, customs and morality. There is an insolvable issue concerning the limits of intolerance and mutual relations between tolerance and indifference, between tolerance and moral, individual and social rigour. Traditional racism or the so-called ideological racism leads a man to great and real tragedies.

3.2. IGNORANCE

As far as the origin of intolerance is concerned, ignorance is put first. It is not only due to the fact that intolerant attitude and readiness to intolerant behaviour is a characteristic feature of most people whose education level is low but mainly because the objects of intolerant behaviour and activities are people and phenomena perceived as 'different', 'alien and unknown'.[27] This regularity is confirmed by the fact that members of two religious groups living in the same village are more tolerant towards each other than inhabitants of surrounding villages who have not had direct contacts with people of another denomination. Another source of intolerance is the sense of diversity, which is accompanied by evident ethical, aesthetic or other assessment, always positively evaluating one's own position and features. A condition of intolerance is also the feeling of anxiety and fear. These are common and natural feelings in a situation in which there is a threat of loss of exclusiveness or a privilege. It is a type of social and individual egoism, which causes aggressive behaviour against those who are really or potentially the source of threat. Superstition, as a special form of ignorance, which differs from ignorance in persistence and irremovability with the use of explanation, is indicated among the sources of intolerance. The most dangerous form of superstition is a tendency to perform aggressive acts against representatives of other races, nations or deno-

[27] T. Pilch, *Agresja i nietolerancja jako mechanizmy zagrożenia ładu społecznego*, [in:] T. Pilch, I. Lepalczyk (eds), *Pedagogika społeczna*, Wyd. Żak, Warszawa 1995.

minations. Superstition is very often based on a stereotype, i.e. a set of features a priori attributed to some groups. Stereotypes are resistant to persuasion and even the influence of personal experience that is contrary to them. They are permanent and persistent states of conscience constituting a breeding-ground for aggressive or at least ill-disposed conduct.

The source of intolerance can also be found in some mental dispositions resulting from personal features, such as e.g. authoritarian personality characterised by moral rigorism and a tendency to apply penalties as well as inclination towards intolerant beliefs and conduct in relation to everything that is in conflict with a person's vision of the social order and factual world. Rigidity, the routinised vision of the world and vague sense of security are all features conducive to intolerance. It is also necessary to indicate mental dispositions depending on external circumstances, such as e.g. propaganda, educational system, and convention. All these factors can shape a personality susceptible to intolerant beliefs and conduct towards people, values and groups. It rarely happens that the source of an intolerant act is clearly determined. In general, looking for the source of intolerant behaviour, we find the syndrome of circumstances and conditions in which it is difficult to separate the size and intensity of particular fragmentary causes.

3.3. SOCIAL CATEGORISATION AND DEINDIVIDUATION

There are two processes concerning the perception of social objects in a group and beyond it distinguished in the interpretation of conduct motivated by hatred and occurring among youth belonging to subcultures.[28] One of them is social categorisation, i.e. the division of social surroundings into certain classes based on a criterion, e.g. classifying people who belong and do not belong to a group into 'us' and 'them'. The other process is deindividuation, i.e. simplification of the representation of social objects consisting in depriving them of individual features. It refers to the loss of one's own identity as well as to the loss of individual identity of other people for the person perceiving. What is considered important is the potential influence of categorisation of social surroundings ('us' and 'them') on signals that initiate aggression. It is indicated that the fundamental function of social categorisation is played by the simplification of social world, including determination of one's own membership of a group, although not necessarily the increase in the sense of one's own value or achieving positive group identity. Social differentiation is usually accompanied by favouring one's own group, and cognitive manipulations serving the protection of the sense of one's own value can consist in the change of criteria for social comparison.[29]

If a group has no chances for social recognition within the existing criteria, it looks for such criteria for the assessment of its own product that allow for its positive evaluation. The consequence of categorisation that consists in the decrease in

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[28] E. Orlik-Marciniak, *Agresywność grup subkulturowych*, [in:] J. Mikulska (ed.), *Psychologia rozwiązywania problemów społecznych. Wybrane zagadnienia*, Poznań 1998, pp. 190–212.

[29] M. Cielecki, *Niektóre poznawcze konsekwencje przynależności grupowej*, [in:] M. Cielecki (ed.), *Wybrane zagadnienia z psychologii społecznej*, Warszawa 1989.

the level of differentiation between objects belonging to the same category probably in reality refers mainly to the members of alien groups with which one does not have direct contact. In general, one does not know those persons well, one is not able to provide subtle characteristics, one is less sensitive to their needs. Thus, from the social point of view, the consequences of categorisation that consist in the classification of individuals in the category of 'them' seem to be most important. A series of irregularities are connected with the phenomenon of deindividuation. It has been proved that the membership of a group results in the decrease in normative control over conduct and, in consequence, a release of conduct that is socially unacceptable. Deindividuation understood as the loss of one's own separateness is treated as an intermediate stage mechanism. The factors occurring in a group situation that evoke the increase in socially unacceptable conduct include: dispersion of liability, the size and activity of a group, increase in emotional anxiety and information overload. The factors lead to the limited individual's self-centredness, and decrease the regulatory function of individual norms as well as potential social evaluation of the conduct. This, as a result, increases the intensity of impulsive conduct, including asocial and antisocial one. It is emphasised that the decisive role in triggering uncontrolled conduct, including socially unacceptable one, is played by drawing less attention to oneself and direct presence of others. Concentration on others plays a special role in reducing the regulatory function of an individual's 'Self' and evoking copying behaviour. There is evidence that the sense of being anonymous is not the only regulator of conduct in a group situation, even in the case of strong individualisation. It has been found that groups in which deindividuation takes place are assessed in a more positive way by their members than groups in which members have a stronger sense of separateness. It is indicated that just this unification of conduct lets the examined free themselves from binding social norms.

3.4. INTER-GROUP CONFLICTS

What also plays an important role in the initiation of aggressive conduct, such as hate speech, against members of other groups is the system of principal and instrumental values of a group. An authoritarian aggressive leader modelling the conduct of other group members can strengthen group aggression. The way in which a leader functions and the style of managing a group to a great extent determine what a group is like. The research conducted in Germany found that the increase in crime connected with aggressive conduct of subcultures that are intolerant of others is observed mainly in small towns.[30]

Problems connected with the occurrence and persistence of inter-group conflicts often have a psychological basis. The phenomenon of natural inclination to favour members of one's own group is one of such mechanisms. It appears not only within the scope of direct indicators such as better assessment of 'some of us', attributing positive features to them, favourable distribution of awards, but also indirect ones such as inclination to treat 'our' positive features and 'their' negative features as

[30] K. Karsznicki, *supra* n. 20, pp. 16–42.

general, permanent characteristics of a group. It is also typical to look for the reasons of 'our' positive conduct and 'their' negative behaviour in different circumstances.[31] The phenomenon of favouring 'some of us' does not explain many disadvantageous aspects of inter-group relations. In particular, it does not explain why there is so often a weaker inclination to feel the same as people belonging to an alien group (e.g. people of a different nationality, religion or culture) and help them, and especially why emotional sensitivity to suffering of persons belonging to other groups is clearly limited.[32] In the case of highly intensive inter-group conflicts, there is a tendency to delegitimise 'aliens' and to exclude stigmatised groups morally, i.e. to treat their representatives in the way as if the moral code binding in relation to one's own group was not applicable to them. Acts of massive cruelty such as pogroms and systematic extermination in general take place only in relation to 'aliens' and not 'some of us', and perpetrators of such acts as a rule do not feel guilty.

All the above-described cases concern something more than just the feeling of aversion or negative attitude towards members of alien groups. One can suppose that behind the indicated phenomena, there is a hidden inclination to dehumanise 'aliens', i.e. deny full humanity to them. It can be assumed that humanity is an essential component of the picture of 'some of us' and not of 'aliens', an important aspect of differences between one's own group and alien groups. Natural categories (e.g. plants and animals) and artefacts (products made by people) are distinguished in cognitive psychology. Natural categories are created based on certain key features, common to all elements of a given class, and a collection of those features constitutes the so-called category essence. The essential feature is a fundamental, in general, non-adjustable feature. Its existence decides on the perception of similarity of the items of the same category. Attention is drawn to the fact that some social categories (such as ethnic and racial groups) are treated by people like natural categories; they are attributed some types of essence perceived as common to all members of a category.[33] According to the proposed hypothesis, humanity, i.e. being a human within the full meaning of the word, would be an essential feature of one's own group but not of alien groups. Thus, each time a distinction between 'some of us' and 'aliens' is made (e.g. because of nationality), apart from apparent content connected with it, e.g. different physical features, place of residence, climate, lifestyle, religiosity, wealth, personality etc., some hidden features concerning humanity are activated. 'Some of us' are people in all aspects; 'aliens' are not. The adoption of this hypothesis allows understanding such phenomena as the decrease in empathy and sensitivity to suffering as well as a tendency to exclude aliens morally and delegitimise them.

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[31] A. Maas, D. Salvi, L. Arcuri, G.R. Swim, *Language Use in Intergroup Context: The Linguistic Intergroup Bias*, Journal of Personality and Social Psychology 57, 1989, pp. 981–993.

[32] M. Mirosławska, M. Kofta, *Zjawisko infrahumanizowania „obcych": wstępny test hipotezy generalizacji Ja*, Psychologia Społeczna 2(1), 2007, pp. 52–65.

[33] M. Rothbart, M. Taylor, *Category Labels and Social Reality: Do we View Social Categories as Natural Kinds?*, [in:] K. Fiedler, G.R. Semin (eds), *Language, Interaction and Social Cognition*, Sage, Newbury Park 1992, pp. 11–36.

The phenomenon of attributing certain typically human features to members of alien groups (out-groups) to a lesser extent than to the members of one's own group (in-group) is called infrahumanisation.[34] Thus, the term refers to the perception of members of an out-group as not fully human, which differs from the term 'dehumanisation' by the force of effect that it describes. In the case of dehumanisation, there is a phenomenon often accompanying strong social conflicts, i.e. open exclusion of 'aliens' from the area where human rights are in force. In the case of infrahumanisation, there is a phenomenon of decreased inclination to attribute typically human characteristic features to 'aliens' because they are completely reserved for the members of one's in-group. A series of research focused on one indicator of this variable, namely the inclination to attribute human emotions to 'some of us' and 'aliens'. The research in which students took part showed that the participants were more inclined to attribute secondary emotions (typically human ones) to 'some of us' than to 'aliens', and it occurred in the case of positive as well as negative emotions.[35] At the same time, there were no differences found in attributing primary emotions, common to people and animals. In the successive study in the series, it was found that during the accumulation of sequentially provided fragmentary information on the ability to experience emotions in a group average, the participants showed a tendency to relatively underestimate the frequency of occurrence of secondary emotions among the members of an out-group. It was also proved that the effect of infrahumanisation in the form of a decreased inclination to attribute secondary emotions to an alien group occurs in the conditions of a minimal group, which means that it can be evoked by the fact of social categorisation and not the history of inter-group relationships strengthened by negative stereotypes, etc.[36] The research with the use of the Implicit Association Test found that reaction time when the names of the members of one's in-group co-occurred with the names of secondary emotions, and names of the out-group with the names of primary emotions was shorter than in a reverse combination. The result suggests that also at the level of concealed attitudes, the category of secondary emotions is in conformity with the category of 'us', i.e. closely connected with it by association. An experiment conducted among students of one of Belgian universities, with Belgians as an in-group and Arabs as an out-group, proved that the force of concealed associations is much stronger for relations between names of secondary emotions with one's in-group than with an out-group.[37]

Showing secondary emotions by the representatives of an alien group in reverse weakens pro-social reactions to them, decreases hidden conformism and accelerates the reaction of avoidance. Thus, previous findings suggest that people really have a tendency to dehumanise 'aliens'. It is emphasised that the tendency is so

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[34] J.P. Leyens et al., *Emotional Prejudice, Essentialism, and Nationalism*, European Journal of Social Psychology Vol. 33(6), 2003, pp. 703–717.

[35] M. Mirosławska, M. Kofta, *supra* n. 32, pp. 52–65.

[36] M. Mirosławska, *Zjawisko infrahumanizacji „obcych" – demonstracja w warunkach grup minimalnych*, Studia Psychologiczne Vol. 44(4), 2006, pp. 45–55.

[37] R. Gaunt, J.P. Leyens, S. Demoulin, *Intergroup Relations and the Attribution of Emotions*, Journal of Experimental Social Psychology 38, 2002, pp. 508–514.

strong that it is reflected not only at the level of apparent but also those concealed measures. It is revealed in mutual perception of groups that are not in conflict and even those that have had minimum contact or no contact at all with each other, and also when the status of one's in-group is relatively high as well as relatively low in comparison with an out-group. It is not clear to what extent the tendency observed is primary in nature, i.e. whether this means that being a human is the essence of the category of 'us' or results from an activity other than a psychological mechanism. If we assume that humanity is an essential feature of one's in-group, we can expect that the effect of dehumanisation of 'aliens' will be very stable and common, thus occurring in various types of inter-group relationships. Previous research does not provide unambiguous support for the above. Explaining the phenomenon of infrahumanisation, researchers refer inter alia to the concept of generalisation of 'Self'. In the classical theory of social identity, the existence of particular relationships between an image of one's in-group and one's own image was emphasised, and it was indicated that the sense of membership of a group valued by a person was one of important conditions of positive self-assessment. This is the origin of the tendency to ethnocentrism, i.e. to glorify one's in-group and depreciate out-groups. More current research indicates that not only one's attitude to oneself depends on the image of one's in-group, but there is also a reverse dependence; paving the way for representation of 'Self' (most often evaluated positively) is a factor conducive to favouring 'some of us'. In the research conducted in the field of social cognition, it was observed that the representation of one's own person and the representation of one's in-group partly 'overlap'.[38] The phenomenon is reflected in the fact that attributing a feature not only to oneself but also to one's own group considerably accelerates taking a decision that a given feature belongs or does not belong to one's 'Self'. However, if a feature is attributed not only to oneself but also to an alien group, it has no influence on the time of taking such a decision. The existence of such a regularity indicates not only partial overlapping of the representation of Self and one's in-group but also that activation of Self leads to automatic activation of the image of one's in-group but not an out-group. It was found that people are inclined to design features attributed to them for others provided that they perceive those others as similar to 'Self'. Otherwise, they stop using the knowledge about themselves as a premise for a conclusion concerning the psychological features of those others, and take into account social knowledge about the features of the category to which those others belong. Thus, if someone is perceived as a member of an alien group, the process of activating the category to which the person belongs and drawing conclusion on their stereotypical features will be more probable. At the same time, the perception of others as members of an alien group slows down the process of generalisation of 'Self', hampering the attribution of typically human emotions to them.

[38] E.R. Smith, S. Coats, D. Walling, *Overlapping Mental Representations of Self, In-Group, and Partner*, Personality and Social Psychology Bulletin 25(7), 1999, pp. 873–882.

3.5. PREJUDICE

Depreciation of other groups is often connected with prejudice that is not only a phenomenon common in almost all societies worldwide but also a dangerous one. Even people who are convinced that they are objective often demonstrate a hidden negative attitude towards other races. Aversion to a given group often gives birth to hatred and in extreme situations it can lead to the use of violence against its members. Emotions play the most important role in generating prejudices because they influence the way in which information concerning social groups and their members is processed.[39] In accordance with the conception of integrated threats, prejudices occur in inter-group contacts when the feeling of security of the group to which an individual belongs is endangered. Therefore, fear and anger are dominant emotions that take part in the creation of prejudices, on the other hand, escape or attack are typical reactions. Anger usually occurs when someone encounters obstacles to achieve a set objective. It can be released when a group perceived as alien tries to obtain access to economic resources, take over or destroy property, limit freedom and the rights of the group members, infringe group principles and interfere in social cooperation or breach trust of one's own group.[40] Emotions connected with prejudices differ depending on the position of an alien group in two dimensions: friendliness and competence. A high position in both dimensions generates admiration and pride. On the other hand, groups that have a high competence-related position but low friendliness position evoke jealousy. In a situation in which a group is placed high in the friendliness dimension and low in the field of competence, the feeling of sorrow occurs, while low position in the two dimensions results in the dominating feeling of disgust with the alien group.[41]

Disgust is an emotion addressed to people and objects that seem repulsive. The emotion was developed as a biological mechanism of rejection in order to protect a human organism against an unpleasant taste, contaminated food, illness, and also immorality and violation of social norms.[42] The emotion can be perceived as the defence of 'Self' against mental connection with the source of contamination and a reaction connected with undesired intimacy with a repulsive object. In accordance with the hypothesis of social contamination, groups that are treated as alien can be perceived not only as a threat to life and economic resources but also as disease carriers, and danger to integrity and purity of one's own group. Ethnic groups against which prejudices are generated are often accused of infringing a social order, opposing universal values, and transmitting contagious diseases. The word 'repulsion' often occurs in the language used to describe the members of those groups,

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[39] P. Pelzer, *The Hostility Triad: The Contribution of Negative Emotions to Organizational (Un)wellness*, Culture and Organization 11(2), 2005, pp. 111–123.

[40] C.A. Cottrell, S.L. Neuberg, *Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to Prejudice*, Journal of Personality and Social Psychology 88(5), 2005, pp. 770–789.

[41] E. Sinacka-Kubik, *Wpływ wstrętu na uprzedzenia etniczne kobiet i mężczyzn*, Psychologia Społeczna 6(1), 2011, pp. 24–33.

[42] P. Rozin, J. Haidt, C. McCauley, *Disgust*, [in:] M. Lewis, J.M. Haviland-Jones (eds), *Handbook of Emotions*, Guilford Press, New York 2000.

which is confirmed by research including analyses of texts calling for extreme intergroup hatred. Repulsion in a situation of threat of contamination causes a reaction of removal of the source of threat or, if it is not possible, distancing from the object evoking repulsion. Therefore, when the level of repulsion is high, the removal of an alien group that constitutes the source of threat can become a priority for the endangered group.[43]

Prejudice is characterised by the presence of physical or psychological distance to a given person or group. It is suggested that social distance should be described as the feeling of aversion to accepting intimacy in contact with members of an alien group. In the research into prejudice against various ethnic groups, social distance described as the level of intimacy in physical contacts is a measure of prejudice.[44] The people examined are to show to what extent they accept the neighbourhood of people of other nationalities or to what extent they accept a marriage of their next of kin with a person of a different nationality. The issue of distance also concerns the feeling of repulsion because people have a tendency to escape from or avoid contact with an object that is its source and not to attack that object. The intensity of repulsion is connected with the level of this contact intimacy: the shorter the distance from the source of potential contamination, the stronger the reaction of repulsion. The approach to the surroundings as a source of potential contamination is conducive to maintaining social hierarchy, dividing groups within the categories: us versus them, and maintaining separateness. Evoking repulsion can be conducive to this social categorisation and keeping distance from a group perceived as alien. In the context of the issue of hate speech, cases concerning the conduct of football fans during matches are a serious problem for law enforcement. First of all, it is extremely difficult to individualise liability of particular fans shouting insulting slogans addressed to other people in a stadium filled with crowds (even in the case it is filmed). Secondly, even if perpetrators are identified, a person judging the situation must refer to the content of words pronounced and take into account a group of people to whom they are addressed. Addressees are usually fans of another club and not another ethnic or religious group. Such problems do not occur if we deal with a group unfurling banners insulting a particular ethnic, national or religious group.

4. SELECTED ASPECTS OF PROSECUTING HATE CRIME

Analyses of research into criminal case files show that in general identification of a perpetrator of an offence does not pose a problem for law enforcement bodies if it concerns acts the basic element of which is battery, injury or violation of the bodily integrity. In such a situation, identification is possible thanks to the fact that a victim knows a perpetrator or a victim and witnesses describe an event and a perpetrator in detail. On the other hand, identification of perpetrators of hate crimes

[43] E. Sinacka-Kubik, *supra* n. 41, pp. 24–33.

[44] Ch.N. Weaver, *Social Distance as a Measure of Prejudice Among Ethnic Groups in the United States*, Journal of Applied Social Psychology 38(3), 2008, pp. 779–795.

committed via the Internet presents serious difficulties. The first thing to be done should be the establishment a computer's IP identification number used to log into a given web forum. Having this information, it is necessary to obtain information about a computer user's personal data and address. In most cases analysed, law enforcement bodies have managed to determine those data. However, difficulties concerning identification occurred later when it was necessary to interrogate all the household members in connection with the posting of a text offending persons belonging to other groups that can be distinguished based on their race, ethnicity, nationality or religion. Analyses show inaccuracy and superficiality of interrogation, which in most cases was limited to the receipt of declarations from the persons involved.[45] The declarations indicated that the persons questioned had not posted any texts, which means that other people who often visited the household members must have developed the material. Officers conducting proceedings usually did not verify those statements and did not ask further questions about personal data of visitors on dates and hours when a text was posted, and the time when they were in and out on particular days. Apart from the above-mentioned activities, officers conducting preparatory proceedings should also protect the history of electronic correspondence and the history of surfing the net as well as carry out a search of the home for documents, magazines or films on issues strictly connected with the committed offence. Such evidence would surely make a perpetrator's identification possible. In some cases interviewing witnesses, neighbours or friends, can be justified in order to obtain information about the household members' interests, apparel worn, and contacts with subcultures or football fans.

It is highlighted that it would be useless to introduce a definition of hate speech used in everyday language to the Polish Criminal Code.[46] Article 256 § 1 CC penalises inciting to hatred and not to the hate speech, and the two types of conduct cannot be treated as the same. Victims of any hate crimes can pursue their rights in the course of criminal proceedings. A court must assess the motivation of a perpetrator of any prohibited acts because it is important for the determination of the level of social harmfulness of a given act, and the level of fault and guilt. Persons who believe they are victims of the hate speech can file claims in civil proceedings and sue perpetrators for the violation of personality rights. A plaintiff should indicate the infringed interests. The content of Article 24 § 1 Civil Code stipulates the presumption of unlawfulness of the violation of personality rights, which means that a complainant must present facts confirming the violation of his/her personality rights, and a defendant denying liability can try to prove that his/her activity did not have the features of unlawfulness. Such division of the burden of proof makes it easier to pursue claims concerning the violation of personality rights and the reference courts make to the concept of hate speech is not significant for the

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[45] K. Karsznicki, *supra* n. 20, pp. 16–42.

[46] P. Sobański, *Zagadnienie celowości i możliwości zdefiniowania tzw. mowy nienawiści w prawie polskim*, https://www.researchgate.net/profile/Piotr_Sobanski4/publication/335313156_Zagadnienie_mozliwosci_i_celowosci_zdefiniowania_tzw_mowy_nienawisci/links/5d5d917f92851c3763713a19/Zagadnienie-mozliwosci-i-celowosci-zdefiniowania-tzw-mowy-nienawisci.pdf (accessed 20.12.2019).

establishment of the violation of personality rights and the recognition of claims under Article 24 Civil Code as justified. The author quoted above highlights that this type of approach could lead to a state of uncertainty concerning the law in force. Sufficient protection of the victims of particular conduct based on civil and criminal law is in conflict with the concept of introducing the definition of hate speech by the legislator.

The development of a broad legal definition of the concept of hate speech could be also in conflict with the freedom of speech guaranteed in the Constitution, and narrowing the application of the Constitution to particular persons or groups would deprive entities who do not match the adopted criteria of protection. Formulation of an unambiguous definition of a complex concept of hate speech seems impossible and the common use of this term in everyday language should not be directly translated into the legal sphere. The hate speech should be treated as an imprecise expression of everyday language and can be used in different ways like any other fuzzy concepts. Every type of conduct of a given entity should be assessed individually, which will make it possible to distinguish statements that are legally indifferent, e.g. only violate cultural standards, from conduct that violates personality rights or matches the features of a crime. Very often, hate crime, hate speech and discrimination are treated as the same and are attributed the same weight.[47] However, they are not identical acts because what characterises hate speech as a separate category of social conduct is not hatred but the fact that it is addressed to a group and not individuals; even if it is addressed to a particular person, it aims to reduce him/her to a typical representative of a group hated. Thus, we deal with a situation when conduct is recognised as inappropriate not because of behaviour that is negative but due to the fact that it is addressed to a particular social group.

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CRIMINOLOGICAL EVALUATION OF VERBAL AGGRESSION

Summary

The article analyses the phenomenon of verbal aggression (in other words, hate speech) and the so-called hate crimes from the criminological point of view. Psychological sources of hate speech include emotions such as anger and hatred. Characterising sociological sources of hate crime, the author draws attention to the issue of stereotypes, ignorance and social categorisation, and deindividuation. Inter-group conflicts and prejudice addressed to particular social groups and people are also recognised to be important factors in initiating aggressive conduct like hate speech. The main problem connected with the prosecution of hate crime is identification of perpetrators of those offences committed via the Internet. The issue is less significant in relation to acts of battery, injury or violation of bodily integrity because in such cases a victim usually knows a perpetrator or he/she can be identified based on a victim's or witnesses' description. It is assessed that the basic reasons of poorer results in the fight against hate speech in the web include inadequate enforcement of the existing provisions of law and the lack of appropriate regulations.

Keywords: criminology, hate speech, verbal aggression, hate crime, criminal law

KRYMINOLOGICZNA OCENA AGRESJI WERBALNEJ

Streszczenie

W artykule dokonano analizy zjawiska agresji werbalnej (inaczej, mowy nienawiści) oraz tzw. „przestępstw z nienawiści" w ujęciu kryminologicznym. Do psychologicznych źródeł mowy nienawiści zaliczono emocje, takie jak gniew i nienawiść. Charakteryzując socjologiczne źródła przestępstw popełnianych z nienawiści, zwrócono uwagę na problematykę stereotypów, ignorancji oraz kategoryzacji społecznej oraz deindywidualizacji. Za istotne czynniki w inicjowaniu zachowań agresywnych, takich jak mowa nienawiści, uznano również konflikty międzygrupowe oraz uprzedzenia kierowane wobec określonych grup społecznych oraz osób. Zasadniczym problemem związanym ze ściganiem przestępstw popełnianych z nienawiści jest identyfikacja sprawców tych przestępstw popełnionych za pośrednictwem Internetu. Kwestia ta ma mniejsze znaczenie w odniesieniu do czynów polegających na pobiciu, uszkodzeniu ciała czy naruszeniu nietykalności cielesnej, albowiem w takich wypadkach sprawca jest z reguły znany pokrzywdzonemu lub też możliwe jest jego ustalenie na podstawie zeznań

pokrzywdzonego czy świadków. Oceniono, iż podstawą słabych efektów walki z mową nienawiści w sieci jest zarówno nieodpowiednie egzekwowanie istniejących przepisów prawa, jak również brak właściwych regulacji.

Słowa kluczowe: kryminologia, mowa nienawiści, agresja werbalna, przestępstwa z nienawiści, prawo karne

VALORACIÓN CRIMINOLÓGICA DE AGRESIÓN VERBAL

Resumen

El artículo analiza el fenómeno de agresión verbal (el discurso de odio) y los llamados "delitos de odio" desde la perspectiva criminológica. Los fuentes psicológicos del discurso de odio comprenden tales emociones como rabia y odio. Caracterizando los fuentes sociológicos de delitos cometidos por motivo de odio se presta la atención a la problemática de estereotipos, ignorancia y categorización social. Los factores importantes que producen comportamientos agresivos, tales como discurso de odio, incluyen también conflictos entre grupos y prejuicios dirigidos hacia determinados grupos sociales y personas. El problema básico relativo a la persecución de delitos cometidos por motivos de odio es la identificación de autores de estos delitos cometidos a través de internet. Esta cuestión es menos importante en cuanto a los hechos que consisten en lesiones o violación de integridad física, ya que en tales casos el perjudicado por lo general conoce al autor o es posible identificarlo en virtud de las declaraciones del perjudicado o de testigos. Los efectos insatisfactorios de la lucha contra el discurso de odio en la red se debe tanto a la ejecución indebida de normativa vigente, como a la falta de regulación pertinente.

Palabras claves: criminología, discurso de odio, agresión verbal, delitos de odio, derecho penal

КРИМИНОЛОГИЧЕСКАЯ ОЦЕНКА СЛОВЕСНОЙ АГРЕССИИ

Аннотация

В статье анализируется криминологический аспект явления словесной агрессии («языка вражды»), а также преступлений на почве ненависти. К психологическим источникам языка вражды относятся такие эмоции, как гнев и ненависть. Характеризуя социологические источники преступлений на почве ненависти, автор уделяет особое внимание проблеме стереотипов, невежества, социальной категоризации и деиндивидуализации. Среди существенных факторов, побуждающих преступников к агрессивному поведению, включая язык вражды, выделяются межгрупповые конфликты, а также предрассудки в отношении конкретных социальных групп и отдельных лиц. Основная проблема, связанная с преследованием за преступления на почве ненависти, заключается в выявлении лиц, совершающих такие преступления в сети Интернет. Данная проблема имеет меньшее значение в случае таких преступлений, как нанесение побоев и телесных повреждений либо иных видов нарушения физической неприкосновенности, поскольку в таких случаях преступник обычно известен потерпевшему либо может быть установлен на основании показаний жертвы или свидетелей. По мнению автора, недостаточная эффективность борьбы с языком вражды в сети Интернет является следствием как ненадлежащего соблюдения существующего законодательства, так и отсутствием соответствующих нормативно-правовых актов.

Ключевые слова: криминология, язык вражды, словесная агрессия, преступления на почве ненависти, уголовное право

DIE KRIMINOLOGISCHE BEWERTUNG VON VERBALER AGGRESSION

Zusammenfassung

In dem Beitrag wird das Phänomen der verbalen Aggression (anders ausgedrückt: von Hassreden) und der sogenannten „Hassverbrechen" aus kriminologischer Sicht analysiert. Die psychologischen Ursachen für Hassreden sind in Emotionen wie Wut und Hass zu suchen. Bei der Charakterisierung der soziologischen Gründe für hassmotivierte Straftaten wird auf die Themenbereiche Stereotypisierung, Ignoranz und soziale Kategorisierung sowie Entindividualisierung hingewiesen. Gruppeninterne Konflikte und Vorurteile, die sich gegen bestimmte soziale Gruppen und Personen richten, werden ebenfalls als wichtige Faktoren für das Auslösen von aggressivem Verhalten wie Hassrede ausgemacht. Das grundlegende Problem, das sich bei der Verfolgung von Hassverbrechen ergibt, besteht darin, die Täter dieser über das Internet begangenen Straftaten zu identifizieren. In Bezug auf Straftatbestände wie Schläge, Körperverletzungen oder die Verletzung der körperlichen Unversehrtheit kommt dieser Frage geringere Relevanz zu, da der Täter dem Opfer in solchen Fällen normalerweise bekannt ist oder auf Grundlage der Aussagen von Opfer oder Zeugen ermittelt werden kann. Der Autor gelangt zu dem Schluss, dass der Grund für die unbefriedigenden Ergebnisse im Kampf gegen Hassreden im Netz sowohl in der unzulänglichen Durchsetzung der bestehenden Gesetze, als auch im Fehlen geeigneter Regelungen zu suchen ist.

Schlüsselwörter: Kriminologie, Hassreden, verbale Aggression, Hassverbrechen, Strafrecht

ÉVALUATION CRIMINOLOGIQUE DE L'AGRESSION VERBALE

Résumé

L'article analyse le phénomène d'agression verbale (ou de discours de haine) et le soi-disant «crimes de haine» en termes criminologiques. Les sources psychologiques du discours de haine comprennent des émotions telles que la colère et la haine. Lors de la caractérisation des sources sociologiques des crimes de haine, une attention a été accordée aux problèmes de stéréotypes, d'ignorance et de catégorisation sociale, ainsi qu'à la désindividualisation. Les conflits intergroupes et les préjugés dirigés contre des groupes sociaux et des individus spécifiques ont également été reconnus comme des facteurs importants dans l'initiation d'un comportement agressif, comme le discours de haine. Le principal problème lié à la poursuite des crimes de haine est d'identifier les auteurs de ces crimes commis via Internet. Cette question est moins importante en ce qui concerne les actes de coups, de blessures ou de violation de l'intégrité corporelle, car dans de tels cas, l'auteur est généralement connu à la victime ou il est possible de le déterminer sur la base du témoignage de la victime ou des témoins. Il a été estimé que la base des mauvais effets de la lutte contre le discours de haine sur le Web est à la fois une application inadéquate des lois existantes et l'absence de réglementations appropriées.

Mots-clés: criminologie, discours de haine, agression verbale, crimes de haine, droit pénal

VALUTAZIONE CRIMINOLOGICA DELL'AGGRESSIONE VERBALE

Sintesi

Nell'articolo è stato analizzato il fenomeno dell'aggressione verbale (in altre parole: discorsi di odio) e dei cosiddetti "reati di odio" sotto il punto di vista criminologico. Tra le fonti psicologiche dei discorsi di odio vi sono le emozioni, come la rabbia e l'odio. Caratterizzando le fonti sociologiche dei reati commessi per odio si è fatta notare la problematica degli stereotipi, dell'ignoranza e della categorizzazione sociale e della depersonalizzazione. Tra fattori essenziali nello scatenare i comportamenti aggressivi, come i discorsi di odio, sono stati considerati anche i conflitti tra gruppi e i pregiudizi rivolti a determinati gruppi sociali e persone. Un problema fondamentale legato al perseguimento dei reati di odio è l'identificazione degli autori di tali reati compiuti attraverso Internet. Tale questione ha minore importanza in riferimento agli atti consistenti in percosse, lesioni, violazione dell'integrità fisica, infatti in tali caso l'autore è solitamente noto alla parte lesa o può essere determinato sulla base delle testimonianze della parte lesa o dei testimoni. Si è valutato che alla base dei scarsi risultati della lotta ai discorsi di odio in rete vi sono sia la scorretta applicazione delle norme di legge esistenti, così come l'assenza di opportune regolamentazioni.

Parole chiave: criminologia, discorsi di odio, aggressione verbale, reati di odio, diritto penale

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SELECTED ISSUES CONCERNING A NEW APPROACH TO THE IDEA OF PUNISHMENT IN THE LIGHT OF ACT OF 13 JUNE 2019

MIROSŁAWA MELEZINI*

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The Act of 13 June 2019 amending the Criminal Code[1] turned out to be such a controversial law that, before taking a decision to sign it, the President sent it to the Constitutional Tribunal, due to his serious doubts whether the constitutional standards of the legislative process were met. However, the enacting of the new statute was criticised by scientists and experts as well as the Ombudsman not only for procedural but also substantive reasons. The critical opinions indicated, in particular, the lack of criminal and political arguments diagnosing the current state in the area of combating criminality and the practice of the administration of justice established at present, which might indicate the need to aggravate penal sanctions, as well as the dogmatically erroneous approach to some provisions, sometimes in conflict with international law or infringing constitutional values.[2] As of today (10 February 2020), the status of the statute has not changed because the Constitutional Tribunal

* Prof., PhD hab., Department of Law and Administration, Faculty of Social Sciences and Humanities of Łomża State University of Applied Sciences; e-mail: mmelezini@pwsip.edu.pl; ORCID: 0000-0001-6168-5590

1 Act of 13 June 2019 amending the Act: Criminal Code and some other acts, Sejm print no. 3451; hereinafter CC.

2 See critical statements made in over 20 legal opinions posted on the Ombudsman's website: https://www.rpo.gov.pl/pl/content/zmiany-wprawie-karnym-2019-opinie-ekspertow-i-RPO (accessed 20.10.2019), including: Opinia na temat projektu zmian przepisów kodeksu karnego (uchwała Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 roku), Katedra Prawa Karnego Materialnego, Uniwersytet Wrocławski; Opinia Komisji Legislacyjnej Naczelnej Rady Adwokackiej do projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, przygotowana przez adw. prof. Jacka Giezka i adw. prof. Roberta Zawłockiego z 14.02.2019 r.; Opinia Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych na temat projektu z dnia 25 stycznia 2019 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, sporządzona przez dr hab., prof. UWr. Annę Muszyńską. Also see M. Melezini, *Problemy reformy*

has not resolved the problem. It does not change the fact that the solutions proposed in the statute constitute a good reason for discussion.

The discussion presented below aims to analyse the most important changes introduced to the Criminal Code concerning penalties and penalty imposition. In judicial adjudicating practice, they have essential influence on the shape of the penal policy being implemented.

The presentation of changes proposed in the statute requires that reference be made to the legislator's motives expressed in the justification of the bill. The legislator's declaration indicates that: 'The main assumption that was the basis for the work on the bill amending the Criminal Code was the need to strengthen the penal law protection in the field of acts committed to the detriment of such fundamental legal interests as human life and health, sexual freedom or ownership'. At the same time, the authors of the bill decided that 'The present legal state does not correspond to the demands resulting from the protective function of criminal law, and because of that it does not ensure sufficient tools to limit criminality and protect essential social values […]', which 'justifies legislative activities aimed at aggravating penal sanctions and developing institutions that influence penalty imposition in such a way that they direct a court's decisions towards limiting the possibility of making use of a reduced sanction or extend the possibility of aggravating a penal sanction to perpetrators of offences at high degree of blameworthiness'. The justification of the bill highlights that the means of strengthening penal law protection in the field consists in 'adequate development of the type and size of a penal sanction for a given type of offence, taking into account the need of strict punishment for perpetrators of acts that raise a strong social desire to have revenge and stigmatise'.[3]

According to the justification of the amendment, the increase in the punitive characteristics of the Criminal Code takes place at three levels that concern:

1) changes in the area of penal sanctions severity and the structure of some types of prohibited acts;
2) extension of the institution of extraordinary aggravation of a penalty;
3) changes in general directives for penalty administration aimed at selecting a more severe penal response.[4]

The direction of changes in criminal law adopted by the authors of the amendment was undoubtedly based on the idea of aggravating penal sanctions. This way the rationality of the former Criminal Code was challenged. Therefore, one should expect a presentation of detailed justification of the reasons for changes based, inter alia, on facts, i.e. a diagnosis of the current state in the field of combating crime and developing penalty administration practice with reference to empirical data. Otherwise, the binding normative solutions should not be questioned, and the Criminal Code should not be amended without a good reason for that. Unfortunately,

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prawa karnego. Uwagi na tle ustawy z 13 czerwca 2019 r., [in:] P. Góralski, A. Muszyńska (eds), *Reforma prawa karnego w latach 2015–2019*, in print.

[3] Uzasadnienie do projektu ustawy z dnia 13 czerwca 2019 r. o zmianie ustawy – Kodeks karny oraz innych ustaw [Justification of the Bill of 13 June 2019 amending the Act: Criminal Code and some other acts], Sejm print no. 3451, p. 1.

[4] *Ibid*., pp. 1–2.

regardless of a decreasing criminal threat, the occurrence of positive changes in the practice of law application after the 2015 criminal law reform[5] and the improvement of the citizens' sense of safety,[6] far-reaching changes are introduced, which express a new vision of penal policy based on the idea to aggravate penal sanctions, in particular towards perpetrators of offences against life, health, sexual freedom and ownership. The amendments to the Criminal Code concern over a hundred articles. Thus, it is an extensive amendment.

Getting down to the analysis of the amendments introduced, it is necessary to discuss the modifications to the penalty of deprivation of liberty.

The statute introduces an amendment to the catalogue of penalties laid down in Article 32 CC accompanied by the modification to the content of Article 37 CC determining the generic limits of the penalty of deprivation of liberty. The penalty of deprivation of liberty for 25 years was repealed from the catalogue of penalties, however, the two other penalties of deprivation of liberty, i.e. penalties of life imprisonment and deprivation of liberty for a period determined by court, were maintained. It was rightly indicated in the legislative motives that giving up the fixed penalty of deprivation of liberty for 25 years and at the same time raising the maximum limit of the penalty of deprivation of liberty for a period determined by court to 30 years will ensure a court's sentencing discretion and will make it possible to impose a fully individualised penalty, taking into account a varied level of guilt intensity and harm caused in a given case, which was difficult especially in the case of criminal co-perpetration and when a court had a choice between a penalty of deprivation of liberty for up to 15 years and a penalty of deprivation of liberty for 25 years.[7] On the other hand, the modification of Article 37 CC consisted in raising the maximum limit of the penalty of deprivation of liberty from 15 to 30 years, while the minimum period of deprivation of liberty for a period determined by court remains unchanged and is one month. The amendment results in the modification to the regulation laid down in Article 38 § 2 CC, which raises the maximum limit of aggravated penalty of deprivation of liberty from 20 to 30 years, and the regulation of Article 38 § 3 CC stipulating the rules of mitigating the most severe penalties in connection with the fact that the penalty of deprivation of liberty for 25 years was repealed and the maximum limit of the penalty of deprivation of liberty for a period determined by court was raised.

It should be emphasised that, for years, the issue of maintaining the maximum limit of the penalty of deprivation of liberty for 15 years and the fixed penalty of deprivation of liberty for 25 years has been the subject matter of lively discussions and criticism, as well as many proposals for changes put forward, inter alia, by the authors of the bill amending the Criminal Code. It is worth mentioning that even the governmental Bill amending the Criminal Code of 19 June 2001 (print no. 2510), and

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[5] See Act of 20 February 2015 amending the Act: Criminal Code and some other acts (Dz.U. of 2015, item 396). Compare M. Melezini, *Tendencje w polityce karnej po reformie prawa karnego z 2015 r.*, [in:] P. Góralski, A. Muszyńska (eds), *Racjonalna sankcja karna w systemie prawa*, EuroPrawo 2019, pp. 123–135.

[6] See M. Melezini, *Problemy reformy*, *supra* n. 2.

[7] For more on the issue, see justification of the Bill, *supra* n. 3, pp. 2–4.

the Act of 24 August 2001 (print no. 785) based on it, which was vetoed by the President of the Republic of Poland, and the MPs' Criminal Code Bill of 1 March 2002 (print no. 775), and next the Bill amending the Criminal Code of 2004 prepared by the Sejm committee (print no. 2696) proposed abandoning a separate special penalty of deprivation of liberty for 25 years and raising the maximum limit of the penalty of deprivation of liberty from 15 to 25 years.[8] In the course of the discussion on the scope of the proposed amendment to the Criminal Code of 2001, the controversies over the penalty of deprivation of liberty for 25 years focused mainly on two issues:

– firstly, a fixed nature of the penalty of deprivation of liberty for 25 years and a big difference in the length of time between this penalty and the penalty of deprivation of liberty for 15 years, which does not make it possible to measure the painfulness in the case of the most serious offences, especially those committed in co-perpetration;
– secondly, the need to maintain two extremely strict penalties, i.e. life imprisonment and deprivation of liberty for 25 years.

There were proposals in literature at that time to amend the Criminal Code based on a variant-like approach. It was believed that the penalty of deprivation of liberty should be extended for a period from one month to 25 years, or another level of the penalty of deprivation of liberty for a period from 20 to 30 years should be introduced.[9]

The Bill amending the Criminal Code of 18 May 2007 (print no. 1756) also proposed abandoning the penalty of deprivation of liberty for 25 years as a separate type of penalty, and the change in the maximum limit of the penalty for a period determined by court from 15 to 25 years. The opinions about the proposed changes varied.

On the one hand, the proposal was 'strongly critically' assessed because it was assumed that it would most probably result in the increase in the number of cases of 'total remission, desocialisation and imprisonment of convicts as a consequence of the imposition of a bigger number of penalties of deprivation of liberty for a period exceeding 15 years'. At the same time, it was indicated that it would result in the need to modify many penalties specified in the Special part of the Criminal Code, which became evident in the proposals of the bill, in which the modifications to statutory penalties did not only have an adjusting character but led to aggravating the existing penalties.[10] On the other hand, there were opinions that the proposal

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[8] For more details on the issue, see M. Melezini, *Granice czasowe kary pozbawienia wolności*, [in:] L. Gardocki, M. Królikowski, A. Walczak-Żachowska (eds), *Gaudium in litteries est. Księga jubileuszowa ofiarowana Pani Profesor Genowefie Rejman z okazji osiemdziesiątych urodzin*, Warszawa 2005, pp. 453–462.

[9] See L. Tyszkiewicz, *Wystąpienie panelisty*, [in:] *Czy trzeba zmieniać kodeks karny? Materiały z konferencji naukowej „Nowelizacja kodeksu karnego", Warszawa, 10 lutego 2003 r.*, Warszawa 2003, pp. 42–43; *idem*, *Co i jak zmienić w nowym kodeksie karnym*, Palestra 12–1, 1999–2000, pp. 29–30.

[10] See J. Warylewski, *Opinia w sprawie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw w zakresie dotyczącym nowelizacji katalogu kar i zmiany sankcji karnej w części szczególnej (art. 32–38 k.k.)*, [in:] *Kodeks karny – projekt nowelizacji*, Sejm print no. 1756, Biuro Analiz Sejmowych Kancelarii Sejmu, No. 5, Warszawa 2007, pp. 48–49.

of abandoning the penalty of deprivation of liberty for 25 years and increasing the maximum limit of the penalty of deprivation of liberty for a period determined by court from 15 to 25 years did not raise any objections as long as it did not lead to the increase in the maximum limits of statutory penalties for particular offences. It was emphasised, inter alia, that the maximum limit of imprisonment imposed by court for 15 years was a traditional limit in our legal system, but it was only a matter of a certain convention in the same way as the penalty of deprivation of liberty for 25 years. However, in fact, the extension of the possibility of imposing the penalty of imprisonment for a period between 15 and 25 years 'will facilitate the implementation of the principle of penalty individualisation in the case of most severe offences, and the implementation of the principle of the so-called internal justice of a sentence in the case of criminal co-perpetration'.[11]

Another proposal to be considered in the area concerning the possible maintenance of the penalty of deprivation of liberty for a period determined by court for up to 15 years and the fixed penalty of deprivation of liberty for 25 years, or the introduction of a uniform penalty of deprivation of liberty with a varied maximum limit, was presented at the session of the Criminal Law Codification Commission during a conference organised in Popowo in November 2011. The recognition that the current legal state 'does not give a court discretion to shape a penalty size in the case of the most severe offences' led to an assumption that 'determination of the maximum limit of the penalty of deprivation of liberty and increasing it to e.g. 20 years (or even 25 years) would give a court more possibilities of freely developing the level of punishment without the need to follow the strictly determined penalty of deprivation of liberty for 25 years', the maintenance of which in the catalogue of penalties would not be justified. Therefore, it would be necessary to repeal it from the Criminal Code. At the same time, attention was drawn to the fact that such changes would require that penal sanctions should be redesigned and, in the case of some specific offences, they might prescribe the penalty of deprivation of liberty with the maximum limit determined at a lower level.[12]

In the discussion on the issue of the penalty of deprivation of liberty for 25 years, there were opinions opting for the maintenance of this penalty. It was indicated that the increase in the maximum limit of the penalty of deprivation of liberty for a period determined by court from 15 to 25 years as well as the establishment of a new 'extent' of the penalty of deprivation of liberty from 20 to 30 years would result in the treatment of penalties exceeding 20 years' imprisonment as 'standard' and not 'extraordinary' ones. In such a situation, 'when the penalty of life imprisonment exists, another similarly extraordinary intermediate penalty, also non-gradable

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[11] See J. Majewski, *Opinia na temat projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (w zakresie rozdziałów IV, VII oraz XIV k.k.)*, [in:] *Kodeks karny – projekt nowelizacji*, Sejm print no. 1756, Biuro Analiz Sejmowych Kancelarii Sejmu, No. 5, Warszawa 2007, p. 54.

[12] See Z. Sienkiewicz, *Ocena obowiązujących rozwiązań w zakresie kar, środków karnych, środków probacyjnych oraz wymiaru kary łącznej*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, pp. 116–118; and *idem*, *Niektóre propozycje zmian w regulacji kar, środków karnych i środków probacyjnych*, Państwo i Prawo 4, 2012, p. 31.

[…], seems to be useful'.[13] It was emphasised that the maintenance of the penalty of deprivation of liberty for 25 years results in less frequent imposition of life imprisonment. It was not noticed that there is a need to modify the maximum limit of the penalty of deprivation of liberty for a period determined by court (from 15 to 25 years) and it was indicated that such a change might result in considerable increase in the level of repressiveness of penal solutions. It was also assumed that the increased time limit of the penalty of deprivation of liberty, e.g. to 30 years, would mean approximating it to life imprisonment.[14]

A different stance, opting for the abolition of the penalty of deprivation of liberty for 25 years and the increase in the penalty of deprivation of liberty for a period determined by court to 25 years[15] was expressed in the Opinion for the Criminal Law Codification Commission, where it was raised that at present there is a too big 'unused space' between the penalty of deprivation of liberty for up to 15 years and the penalty of deprivation of liberty for 25 years, which in the cases concerning felonies hampers full implementation of the principle of individualised penal liability. At the same time, attention was drawn to the fact that the introduction of such a change would result in the necessity of amending other provisions, including the modification to sanctions prescribed for felonies, which could be limited to the maximum punishment of 15 years.[16]

There was also a new proposal concerning the most severe penalties in the doctrine, namely the elimination of the penalty of deprivation of liberty for 25 years and life imprisonment, i.e. the two fixed penalty types, from the Polish penal system, and the maintenance of the penalty of deprivation of liberty for a period from one month to 15 years, and the introduction of a long-term penalty of deprivation of liberty for the statutory period from 20 to 30 years as alternative penalties for the most serious felonies. It was indicated that the introduction of such changes 'would enable courts to impose just, severe and individualised penalties on perpetrators, their accomplices, and other persons cooperating in the commission of crime, with a determined prospect of the end of penalty and return to liberty'.[17]

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[13] L. Wilk, *Kara 25 lat pozbawienia wolności*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i środki karne. Poddanie sprawcy próbie*, Warszawa 2010, p. 144; J. Raglewski, *Referat na posiedzenie Komisji Kodyfikacyjnej Prawa Karnego dotyczący propozycji nowelizacyjnych kodeksu karnego z 1997 r. w zakresie kar, środków karnych, środków probacyjnych, a także zagadnień związanych z wymiarem kary łącznej i zanikiem karania*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, pp. 136–138. Also see opinions in the discussion in Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, pp. 192–198.

[14] See J. Raglewski, *supra* n. 13, pp. 136–138.

[15] See J. Kulesza, *Głos w dyskusji*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, p. 202.

[16] See J. Lachowski, *Opinia dla Komisji Kodyfikacyjnej Prawa Karnego w związku z Konferencją, która odbyła się w dniach 15–16 listopada 2011 r. w Popowie*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, pp. 183–184.

[17] See V. Konarska-Wrzosek, *Głos w dyskusji na posiedzeniu Komisji Kodyfikacyjnej Prawa Karnego*, Biuletyn Komisji Kodyfikacyjnej Prawa Karnego 3, 2011, pp. 193–194. For more particulars on the new proposal, see V. Konarska-Wrzosek, *Propozycje zmian katalogu kar w kodeksie karnym z 1997 r. w zakresie kar pozbawienia wolności oraz dolegliwości związanych z niektórymi rodzajami kar wolnościowych*, [in:] P. Kardas, T. Sroka, W. Wróbel (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa 2012, pp. 858–861.

Undoubtedly, the normative solutions adopted in the Act of 13 June 2019, which eliminate the penalty of deprivation of liberty for 25 years from the catalogue of penalties and increase the maximum limit of the penalty of deprivation of liberty from 15 to 30 years, are elements of the basic direction of change aimed at aggravating the penal system. The penalty of deprivation of liberty for 25 years, which was in practice treated as an extraordinary penalty, is becoming a standard penalty of deprivation of liberty for a potentially lengthened period of up to 30 years.

Unfortunately, as it was predicted, the change caused a significant increase in almost all maximum limits of the statutory penalties for serious offences, which raises considerable objections. Some changes are adjusting in nature and result from the increase in the maximum limit of the penalty of deprivation of liberty to 30 years. This concerns both the provisions of the General part and the Special part of the Criminal Code. However, as a result of the adoption of new types of statutory penalties (deprivation of liberty for a period from two to fifteen years, deprivation of liberty for a period from three to twenty years, deprivation of liberty for a period from five to twenty-five years, deprivation of liberty for a period from eight to thirty years, deprivation of liberty for a period from ten to thirty years, and deprivation of liberty for a period from twelve to thirty years, and in the three latest cases with the possibility of imposing the penalty of life imprisonment), the statutory maximum penalty limits were drastically raised for many types of prohibited acts, and the scale of those changes is enormous as it embraces 50 provisions of the Special part of the Criminal Code.[18] Undoubtedly, they are connected with the implementation of the idea to aggravate penal liability, which is also reflected in the increase in some minimum limits of statutory penalties and the development of sanctions with high penalty limits for aggravated types of prohibited acts.[19]

It should be noted that while the motive behind the statutory solutions in relation to the penalty of deprivation of liberty was the need to ensure courts' discretion and enable them to impose fully individualised penalties for the most serious offences, which took into account the basic assumption of the new act concerning the increase in the level of repressiveness of the penal system, the statutory solutions determining the minimum limits of non-custodial penalties are a reflection of the tendency to narrow the scope of judicial discretion and increase the severity of imposed penalties.

Namely, the statute increased the minimum limit of a fine (Articles 33 § 1a CC and 33 § 2a CC were added) and penalties of limitation of liberty (Article 34 § 1aa CC was added) differentiating their level depending on the maximum limit of the statutory penalty of deprivation of liberty for a given type of a prohibited act. In accordance with Article 33 § 1a CC, if the statute does not stipulate otherwise and the offence carries a penalty of a fine and deprivation of liberty, the fine shall be at least: 50 daily rates in the case of an act carrying the penalty of deprivation of liberty for up to one year; 100 daily rates in the case of an act carrying the penalty of deprivation of liberty for up to two years; 100 daily rates in the case of an act

[18] See justification of the Bill, *supra* n. 3, pp. 21–22.
[19] *Ibid.*, pp. 20–21.

carrying the penalty of deprivation of liberty for up to three years; and 300 daily rates in the case of an act carrying the penalty of deprivation of liberty for a period exceeding three years. At the same time, the application of the regulation was extended in the case of a fine imposed together with a penalty of deprivation of liberty (Article 33 § 2a CC). On the other hand, in accordance with Article 34 § 1aa CC, if the statute does not stipulate otherwise and the offence carries both the penalty of limitation of liberty and the penalty of deprivation of liberty, the penalty of limitation of liberty shall be imposed for at least: two months in the case of an act carrying the penalty of deprivation of liberty for up to one year; three months in the case of an act carrying the penalty of deprivation of liberty for up to two years; six months in the case of an act carrying the penalty of deprivation of liberty for up to three years; and nine months in the case of an act carrying the penalty of deprivation of liberty for a period exceeding three years.

It was indicated in the justification of the bill amending the Criminal Code that non-custodial penalties should be most important in the case of petty crimes. However, carrying out a coherent and efficient penal policy makes it difficult to establish the minimum limit of penalties for offences punishable with a fine and the penalty of limitation of liberty at a very low level, inadequate to their blameworthiness, and makes this limit uniform in relation to acts that are very different, incomparably socially harmful, which made judicial decisions imposing those penalties too arbitrary and often irrational in nature, thus decreasing the efficiency of the penal policy.[20] Such arguments are not convincing. The solutions adopted constitute useless casuistry in the field of non-custodial penalties and unnecessarily increase the level of severity of the existing solutions, which limits flexibility of the statutory penalty of a fine and limitation of liberty as well as narrows the scope of judicial discretion. Due to the principle of individualisation of penal liability, it is justified to give a court that hears a particular case broad sentencing possibilities so that it can consider different factors and, in particular, all circumstances of an act commission, and a different level of social harmfulness.

The modification to the content of Article 37a CC, which admits the possibility of imposing a fine and the penalty of limitation of liberty instead of the penalty of deprivation of liberty, also raises objections. It considerably limits the scope of non-custodial penalties application to substitute for the penalty of deprivation of liberty, and its only justification seems to be striving to aggravate penal sanctions. In accordance with the presently binding regulation, which was introduced by the amendment to the Criminal Code of 20 February 2015,[21] if the statute stipulates the penalty of deprivation of liberty not exceeding eight years, instead of this penalty, a fine or the penalty of limitation of liberty referred to in Article 34 § 1a(1), (2) or (4) can be imposed. Ignoring the discussion about the issue concerning the nature of the legal norm here, it should be emphasised that the existing regulation determined broadly the possibilities of applying non-custodial penalties, because it referred to

[20] *Ibid*., pp. 6–7.

[21] Act of 20 February 2015 amending the Act: Criminal Code and some other acts (Dz.U. item 396).

cases in which the provisions prescribe the penalty of deprivation of liberty not exceeding eight years as the only penalty, as well as cases of cumulative penalties of deprivation of liberty and a fine, or alternative-cumulative penalties of deprivation of liberty and a fine. However, in accordance with the new wording of Article 37a § 1 CC, which became an instrument of judicial imposition of a penalty, the non-custodial penalty can be imposed only in the case an offence carries the penalty of deprivation of liberty for up to eight years, and the penalty of deprivation of liberty imposed for it does not exceed a year, however, it cannot be shorter than three months and a fine cannot be lower than 100 daily rates. Moreover, in order to apply Article 37a § 2 CC, it is also necessary to apply a penal measure, a compensatory measure or forfeiture.

Further limitation of the application of Article 37a § 1 CC is connected with the added Article 37a § 2 CC, which excludes the application of Article 37a § 1 CC to perpetrators who commit an offence, while acting in an organised group or association aimed at committing an offence or a fiscal offence, and perpetrators of terrorist offences. The limitation of possibilities of imposing non-custodial penalties instead of the penalty of deprivation of liberty to the above-mentioned category of perpetrators does not raise objections, although one can consider its grounds, taking into account the requirements for the application of Article 37a § 1 CC and obliging a court to establish particular facts concerning a predicted penalty and then a penalty that would be imposed.

The changes in the sentencing directives also match the entirety of changes aggravating the penal system. In particular, the bill introduces a complete change in Article 53 § 1 CC, i.e. the basic provision determining the directives on the judicial imposition of penalties. In accordance with the new wording of Article 53 § 1 CC, 'A court shall impose a penalty at its discretion, within the limits prescribed in the statute, taking into account the level of social harmfulness of an act, aggravating and extenuating circumstances, the aim of a penalty concerning its social impact, and preventive objectives that can be achieved in relation to a convict. The painfulness of a penalty cannot exceed the level of guilt.'

The new wording of the provision of Article 53 § 1 CC substantially changes the model of sentencing, in accordance with which a penalty is to be imposed considering social harmfulness of an act and the general preventive purposes specified as 'the aims within the scope of social influence of a penalty'. As it is emphasised in the legislative motives, it is to be the most important directive on sentencing.[22] Thus, it focuses on the negative aspect of the so-called general prevention, using the aims of a penalty within the scope of its social influence when issuing a sentence instead of taking into consideration the development of legal awareness of society. At the same time, in the new approach, the assessment of the level of guilt that plays the role of limiting the painfulness of a penalty to a perpetrator was placed at the end of the provision. The new provision also abandons educational aims that a penalty should have for a convict and limits the directive on individual prevention exclusively to preventive objectives in relation to the convict. The change analysed is undoubtedly

[22] See justification of the Bill, *supra* n. 3, pp. 7–8.

an expression of a deterrent effect, which is becoming the main determinant of punishment. It is in conformity with the entirety of changes aimed at aggravating penal sanctions. It raises concerns over instrumental treatment of a perpetrator, whose punishment is to be a 'means' of deterring other potential perpetrators.

What is another significant novelty is the introduction of the catalogue of aggravating and extenuating circumstances as special directives on judicial sentencing. It should be emphasised that the statutory determination of such circumstances is in conflict with the principle of judicial discretion and is a reflection of limitation of judicial power to issue sentences. As a result, there is a threat of automatism that will not allow taking into account untypical factors concerning a particular event or a perpetrator, which can have influence on a penalty in a given case. The catalogue of aggravating and extenuating circumstances is open.

In the light of Article 53 § 2a CC, the aggravating circumstances include in particular: (1) former conviction for an intentional offence or a similar unintentional offence; (2) unlawfully influencing the content of the aggrieved persons' testimonies or statements, witnesses' testimonies, experts' opinions, or the content of other accused persons' explanations; (3) abusing the aggrieved persons' helplessness, disability, illness or advanced age; (4) modus operandi leading to the aggrieved party's humiliation or torment; (5) commission of an offence with premeditation; (6) commission of an offence with motivation deserving particular condemnation or for such reasons; (7) commission of an offence with the use of violence motivated by hatred resulting from national, ethnic, racial, political, religious or atheistic identity of a victim; (8) acting with extraordinary cruelty; (9) commission of an offence under the influence of alcohol or intoxicating substances, provided the state was a factor leading to the commission of an offence or to an increase in its consequences; (10) commission of an offence in cooperation with a minor or making use of their participation. On the other hand, Article 53 § 2b CC stipulates that extenuating circumstances include, in particular: (1) acting for the reasons that deserve consideration; (2) commission of an offence under the influence of anger, fear or agitation justified by the circumstances of the event; (3) acting under the influence of a person to whom a perpetrator is in subjection; (4) commission of an offence as a response to a sudden situation the assessment of which was very difficult due to a perpetrator's personal circumstances, range of knowledge or life experience; (5) acting under the influence of especially difficult personal conditions; (6) voluntary taking steps to prevent damage or harm resulting from an offence or to limit its size; (7) reconciliation with the aggrieved; (8) voluntary redressing of the damage caused by an offence; (9) voluntary giving satisfaction to the aggrieved; and (10) voluntary revealing of the offence committed to law enforcement agencies. Moreover, Article 53 § 2c CC stipulates that: 'A circumstance constituting a feature of an offence committed by a perpetrator is not a circumstance referred to in §§ 2a and 2b, unless it occurred with especially high or especially low intensity.'

It is worth noticing that the formulation of the obligation to examine aggravating and extenuating circumstances in the process of deciding on a penalty, as well as the legal shape of particular circumstances, encountered doubts and objections in litera-

ture.[23] It was indicated, inter alia, that a court hearing a case is able to assess which circumstance should influence the imposition of a more severe penalty and which a more lenient one, and it is hard to imagine that a court can ignore, e.g. acting with extraordinary cruelty, former conviction, motivation deserving particular condemnation or the aggrieved persons' humiliation or torment.[24] In the light of the above, the solution adopted should be recognised as useless.

Among the numerous amendments made by the Act of 13 June 2019, Article 77 CC that introduces a possibility of banning a conditional release in the case of convicts sentenced to life imprisonment cannot escape our attention. In accordance with Article 77 § 3 CC, 'Imposing the penalty of life imprisonment for an act committed by a perpetrator who has been sentenced for a different offence to life imprisonment or the penalty of deprivation of liberty for at least 20 years, a court can ban a conditional release.' On the other hand, in accordance with § 4, 'Imposing the penalty of life imprisonment, a court can ban a conditional release of a perpetrator if the nature and circumstances of the act and the perpetrator's personal features indicate that leaving him/her at large will create persistent threat to other people's life, health, liberty or sexual freedom.'

It should be emphasised that the possibility of banning a conditional release of a convict sentenced to life imprisonment encounters basic objections in literature, which are expressed in numerous legal opinions.[25] Thus, referring to the expressed stance and fully approving of it, it is necessary to state that the solution discussed is in conflict with the European Court of Human Rights judgments, because it breaches Article 3 of the European Convention on Human Rights (ECHR), which lays down

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[23] See in particular: Opinia na temat projektu zmian przepisów kodeksu karnego (uchwała Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 roku), Katedra Prawa Karnego Materialnego, Uniwersytet Wrocławski, pp. 12–15; Opinia do uchwały Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 r. w sprawie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, uchwalonej przez Sejm Rzeczypospolitej Polskiej na 81. posiedzeniu w dniu 16 maja 2019 r., Kraków, 9 June 2019, Krakowski Instytut Prawa Karnego Fundacja, pp. 93–96.

[24] See J. Giezek, J. Brzezińska, D. Gruszewska, R. Kokot, K. Lipiński, Opinia na temat wybranych zmian przepisów kodeksu karnego, part 2 of: Opinia na temat projektu zmian przepisów kodeksu karnego (uchwała Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019), Katedra Prawa Karnego Materialnego, Uniwersytet Wrocławski, posted on the Ombudsman's website, https://www.rpo.gov.pl/plcontent/zmiany-wprawie-karnym-2019-opinie-ekspertow-i-RPO (accessed 20.10.2019).

[25] See opinions posted on the Ombudsman's website indicated in footnote 2 *supra*, in particular: Opinia Rzecznika Praw Obywatelskich do ustawy z dnia 16 maja 2019 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw; Opinia – sygnowana przez ponad 150 naukowców – dotycząca uchwalonej przez Sejm w dniu 13 czerwca 2019 r. ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, przedstawionej Prezydentowi Rzeczypospolitej Polskiej w trybie art. 122 ust. 1 Konstytucji RP, pp. 22–25; Opinia Krakowskiego Instytutu Prawa Karnego Fundacja z dnia 9 czerwca 2019 r. do uchwały Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 r. w sprawie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, uchwalonej przez Sejm Rzeczypospolitej Polskiej na 81. posiedzeniu w dniu 16 maja 2019 r., pp. 106–110; Opinia Biura Studiów i Analiz Sądu Najwyższego do projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw; Opinia Katedry Prawa Karnego Materialnego Uniwersytetu Wrocławskiego na temat projektu zmian przepisów kodeksu karnego (uchwała Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 roku), pp. 24–31.

a ban on inhuman and degrading treatment. The European Court of Human Rights drew attention to the fact that, while the penalty of life imprisonment as such does not breach it, the lack of regulation in national law that lays down a possibility of verifying grounds for further execution of such a penalty after a statutory period which is usually 25 years does. This does not mean that a convict is entitled to finish serving the penalty earlier than when the period ends. It means that they can apply for a conditional release, which gives them hope for regaining freedom. It should be added that the European Court of Human Rights recognised the situation in which the only method to reduce the penalty of life imprisonment was the President's pardon as one that infringes Article 3 ECHR.

Summing up, it should be stated that the statute contains solutions that raise considerable objections. They lead to aggravation of the penal system, which is justified neither by the diagnosis of the present criminality nor by the practice of justice administration. At the same time, the statute introduces regulations that limit judicial discretion in the field of sentencing, and even such that are in conflict with international law. Due to the above, the amendments presented do not deserve approval.

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SELECTED ISSUES CONCERNING A NEW APPROACH TO THE IDEA OF PUNISHMENT IN THE LIGHT OF ACT OF 13 JUNE 2019

Summary

The article discusses the issues concerning extensive amendments to the provisions of the Criminal Code laid down in the Act of 13 June 2019. It considers the most important solutions introduced to the General part of the Criminal Code in the field of penalties and sentencing. These concern: elimination of the penalty of deprivation of liberty for 25 years from the catalogue of penalties; increasing the maximum limit of the penalty of deprivation of liberty for a period determined by court from 15 years to 30 years; modification of the content of Article 37a CC admitting a possibility of imposing a fine or the penalty of limitation of liberty instead of the penalty of deprivation of liberty; general directives on judicial sentencing decisions and the catalogue of aggravating and extenuating circumstances; and imposition of the penalty of life imprisonment without a possibility of conditional release. The analysis carried out leads to a conclusion that the proposed solutions do not deserve approval.

Keywords: penalty of deprivation of liberty for a period of 25 years, penalty of deprivation of liberty for a period determined by court, penalty of limitation of liberty, directives on judicial sentencing decisions, catalogue of aggravating and extenuating circumstances, penalty of life imprisonment

WYBRANE PROBLEMY NOWEGO PODEJŚCIA DO FILOZOFII KARANIA W ŚWIETLE USTAWY Z 13 CZERWCA 2019 R.

Streszczenie

Artykuł podejmuje problemy rozległych zmian przepisów kodeksu karnego w ujęciu ustawy z 13 czerwca 2019 r. Przedmiotem rozważań uczyniono najważniejsze rozwiązania wprowadzone w części ogólnej kodeksu karnego w obrębie kar i instytucji wymiaru kary. Dotyczyły one: wyeliminowania kary 25 lat pozbawienia wolności z katalogu kar; wydłużenia z 15 lat do 30 lat górnej granicy terminowej kary pozbawienia wolności; podwyższenia dolnej granicy grzywny oraz kary ograniczenia wolności; modyfikacji treści art. 37a k.k. dopuszczającego możliwość orzeczenia grzywny lub kary ograniczenia wolności zamiast kary pozbawienia wolności; ogólnych dyrektyw sądowego wymiaru kary oraz katalogu okoliczności obciążających oraz łagodzących; orzeczenia kary dożywotniego pozbawienia wolności bez możliwości warunkowego zwolnienia skazanego. Przeprowadzona analiza doprowadziła do konkluzji, że przestawione rozwiązania nie zasługują na aprobatę.

Słowa kluczowe: kara 25 lat pozbawienia wolności, terminowa kara pozbawienia wolności, grzywna, kara ograniczenia wolności, dyrektywy sądowego wymiaru kary, katalog okoliczności obciążających i łagodzących, kara dożywotniego pozbawienia wolności

PROBLEMAS SELECTOS DE NUEVA ACTITUD DE FILOSOFÍA DE LA PENA EN EL MARCO DE LA LEY DE 13 DE JUNIO DE 2019

Resumen

El artículo analiza problemas de modificaciones extensas del código penal contenidas en la ley de 13 de junio de 2019. Las soluciones más importantes previstas en la parte general del código penal en cuanto a las penas y su duración son: eliminación de la pena de 25 de privación de libertad del catálogo de las penas; prolongación de 15 a 30 años del límite máximo de la pena de privación de libertad, agravación del límite mínimo de la multa y de la pena de restricción de libertad, modificación del art. 37a CP, que admite la posibilidad de imponer la multa o la pena de restricción de libertad, directivas generales de imposición judicial de la pena y el catálogo de circunstancias agravantes y atenuantes, imposición de la pena de privación de libertad vitalicia sin la posibilidad de libertad condicional del penado. El análisis lleva a la conclusión de que las soluciones propuestas no pueden aprobarse.

Palabras claves: pena de 25 de privación de libertad, la pena de privación de libertad de duración determinada, multa, pena de restricción de libertad, directivas de imposición judicial de la pena, catálogo de circunstancias agravantes y atenuantes, pena de privación de libertad vitalicia

ИЗБРАННЫЕ ПРОБЛЕМЫ НОВОГО ПОДХОДА К ФИЛОСОФИИ НАКАЗАНИЯ В СВЕТЕ ЗАКОНА ОТ 13 ИЮНЯ 2019 ГОДА

Аннотация

Статья посвящена обширным изменениям, внесенным в Уголовный кодекс Законом от 13 июня 2019 года. Рассматриваются наиболее важные изменения, внесенные в общую часть Уголовного кодекса в отношении наказаний и института назначения меры наказания. К этим изменениям относятся: исключение меры наказания в виде лишения свободы сроком на 25 лет из перечня наказаний; повышение верхнего предела срока временного лишения свободы с 15 до 30 лет; повышение нижних пределов наказаний в виде штрафа и ограничения свободы; изменение содержания статьи 37a УК, предусматривающей возможность назначения наказания в виде штрафа или ограничения свободы вместо лишения свободы; изменение общих директив относительно системы судебных наказаний, а также включение в УК перечня отягчающих и смягчающих обстоятельств; возможность назначения наказания в виде пожизненного лишения свободы без возможности условно-досрочного освобождения. На основании проведенного анализа автор делает вывод о том, что предложенные решения не заслуживают одобрения.

Ключевые слова: наказание в виде лишения свободы на срок 25 лет, наказание в виде временного лишения свободы, штраф, наказание в виде ограничения свободы, директивы относительно системы судебных наказаний, перечень отягчающих и смягчающих обстоятельств, наказание в виде пожизненного лишения свободы

AUSGEWÄHLTE PROBLEME DES NEUEN ANSATZES FÜR DIE STRAFTHEORIE MIT BLICK AUF DAS GESETZ VOM 13. JUNI 2019

Zusammenfassung

Der Artikel greift die Probleme der umfangreichen Änderungen der Bestimmungen des polnischen Strafgesetzbuches durch das Gesetz vom 13. Juni 2019 auf. Gegenstand der Überlegungen sind die wichtigsten, im allgemeinen Teil des polnischen Strafgesetzbuches im Bereich der Strafen und der Institution der Strafzumessung eingeführten Regelungen. Diese betreffen: die Abschaffung und Streichung der Freiheitsstrafe von 25 Jahren aus dem Strafenkatalog des Gesetzes; die Erhöhung der Obergrenze einer zeitlich begrenzten Freiheitsstrafe von 15 auf 30 Jahre; Erhöhung der Untergrenze von Geldbußen und Freiheitsbeschränkungen; die Abänderung von Artikel 37a des polnischen Strafgesetzbuches, der die Möglichkeit einer Geldstrafe oder Strafe in Form einer Freiheitsbeschränkung anstelle von Freiheitsentzug zulässt; die allgemeine Richtlinien für die gerichtliche Strafzumessung und den Katalog von strafschärfenden und strafmildernden Umständen; die Verhängung einer lebenslänglichen Freiheitsstrafe ohne Möglichkeit der Freilassung des Verurteilten auf Bewährung. Die Untersuchung kommt zu dem Schluss, dass die vorgestellten Lösungen keine Zustimmung verdienen.

Schlüsselwörter: Freiheitsstrafe von 25 Jahren, zeitige/zeitlich begrenzte Freiheitsstrafe, Geldstrafe, freiheitsbeschränkende Strafe, Richtlinien für die gerichtliche Strafzumessung, Katalog von strafschärfenden und strafmildernden Umständen, lebenslange/lebenslängliche Freiheitsstrafe

PROBLÈMES SÉLECTIONNÉS DE LA NOUVELLE APPROCHE DE LA PHILOSOPHIE DE LA PUNITION À LA LUMIÈRE DE LA LOI DU 13 JUIN 2019

Résumé

L'article aborde les problèmes de modifications importantes des dispositions du Code pénal à la lumière de la loi du 13 juin 2019. Les solutions les plus importantes introduites dans la partie générale du Code pénal dans le cadre des sanctions et des institutions de la peine ont été examinées. Ils concernaient: l'élimination de la peine de 25 ans d'emprisonnement du catalogue des peines; la prolongation de 15 à 30 ans de la peine maximale d'emprisonnement; l'augmentation de la limite inférieure de l'amende et de la peine restrictive de liberté; la modification du contenu de l'art. 37a du Code pénal permettant la possibilité d'une amende ou d'une peine de restriction de liberté au lieu d'une peine de privation de liberté; les directives générales de la condamnation judiciaire et du catalogue des circonstances aggravantes et atténuantes; la peine de réclusion à perpétuité sans possibilité de libération conditionnelle du condamné. L'analyse a permis de conclure que les solutions présentées ne méritent pas d'être approuvées.

Mots-clés: 25 ans d'emprisonnement, emprisonnement en temps opportun, amende, restriction de liberté, directives de la condamnation judiciaire, catalogue des circonstances aggravantes et atténuantes, emprisonnement/réclusion à perpétuité

PROBLEMI SCELTI DEL NUOVO APPROCCIO PUNITIVO ALLA LUCE DELLA LEGGE DEL 13 GIUGNO 2019

Sintesi

L'articolo tratta i problemi delle estese modifiche delle norme del codice penale introdotte con la legge del 13 giugno 2019. Oggetto delle riflessioni sono state le soluzioni più importanti introdotte nella parte generale del codice penale, nell'ambito delle pene e dell'istituzione della determinazione della pena. Esse riguardano: l'eliminazione della pena detentiva di 25 anni dal catalogo delle pene, l'estensione del limite superiore della pena detentiva a tempo determinato da 15 a 30 anni, l'innalzamento del limite inferiore della pena pecuniaria e della pena detentiva; la modifica dell'art. 37a del codice civile che ammette la possibilità di comminare una pena pecuniaria o una pena detentiva invece di una pena detentiva, le direttive generali sulla determinazione giudiziale della pena e il catalogo delle circostanze aggravanti e attenuanti, la sentenza di pena detentiva perpetua senza possibilità di liberazione anticipata o condizionale della persona condannata. L'analisi condotta ha portato alla conclusione che le soluzioni presentate non sono degne di approvazione.

Parole chiave: pena detentiva di 25 anni, pena detentiva a tempo determinato, pena pecuniaria, pena detentiva, direttive sulla determinazione giudiziale della pena, catalogo delle circostanze aggravanti e attenuanti, pena detentiva perpetua

Cytuj jako:

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NON-CUSTODIAL PENALTIES LAID DOWN BY STATUTE AND DETERMINED BY COURT IN THE LIGHT OF THE AMENDMENT TO CRIMINAL CODE OF 13 JUNE 2019

VIOLETTA KONARSKA-WRZOSEK*

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The amendment to the Criminal Code of 13 June 2019, which is waiting for the Constitutional Tribunal judgment whether it is in conformity with the Constitution of the Republic of Poland,[1] was based on the assumption that it was necessary to strengthen the penal law protection of fundamental legal interests such as life, health, sexual freedom and ownership; to raise the level of the punitive response to criminality by means of increasing the severity of penal sanctions and developing institutions that would influence penalty imposition in such a way that they direct a court decisions towards the limitation of the possibility of making use of the reduction of a sanction, or extend the possibility of aggravating a penal sanction towards perpetrators of offences with a high level of blameworthiness.[2] The changes introduced are justified by the conviction that 'criminal law, with the use of its instruments, is to satisfy the social demand for the sense of security and justice'.[3]

In order to achieve the above-mentioned objectives, the directives on penalties that are laid down by statute and those determined by court were amended.

In particular, the maximum level of the standard penalty of deprivation of liberty was raised from 15 to 30 years (see the amended Article 37 CC), which made the penalty of deprivation of liberty for a period of 25 years useless and resulted in

* Prof., PhD hab., Department of Criminal Law, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń; e-mail: vwrzosek@umk.pl; ORCID: 0000-0003-3859-8821

1 Act of 13 June 2019 amending the Act: Criminal Code and some other acts, Sejm print no. 3451; hereinafter CC.

2 Compare Uzasadnienie do projektu ustawy z dnia 13 czerwca 2019 r. o zmianie ustawy – Kodeks karny oraz innych ustaw [Justification of the Bill of 13 June 2019 amending the Act: Criminal Code and some other acts], Sejm print no. 3451, p. 1.

3 See *ibid*.

its abolition (by repealing Article 32(4) CC). However, another extremely severe penalty of life imprisonment was maintained (see Article 32(5) CC) and the minimum period of serving it before the application for conditional release is admissible was raised from 25 to 35 years (see the amended Article 78 § 3 CC), moreover, a new solution gave the possibility of ruling a ban on conditional release by a trial court (see the added Article 77 §§ 3 and 4 CC). Obviously, amendments were made to many sanctions for the offences specified in the Special part of the Criminal Code and, as a result, the penalty of deprivation of liberty was aggravated and the period raised to 20, 25 or 30 years.

At first sight, no amendments were made to the basic statutory non-custodial penalties prescribed within the field of common criminal law. Article 33 § 1 CC maintains the principle of the lowest number of daily rates of a fine imposed for the commission of an offence and stipulates it should account for ten, and the highest one for 540 rates. The basic statutory penalty of limitation of liberty for perpetrators of offences is to be at least one month and the longest period shall be two years (Article 34 § 1 CC). However, §§ 1a and 2a, and § 1aa were added to both provisions, respectively, and they modify the minimum penalty of a fine and limitation of liberty in the case of all types of offences carrying an alternative or cumulative sanction in which, apart form a non-custodial penalty, the penalty of deprivation of liberty is also envisaged.

Thus, in accordance with the added Article 33 § 1a CC,

> If the statute does not prescribe otherwise, and an offence is subject to a fine as well as the penalty of deprivation of liberty, the penalty of a fine shall be at least:
> 1) 50 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to one year;
> 2) 100 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to two years;
> 3) 200 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to three years;
> 4) 300 rates – in the case of an act carrying the penalty of deprivation of liberty for a period exceeding three years.

The minimum limits of a fine indicated are also applicable to a fine imposed beside the penalty of deprivation of liberty (see the added Article 34 § 2a CC).

With the use of the statutory reservation made in Article 33 § 1 CC concerning the daily rates of a fine accounting for the minimum of 10 and the maximum of 540 if the statute does not stipulate otherwise, the provisions added in Article 33 § 1a CC change all common and military criminal law penalties that were laid down for different types of offences for which, apart from non-custodial penalties, the penalty of deprivation of liberty for alternative application as well as cumulative sentencing were prescribed. Taking into account the fact that in our legal system there are relatively few types of offences carrying only non-custodial penalties (Special part of the Criminal Code prescribes such penalties in just nine cases) and in general even petty crimes carry, apart from non-custodial penalties, a selection of penalties of deprivation of liberty, the amendment results in a general revision of the existing penal law assessment of all types of offences and considerable aggravation of penalties. One can wonder why

it was not decided to raise the minimum levels of fines prescribed in criminal law if the legislator believes that a fine of ten daily rates is absolutely insufficient for an offence, especially in comparison to some penalties prescribed for misdemeanours.[4] It is also puzzling why the legislator did not decide to directly change the sanctions in the provisions classifying particular types of offences and did it in a complete way in the provisions of the General part of the Criminal Code. The answer seems to be simple. The introduction of changes to penalties for many types of offences in the whole legal system is, from the technical point of view, much easier when it is done by introducing one general provision that is universally applicable to the legal system. However, a question should be asked whether the adoption of such a solution really modifying penal sanctions for a big number of offences is in conformity with the fundamental principles of criminal law established centuries ago in the criminal law doctrine and then directly or indirectly confirmed in domestic, international and the European Union legal acts. It concerns the obligation to adhere to the principle *nulla poena sine lege certa*.[5] In the system of sanctions determined relatively, which is applicable inter alia in our country, the principle results in the legislator's obligation to unequivocally determine a penalty for a given type of conduct and specify its nature and the limits of its imposition. It should be highlighted here that information included in the sanction of criminal law provision should be clear and complete. The principle is not betrayed when only the type of penalty is determined without specifying its minimum and maximum limits. This is so because the type of penalty can be imposed within its whole scope, i.e. a penalty can be imposed within the range from the statutory minimum to the statutory maximum determined in the general provisions of the Criminal Code. However, it is inadmissible to introduce sanctions misinforming their addressees. Unfortunately, one will deal with such a situation if the amendment of 13 June 2019 enters into force. Due to the regulations in the added provisions of Article 33 §§ 1a and 2a CC, the fines will be totally different from those specified in the sanctions for particular types of offences. A number of offences will in fact not carry a fine from 10 to 540 daily rates but from 50 to 540 rates, or from 100 to 540 rates, or from 200 to 540 rates, or from 300 to 540 daily rates.

The *nulla poena sine lege certa* principle will also be betrayed in the case of offences carrying, inter alia, the penalty of limitation of liberty because, in accordance with § 1aa added to Article 34 CC,

> If the statute does not stipulate otherwise and an offence carries both the penalty of limitation of liberty and the penalty of deprivation of liberty, the penalty of limitation of liberty shall be imposed for a period of at least:
> 1) two months – in case an act carries the penalty of deprivation of liberty for a period of up to one year;
> 2) three months – in case an act carries the penalty of deprivation of liberty for a period of up to two years;
> 3) six months – in case an act carries the penalty of deprivation of liberty for a period of up to three years;
> 4) nine months – in case an act carries the penalty of deprivation of liberty for a period exceeding three years.

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[4] Compare the arguments presented in the justification of the Bill of 13 June 2019, *ibid.*, p. 8.
[5] See e.g. Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2012, p. 37.

The norm laid down in Article 34 § 1aa CC means that instead of the penalty of limitation of liberty in its full range, which is stipulated in the provisions on particular sanctions, *de facto* many types of offences will carry the same type of penalty within different, more severe limits from two months, or from three months, or from six months, or from nine months to two years.

It is essential that the legislator adhere to the *nulla poena sine lege certa* principle not only for the guarantee reasons but also because the information about offences and penalties has to perform an important role, namely a preventive and educational function in general as well as special prevention, and via it also a protective function. Due to the fact that the criminal and penal provisions are first of all addressed to the general public (not experts in criminal law), the message that statutes send should be easy to read and understand and not provided in a camouflaged way, difficult for the majority of people to decode properly. This untypical way of introducing a general change in the severity of statutory penalties that was applied in Article 33 §§ 1a and 2a and in Article 34 § 1aa CC for a big number of offences penalised in our legal system is not able to start a mechanism expected by the legislator and to act as an effective crime deterrent resulting in better protection of legal interests before they are infringed.

It should also be raised that the aggravated minimum limits of a fine or the penalty of limitation of liberty are not integrated with any, in particular negative, features of a perpetrator or an offence committed by them. These are new aggravated limits of non-custodial penalties that courts shall impose within the standard sentencing whenever they co-exist in conjunction with the penalty of deprivation of liberty for any period. In the pre-amendment legal state, in the same way as in the two previous criminal codes, i.e. CC of 1932 and CC of 1969, the departure from the basic minimum and maximum limits of a given type of penalty could take place based on the provisions of the General part of the Criminal Code and only in the case special circumstances occurred that required the application of extraordinary aggravation or extraordinary extenuation of punishment.[6] The amendment of 13 June 2019 compromises the established principle, which should encounter criticism because the legislator, with no rational grounds (except for a subjectively perceived need to raise the level of the criminal law punitive response),[7] interferes with the sphere of a court's discretion and limits it.

The principle of a court's sentencing discretion, which is inseparably connected with the system of relevantly determined sanctions, is to guarantee a just and, at the same time, preventive selection of penal responses to a perpetrator's criminal act. Its role is to materialise another fundamental rule that is in force in criminal law, i.e. individualised penalty and other penal measures (see Articles 53–56 CC). This individualisation is reflected in the proper selection of the type of penalty and its severity so that it is relevant to a given individual case. Only a trial court's relatively broad discretion can ensure real individualisation of a sentence issued in

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[6] For more on the issue, see V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, pp. 41–45.

[7] Compare justification of the Bill, *supra* n. 3, p. 1.

relation to a particular offence committed by a particular perpetrator. Each instance of narrowing a court's sentencing possibilities by a legislator, especially when it is arbitrary and not rational, i.e. not supported by any significant arguments, makes the individualisation of a sentence in a given case impossible to implement and the administration of justice may become unjust and useless. It is necessary to avoid situations and solutions that can lead to that. Raising the statutory minimum levels of the penalty of a fine following a determined pattern, the legislator totally ignored the two-stage process of its imposition and the intended objectives of the system of daily rates fines. The daily rates system of fines adopted in the Criminal Code was aimed at satisfying the sense of justice and at achieving preventive objectives laid down in Article 53 § 1 CC through the imposition of an adequate amount of daily rates ruled in an individual sentence.[8] Courts will find those objectives difficult to achieve as the minimum amount of a fine was established at a strictly fixed and rather high level. It will be even more difficult, due to the fact that the catalogue of aggravating and extenuating circumstances was introduced to the Criminal Code (see Article 53 §§ 2a and 2b CC) with the obligation to take them into account in every single sentence issued (see the amended Article 53 § 1 CC). Raising the minimum number of daily rates of a fine that shall be imposed when selecting this and not another one out of the prescribed sanctions, the legislator, unfortunately, also ignored the poor financial condition of the Polish society. For years, the individual economic situation of perpetrators of offences that courts have to take into account when determining the daily rates of a fine, in accordance with a special directive formulated in Article 33 § 3 CC, causes that over 70–80% of all fines imposed as the only penalty for offences do not exceed PLN 2,000[9] (after the calculation of the whole amount to be paid). This means that in the case of a fixed minimum of daily rates for particular types of offences, courts will not be able to impose the number of daily rates based on their own individualised assessment of the level of social harmfulness of an act and the level of a perpetrator's guilt as well as the needs of prevention; what is more, they will not be able to impose higher amounts than the available minimum, i.e. PLN 10, so that a convict can pay the whole amount after calculation and it is not necessary to execute the fine in a substitute form. This way, the system of fines expressed in daily rates lost its sense and raison d'être.

Therefore, the general increase in the minimum levels of punishment, based on a certain schematic pattern, in relation to non-custodial penalties prescribed in alternative or cumulative sanctions in which they co-occur with the penalty of deprivation of liberty, does not deserve a positive assessment. The adopted method of

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[8] See M. Melezini, [in:] M. Melezini (ed.), *Kary i inne środki reakcji prawnokarnej*, Vol. 6: *System Prawa Karnego*, Warszawa 2016, pp. 122 and 126.

[9] In 2018, fines in the amount of PLN 2,000 imposed as the only penalties occurred in 71 cases, accounting for 22% of all fines; in 2017 in 74 cases, 42% of all fines, and in 2016 in 79 cases, 52% of all fines for offences. Fines imposed in the amount of PLN 2,001–5,000 as the only penalties accounted for 21.09% of fines in 2018, 18.64% in 2017, and 14.78% in 2016. Fines exceeding PLN 5,000 accounted for 7.69% in 2018, 6.93% in 2017, and 5.70% in 2016. The author's own calculations based on court statistics, compare skazania-prawomocne-dorośli-wg-rodzajów-przestępstw-i-wymiaru kary-w-l-2008-2018, https://isws.ms.gov.pl/pl/baza-statystyczna (accessed 15.02.2020).

changing the statutory penalties within the whole common (and military, compare Article 317 § 1 CC) criminal law system consisting in schematic correlation between the minimum limit of non-custodial penalties and the maximum limit of the penalty of deprivation of liberty for a given type of offence is questioned by the representatives of the criminal law doctrine and is recognised as senseless.[10]

As it has been signalled earlier, the narrowing of a court's discretion by introducing the catalogue of aggravating and extenuating circumstances and the necessity of taking them into account when sentencing as well as treating the objectives of a penalty in the field of social influence as the issue of key importance do not serve the reinforcement of the principle of individualisation of punishment (see the amended Article 53 § 1 and added §§ 2a, 2b and 2c CC).

The introduction of the catalogue of extenuating circumstances to the Criminal Code, in particular, obliges courts to thoroughly examine whether such circumstances have occurred in a given case and analyse whether and to what extent they justify a more lenient treatment of a perpetrator within the standard sentencing and to what extent they justify the application of the extraordinary extenuation of a sentence, as prescribed in Article 60 CC. It should be noticed that the catalogue of extenuating circumstances laid down in Article 53 § 2b CC lists as many as 12 circumstances in ten subsections, which are connected with the commission of an offence recognised as a reason for a more lenient assessment of a prohibited act and its perpetrator. It is a broad and open catalogue. This means that there can be more reasons why a court should form the opinion that a perpetrator should be treated more leniently. Some of the circumstances listed in Article 53 § 2b CC are the same as the circumstances that may justify extraordinary extenuation of a sentence. This creates a problem of assessment and appropriate indication to what extent the occurrence of particular extenuating circumstances justifies the application of a more lenient sentence within the standard sentencing and in what cases their occurrence should justify extraordinary extenuation of a sentence. It should be raised here that limiting a court's discretion by introducing the catalogue of extenuating circumstances, which is open, the legislator did not indicate the criteria making it possible to measure their intensity in order to properly weigh whether it is right to remain in the area of standard sentencing or use the institution of extraordinary extenuation of a sentence. The introduction of the catalogue of extenuating circumstances to the Criminal Code causes that the only hint that allows deciding whether it will be more appropriate to apply the standard mode of sentencing or extraordinary extenuation of a sentence is the statutory indication in Article 60 § 2 introductory sentence CC, which stipulates that it concerns a particularly justified case 'when even the lowest penalty prescribed for an offence would be disproportionally severe'. However, the problem arises how far this severe penalty prescribed for an offence is to be disproportional. Taking into account the changed general directives on sentencing laid down in the amended Article 53 § 1 CC, answering the question is not easy. It is not clear whether this

[10] Compare J. Giezek, J. Brzezińska, D. Gruszecka, R. Kokot, K. Lipiński, *Opinia na temat projektu zmian przepisów kodeksu karnego*, https://www.rpo.gov.pl/sites/default/files/Opinia %20 Katedry%20 Prawa (accessed 15.02.2020).

disproportionality is to be referred to the level of social harmfulness of an act, or the number or intensity of the established extenuating circumstances, or to the needs in the area of social influence, or to the special preventive needs, or eventually to the level of a perpetrator's guilt. It seems that in the legal circumstances after the amendment, contrary to the intentions of the authors of the bill, courts will find it more difficult than before to issue just and uniform sentences in similar cases.

The difficulty becomes even more serious because of the obligation to impose just punishment on offenders (taking into consideration the level of social harmfulness of an act and aggravating and extenuating circumstances) that must be fulfilled within the reduced limit of a court's discretion (which has been discussed above), and the necessity of taking into account the objectives of a penalty within the scope of its social influence and preventive objectives that a penalty is to achieve in relation to the convict, with the abolition of severity exceeding the level of guilt at the same time (compare the amended Article 53 § 1 CC). In the light of such general directives on sentencing, which should be commonly applied in the case of all perpetrators regardless of the type of an offence they have committed, courts would be obliged to issue sentences in individual cases in the manner that would primarily influence the entire society, i.e. it would serve general prevention; what is more, it is to be done in line with the negative general prevention,[11] i.e. by deterring people from violating the law. What comes to mind in this situation is Immanuel Kant's significant remark approved of in the whole civilised world, according to which no man (even a criminal) can be treated as a means to an objective because such treatment cannot be reconciled with the inherent human dignity.[12] That is why, exchanging the positive general preventive directive, which concerns the obligation to take into account the needs of developing the society's legal awareness while issuing an individual sentence, for the negative general preventive directive should be assessed critically. It deserves this negative assessment in particular due to the fact that those general preventive objectives of punishing an individual were assigned a fundamental role to fulfil. It should be raised here that in the former wording of Article 53 § 1 CC, the general preventive objective of a sentence issued was subsidiary in nature in relation to justice-related and individual preventive objectives. Another matter of concern is the fact that in the amended Article 53 § 1 CC, the rank of the objectives of individual prevention was reduced; they became secondary. Moreover, they were considerably limited to the need to take into account only preventive aims, thus to develop a sentence in such a way that a penalty and other penal measures prevent or at least significantly hamper the commission of an offence by a convict again.[13] On the other hand, the legislator totally eliminated from the directives on sentencing the necessity of taking into account educational objectives to be achieved in relation to a convict. The discussed amendments to the Criminal Code adopted changes in

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[11] For the issue of negative general prevention, see T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, pp. 207–208.

[12] Compare I. Kant, *Uzasadnienie metafizyki moralności*, Warszawa 2002, pp. 86–89. Also see J. Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, pp. 41–43.

[13] V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 429.

the general directives on sentencing which create a risk that: 'As a result, a penalty will become primitive revenge, like that taken in old times, repeatedly discredited and recognised as ineffective and inefficient.' Almost all the representatives of the criminal law jurisprudence are strongly critical of the whole criminal law reform, and justifiably and unanimously warn against it.[14]

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NON-CUSTODIAL PENALTIES LAID DOWN BY STATUTE AND DETERMINED BY COURT IN THE LIGHT OF THE AMENDMENT TO CRIMINAL CODE OF 13 JUNE 2019

Summary

The article discusses amendments to the General part of the Criminal Code passed on 13 June 2019, concerning penalties laid down by statute and determined by court. In particular, the author analyses the issue of seemingly directive-like changes concerning the imposition of a fine and the penalty of limitation of liberty in the case those penalties co-occur with the penalty of deprivation of liberty, which in fact increase the minimum limits of those penalties for many offences in the field of the whole common and military criminal law. The author examines the provisions added to Article 33 CC: §§ 1a and 2a, and to Article 34 CC: § 1aa, in the context of the *nulla poena sine lege certa* principle, the principle of individualised sentencing and the principle of

[14] See *Naukowcy w PAN piszą do prezydenta: Przyjęta nowelizacja kodeksu karnego cofa nas o co najmniej wiek wstecz*, Gazeta Prawna.pl, https://prawo.gazetaprawna.pl/artykuły/1417622,naukowcy-z-pan-do-prezydenta-kodeks-karny.html of 14 June 2019 (accessed 15.02.2020).

a court's discretion in the process of imposing a penalty or other penal measures. The author also assesses the purposefulness of the introduction of the catalogue of aggravating and extenuating circumstances to the Criminal Code (Article 53 §§ 2a and 2b CC added). She mainly draws attention to difficulties that can occur in a court's assessment to what extent the occurrence of given extenuating circumstances justifies taking them into account within standard sentencing and when it will give grounds for the application of the institution of extraordinary extenuation of a sentence. The article also presents the amendments to the wording of Article 53 § 1 CC within the scope of general directives on a penalty determined by court, which mainly tend to direct sentencing towards revenge for an offence committed and general prevention. Taking into account individual prevention was pushed to the background, and the objective of preventing a convict from returning to crime was narrowed, while striving to achieve educational objectives in the field of a convict's attitudes and conduct was totally ignored. The article is strongly critical of the amendments passed. That is why, it is expected they will not enter into force.

Keywords: penalty laid down by statute, penalty determined by court, *nulla poena sine lege certa* principle, principle of individualised sentencing, principle of a court's discretion, non-custodial penalties and their limits, general directives on court sentencing

USTAWOWY I SĄDOWY WYMIAR KAR WOLNOŚCIOWYCH W ŚWIETLE NOWELI DO KODEKSU KARNEGO UCHWALONEJ DNIA 13 CZERWCA 2019 R.

Streszczenie

Publikacja dotyczy zmian uregulowań części ogólnej Kodeksu karnego uchwalonej ustawą z 13 czerwca 2019 r. w zakresie ustawowego i sądowego wymiaru kary. W szczególności podjęto w niej kwestię z pozoru dyrektywalnych zmian dotyczących wymiaru kary grzywny i kary ograniczenia wolności, gdy kary te współwystępują w sankcji z karą pozbawienia wolności, które w istocie podwyższają dolne granice tych kar za liczne typy przestępstw w obszarze całego prawa karnego powszechnego i wojskowego. Przeanalizowano postanowienia dodanych do art. 33 k.k.: § 1a i 2a oraz do art. 34 k.k. – § 1aa w kontekście zasady *nulla poena sine lege certa*, zasady indywidualizacji wymiaru kary i zasady swobodnego uznania sądu przy wymierzaniu kary i innych środków penalnych. Oceniono także celowość wprowadzenia do Kodeksu karnego katalogu okoliczności obciążających oraz łagodzących (dodany art. 53 § 2a i 2b k.k.). Zwrócono przede wszystkim uwagę na mogące pojawiać się trudności przy ocenianiu przez sąd, na ile wystąpienie danych okoliczności łagodzących uzasadnia ich uwzględnienie w ramach tzw. zwyczajnego wymiaru kary, a kiedy upoważniać będzie do zastosowania instytucji nadzwyczajnego złagodzenia kary. W artykule zajęto się także zmianami przeprowadzonymi w treści art. 53 § 1 k.k. z zakresie dyrektyw ogólnych sądowego wymiaru kary, które ukierunkowują ten wymiar przede wszystkim na odpłatę za popełnione przestępstwo i prewencję ogólną. Wzgląd na prewencję indywidualną zszedł na plan dalszy, przy czym zawężono jej cele do zapobiegania powrotowi sprawcy do przestępstwa z całkowitym pominięciem starań o osiągnięcie celów wychowawczych w zakresie postaw i zachowania karanej jednostki. Artykuł ma charakter zdecydowanie krytyczny wobec uchwalonych zmian. Dlatego należy oczekiwać, że nie wejdą one w życie.

Słowa kluczowe: ustawowy wymiar kary, sądowy wymiar kary, zasada *nulla poena sine lege certa*, zasada indywidualizacji wymiaru kary, zasada swobodnego uznania sądu, kary wolnościowe i ich granice, dyrektywy ogólne sądowego wymiaru kary

LA DIMENSIÓN LEGAL Y JUDICIAL DE LAS PENAS NO PRIVATIVAS DE LIBERTAD EN EL MARCO DE LA REFORMA DEL CÓDIGO PENAL PROMULGADA EL 13 DE JUNIO DE 2019

Resumen

La publicación se refiere a las modificaciones en la parte general del Código Penal introducidas mediante la ley de 13 de junio de 2019 en cuanto a la dimensión legal y judicial de la pena. En particular, trata de modificaciones de las directivas de imposición de la pena de multa y la pena de restricción de libertad cuando estas sanciones figuren como penas alternativas a la pena de privación de libertad. Estas modificaciones agravan la pena mínima de estas sanciones por muchos delitos comunes y de la parte militar. Se analiza los preceptos añadidos al art. 33 CP – § 1a y 2a y al art. 34 CP – § 1aa desde el punto de vista del principio *nulla poena sine lege certa*, principio de individualización de la sanción y libertad del Tribunal a la hora de imponer la pena y otras medidas penales. Se juzga la finalidad de introducir al Código Penal el catálogo de circunstancias agravantes y atenuantes (nuevo art. 53 § 2a i 2b CP). Se destaca las dificultades a la hora de juzgar por el Tribunal si las circunstancias atenuantes justifican la imposición de la pena normal o si es posible imponer la pena extraordinariamente atenuada. El articulo versa también sobre las modificaciones del art. 53 § 1 CP en cuanto a las directivas generales a la hora de imponer la pena por el Tribunal que como finalidad tengan sobre todo la compensación del delito y la prevención general. La prevención individual ha sido marginalizada y se restringen sus fines a la vuelta del sujeto a cometer el delito, prescindiendo totalmente de esfuerzos a conseguir los fines educativos en cuanto a la postura y comportamiento del penado. El artículo definitivamente critica las modificaciones, por lo que hay que esperar que no entren en vigor.

Palabras claves: pena legal, pena judicial, principio *nulla poena sine lege certa*, principio de individualización de la pena, principio de libertad del Tribunal, penas no privativas de libertad y sus límites, directivas generales de pena judicial

ЗАКОНОДАТЕЛЬНАЯ И СУДЕБНАЯ СИСТЕМА НАКАЗАНИЙ, НЕ СВЯЗАННЫХ С ЛИШЕНИЕМ СВОБОДЫ, В СВЕТЕ ПОПРАВОК К УГОЛОВНОМУ КОДЕКСУ ОТ 13 ИЮНЯ 2019 ГОДА

Аннотация

Статья посвящена поправкам к общей части Уголовного кодекса, введенным Законом от 13 июня 2019 года в отношении законодательной и судебной системы наказаний. В частности, в статье рассмотрен вопрос об изменениях (носящих, как кажется, директивный характер) в отношении наказания в виде денежного штрафа или ограничения свободы в тех случаях, когда эти меры предусмотрены параллельно с наказанием в виде лишения свободы. На практике принятые изменения повышают нижние пределы этих наказаний за целый ряд преступлений в рамках общего и военного уголовного права. Анализируются положения, внесенные в ст. 33 §§ 1a и 2a и в ст. 34 § 1aa УК, с точки зрения принципа *nulla poena sine lege certa*, принципа индивидуализации наказания и принципа свободного усмотрения суда при назначении меры наказания и других мер уголовно-правового воздействия. Кроме этого, автор оценивает целесообразность внесения в Уголовный кодекс перечня отягчающих и смягчающих обстоятельств (добавлены ст. 53 § 2a и 2b УК). В этом контексте внимание, прежде всего, обращено на трудности, с которыми суд может столкнуться при попытке оценить, в каких случаях наличие тех или иных смягчающих

обстоятельств оправдывает их учет в рамках назначения меры наказания в общем порядке, а в каких будет оправдано применение института чрезвычайного смягчения наказания. В статье также рассмотрены поправки к ст. 53 § 1 УК, которые касаются общих директив относительно системы судебных наказаний. По мнению автора, эти поправки направлены, главным образом, на осуществление мер возмездия за совершенное преступление и на общую превенцию. Специальная превенция отходит на второй план, а ее цели сведены к предупреждению рецидивизма. При этом полностью игнорируются усилия по достижению воспитательных целей, призванных исправить поведение и взгляды осужденного. Подвергнув жесткой критике принятые изменения, автор выражает надежду, что они не вступят в силу.

Ключевые слова: законодательная система наказаний, система судебных наказаний, принцип *nulla poena sine lege certa*, принцип индивидуализации наказания, принцип свободного усмотрения суда, меры наказания не связанные с лишением свободы и их пределы, общие директивы относительно системы судебных наказаний

DIE GESETZLICHE UND GERICHTLICHE STRAFZUMESSUNG BEI FREIHEITSSTRAFEN IN ANBETRACHT DER AM 13. JUNI 2019 VERABSCHIEDETEN NOVELLE ZUM POLNISCHEN STRAFGESETZBUCH

Zusammenfassung

Der Beitrag behandelt die durch Gesetz vom 13. Juni 2019 beschlossenen Änderung der Regelungen des allgemeinen Teils des polnischen Strafgesetzbuches im Bereich der gesetzlichen und gerichtlichen Strafzumessung. Insbesondere wird auf die Frage der potenziell richtlinienändernden Änderungen bei der Strafzumessung bei Geldbußen und freiheitsbeschränkenden Strafen eingegangen, da diese Strafen nebeneinander und zusammen mit der Sanktion des Freiheitsentzugs verhängt werden und im Kern die Untergrenzen der Strafen für eine ganze Reihe von Straftatbeständen im Bereich des gesamten allgemeinen Strafrechts und des Militärstrafrechts anheben. Analysiert werden die Artikel 33 des polnischen Strafgesetzbuches (kodeks karny, k.k.) – § 1a und 2a, sowie Artikel 34 k.k. – § 1aa hinzugefügten Bestimmungen mit Blick auf das Prinzip *nulla poena sine lege certa*, dem strafrechtlichen Bestimmtheitsgrundsatz, d.h. dem Grundsatz der Individualisierung der Strafzumessung und des freien richterlichen Ermessens bei der Verhängung von Strafen und anderer Strafmaßnahmen. Einer Bewertung unterzogen wurde daneben auch die Zweckmäßigkeit der Aufnahme eines Katalogs von erschwerenden und mildernden Umständen in das polnische Strafgesetzbuch (hinzugefügter Artikel 53 § 2a und 2b k.k.). Vor allem wird auf mögliche Schwierigkeiten bei der Würdigung durch das Gericht hingewiesen, inwiefern das Vorliegen der betreffenden strafmildernden Umstände rechtfertigt, dass diese im Rahmen der sog. gewöhnlichen Strafzumessung Berücksichtigung finden und wann das Gericht eine außerordentliche Strafmilderung anwenden kann und sollte. Der Artikel befasst sich außerdem mit den an Artikel 53 § 1 k.k. vorgenommenen Änderungen in Bezug auf die allgemeinen Richtlinien zur richterlichen Strafzumessung, wobei diese vor allem auf eine Vergeltung für die begangene Straftat und die allgemeine Prävention abzielen. Die Ausrichtung auf die individuelle Prävention rückt in den Hintergrund, wobei sich der Zweck der individuellen Prävention nunmehr darauf beschränkt, Wiederholungsstraftaten zu verhindern, d.h. zu verhindern, dass Straftäter rückfällig werden, bei einem vollständigen Verzicht auf das Erzielen einer erzieherischen Wirkung im Bereich der Einstellung und des Verhaltens des bestraften Individuums. Der Artikel steht den beschlossenen Änderungen entschieden kritisch gegenüber und es ist zu erwarten, dass diese nicht in Kraft treten.

Schlüsselwörter: gesetzliche Strafzumessung, richterliche Strafzumessung, Bestimmtheitsgrundsatz *nulla poena sine lege certa*, Grundsatz der Individualisierung der Strafzumessung, Grundsatz des freien Ermessensspielraums des Gerichts, Freiheitsstrafen und ihre Grenzen, allgemeine Richtlinien zur richterlichen Strafzumessung

LE QUANTUM LÉGAL ET JUDICIAIRE DES PEINES DE LIBERTÉ À LA LUMIÈRE DE L'AMENDEMENT AU CODE PÉNAL ADOPTÉ LE 13 JUIN 2019

Résumé

La publication concerne les modifications du règlement de la partie générale du Code pénal adopté par la loi du 13 juin 2019 concernant les sanctions légales et judiciaires. En particulier, il aborde la question des modifications apparemment directives concernant l'imposition d'amendes et la peine de restriction de liberté, lorsque ces peines coexistent avec la peine d'emprisonnement, ce qui en fait augmente les limites inférieures de ces peines pour de nombreux types d'infractions dans le domaine du droit pénal commun et militaire. Les dispositions des § 1a et 2a ajoutées à l'art. 33 du Code pénal et du § 1aa à l'art. 34 du Code pénal ont été analysés dans le contexte du principe *nulla poena sine lege certa*, du principe d'individualisation de la peine et du principe de la libre discrétion du tribunal lors de l'imposition de la peine et d'autres mesures pénales. L'opportunité d'introduire un catalogue des circonstances aggravantes et atténuantes dans le Code pénal a également été évaluée (art. 53 § 2a et 2b ajouté au Code pénal). Tout d'abord, l'attention a été attirée sur les difficultés qui peuvent surgir lors de l'appréciation par le tribunal dans quelle mesure la survenance de circonstances atténuantes données justifie leur inclusion dans ce que l'on appelle punition ordinaire, et lorsqu'elle autorise l'application d'une atténuation extraordinaire de la peine. L'article traite également des modifications apportées au contenu de l'art. 53 § 1 du code pénal dans le cadre des directives générales du quantum judiciaire de la peine, qui orientent ce quantum principalement vers le paiement des délits commis et la prévention générale. La prise en compte de la prévention individuelle est tombée à l'arrière-plan, ses objectifs pour empêcher le délinquant de retourner au crime étant réduits, contournant complètement les efforts visant à atteindre des objectifs éducatifs en termes d'attitudes et de comportement de la personne punie. L'article est définitivement critique pour les changements adoptés. Il faut donc s'attendre à ce qu'ils n'entrent pas en vigueur.

Mots-clés: quantum légale de la peine, quantum judiciaire de la peine, principe *nulla poena sine lege certa*, principe de l'individualisation de la peine, principe de la libre discrétion du tribunal, peines de liberté et leurs limites, directives générales du quantum judiciaire de la peine

DETERMINAZIONE LEGALE E GIUDIZIALE DELLE PENE DETENTIVE ALLA LUCE DELLA RIFORMA DEL CODICE PENALE PROMULGATA IL 13 GIUGNO 2019

Sintesi

La pubblicazione riguarda le modifiche delle norme della parte generale del Codice penale, introdotte con la legge del 13 giugno 2019, nell'ambito della determinazione legale e giudiziale della pena. In particolare sono state trattate le modifiche, apparentemente conformi alle

direttive, circa la determinazione della pena pecuniaria e della pena detentiva, quando tali pene coesistono in una sanzione con pena detentiva, e aumentano il limite inferiore di tali pene per numerosi tipi di reati, nell'ambito dell'intero diritto penale e militare. Sono state analizzate le norme aggiunte all'art. 33 § 1a e 2a, nonché all'art. 34 § 1aa del Codice penale nel contesto del principio *nulla poena sine lege certa*, del principio di personalizzazione della pena e del principio di libera valutazione del giudice nella determinazione della pena e di altre misure penali. È stata anche valutata l'opportunità dell'introduzione nel Codice penale del catalogo di circostanze aggravanti e attenuanti (aggiunto art. 53 § 2a e 2b del Codice penale). Si è concentrata soprattutto l'attenzione sulle difficoltà che potrebbero emergere nella valutazione, da parte del giudice, circa quanto la presenza di determinate circostanze attenuanti motivi la loro considerazione nell'ambito della cosiddetta pena ordinaria e autorizzi ad utilizzare l'istituzione delle attenuanti straordinarie. Nell'articolo si sono trattate anche le modifiche introdotte nella norma dell'art. 53 § 1 del Codice penale, nell'ambito delle direttive generali sulla determinazione giudiziale della pena, che orientano l'ammontare della pena soprattutto come retribuzione per il reato commesso e per la prevenzione generale. La questione della prevenzione individuale è passata in seconda linea, riducendo il suo obiettivo alla prevenzione della recidiva di reato, trascurando completamente gli sforzi per raggiungere obiettivi educativi nell'ambito dell'atteggiamento e del comportamento della persona punita. L'articolo ha un carattere decisamente critico nei confronti delle modifiche promulgate. Per questo bisogna augurarsi che non entrino in vigore.

Parole chiave: determinazione legale della pena, determinazione giudiziale della pena, principio *nulla poena sine lege certa*, principio di personalizzazione della pena, principio di libera valutazione del giudice, pene detentive e loro limiti, direttive generali sulla determinazione giudiziale della pena

Cytuj jako:

Konarska-Wrzosek V., *Non-custodial penalties laid down by statute and determined by court in the light of the amendment to Criminal Code of 13 June 2019 [Ustawowy i sądowy wymiar kar wolnościowych w świetle noweli do Kodeksu karnego uchwalonej dnia 13 czerwca 2019 r.]*, „Ius Novum" 2020 (14) nr 2, s. 55–67. DOI: 10.26399/iusnovum.v14.2.2020.13/v.konarska-wrzosek

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A FEW COMMENTS ON THE FEATURE OF 'PERSISTENT HARASSMENT' IN THE LIGHT OF ARTICLE 190A CRIMINAL CODE

MAREK MOZGAWA*

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1. PERSISTENT HARASSMENT IN POLISH LAW

The offence of persistent harassment (together with the offence of what is called theft of identity) was introduced to the Polish Criminal Code by Article 1(2) of the Act of 25 February 2011 amending the Act: Criminal Code,[1] which entered into force on 6 June 2011. The introduction of this prohibited act to the Polish legal system resulted from international obligations, namely the Council of Europe Convention on preventing and combating violence against women and domestic violence adopted in Istanbul on 11 May 2011, which stipulates in Article 34 entitled Stalking that: 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.'[2] Before the provision of Article 190a CC entered into force, in cases of persistent harassment (apart from civil law protection measures: Articles 23 and 24 Civil Code),[3] the following provisions had been applied based on criminal law: Article 107 Misdemeanour Code (MC) (malicious intrusion), Article 207 CC (mistreatment), Article 190 CC (punishable threat), Article 191 CC (coercion), Article 193 (domestic trespass), Article 202 § 3 (dissemination of the so-called hard-core pornography), Article 216 CC (insult), Article 217 (breach of personal inviolability), Article 267 (breach of the secrecy of correspondence),

* Prof., PhD hab., Department of Criminal Law and Criminology, Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin; e-mail: mmozgawa@poczta.umcs.lublin.pl; ORCID: 0000-0002-7341-6563

1 Dz.U. of 2011, No. 72, item 381; hereinafter CC.

2 Dz.U. of 2015, item 961.

3 A. Michalska-Warias, K. Nazar-Gutowska, *Prawnokarne aspekty nękania w polskim prawie karnym*, Studia Iuridica Lublinensia 14, 2010, pp. 73–75.

Article 278 (theft) and by analogy Article 119 MC in the case of the property value up to PLN 250, Article 288 (property damage or destruction) and by analogy Article 124 MC in the case of the property value up to PLN 250, Article 126 MC (theft, appropriation, or damage of someone else's objects of non-pecuniary value), Article 127 MC (using someone else's property without consent) or, less frequently, Article 140 MC (indecent deed), Article 51 (disturbance of public order).[4] However, in most cases, a harasser could avoid the breach of any of the indicated norms (sometimes knowing very well what conduct is prohibited by the binding provisions), and the police refused to take steps based on no breach of law. Therefore, the idea of regulating the phenomenon of harassment was justified,[5] although it is possible to encounter an opinion that the new provision was a response to some social discussions rather than to a real need.[6] The current wording of Article 190a was introduced by the Act of 31 March 2020 amending the Act on special measures to prevent, contain and combat COVID-19 and other contagious diseases and related crisis situations, and amending some other acts,[7] which entered into force on 31 March 2020. *De lege lata*, in the Polish criminal law, criminalisation covers persistent harassment of another person or another person's next of kin, which creates a justified sense of danger, humiliation or torment, or substantially violates the person's privacy (which is subject to the penalty of deprivation of liberty for a period of up to three years – Article 190a § 1 CC). There is an aggravated type of the offence when persistent harassment or the so-called theft of identity, under Article 190a § 2 CC,[8] results in a suicide attempt of the aggrieved (it carries the penalty of deprivation of liberty for a period from two to twelve years). The standard type is prosecuted based on the complaint of the aggrieved party. The aggravated type is prosecuted *ex officio* (Article 190a § 3 CC).

2. PERSISTENT HARASSMENT IN EUROPEAN LAW

In the European countries where the phenomenon is criminalised, the term of harassment is defined with the use of various words that are synonyms of the word 'stalking' in a given language (Albania, Austria, Belgium, Croatia, the Czech Republic, Finland, the Netherlands, Liechtenstein, and Luxembourg). Another group includes countries where stalking is called 'harassment' in a given national language, e.g. in Germany, Romania, and Hungary.[9] In the states that criminalise

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[4] For more, compare M. Mozgawa, [in:] J. Warylewski (ed.), *System Prawa Karnego. Przestępstwa przeciwko dobrom indywidualnym*, Vol. 10, Warszawa 2016, p. 452 et seq.

[5] *Ibid*., p. 454.

[6] Thus M. Budyn-Kulik, *Kodeks karny. Komentarz do zmian wprowadzonych ustawą z dnia 25 lutego 2011 r. o zmianie ustawy – Kodeks karny*, thesis 2, LEX/el 2011.

[7] Dz.U. of 2020, item 568.

[8] The so-called theft of identity is classified in Article 190a § 2 CC and its wording is as follows: 'Anyone who poses as another person and uses his or her image or other personal details, or other data by which he or she is publically recognised, in order to cause property or personal damage shall be liable to the same penalty.'

[9] K. Nazar, *Uporczywe nękanie oraz kradzież tożsamości*, [in:] M. Mozgawa (ed.), *Przestępstwa przeciwko wolności*, Lublin 2020, pp. 298–299.

stalking, the offence is defined in various ways, e.g. as 'threatening or provoking another person' (Albania), 'multiple threats, following, getting in touch or oppressing in another comparable way' (Finland), 'unlawful, regular and intentional violation of privacy' (the Netherlands), 'multiple intrusion of another person or monitoring the place of residence, workplace or another place where a given person stays' and 'making telephone calls or initiating communication with the use telecommunications devices' (Romania).[10] Due to the description of a prohibited act, there are legislations that treat the offence in a concise way (Belgium: Article 442 bis, Luxembourg: Article 442–2, the Netherlands: section 285b), and more or less casuistic way (Albania: Article 121a, Austria: § 107a, Croatia: Article 140, the Czech Republic: section 354, Finland: section 7(a), Liechtenstein: § 107a, Germany: § 238, Romania: Article 208, Hungary: section 222).[11] For example, stalking is described in a rather detailed way in Austrian law (Article 107a).[12] A prohibited act described in general in para. 1 consists in unlawful and persistent harassment of another person, and in para. 2 this harassment is defined as an action that aims to have influence on the life of the aggrieved persons by getting in touch with them, getting in touch with the use of means of telecommunication, and creating conditions for communication with the aggrieved with the use of means of communication or third persons. Persistent harassment also consists in ordering goods or services with the use of someone else's personal data, at someone's expense, or making third persons contact the aggrieved person with the use of his or her data. The casuistic definition of particular forms of stalking can also be found in Croatian, Czech and German law.[13] Some legislations require that the commission of the offence result in a consequence determined in the provision, which independently constitutes a feature of the objective aspect, a feature of the executive activity (possibility of an action to result in an effect), or a feature of the subjective aspect (a perpetrator acts to achieve a particular effect). And so, in the Finnish law, the statute requires that a perpetrator's conduct be able to evoke fear. In the Dutch law, an effect constitutes an element of the subjective aspect: it concerns conduct that is aimed at forcing the aggrieved person to action, omission or suffering, or at evoking fear. The Romanian legislator directly determined the effect (causing the state of fear) as a feature of a prohibited act.[14] Sometimes, there are aggravated types distinguished beside a standard type of the offence. The aggravating features are, e.g. the commission of the offence to the detriment of a person who is especially vulnerable to threat, due to old age, pregnancy, illness, physical or mental impairment (Belgium); the commission of the offence against a minor, a pregnant woman, with the use of weapons or with an accomplice (the Czech Republic); exposing the aggrieved persons, their next of kin or another person close to them to the threat of death or serious body injury (Germany); the threat of using violence or the creation of public hazard that

[10] *Ibid.*, p. 299.

[11] For more on this issue, compare M. Kulik, *Stalking w wybranych państwach europejskiego systemu kontynentalnego*, [in:] M. Mozgawa (ed.), *Stalking*, Warszawa 2018, p. 134 et seq.

[12] The same solution is adopted in the criminal code in Liechtenstein (§ 107a).

[13] K. Nazar, *supra* n. 9, pp. 300.

[14] *Ibid.*, p. 301.

can result in harm to the aggrieved or their next of kin, or making an impression that a threat to the aggrieved person's life, body integrity or health is unavoidable (Hungary).[15]

3. HARASSMENT UNDER ARTICLE 190A OF THE POLISH CRIMINAL CODE

In accordance with Article 190a of the Polish Criminal Code, the basic difficulty consists in the interpretation of the verbal feature of 'harassment', which is not defined in the statute. However, it is worth recalling that the concept of harassment was used in the Polish law system in the past, namely in the Act of 14 November 2003 amending the Act: Labour Code and some other acts.[16] Article 94^3 was added to the Labour Code, which obliged employers to prevent mobbing, and defined mobbing as:

> action or conduct aimed at or against an employee consisting in persistent and long-term harassment or threatening, evoking this employee's underrated assessment of vocational usefulness, causing or intended to cause an employee's humiliation or derision, isolation or exclusion from the team of employees (Article 94^3 § 2 LC).[17]

It is necessary to quote the dictionary definition of the word 'to harass' which means 'to constantly torment, bother, trouble someone with something, tease somebody, keep pestering'.[18] It is not a distinctive feature and as such it raises serious interpretational doubts. It seems that the feature of harassment matches only conduct that upsets the aggrieved person, harms them or causes discomfort. It is indicated in the legal doctrine that different types of conduct may be taken into account. For example, Dagmara Woźniakowska-Fajst believes that harassment is most often demonstrated in such conduct as: making telephone calls constantly; calls going dead; telephone calls at night; wandering around a victim's place of residence; getting in touch via third persons; inquiring about a victim in their surroundings; standing in front of the door/house/workplace; sending letters, e-mails, text

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[15] *Ibid.*, p. 302.

[16] Dz.U. 2003, No. 213, item 2081; hereinafter LC.

[17] For more on this issue, compare the Supreme Court judgment of 29 January 2019, III PK 6/18, LEX No. 2619173 ('1. The definition of mobbing laid down in Article 94^3 § 2 LC does not determine fixed time limits or the frequency of the conduct classified as mobbing for a period of at least six months. However, it undoubtedly indicates that one-time mobbing or its occurrence a few times in a short period is not sufficient because its relevant feature shall be persistent and long-term harassment or threatening of an employee. 2. Mobbing is an action or conduct: (1) concerning an employee or aimed against an employee; (2) consisting in persistent and long-term harassment or threatening of an employee; (3) evoking an employee's underrated assessment of vocational usefulness; (4) causing or intended to cause an employee's humiliation or derision; (5) isolating or excluding from a team of employees'). Also compare the Supreme Court judgment of 14 November 2008, II PK 88/08, OSNP 2010/9–10, item 114; the judgment of the Court of Appeal in Katowice of 8 November 2018, III APa 47/18, LEX No. 2612789; the judgment of the Court of Appeal in Warsaw of 24 October 2018, III APa 20/18, LEX No. 2637899.

[18] M. Szymczak (ed.), *Słownik Języka Polskiego PWN*, Vol. 2, Warszawa 1984, p. 317.

messages, and presents; ordering goods, e.g. by post on behalf of someone, waiting for someone, following/monitoring a victim; slander (disseminating false information and gossip); breaking into a victim's house or car; theft of a victim's possessions; harassing a victim's family members and friends; assaults on and battering family members and friends.[19] Justyna Fronczak presents a long list of examples of a stalker's possible conduct, including spying and following a victim, sending unwanted gifts, persistent telephone calls and sending short messages or e-mails, ordering a pizza, calling the fire brigade or emergency services to a victim's address, initiating false legal actions.[20] Anna Szelęgiewicz indicates the following possible examples of harassment: attempts to get in touch with a given person, frequent telephone calls that go dead or calls at night, unwanted e-mails, letters or short messages, leaving messages at the door, and taking pictures without the aggrieved person's consent.[21] According to the survey conducted by the OBOP Centre for Public Opinion Research, commissioned by the IWS Institute of Justice:

> The most common method of harassing victims was dissemination of slander, lies and gossip concerning victims (nearly 70% of the aggrieved experienced that), getting in touch via a third person (more than half of the aggrieved experienced that), threatening the aggrieved and blackmailing them (half of all cases), and frequent telephone calls, quite often going dead or made at night (half of the harassed persons). More than every third victim had to cope with such conduct as receipt of unwanted letters, e-mails, short text messages or voice mail, threats, provocative behaviour towards a victim's friends, and following.[22]

According to the research conducted by Marek Mozgawa and Magdalena Budyn-Kulik (concerning the period between 6 June 2011 and 6 June 2012), the basic method of harassment consisted in making (landline or mobile) telephone calls; such conduct took place in 284 cases out of 451 analysed, i.e. 63% (classified under Article 190a § 1, or possibly under Article 190a § 3 in conjunction with § 1), obviously, usually beside other harassing behaviour. Harassment with the use of unwanted short messages occurred in 171 cases (38%). As far as other forms of harassment are concerned, the following ones occurred quite often: intruding – 73 cases (16.2%), sending e-mails – 42 cases (9.3%), spying – 39 cases (8.6%), threatening – 34 cases (7.5%), insult – 13 cases (2.9%), observing – 11 cases (2.4%), taking pictures or filming – 9 cases (2%), sending mail or presents – 9 cases (2%),

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[19] D. Woźniakowska-Fajst, *Prawne możliwości walki ze zjawiskiem stalkingu – czy w prawie polskim potrzebna jest penalizacja prześladowania?*, Archiwum Kryminologii, Vol. XXXI, 2009, p. 177.

[20] J. Fronczak, *Stalking z perspektywy interdyscyplinarnej*, Białostockie Studia Prawnicze 13, 2013, pp. 149–150.

[21] A. Szelęgiewicz, *Stalking i przywłaszczenie tożsamości w polskim prawie karnym – zagadnienia wybrane*, Ius Novum 3, 2013, p. 68.

[22] B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *Stalking w Polsce. Rozmiary – formy – skutki*, [in:] A. Siemaszko (ed.), *Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości*, Warszawa 2011, pp. 838–839. For more on the issue, compare also J. Chamernik, *Przestępstwo stalkingu w regulacji kodeksu karnego*, Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach, Seria: Administracja i Zarządzanie 99, 2013, p. 310; A. Chlebowska, P. Nalewajko, *Stalking – zarys problemu oraz analiza rozwiązań ustawodawcy niemieckiego, austriackiego i polskiego*, Prokurator 4(44)–1(45), 2010–2011, p. 32.

disturbing (knocking at the door or wall) – 6 cases (1.3%), damage to property – 5 cases (1.1%), breach of personal inviolability – 3 cases (0.7%), using the entry phone – 3 cases (0.7%), sending parcels containing excrements – 2 cases (0.4%).[23] According to Marcin Jachimowicz, 'the use of the word "harassment" sufficiently expresses the sense of conduct called stalking, in particular the conduct that is repetitive, perceived by a victim as torment, which on its own means affecting an individual's freedom, and as a result limiting it, and causes the sense of danger and violation of privacy.'[24] In Natalia Kłączyńska's opinion, 'Harassment is a phenomenon difficult to define. It can be described as mobbing, oppressing. Repetitiveness is its characteristic feature […]. Harassment causes a nuisance to a person involved. However, it does not have to reach a highly intensive level.'[25] Michał Królikowski and Andrzej Sakowicz write that harassment is conduct that, from the point of view of 'an objective observer, may lead to torment, threatening, domination, humiliation, and evoking negative feelings'.[26] In Paulina Furman's opinion, harassment is '[…] taking repetitive steps that affect an addressee's psyche in a negative way. […] Thus, "'harassment" covers various types of behaviour that objectively have the features of action resulting in torment, troubling, threatening, domination, affecting the will, humiliation, or having other consequences or evoking negative feelings.'[27] Marian Filar and Marcin Berent highlight the fact that 'harassment is a perpetrator's conscious and intentional action (there is no harassment by omission) that includes repetitive acts of approaching a victim, e.g. following them, communicating with them against their will, in particular making unwanted proposals, statements, declarations, etc.'[28] It is indicated in the doctrine that harassment means multiple repetitive mobbing expressed in many bothering activities aimed at torment, troubling, teasing, or disturbing the aggrieved person or their next of kin.[29] Undoubtedly, the concept of harassment contains a perpetrator's repetitive conduct, sometimes of the same and sometimes of a different nature and the level of painfulness (thus, it is not one-time behaviour).[30] It is a multi-act offence (thus, there is

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[23] M. Mozgawa, M. Budyn-Kulik, *Prawnokarne i kryminologiczne aspekty nękania*, Themis Polska Nova 2(3), 2012, p. 41.

[24] M. Jachimowicz, *Przestępstwo stalkingu w świetle noweli do kodeksu karnego*, Wojskowy Przegląd Prawniczy 3, 2011, p. 44. As the author states further: 'Using this term, the author of the bill puts general emphasis on the victims' perception of perpetrators' conduct and not on perpetrators' intentions, which are irrelevant in this construction of the provision. An offender under Article 190a § 1 CC must be aware that his or her conduct is unwanted and undesired by the aggrieved. It is irrelevant whether a stalker acts in order to cause a nuisance or because of the need to show admiration'; *Ibid*., p. 44.

[25] N. Kłączyńska, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 470.

[26] M. Królikowski, A. Sakowicz, *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz. Art. 117–221*, Warszawa 2017, p. 587.

[27] P. Furman, *Próba analizy konstrukcji ustawowej przestępstwa uporczywego nękania z art. 190a k.k. Zagadnienia wybrane*, Czasopismo Prawa Karnego i Nauk Penalnych 3, 2012, p. 45.

[28] M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, pp. 1174–1175.

[29] S. Hypś, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warszawa 2019, p. 1013.

[30] M. Królikowski, A. Sakowicz, *supra* n. 26, p. 587.

no obligation to apply Article 12 § 1 CC as a directive on consolidating particular instances of a perpetrator's conduct).[31] What is worth mentioning is P. Furman's erroneous opinion that an offence under Article 190a § 1 is 'a permanent offence consisting in the maintenance of a particular state of lawlessness'.[32] Obviously, she is right that sometimes the periods of harassment are very long (lasting even many years),[33] however, this does not give grounds for a conclusion that we deal with a certain state of lawlessness and maintaining it for a certain period. It is rightly highlighted in the doctrine that, although the result in the form of the aggrieved person's sense of danger must occur in an established form, the essence of the offence consists in the numerous stimuli given to the aggrieved person.[34] It seems that harassment, in general, adopts the form of action, however, harassment by omission (although rather exceptionally) cannot be excluded[35] (in the same way as in the case of cruelty, which seems to occur much more frequently). For example, there may be a situation in which a postman who is in love with an addressee (rejecting his advances) persistently fails to deliver letters to her because he imagines that they are from his 'rivals', and the aggrieved woman waits for them. Another example may concern a long time of failing to collect litter from the house (where the aggrieved person lives) by a person who is obliged to do the job, or persistent failure to clean the staircase or the pavement (in spite of the obligation to the aggrieved person). One cannot exclude harassment in the form of omission by persistent failure to make necessary repairs (e.g. by an administrator or the owner of a real property) that the given person is obliged to make.[36] Anna Golonka gives an example of leaving a noisy device on at night and disturbing the night calm of the neighbours.[37]

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[31] *Ibid*.

[32] P. Furman, *supra* n. 27, p. 49.

[33] According to the research (conducted by OBOP, commissioned by the IWS), in 5% of cases examined, the period of harassment took less than a week; in 13% cases – from one week to one month; in 4.8% cases – four to five months; in 8.1% cases – six to eleven months; in 13.8% cases – from one year to two years; in 15% cases – three or more years; in 19.9% cases, harassment has not finished (and in 3.1% cases, the answer was: I don't know). B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *supra* n. 22, p. 838. According to the research conducted by Marek Mozgawa and Magdalena Budyn-Kulik, the period of harassment in the analysed cases was: less than a week in 7.8% cases, from one week to one month in 9.8% cases, from one month to six months in 41% cases, from six months to one year in 12% cases, from one year to two years in 6.4% cases, from two years to five years in 8.2% cases, for over five years in 2.4% cases, and in other cases, there were no data concerning the period of harassment; see M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 40.

[34] M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

[35] Thus also M. Budyn-Kulik, *Kodeks karny*, *supra* n. 6, thesis 20; M. Mozgawa, *Analiza ustawowych znamion przestępstwa uporczywego nękania*, [in:] M. Mozgawa (ed.), *Stalking*, Warszawa 2018, p. 56; A. Golonka, *Uporczywe nękanie jako nowy typ czynu zabronionego*, Państwo i Prawo 1, 2012, p. 91. According to Michał Królikowski and Andrzej Sakowicz, only action can be considered; see M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588. A similar opinion is expressed by A. Zoll, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 117–211a*, Warszawa 2017, p. 592.

[36] M. Mozgawa, *Analiza*, *supra* n. 35, p. 56.

[37] A. Golonka, *supra* n. 35, p. 91.

Summing up, one can state that harassment is characterised by repetitive intentional[38] conduct, in particular in the form of action (and in exceptional situations also omission), of the same or different type, performed against the aggrieved person's will, constituting torment, troubling or humiliation, and causing harm or discomfort, the sense of danger or the violation of privacy.

Michał Królikowski and Andrzej Sakowicz rightly emphasise that harassment takes place not only in case of a perpetrator's same type of conduct but also when a series of different types of conduct occurs (e.g. following, intruding, texting, sending e-mails, making telephone calls, etc.).[39] According to the findings of the empirical research conducted by the IWS, 'only 12% of the aggrieved stated that a perpetrator harassed them with the use of one method. Most often, they were harassed in a few ways: from two to seven (68%). Others experienced harassment with the use of more methods.'[40] It should be emphasised that in order to attribute harassment to a perpetrator's conduct (in accordance with the subjective perception of the aggrieved and the possibility of its objective recognition), the conduct must be against the aggrieved person's will;[41] thus, we cannot speak about harassment when person X is flooded with short messages by person Y, and the addressee (not being forced to do that in any way, e.g. by threats or blackmail) answers them (and next states that they are harassed by Y).

Particular types of a perpetrator's conduct (when assessed *in abstracto* and in separation from the situational context) do not have to, as a rule, constitute prohibited acts. There is nothing wrong with sending somebody a letter, a short message, or paying a courteous visit. A problem occurs when the number of these letters or messages is absolutely excessive (e.g. dozens a day) and the addressee does not want to receive them. Obviously, it can also happen that even a single instance of a perpetrator's conduct constitutes a statutory breach of particular provisions of criminal or misdemeanour law (e.g. domestic trespass – Article 193 CC, threat – Article 190 § 1 CC, theft – Article 278 CC and Article 119 CC, illegal access to information – Article 267 CC, recording a naked person's image – Article 191 CC, and many others). In Sławomir Hypś' opinion, due to the nature of the protected interest, a perpetrator's activities cannot take the form of direct physical assault (e.g. on the aggrieved person's health or bodily inviolability).[42] However, it seems that the opinion is not right. Why is it not possible to recognise harassment in a situation when someone breaches someone else's personal inviolability many times (evoking the person's sense of danger justified by the circumstances) because the requirements that are obligatory to classify this conduct as harassment under Article 207 are not met (the aggrieved person is not the next of kin or helpless due to old age

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[38] Obviously, this concerns deliberateness in the context of potential penal liability under Article 190a CC. In practice, one can imagine cases of unintentional harassment (e.g. persistently listening to loud music and not realising the acoustics of the room, which results in constant disturbance of the peace of other people).

[39] M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

[40] B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Siemaszko, D. Woźniakowska-Fajst, *supra* n. 22, p. 840.

[41] P. Furman, *supra* n. 27, p. 46.

[42] S. Hypś, [in:] *Kodeks karny*, *supra* n. 29, p. 1013.

or physical or psychical condition)? Magdalena Budyn-Kulik also presents such an opinion in the legal doctrine. According to her, harassment affects mainly the aggrieved person's psychical sphere, which does not mean of course that affecting the physical sphere cannot occur (e.g. breach of personal inviolability or causing harm to health). In this author's opinion,

> It should be considered whether an act consisting in affecting an object or animal belonging to the aggrieved, e.g. by teasing the aggrieved person's dog which gets angry and is barking almost all night so that the aggrieved cannot sleep and have a rest, matches the features of an offence under Article 190a CC. It should be noticed that a perpetrator's conduct in itself constitutes the 'harassment' of the dog. Introducing Article 190a to the Criminal Code, the legislator could have also introduced a similar provision to the Act on the protection of animals' rights, because 'harassment of a dog' does not always have to match the feature of misdemeanour under Article 35 of the Act on the protection of animals.[43]

It should be assumed that it is possible to match the statutory features of persistent harassment by affecting an object or animal. It can be, e.g. persistent damaging someone's property (e.g. damage to the aggrieved person's car or scribbling graffiti on the real property of the aggrieved person) or mistreating the aggrieved person's animals (in the case of an animal or chicken farm owner). However, it does not seem justified to introduce a provision analogous to Article 190a CC to the Act on the protection of animals. It is necessary to draw attention to the fact that in accordance with Article 6 para. 2(9) of the Act of 21 August 1997 on the protection of animals,[44] 'maliciously threatening or teasing animals' is a statutory exemplification of one of the methods of mistreating animals. If a perpetrator teasing an animal aims to disturb its owner's night calm and rest, we deal with a misdemeanour under Article 51 MC (violation of peace, public order or night sleep). Moreover, we cannot lose sight of Article 78 MC ('Whoever, by teasing or frightening, makes an animal become dangerous […]').

Although in practice, in the case of harassment, a perpetrator usually acts in person and matches the features of the offence, it cannot be excluded that they can use a third person for the purpose of harassment. P. Furman indicates that it is possible, e.g. to provoke 'many persons' persistent communication with the aggrieved'[45] (e.g. by providing false information about the situation of the aggrieved, calling emergency services or the police to their address, ordering a taxi or a pizza, etc.). Also J. Fronczak rightly states that 'a stalker's conduct can be direct when the perpetrator harasses their victim in person as well as indirect when they use other persons' assistance or tools that make it possible to remain anonymous'.[46] According to M. Królikowski and A. Sakowicz, the opinion that a perpetrator can use a third person does not seem to be justified; however, they do not present any arguments for it.[47]

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43 M. Budyn-Kulik, *Kodeks karny*, *supra* n. 6, thesis 23.
44 Dz.U. of 2020, item 638.
45 P. Furman, *supra* n. 27, p. 47.
46 J. Fronczak, *supra* n. 20, p. 149.
47 M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

4. OBJECTIVE FEATURES OF THE OFFENCE OF HARASSMENT

In accordance with Article 190a, it is not sufficient for harassment to occur. For the occurrence of the offence, it must be 'persistent'.[48] Analysing the feature of persistence, it is also necessary to start with the linguistic meaning of the word. 'Persistent' means difficult to eliminate, long-lasting or continually repeated, ceaseless, burdensome.[49] As it is known, the feature of persistence occurs in the definitions of other offences: Article 145 § 1(1) CC – persistent evasion of substitute military service; Article 191 § 1a CC – use of another (i.e. indirect) type of violence persistently;[50] Article 218 § 1a CC – persistent infringement of an employee's rights; Article 341 § 2 CC – persistent refusal to perform the duty arising from military service; Article 209 § CC (before the amendment of 23 March 2017) – persistent evasion of the obligation of maintenance, and it saw many interpretational attempts (mainly in the context of the offence of maintenance evasion[51]).[52] In the judicature, persistence is interpreted as long-term, repetitive, ill will and uncompromising conduct (e.g. the Supreme Court judgment of 27 February1996, II KRN 200/95;[53] the ruling of the Court of Appeal in Kraków of 13 December 2000, II AKz 289/00[54]). In the judgment of 5 January 2001 (V KKN504/00),[55] the Supreme Court stated that persistence is

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[48] In some criminal statutes, the provision directly indicates the persistence of a perpetrator's conduct (as in the Polish Criminal Code), e.g. the criminal codes of Austria, Liechtenstein, Germany, the Czech Republic, and Croatia; in other countries, multiplicity of the conduct is indicated (Finland, Luxembourg, and Romania); or repetitiveness of conduct (Albania), or long-term (the Czech Republic) or systematic harassment (the Netherlands). See K. Nazar, *supra* n. 9, p. 300.

[49] S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 4, Warszawa 2003, p. 1007. A similar definition can be found in T. Szymczak (ed.), *Słownik Języka Polskiego*, Vol. 3, Warszawa 1984, p. 610 ('difficult to remove, eliminate, remaining for a long time, troublesome').

[50] For more on the issue, compare M. Mozgawa, M. Kulik, *Zmuszanie przy zastosowaniu przemocy pośredniej – art. 191 § 1a k.k.*, [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana profesorowi Markowi Bojarskiemu*, Wrocław 2016, p. 302 et seq.; A. Michalska-Warias, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 542. It can be assumed that relations between harassment specified in Article 190a § 1 CC and the use of indirect violence (under Article 191 § 1a) are definitely closer than they seem to be (which implicates difficulties in determining the mutual relationship between the provisions).

[51] For more on the issue of possible interpretations of the feature of persistence (in accordance with Article 209 CC in the original wording): 'objectivist' and the (dominating) objective-subjective ones, compare A. Wąsek, J. Warylewski, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz do artykułów 117–221*, Warszawa 2010, pp. 1247–1249.

[52] According to Jacek Kosonoga, the term 'persistence' should be assigned the same sense as is based on the interpretation of the quoted provisions, which results from the ban on homonymous interpretation consisting in the exclusion of the possibility of attributing different meanings to the same phrase used in the same legal act (called the directive on the identity of meaning). J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 1169. According to Michał Królikowski and Andrzej Sakowicz, the possibilities of applying homonymous interpretation in this case are limited; see M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

[53] LEX No. 25594.

[54] LEX No. 46065.

[55] OSNKW 2001/7–8, item 57.

an antinomy of a perpetrator's one-time or even multiple conduct. Thus, it is clear how the issue of persistence was treated in practice (mainly in the context of Article 209 CC before the amendment of 23 March 2017), and it should be assumed that the same approach is presented in Article 190a CC (i.e., as a rule, it is not sufficient to recognise the commission in relation to a multiple conduct of a perpetrator, although in such a case the issue of liability for an attempt is of course open).[56] Undoubtedly, while interpreting the provision of Article 190a, certain former findings concerning the interpretation of the feature of persistence will be helpful (to a certain extent), however, they cannot be uncritically applied to Article 190a CC.[57] Therefore, e.g. ill will, the existence of which is usually assumed in the analysis of the feature of persistence, does not seem to be an element necessary in the case of the offence of harassment. Taking into account that in practice the motive behind a perpetrator's conduct is very often the feeling of love for a victim (the feeling that is unrequited or already extinct on the part of a victim), it would be difficult to state that in every case like this a perpetrator acts because of ill will.[58] In the judgment of 19 February 2014 issued based on Article 190a CC (II AKa 18/14),[59] the Court of Appeal in Wrocław stated that:

> What shows a perpetrator's persistent conduct is, on the one hand, their specific mental attitude expressed in uncompromising harassment, i.e. sticking to the specific obstinacy regardless of reprimands and polite requests from the aggrieved or other persons to discontinue the conduct and, on the other hand, a longer period of time when a perpetrator demonstrates it.

The above stance is rational, however, one cannot lose sight of the fact that whatever requests (e.g. on the part of the aggrieved) and reprimands (e.g. on the part of the police) *de lege lata* are not elements of the statutory features of the offence under Article 190a § 1 CC, thus they do not have to occur for the recognition of the existence of the offence.[60] According to M. Królikowski and A. Sakowicz, 'due to the

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[56] M. Mozgawa, [in:] *System*, *supra* n. 4, p. 461.

[57] For more on the issue, compare M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 44.

[58] According to empirical research findings, in most cases (62.5%), a perpetrator and a victim were in a close emotional relationship. M. Mozgawa, M. Budyn-Kulik, *Prawnokarne*, *supra* n. 23, p. 47. According to Joanna Długosz, 'There are no doubts that the conduct typical of stalking does not have to result from such a negative attitude of a perpetrator; moreover, it is quite often influenced by emotions that are in their essence positive, such as admiration or adoration of the aggrieved, although unwanted and undesired by him/her. Therefore, in such situations, it is not possible to assume that a perpetrator's action results from ill will. This circumstance leads to a conclusion that the understanding of persistence in the context of a prohibited act regulated in Article 190a § 1 CC must be substantially different from the interpretation of this feature adopted based on other provisions, which subsequently raises justified doubts in the context of the legislator's compliance with the *nullum crimen sine lege* principle in the process of formulating the statutory features of stalking'; see J. Długosz, *O zasadności kryminalizacji tzw. stalkingu*, [in:] S. Pikulski, M. Romańczuk-Grącka, B. Orłowska-Zielińska (eds), *Tożsamość polskiego prawa karnego*, Olsztyn 2011, p. 254.

[59] LEX No. 1439334.

[60] Unlike it was in the criminal law of Denmark until recently, where (in accordance with Article 265 CC) for the recognition of the offence of stalking, it was required that a perpetrator continued acting despite 'the police warnings'.

nature of the feature of "harassment", the content of "persistence" was reduced only to elements of the subjective aspect of a perpetrator's act.'[61] In the authors' opinion, the flow of time connected with harassment does not always have to be long because the effect in the form of the aggrieved person's justified sense of danger or substantial violation of privacy can occur as a result of short-term harassment.[62] To some extent, the opinion is right. It can happen that the sense of danger can arise even after a perpetrator's first act, however, this does not justify the adoption of the definition of commission of the offence under Article 190a § 1 CC because of the lack of the element of persistence (and it is doubtful whether the institution of an attempt can be applied). Therefore, a perpetrator's conduct must take some time (although it does not have to be especially long) in order to make it possible to speak about persistence. By the way, it is worth mentioning that in accordance with the above-mentioned Article 94^3 § 2 LC (which defines mobbing), the legislator speaks about 'persistent and long-term harassment', and thus recognises that persistent conduct does not always have to be long-term.

Obviously, it is not possible to state *in abstracto* how long the period should be for the feature to be matched; it should be established each time in the light of the circumstances of a particular case.[63] Therefore, it seems that it can be a period of a few days (e.g. in case of hundreds of short messages sent by a perpetrator every day) as well as a few months (when the harassing conduct occurs with a few days' intervals). One cannot agree with the opinion of Waldemar Woźniak, who believes that a given conduct can be described as stalking if it occurs for at least 30 days and during this period at least ten acts are performed.[64] It is hard to say based on what factors the author drew the above conclusion, but it cannot be assumed that those arbitrarily determined criteria could be binding.

An interesting problem arises in case a perpetrator's conduct harasses a few people (who are the closest relations, e.g. a perpetrator's wife and children). In such a case, in order to assess persistence properly, a combined assessment of all types of his/her conduct is necessary; it is inadmissible to divide particular acts into groups concerning particular aggrieved persons.[65] Particular types of a perpetrator's conduct that are elements of harassment also do not have to be the same in relation to particular victims (e.g. following and soliciting a wife on the telephone, and short messages and e-mails sent to children).[66] It seems that there

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[61] M. Królikowski, A. Sakowicz, *supra* n. 26, p. 588.

[62] *Ibid*.

[63] Thus also J. Kosonoga, [in:] R.A. Stefański (ed.), *supra* n. 52, p. 1123.

[64] W. Woźniak, *Stalking jako zjawisko patologiczne – definicje, zakres, charakterystyka stalkera i radzenie sobie ze stalkingiem*, [in:] M. Ilnicka (ed.), *Wybrane elementy pedagogiki resocjalizacyjnej – ujęcie teoretyczne i praktyczne*, Lublin 2011, p. 133. The author adds that given conduct can be described as stalking if (apart from the element of time and number: the minimum of ten acts within thirty days) it has the following features: it is intended, evokes fear, results in negative psychical and social consequences (anxiety, insomnia, need to change the telephone number, workplace or place of residence), involves a victim's next of kin, friends and colleagues; see W. Woźniak, *ibid*., p. 133.

[65] Thus, rightly, the Supreme Court judgment of 12 January 2016, IV KK 196/15, LEX No. 1976249 (with a gloss of approval by K. Nazar, Palestra 7–8, 2016, pp. 176–182).

[66] M. Mozgawa [in:] *System*, *supra* n. 4, p. 462.

can be a real situation in which one deals with mutual harassment (by analogy to mutual mistreatment, which is possible, in my opinion).[67] It should be recognised that neither the construction of statutory features of the offence under Article 190a nor the nature of the phenomenon can be an obstacle to adopting the construction of mutual harassment. It seems that in the case of mutual harassment, there can be situations when perpetrators (being the aggrieved at the same time) evoke consequences in the form of substantial violation of their privacy (e.g. by filming each other, disturbing). Obviously, those specific acts of retorting do not lead to the exclusion of penal liability of any of the parties but they undoubtedly must influence a penalty.

In accordance with the Supreme Court ruling of 12 December 2013, III KK 417/13,[68]

> In order to recognise conduct as stalking, harassment must be persistent, i.e. it must consist in continual and substantial violation of another person's privacy and evoking a victim's justified sense of danger. The legislator does not require that a stalker's conduct carry an element of aggression. Moreover, it is legally irrelevant in the context of the subjective aspect of the offence whether a perpetrator's act is motivated by the feeling of love for the aggrieved or hatred, intention to tease them, malice or desire to take revenge. For the recognition of this offence, it does not matter whether a perpetrator intends to implement their threats. What is decisive is the threatened person's subjective feeling, which must be assessed in an objective way.

The above stance is right in general, however, 'continual' violation of privacy is not necessary. The term 'continual' means: 'lasting continuously, non-stop for a longer period; unceasing, constant, permanent.'[69] Harassment is possible for a long time but there can be shorter or longer intervals. The aggrieved can, e.g. be flooded with e-mails or short messages for a few days and then a perpetrator takes a break (for subjective or objective reasons), and then harassment starts again.[70]

In my opinion, the addition of the feature of 'persistence' to the content of Article 190a is absolutely useless. If the word 'to harass' on its own means that the action consists in a series of acts, it is useless to implicate additional statutory requirements, which only hamper the application of the provision in practice. If to harass means 'to ceaselessly disturb' or 'to constantly mistreat' (i.e. do this many times), what is the purpose of the requirement that the disturbance should be 'persistently multiple'? Some similarity between harassment and mistreatment can be seen. However, it is worth drawing attention to the fact that Article 207 CC uses

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[67] In the judgment of 4 June 1990, V KRN 96/90, Wojskowy Przegląd Prawniczy 1–2, 1993, p. 56, the Supreme Court expressed an erroneous opinion that it is not possible to recognise spouses' mutual harassment at the same time. It was critically assessed by I. Kozłowska-Miś, M. Mozgawa (*Glosa do wyroku SN z 4.06.1990 r., V KRN 96/90*, Wojskowy Przegląd Prawniczy 1–2, 1993, p. 56 et seq.); thus also A. Wąsek, J. Warylewski, [in:] *Kodeks karny*, *supra* n. 51, p. 1198. Also compare detailed comments on the issue of mutual harassment by Sławomir Hypś, who seems to admit the possibility of such a situation (S. Hypś, [in:] *Kodeks karny*, *supra* n. 29, p. 1105). It is also worth noticing that in another judgment (of 23 September 1992, III KRN 122/92, LEX No. 22076), the Supreme Court disagreed with the thesis on impossibility of mutual harassment.

[68] LEX No. 1415121.

[69] M. Szymczak (ed.), *Słownik Języka Polskiego PWN*, Vol. 2, Warszawa 1984, p. 367.

[70] On the issue, compare K. Nazar, *Glosa do postanowienia Sądu Najwyższego z dnia 12 grudnia 2013 r., III KK 417/13*, Prawo w Działaniu 26, 2016, p. 247.

a phrase 'who mistreats' and not 'who persistently mistreats', and the same concept should be adopted in Article 109a CC. One can risk an opinion that by the use of the feature of 'persistence' the legislator, in fact, substantially narrowed the penal law protection of the aggrieved person.[71]

5. SUBJECTIVE FEATURES OF THE OFFENCE OF HARASSMENT

The offence under Article 190a § 1 is substantive in nature. A necessary consequence is evoking the aggrieved person's justified sense of danger, humiliation or torment,[72] or substantial violation of privacy. The broad approach to the consequence can be recognised as purposeful, because in practice there can be cases when a victim of harassment starts feeling fear, changes their relations with other people or even seeks help of a doctor or a psychologist, as well as such cases where the victim does not have the sense of danger (due to a very strong mental toughness or because they have effective personal guards). Even if such sense of danger does not occur but the aggrieved is forced to substantial (uncomfortable) changes in their private life, a perpetrator's conduct should be criminalised. There can be also cases in which a perpetrator's acts do not evoke the sense of danger, humiliation or torment, and they do not substantially violate the victim's privacy but the victim perceives them as troublesome (although they do not result in the change in the aggrieved person's lifestyle or habits). In such a case, a construction of an attempt to commit the offence under Article 190a § 1 CC can be considered.[73] This offence is common and intentional in nature; due to the feature of persistence laid down in the provision, which has a subjective element, it should be recognised that this group of features must be related to direct intent. On the other hand, one can believe that there are no

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[71] M. Budyn-Kulik, *Kodeks karny*, *supra* n. 6, thesis 22.

[72] It is worth stressing that the two new consequences (humiliation and torment) were introduced to the provision by the Act of 31 March 2020 amending the Act on special measures to prevent, contain and combat COVID-19 and other contagious diseases and related crisis situations, and amending some other acts. Doubts are raised in the legal doctrine whether the extension of the consequences (which have already been detailed) is justified. As argued by Katarzyna Nazar, '[…] the consequence in the form of humiliation may be achieved (relatively easy) by a one-time act, which contradicts the feature of the act described as "persistent harassment". The consequence in the form of humiliation in the case of this type of offence is possible only when such behaviour is recurring or when, e.g. offensive or humiliating comment posted on the Internet accompanies other harassing acts of a perpetrator. One-off humiliating conduct towards the aggrieved may not be regarded as persistent harassment. Certainly, the issue that remains to be considered is attempt or liability for some other offence depending on the perpetrator's conduct (e.g. libel or insult).' (See, K. Nazar, *Uporczywe*, *supra* n. 9, pp. 323). It is hard to imagine harassment (which must be persistent) that would not lead to torment, although obviously a lot depends on the types of the perpetrator's acts and the psychological predisposition of the aggrieved person. It is rightly raised in the legal doctrine that the new consequences (humiliation or torment) will be practically easier to prove than, for instance, the sense of danger or substantial violation of privacy, yet it should be stated that extending the provision to include further non-distinctive features was not necessary (K. Nazar, *Uporczywe*, *supra* n. 9, p. 324).

[73] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warszawa 2019, p. 611.

obstacles to relate the feature of consequence (i.e. evoking the aggrieved person's sense of danger, humiliation or torment, or substantial violation of privacy) to both direct and oblique intent. Such approach to the subjective aspect of the offence of persistent harassment (a basic type) seems to dominate the Polish legal doctrine.[74] The aggravated type (laid down in Article 190a § 3 CC) is common and consecutive (attempted suicide is a consequence that occurs here); its commission can be an example of mixed guilt (*culpa dolo exorta*).[75]

6. CONCLUSION

Undoubtedly, it is good that the offence of persistent harassment was introduced to the Polish Criminal Code, although certainly the adopted solution is not perfect. The concept of harassment itself is extraordinarily broad and unclear, and raises many interpretational doubts (which have been discussed in this article). Empirical research indicates that the basic tool used to harass is a telephone at present, because in the majority of cases (63%) concerned making telephone calls to someone (usually beside other types of harassment conduct). Referring to the construction of the provisions analysed, it should be stated that it seems useless to include the feature of persistence in Article 190a CC because doing so the legislator, in fact, narrowed the penal law protection of the aggrieved person.

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A FEW COMMENTS ON THE FEATURE OF 'PERSISTENT HARASSMENT' IN THE LIGHT OF ARTICLE 190A CRIMINAL CODE

Summary

The article attempts to interpret the term 'harassment' that is used in Article 190a CC. The author presents the doctrinal opinions on the issue as well as the findings of empirical research (and concise legal-comparative comments), and draws a conclusion that harassment means repetitive intentional conduct in the form of action (and exceptionally also omission), of identical or different type, performed against the aggrieved persons' will, constituting their torment, suffering or humiliation, and causing harm or discomfort, the sense of danger or the violation

of privacy. For the offence under Article 190a § 1 to be recognised it is required that this harassment be persistent. It is not possible to determine *in abstracto* how long the period should be to match this feature; it should be determined each time in the light of the circumstances of a given case. Thus, it seems that it can be a period of a few days (e.g. in the case of text messages sent by a perpetrator every day) and a few months (when harassment is committed with a few days' intervals). It can be believed that by including the feature of persistence in Article 190a CC, the legislator in fact has limited the legal protection of the aggrieved. The author presents a stance that there is a real possibility of a situation in which harassment is mutual (by analogy to mutual mistreatment which is possible, in the author's opinion). It should be recognised that neither the construction of statutory features of the offence under Article 190a nor the nature of the phenomenon are an obstacle to adopting the construction of mutual harassment.

Keywords: stalking, persistent harassment, repetitiveness of conduct, sense of danger, substantial violation of privacy

KILKA UWAG NA TEMAT ZNAMIENIA „UPORCZYWEGO NĘKANIA" NA GRUNCIE ART. 190A K.K.

Streszczenie

Artykuł prezentuje próbę wykładni pojęcia „nękanie" występującego na gruncie art. 190a k.k. Autor przedstawia poglądy doktryny w tej materii, jak również wyniki prowadzonych badań empirycznych (i syntetyczne uwagi prawnoporównawcze), dochodząc do wniosku, że nękanie to charakteryzujące się powtarzalnością intencjonalne zachowania, przede wszystkim w postaci działania (a wyjątkowo również zaniechania), tożsame rodzajowo lub rodzajowo odmienne, podejmowane wbrew woli pokrzywdzonego, stanowiące jego dręczenie, trapienie czy upokorzenie, a wyrządzające mu krzywdę czy powodujące jego dyskomfort, poczucie zagrożenia czy naruszenie prywatności. Dla zaistnienia przestępstwa z art. 190a § 1 konieczne jest, aby owo nękanie było uporczywe. Nie da się stwierdzić *in abstracto*, jak długi okres powinien upłynąć, aby owo znamię zostało zrealizowane; ustaleń w tym zakresie należy dokonywać każdorazowo na tle okoliczności konkretnej sprawy. Wydaje się, że może to być zarówno okres kilku dni (np. w przypadku setek smsów wysyłanych codziennie przez sprawcę), jak i kilku miesięcy (gdy nękające zachowania realizowane są w odstępach kilkudniowych). Można sądzić, że poprzez włączenie do treści art. 190a k.k. znamienia uporczywości ustawodawca *de facto* zawęził prawnokarną ochronę pokrzywdzonego. Autor prezentuje stanowisko, że realne jest wystąpienie sytuacji, w której możemy mieć do czynienia z nękaniem się wzajemnym (analogicznie jak jest to możliwe – zdaniem autora – w przypadku znęcania się wzajemnego). Należy sądzić, że przyjęciu konstrukcji nękania się wzajemnego nie stoi na przeszkodzie ani konstrukcja ustawowych znamion przestępstwa z art. 190a, ani też natura rzeczy.

Słowa kluczowe: stalking, uporczywe nękanie, powtarzalność zachowań, poczucie zagrożenia, istotne naruszenie prywatności

VARIOS COMENTARIOS SOBRE EL "ACOSO REITERADO" EN VIRTUD DEL ART. 190A CP

Resumen

El articulo presenta el intento de interpretar la noción "acoso" que aparece en el art. 190a CP. El Autor acude a la doctrina, así como muestra resultados de su investigación empírica (y comentarios sintéticos de derecho comparado), llegando a la conclusión de que el acoso es una conducta intencional con empeño, sobre todo consiste en acción (excepcionalmente en omisión), similar o diferente, emprendida contra la voluntad del perjudicado. Consiste en hacer sufrir, angustiar o humillar causando daño o malestar, peligro o violación de la privacidad del perjudicado. Para que exista el delito del art. 190a §1 es necesario que tal acoso sea reiterado. No se puede definir *in abstracto* cuánto tiempo ha de pasar para que este elemento se cumpla; hay que determinarlo cada vez a la luz de las circunstancias del caso concreto. Parece que pueden pasar tanto varios días (p.ej. en caso de centenar de mensajes enviados a diario por el sujeto), como varios meses (cuando la conducta que acosa se realiza cada varios días). Mediante la inclusión al art. 190a CP de la reiteración, el legislador de facto ha limitado la protección legal del perjudicado. El autor considera que es real la situación en la cual estaremos ante el acoso mutuo (analógicamente, como es posible – según el autor – en el caso de malos tratos mutuos). La admisión del acoso mutuo no es imposible debido a la construcción de elementos del delito del art. 190aCP, ni debido a la naturaleza de las cosas.

Palabras claves: stalking, acoso reiterado, conducta repetitiva, peligro, violación importante de privacidad

НЕСКОЛЬКО ЗАМЕЧАНИЙ ПО ПОВОДУ СОСТАВА ПРЕСТУПЛЕНИЯ «НАВЯЗЧИВОЕ ПРЕСЛЕДОВАНИЕ», ПРЕДУСМОТРЕННОГО СТ. 190А УК

Аннотация

В статье предпринята попытка истолковать понятие «преследование», предусмотренное ст. 190а УК. Автор приводит как доктринальные взгляды на данный вопрос, так и результаты проведенных эмпирических исследований (а также синтетические сравнительно-правовые наблюдения). На этих основаниях он приходит к выводу, что «преследование» – это повторяющееся преднамеренное поведение однотипного или разнотипного характера, проявляющееся, главным образом, в форме действия, а в исключительных случаях – и в форме бездействия. Действия, осуществляемые против воли потерпевшего, состоят в его причинении ему мучений, докучливом приставании или унижении. Они причиняют ему вред, вызывают чувство дискомфорта или опасности либо состоят в нарушении неприкосновенности его частной жизни. Следует подчеркнуть, что для того, чтобы имело место преступление, предусмотренное ст. 190а § 1, преследование должно иметь упорный, повторяющийся характер. В отвлечении от обстоятельств конкретного дела невозможно определить, как долго должно иметь место преследование, чтобы его можно было признать носящим упорный характер. Как кажется, это может быть как период нескольких дней (например, в случае отправления преступником на протяжении этого времени сотен текстовых сообщений), так и нескольких месяцев (когда действия с признаками преследования совершаются с интервалом в несколько дней). Можно полагать, что законодатель, включив в содержание статьи 190а УК признак упорного характера противозаконных действий, де-факто сузил возможности

для уголовно-правовой защиты потерпевшего. Как отмечает автор статьи, можно без труда представить себе ситуацию, в которой имеет место взаимное преследование (аналогично тому, как, по мнению автора, может иметь место и взаимное насилие в семье). Следует полагать, что понятие взаимного преследования не находится в противоречии ни с совокупностью установленных законом признаков преступления, предусмотренного ст. 190a, ни с природой вещей.

Ключевые слова: сталкинг, навязчивое преследование, повторяющийся характер поведения, чувство опасности, существенное нарушение неприкосновенности частной жизни

EINIGE ANMERKUNGEN ZUM TATBESTAND DER „ANHALTENDEN BELÄSTIGUNG" IM SINNE VON ARTIKEL 190A DES POLNISCHEN STRAFGESETZBUCHES

Zusammenfassung

Der Artikel stellt den Versuch einer Auslegung des Rechtsbegriffs der „Belästigung" im Sinne von Artikel 190a des polnischen Strafgesetzbuches dar. Der Autor legt die Auffassungen der Rechtslehre in dieser Angelegenheit dar und präsentiert die Ergebnisse empirischer Untersuchungen (und eine zusammenfassende rechtsvergleichende Betrachtung) und kommt zu dem Schluss, dass Belästigung ein vorsätzliches, durch Wiederholung gekennzeichnetes Verhalten, hauptsächlich in Form von – ihrer Art nach identischen oder unterschiedlichen – Handlungen (im Ausnahmefall auch Unterlassungen) darstellt, die gegen den Willen des Opfers erfolgen und durch die dieser gequält, bedrängt oder erniedrigt wird und die dem Opfer Schaden zufügen oder bei diesem Unbehagen, ein Gefühl der Bedrohung oder eine Verletzung der Privatsphäre verursachen. Für das Vorliegen einer Straftat nach Artikel 190a § 1 muss diese Belästigung über einen bestimmten Zeitraum andauern. Es lässt sich nicht *in abstracto* angeben, wie viel Zeit vergangen sein muss, bis dieser Straftatbestand erfüllt ist und diesbezügliche Feststellungen sind jeweils vor dem Hintergrund der konkreten Umstände des bestimmten Falls zu treffen. Und so scheint es, dass es sich dabei sowohl um einen Zeitraum von wenigen Tagen (z.B. bei vom Täter gesendeten Hunderten von Textnachrichten täglich), als auch um mehrere Monate (wenn die Belästigungen in Abständen von jeweils mehreren Tagen erfolgen) handeln kann. Man kann zu dem Schluss gelangen, dass der Gesetzgeber den strafrechtlichen Schutz des Opfers durch Aufnahme des Tatbestands der Beharrlichkeit in Artikel 190a des polnischen Strafgesetzbuches de facto eingeschränkt hat. Der Autor vertritt die Position, dass es die reale Situation gibt, in der wir es mit einer gegenseitigen Belästigung zu tun haben (so wie – nach Ansicht des Autors – auch Fälle von gegenseitigem Mobbing möglich sind). Es ist davon auszugehen, dass einer Annahme der Konstruktion der gegenseitigen Belästigung weder die Konstruktion der gesetzlichen Straftatbestände nach Artikel 190a des polnischen Strafgesetzbuches, noch die Natur der Dinge entgegen steht.

Schlüsselwörter: Stalking, anhaltende Belästigung, wiederholtes Verhalten, Bedrohungsgefühl, schwerwiegende Verletzung der Privatsphäre

CERTAINES REMARQUES SUR LA NATURE DU «HARCÈLEMENT PERSISTANT» AU SENS DE L'ART. 190BIS DU CODE PÉNAL

Résumé

L'article présente une tentative d'interprétation du concept de «harcèlement» qui se produit à l'art. 190bis du Code pénal. L'auteur présente les points de vue de la doctrine en la matière, ainsi que les résultats de recherches empiriques (et remarques juridiques comparatives synthétiques), concluant que le harcèlement est un comportement intentionnel caractérisé par la répétitivité, principalement sous forme d'action (et exceptionnellement aussi d'omission), identique ou différente dans le genre, prise contre la volonté de la victime, constituant son tourment, sa détresse ou son humiliation, et lui causant du tort ou son inconfort, un sentiment de danger ou une atteinte à la vie privée. Pour le crime d'art. 190bis § 1, ce harcèlement doit être persistant. On ne peut pas dire *in abstracto* combien de temps devrait s'écouler pour que cet élément se réalise; des dispositions à cet égard devraient être prises à chaque fois compte tenu des circonstances d'un cas particulier. Il semble donc que cela puisse être à la fois une période de plusieurs jours (par exemple dans le cas de centaines de SMS envoyés quotidiennement par l'agresseur) et de plusieurs mois (lorsque le comportement de harcèlement est mis en œuvre à des intervalles de plusieurs jours). On peut supposer qu'en incluant l'élément de persistance dans le contenu de l'article 190bis du Code pénal, le législateur a de facto restreint la protection pénale et juridique de la victime. L'auteur présente la position selon laquelle il est tout à fait réelle la situation dans laquelle nous pouvons faire face au harcèlement mutuel (de la même manière qu'il est possible – selon l'auteur – dans le cas de l'intimidation mutuelle). Il convient de supposer que l'adoption de la structure du harcèlement mutuel n'est pas empêchée par la construction des éléments statutaires de l'infraction au titre de l'article 190bis, ni par la nature des choses.

Mots-clés: stalking, harcèlement persistant, répétition du comportement, sentiments de danger, atteinte grave à la vie privée

ALCUNE OSSERVAZIONI SUGLI ELEMENTI COSTITUTIVI DEL REATO DI STALKING ALLA LUCE DELL'ART. 190A DEL CODICE PENALE

Sintesi

L'articolo presenta un tentativo di interpretazione del concetto di "stalking" sulla base dell'art. 190a del Codice penale. L'autore presenta il punto di vista della dottrina su tale materia, così come i risultati di studi empirici condotti (con sintetiche note comparative), giungendo alla conclusione che lo stalking si caratterizza da una ripetitività intenzionale, soprattutto sotto forma di azioni (ed eccezionalmente sotto forma di omissioni), dello stesso tipo o di tipo diverso, intraprese contro la volontà della parte lesa, che costituiscono tormento, vessazione o umiliazione della parte lesa, che le recano un danno, o che provocano disagio, percezione di minaccia o violazione della privacy della parte lesa. Per costituire il reato di cui all'art. 190a § 1 è necessario che tale persecuzione sia persistente. Non è possibile affermare astrattamente quanto tempo debba trascorrere affinché tale elemento costitutivo del reato venga realizzato. Le determinazioni in tale ambito devono essere compiute volta per volta sullo sfondo delle circostanze del singolo caso. Si direbbe che può essere sia un periodo di alcuni giorni (ad esempio in caso di centinaia di SMS inviati quotidianamente dall'autore del reato), sia di alcuni

mesi (se i comportamenti persecutori vengono realizzati a distanza di alcuni giorni). Si può ritenere che attraverso l'inserimento nell'art. 190a del Codice penale dell'elemento costitutivo della "persistenza" il legislatore abbia de facto ridotto la tutela giuridica penale della parte lesa. L'autore presenta la posizione che possa presentarsi una situazione nella quale possiamo avere a che fare con stalking reciproco (analogamente a come è possibile, secondo l'autore, nel caso di maltrattamento reciproco). Bisogna ritenere che nell'assumere il concetto di stalking reciproco non è di ostacolo né la struttura degli elementi costitutivi giuridici del reato, né la natura delle cose.

Parole chiave: stalking, atti persecutori, ripetitività dei comportamenti, percezione di minaccia, violazione essenziale della privacy

Cytuj jako:

Mozgawa M., *A few comments on the feature of 'persistent harassment' in the light of Article 190a Criminal Code [Kilka uwag na temat znamienia „uporczywego nękania" na gruncie art. 190a k.k.]*, „Ius Novum" 2020 (14) nr 2, s. 68–88. DOI: 10.26399/iusnovum.v14.2.2020.14/m.mozgawa

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LEGAL NATURE OF THE TIME LIMIT FOR VERIFICATION ACTIVITIES (ARTICLE 307 § 1 CRIMINAL PROCEDURE CODE)

RADOSŁAW KOPER*

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The issue of verification activities as stipulated in Article 307 of the Criminal Procedure Code (CPC) is strictly connected with grounds for instigating preparatory proceedings as well as the sense and purposefulness of instituting criminal proceedings in general. Thus, this paper deals with a very important matter from the point of view of social interest, reflected in the prosecution of criminals and combating crime, as well as from the point of view of individual interest concerning the protection people potentially (hypothetically) involved in a given offence. The reasoning focuses on the question of a time limit for verification activities, and it aims at determining its legal nature. The issue is approached in different ways in the legal literature and has not become out-of-date, just the opposite. The lack of unanimity on the matter is not conducive to creating a state of legal certainty, even if the practice seems to adopt one of the proposed solutions. Apart from that, one can have an impression that contemporary challenges encountered in criminal proceedings, inter alia, as a result of social trends, inspire searching for a new approach to the issue in question.

The title of the paper directly indicates that the subject matter is the verification activities in the classical version, which immediately brings to mind the legal institution laid down in Article 307 CPC. Other instances of verifying information within criminal proceedings are not covered in the paper.[1]

* PhD hab., Professor of the University of Silesia in Katowice, Department of Criminal Procedure, Faculty of Law and Administration; e-mail: radoslaw.koper@us.edu.pl; ORCID: 0000-0002-6447-8981

[1] For more on the issue, see e.g. B. Janusz, *Czynności sprawdzające prowadzone w stosunku do osoby podejrzewanej chronionej immunitetem w polskim procesie karnym*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4, 2005, p. 200; K. Chałubek, *Specyfika czynności sprawdzających*, Prokuratura i Prawo 9, 2012, p. 120 et seq.

It is almost commonly and rightly assumed that verification activities under Article 307 CPC are not a part (stage, phase, or form) of preparatory proceedings, *ergo* they are not procedural in nature because they are undertaken before proceedings are instigated in order to establish grounds for or admissibility of the proceedings, i.e. in order to avoid hasty or groundless instigation of the proceedings and to eliminate groundless decisions to refuse to instigate the proceedings, which infringes the principle of legalism.[2] Thus, it might seem that while verification activities precede the initiation of criminal proceedings, the CPC provisions regulating time limits are not applicable to them and, as a result, there is no sense in considering the legal nature of the time limit for those activities based on criminal procedure rules. If such activities do not constitute an integral part of the proceedings, why should we apply to them general rules concerning time limits for carrying out procedural activities laid down in Chapter 14 CPC? As it is rightly noticed in literature, although those activities are not in fact part of preparatory proceedings, they are conducted based on the Criminal Procedure Code; however, not every activity prescribed in the CPC must be procedural in nature.[3] Apart from that, as it is indicated in Article 307 §§ 2 and 3 CPC, a verification activity does not consist in collecting evidence in the form of an expert witness's opinions or acts that require writing reports, i.e. activities that are clearly based on evidence collection rules. However, it is admissible to develop a record of the receipt of oral notification of an offence or a motion to prosecute and to interview the person reporting an offence as a witness. This means that the legislator makes an exception and grants concession to conduct proceedings to check the possibility of carrying out particular activities typical of the criminal proceedings. Still, if they are performed within a verification procedure, they must take into account all criminal procedure requirements, i.e. those reserved for procedural activities. Thus, it is fully justified to conduct analyses based on and taking into account the provisions and rules stipulated in the Criminal Procedure Code.

Explaining the basics of the discussed issue, it is necessary to establish one thing. The analysis of the nature of the time limit for verification activities concerns only a situation in which the report of an offence commission is their source. A situation in which law enforcement bodies verify their own information leading to a presumption that an offence has been committed before the decision on instigating an inquiry or investigation is inadmissible (Article 307 § 5 CPC). It is hard to deny that the time limit for verification activities determined in Article 307 § 1 CPC is not

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[2] For instance, J. Tylman, *Instytucja czynności sprawdzających w postępowaniu karnym*, Łódź 1984, pp. 24, 27, 65; *idem*, *Postępowanie przygotowawcze w procesie karnym*, Warszawa 1998, p. 37; R. Kmiecik, *Postępowanie sprawdzające a czynności sprawdzenia „własnych informacji"*, Prokuratura i Prawo 10, 2005, p. 44; F. Prusak, *Pociągnięcie podejrzanego do odpowiedzialności w procesie karnym*, Warszawa 1973, pp. 149, 152–153; S. Stachowiak, *Wszczęcie postępowania przygotowawczego a czynności sprawdzające*, Prokuratura i Prawo 9, 1999, pp. 7, 9; *idem*, *Źródła informacji o popełnionym przestępstwie w polskim postępowaniu karnym*, Prokuratura i Prawo 2, 2005, p. 36; B. Janusz, *supra* n. 1, p. 199; P. Tomaszewski, *Funkcjonowanie czynności sprawdzających*, Wojskowy Przegląd Prawniczy 2, 1983, p. 114; J. Łupiński, *Odmowa wszczęcia postępowania przygotowawczego*, Prokuratura i Prawo 5, 2007, p. 126; A. Choromańska, M. Porwisz, *Zasada legalizmu a reakcja Policji na popełnione przestępstwo*, [in:] B. Dudzik, J. Kosowski, I. Nowikowski (eds), *Zasada legalizmu w procesie karnym*, Vol. 1, Lublin 2015, p. 120.

[3] J. Tylman, *Instytucja*, *supra* n. 2, p. 26.

applicable because § 5 of the provision has reference to § 2 and omits the regulation under § 1. This is also what is emphasised in literature with special attention paid to the lack of statutory time limits for those activities, in fact, in the case of verifying 'own information'.[4]

What has already been stated suggests that statutory indication of a time limit for verification activities is inherently connected with the essence of the situation concerned. Indeed, reporting an offence, as a form of society's cooperation with law enforcement bodies, which has features of notification of an offence commission,[5] makes it possible not only to start verification activities in the event data provided in the notification are not sufficient to instigate proceedings. Moreover, it must imply the possibility of performing those activities only in a precisely determined period. It is so because the above-mentioned notification obliges a law enforcement body to deal with the provided information. The time limit assigned to a law enforcement body for verification is an important issue. The activities can, although do not have to, constitute a characteristic forecast of launching future criminal machinery for limiting citizens' rights. In addition, the activities discussed are in the interest of justice administration so that unnecessary proceedings are not instigated and the waste of time and cost can be avoided as well as unnecessary resources are not involved. The legal doctrine rightly approaches those relationships by indicating that, on the one hand, there is an advantage in the form of protecting a citizen's interest against groundless or premature instigation of criminal proceedings and, on the other hand, this protects public interest in combating crime.[6] The indicated guarantees, because of their nature, should be implemented in the shortest possible period but, at the same time, one that takes into account the possibilities of the practice. In other words, it should be a time limit guaranteeing that it will not constitute harm to the social interest or the state of uncertainty or damage to the interest of an individual (a person suspected of committing an offence or the hypothetically aggrieved). It concerns the necessity of taking a decision on the instigation of preparatory proceedings as soon as there is a justified suspicion that an offence has been committed (Article 303 CPC), which is very important from the point of view of the future collection and protection of evidence and ensuring appropriate (among

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[4] See, e.g. R.A. Stefański, [in:] Z. Gostyński (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa 1998, p. 53; J. Grajewski, [in:] J. Grajewski, L.K. Paprzycki, M. Płachta, *Kodeks postępowania karnego*, Vol. I: *Komentarz do art. 1–424*, Kraków 2003, p. 732; S. Stachowiak, *Wszczęcie*, *supra* n. 2, p. 10; B. Janusz, *supra* n. 1, p. 199; B. Szyprowski, *Postępowanie sprawdzające w procesie karnym*, Prokuratura i Prawo 7–8, 2007, p. 168; J. Łupiński, *Czas trwania postępowania sprawdzającego*, Prokuratura i Prawo 10, 2011, pp. 99–100; K.T. Boratyńska, P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2018, p. 792.

[5] J. Karaźniewicz, *Zawiadomienie o przestępstwie jako forma inicjowania postępowania karnego – zagadnienia wybrane*, [in:] R. Olszewski (ed.), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo. Rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, Warszawa–Łódź 2019, p. 264; S. Cora, *Podstawy społecznego obowiązku zawiadomienia o przestępstwie. Problematyka art. 304 § 1 k.p.k., art. 113 § 1 k.k.s. i art. 4 § 1 i 2 u.p.n.*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, p. 681.

[6] F. Prusak, *Postępowanie sprawdzające w nowym k.p.k.*, Problemy Praworządności 2, 1971, p. 28; Z. Młynarczyk, *Czynności sprawdzające i odmowa wszczęcia postępowania karnego*, Prokuratura i Prawo 5, 1995, p. 108.

others, fast) penal response. It is necessary to protect persons against groundless instigation of proceedings because this causes unjustified painfulness to a person prosecuted[7] (especially in their environment, but not only) just because of the fact that they are subject to the proceedings. On the other hand, the person reporting an offence must be quickly informed about the results of the verification conducted by a law enforcement body, which is extremely significant for the aggrieved.

The above arguments are of fundamental importance for the discussed issue. Determination of the legal nature of the time limit for verification activities is, in fact, an indication of a real time within which those activities can be carried out. However, depending on whether the same term is strict or more flexible in nature, the period assigned for checking activities can actually be different, which is not always advantageous for a social or individual interest.

In accordance with Article 307 § 1 CPC, verification activities should be conducted within 30 days of the date when an offence has been reported because in this period it is necessary to issue a decision on instigation of or refusal to instigate an inquiry or investigation. What clearly confirms the fact that one of those decisions must be taken before the period ends is the content of the provision quoted, where the issue of the decision is directly connected with checking data included in the report on an offence: 'In this case [in the case of verification activities – R.K.], the decision on instigation of an investigation or on refusal to instigate it should be issued at the latest within the time limit […].' Thus, the period of 30 days is strictly and exclusively connected with the need to conduct verification activities,[8] and the instigation or the refusal to instigate are the forms of its conclusion.

Such an understanding of the discussed time limit makes it possible to state that it is obviously statutory in nature, strictly determined by a provision, binds a law enforcement body and is maximal, i.e. verification activities should be carried out before it ends at the latest. The listed features of the time limit for performing those activities are essential for an attempt to decode its legal nature. First of all, it is evident that solving the problem must be contained within the limits of categorization covering statutory time limits. It is necessary to share the opinion of the doctrine that statutory time limits are classified in two groups: definite and indefinite (instructive, regulatory) ones; where the definite time limits include a statute of repose, final deadlines and other (remaining) definite time limits.[9] The phrase 'at the latest' used in Article 307 § 1 CPC should be interpreted as follows: the deadline for verification activities should not be missed, thus a law enforcement body should issue a decision on instituting or refusing to institute preparatory proceedings before 30 days pass since the day when an offence has been reported. In this context, there are no doubts that verification activities should take as little time as possible and the period should be adjusted to the real circumstances, the require-

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[7] J. Tylman, *Istota i formy wszczęcia postępowania karnego w sprawach publicznoskargowych*, Acta Universitatis Lodziensis. Folia Iuridica 22, 1985, p. 32.

[8] J. Tylman, *Instytucja*, *supra* n. 2, p. 186; Z. Szatkowski, *Czynności sprawdzające w ujęciu kodeksu postępowania karnego*, Problemy Kryminalistyki 84, 1970, p. 187.

[9] For instance, K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice 2013, pp. 297–298. Compare I. Nowikowski, *Terminy w kodeksie postępowania karnego*, Lublin 1988, pp. 17–25.

ments of a particular case, and the type of doubts that must be resolved.[10] However, these statements can turn out to be insufficient to determine the legal nature of the said time limit. It is rightly indicated in literature that the basic criterion making it possible to determine the legal nature of a given time limit consists in the legal consequences of its expiry.[11]

Four basic approaches to the legal nature of the analysed time limit can be found in literature, but particular authors also have different views on the way of interpreting the consequences of failing to meet the 30-day time limit.

The first opinion is based on the thesis that the deadline for conducting verification activities is instructive in nature. However, the supporters of this view are not unanimous in interpreting the consequences of failing to meet the 30-day time limit. Some of them argue that activities after the deadline are still effective, including the decision on instigating or refusing to instigate proceedings. Still, in accordance with the essence of an instructive time limit, there may only be disciplinary consequences for the law enforcement employees.[12] Other authors take a stance that failing to meet the deadline results in making a law enforcement body obliged to issue a decision on instituting an enquiry or investigation (in case the commission of an offence is not confirmed in the course of the proceedings, it should be discontinued). However, one cannot refuse to instigate proceedings because, under Article 307 § 1 CPC, this decision can be issued by the 30th day of the receipt of notification of an offence commission at the latest.[13] There is also an opinion, according to which when failure to meet the deadline results from an objective obstacle (e.g. ordering inspection and waiting for its findings), a decision on refusing to instigate an investigation should be issued without delay, which does not mean that a decision on instituting proceedings cannot be taken later.[14]

According to the second stance, when the verification procedure does not resolve doubts within 30 days, preparatory proceedings should be instigated. However, the legal nature of the deadline is not determined[15] and one can only assume that in such a situation it should be treated as a maximal one.

The supporters of the third stance emphasise that the 30-day time limit is not instructive in nature. They do not directly indicate the type of the time limit and

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[10] J. Tylman, *Postępowanie*, *supra* n. 2, pp. 38–39; B. Szyprowski, *supra* n. 4, p. 169.

[11] I. Nowikowski, *Terminy*, *supra* n. 9, p. 16.

[12] J. Tylman, [in:] R.A. Stefański (ed.), *System Prawa Karnego Procesowego*, Vol. X: *Postępowanie przygotowawcze*, Warszawa 2016, p. 234; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarze Zakamycza wraz z komentarzem do ustawy o świadku koronnym*, Kraków 2003, p. 778; M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 1: *Art. 1–424*, Warszawa 2018, p. 1158; M.R. Jasińska, *Źródła informacji o popełnionym przestępstwie*, Szczecin 2016, pp. 238–239.

[13] B. Szyprowski, *supra* n. 4, pp. 171, 180. However, the author did not avoid a certain contradiction in his reasoning because he also argued that as a result of missing the discussed time limit, it is necessary to immediately take a decision on instigation of or refusal to instigate proceedings, although he sees a condition to admissibility of the latter option and says the activities that have not been performed cannot be significant for the assessment of the possible occurrence of an offence; see p. 169.

[14] Z. Brodzisz, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2020, p. 786.

[15] J. Grajewski, [in:] J. Grajewski, L.K. Paprzycki, M. Płachta, *supra* n. 4, p. 731.

just mention that it is based on the guarantee-related interest of justice administration. They highlight that: (1) failure to conclude the verification procedure within the time limit implies the necessity of issuing a decision on refusing to instigate proceedings because it is inadmissible to extend the time limit, even under the prosecutor's supervision; (2) when proceedings are not instituted within this time limit, it means a refusal to prosecute because desisting from issuing a decision on instituting proceedings in the statutory time limit is *ex lege* tantamount to a refusal to institute them.[16]

Finally, it is necessary to mention the fourth opinion, according to which the time limit is one of the definite deadlines for procedural bodies. Two strongly opposite opinions on the legal consequences of failure to meet the deadline can be noticed here. When justifying the above claim, it is emphasised that activities performed with the infringement of the time limit are effective (although it is a maximal one); however, formal defectiveness occurs and it results in a procedural consequence in the case the deadline is not met; it is a complaint about a law enforcement body's inaction (Article 306 § 3 CPC).[17] In order to explain it precisely, it is also indicated that a direct legal consequence cannot be assumed the moment the deadline expires because the principle of factual truth must prevail over the principle of speed. As a result, it is necessary to assume relativism depending on the nature of doubts that must be resolved or the complexity of a given case, which means that necessary activities can be performed after the 30-day time limit if they are inevitable for taking appropriate decisions concerning proceedings.[18] On the other hand, it is emphasised that it is a maximal time limit, which cannot be extended in any case and if it occurs, regardless of the possibility of filing a complaint about inaction, it is necessary to issue a decision on refusing to instigate an inquiry or investigation (which does not constitute an obstacle to institute proceedings in the same case later on based on the material obtained in the later period).[19]

As it is seen, a complex mix of different, often contradictory opinions can be found with reference to the discussed issue. Before their analysis is conducted, a final deadline should be excluded from consideration. The time limit for verification activities is not applicable to appellate measures and, what is more important, the statute does not recognise it as a final one (Article 122 CPC) and it is hard to notice a consequence of inaction, which is the third criterion for the recognition of a final deadline.

Thus, it should be taken into account that the analysis of the Criminal Procedure Code provisions does not lead to the selection and indication of clear consequences of failing to meet the deadline reserved for verification activities.

The possibility of filing a complaint about inaction referred to in Article 306 § 3 CPC, which some authors mention, does not necessarily play such a role. There

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[16] F. Prusak, *Postępowanie*, *supra* n. 6, p. 43; *idem*, *Pociągnięcie*, *supra* n. 2, pp. 160–161. This stance is in general supported by B. Janusz, *supra* n. 1, p. 198.

[17] I. Nowikowski, *Terminy*, *supra* n. 9, p. 70; J. Łupiński, *Czas*, *supra* n. 4, pp. 105–107.

[18] It was highlighted that inviolability of the maximum 30-day time limit should be a rule, unless it is in conflict with the aim of verification activities in the form of further activities of this type; see J. Łupiński, *Czas*, *supra* n. 4, pp. 108–110.

[19] R.A. Stefański, [in:] Z. Gostyński (ed.), *Kodeks*, *supra* n. 4, p. 53.

were obvious reasons for granting a person or an institution that reports an offence the right to file a complaint to a superior prosecutor or one appointed to supervise a body that has been notified in case they are not informed about the instigation of or refusal to instigate preparatory proceedings within six weeks.[20] It was aimed at decreeing a guarantee for the principle of legalism and the principle of speed, stimulating law enforcement bodies to deal with reports on offences efficiently, which is of considerable importance from the point of view of an entity reporting an offence, in particular the aggrieved.[21] The time limit of six weeks undoubtedly reflects the relationship with the time limit for verification activities. This means that it is necessary to issue a decision on instigation of or refusal to instigate proceedings within 30 days of the date of notification of an offence and the remaining two weeks must be assigned for notifying a party concerned about the issued decision (in the case of the refusal to instigate proceedings, a notification must be served on the party).

However, it does not seem that the above-mentioned complaint only applies to the situation in which verification activities have been carried out. It is true that the deadline for filing a complaint is adjusted to the time limit for verification activities but the regulation of Article 306 § 3 CPC can be applicable also when a law enforcement body has not undertaken the steps because of its extraordinary sluggishness in taking a decision concerning grounds for or admissibility of instigating proceedings, and thus inaction when informing an entity reporting an offence about the case results. The Criminal Procedure Code does not differentiate between complaints about inaction of a law enforcement body depending on whether verification activities have been performed or not and, as a result, the deadline for filing a complaint is determined in a general way in relation to both situations.[22] The obligation to issue a decision on instigation of or refusal to instigate proceedings without delay after an offence is reported, which is stipulated in Article 305 § 1 CPC, does not change anything in this matter. When a law enforcement body fails to act within the period of six weeks of the date when an offence has been reported, then a complaint filed in the mode laid down in Article 306 § 3 CPC can constitute the source of information about the omission of that body for a superior prosecutor or the one appointed to supervise it. Attention should be drawn, however, to one circumstance that indicates that a complaint about inaction does not only apply to the extension of the time limit for conducting verification activities. The possibility of filing this complaint is regulated in Article 306 CPC: the provision regulating the mode of filing a complaint about the decision on refusal to instigate an investigation

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[20] For more on the issue of this complaint, see e.g. K. Dudka, *Zażalenie na bezczynność organu procesowego – uwagi de lege ferenda*, Prokuratura i Prawo 12, 2006, pp. 144–149.

[21] It should be assumed that the phrase 'a person or an institution that reported an offence' used in Article 306 § 3 CPC is so broad that it includes the aggrieved within its scope. Although the content of Article 305 § 4, Article 306 §§ 1 and 1a CPC might incline one to a different conclusion, such interpretation would be anti-guarantee. The author who was for referring the regulation under Article 306 § 3 CPC to the aggrieved is e.g. K. Dudka, *supra* n. 20, p. 144, and the one who was against is e.g. R.A. Stefański, [in:] R.A. Stefański (ed.), *System Prawa Karnego Procesowego*, Vol. X: *Postępowanie przygotowawcze*, Warszawa 2016, pp. 720–721.

[22] R.A. Stefański, *Zażalenie na bezczynność w zakresie rozpoznania zawiadomienia o przestępstwie*, Prokuratura i Prawo 6, 2014, p. 11.

and under Articles 303 and 305 CPC concerning mainly instigation of proceedings. It is not regulated in Article 307 CPC concerning verification activities. Thus, the systemic interpretation indicates that the result determined in Article 306 § 3 CPC is not autonomous in nature in relation to these proceedings. On the other hand, there can be doubts whether it is a consequence at all or rather a right to control a law enforcement body.[23]

Moreover, it does not seem that the expiry of the 30-day time limit under Article 307 § 1 CPC was to result in obligatory instigation of proceedings. The content of the provision referred to does not allow making an assumption of automatic response in the matter. In order to be able to instigate an inquiry or investigation, it is necessary to recognise the existence of grounds consisting in a justified suspicion that an offence has been committed and, in addition, the lack of negative procedural conditions excluding admissibility of proceedings. The repressive nature of criminal proceedings is also an argument against the assumption of such automatism. As it has been emphasised earlier, instigation of an inquiry or investigation results in far-reaching legal consequences, especially if it is premature, for human rights and freedoms. As a result, failure to conclude verification activities in the statutory time limit cannot justify the issue of a decision on instigating proceedings only for this reason.[24] It might mean raising an unnecessary suspicion of a given person's involvement and lead to negative consequences resulting from law enforcement bodies' interest in them, not to speak about unnecessary costs, i.e. disadvantages for justice administration within its broad meaning.[25] Moreover, what sounds rational is a practical argument for purposelessness of instigating proceedings in a situation when a few days exceeding the 30-day time limit may be enough to perform activities making it possible to find out that there are no grounds for the instigation of an inquiry or investigation.[26] Abandoning the anticipation of other considerations, it is necessary to state that the way in which the legal nature of the discussed time limit is approached should, at least to a minimal extent, take into account practical aspects of the subject matter.

The opinion that it is inadmissible to refuse to instigate proceedings after the 30-day time limit of the date when an offence has been reported, while it is possible to instigate proceedings in case the deadline expires does not deserve approval, either. This differentiation is unjustified in the light of Article 307 § 1 CPC, where no differentiation like this is stipulated. Apart from that, issuing a decision without delay that constitutes a form of response to the report on an offence, which is referred to in Article 305 § 1 CPC, does not in fact apply only to the instigation of proceedings but also to the refusal to instigate them, thus it is hard to find an argument for the contested stance in this regulation.

It is also necessary to express criticism of the opinion assuming the implied nature of the refusal to prosecute in case proceedings are not instigated within the time limit for verification activities. The assumption of the refusal to prosecute

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[23] Compare R.A. Stefański, [in:] R.A. Stefański (ed.), *System*, *supra* n. 21, p. 716.
[24] Z. Brodzisz, [in:] J. Skorupka (ed.), *supra* n. 14, p. 786.
[25] M.R. Jasińska, *supra* n. 12, p. 239.
[26] *Ibid*.

occurring *ex lege*, i.e. without the issue of a decision, is in fact anti-guarantee-like because it deprives the aggrieved or another entitled entity of the possibility of appealing with the use of a complaint about such a decision.[27]

It should be admitted that the opinion that it is necessary to issue a decision on the refusal to instigate an inquiry or investigation causes quite positive reactions. It seems to be a natural consequence of non-conclusion of the verification procedure within the period of 30 days. Since a law enforcement body has not been able to sufficiently establish with the use of verification activities whether there are grounds for instigating preparatory proceedings, prosecution should be refused in order to avoid exposing particular persons to negative consequences of instigating criminal proceedings against them (also in a real form), the state treasury to unnecessary costs, and those bodies' employees to mobilisation of unnecessary resources. However, there are practical reasons, mentioned above, that are in opposition to this assumption because one cannot lose sight of the principle of truth, influencing also verification activities at the pre-trial stage.

In this context, the concept of conducting verification activities after the 30-day time limit in each case when it is required by the necessity of achieving the aims of criminal proceedings arouses opposition. The problem is that such unclear formulations that allow ignoring the indicated time limit can constitute an impulse to arbitrary actions considerably exceeding the period of 30 days, which can even result in extreme cases in performing verification activities for a period longer than six weeks under Article 306 § 3 CPC. It would be a considerable infringement of the obligation laid down in Article 307 § 1 CPC, which is contained in the phrase 'at the latest'.

Coming to the last part of the discussion in order to resolve the discussed issue, first of all, it is necessary to emphasise that there are no reasons justifying the recognition of the time limit under Article 307 § 1 CPC as another definite deadline. Indeed, the authors opting for this solution use the phrase 'definite deadline for procedural bodies'; however, they adopt a construction that to a great extent corresponds to the concept of the other definite deadlines. These are deadlines that, if they are not met, do not result in ineffectiveness of actions, but other procedural consequences determined by a provision of procedural law are possible. In order to provide examples, one can indicate: (1) the time limit for a break in a trial; failing to meet the deadline results in the recognition of a trial as adjourned (Article 401 § 2 in conjunction with Article 402 § 3 CPC); (2) the deadline for announcing the sentence; failing to meet it results in the necessity of conducting a trial again from the beginning (Article 411 §§ 1 and 2 CPC); (3) the time limit between serving a writ of summons and the date of a trial; failure to meet the time limit results in adjourning a trial on the request of the accused or the counsel (Article 353 §§ 1 and 2 CPC). The comparison of the above situations with the situations regulated in Article 307 § 1 and Article 306 § 3 CPC shows that these are two different groups of cases. Apart from the fact that the consequence regulated in Article 306 § 3 CPC is not autonomous when the time limit for verification activities is not met, which has been highlighted earlier and which constitutes a clear difference in relation to

[27] I. Nowikowski, *Terminy*, *supra* n. 9, p. 69.

the examples of other definite deadlines indicated (particular consequences of failing to meet those deadlines are only typical of situations that they apply to), there is one more important circumstance. Namely, the provisions under Article 401 § 2 in conjunction with Article 411 §§ 1 and 2 and Article 353 §§ 1 and 2 CPC apply the same method of indicating the consequences of missing the time limits. While regulating a given time limit or in connection with this regulation, the consequence of missing it was directly indicated ('in case of missing', 'in case of exceeding'). This way, this consequence is directly connected with the time limit it refers to. Meanwhile, the construction of the solution resulting from Article 306 § 3 CPC proves that its relation with exceeding the time limit for verification activities is indirect at the most. Thus, the sum of all the mentioned arguments is for the refusal of classifying the time limit under Article 307 § 1 CPC as one of the other definite time limits.

Therefore, there are still two options to be discussed: a statute of repose and an instructive deadline.

The categorical nature of the time limit for verification activities resulting from the use of the phrase 'at the latest' supports the first possibility, that means an activity is ineffective when the deadline expires (an activity is inadmissible). One cannot ignore the fact because it would mean a negation of something that cannot be negated. One may have an impression that the legislator's intention was to make the time limit maximal so that it is not missed. There is a question, however, if the meaning of this linguistic phrase is literal in this context.

It is worth emphasising that regulating a statute of repose in the Criminal Procedure Code, the legislator in general uses phrases strongly and clearly stressing the prohibition of exceeding a given time limit (e.g. 'It is inadmissible […]' – Article 524 § 3 CPC, 'After a year's time, […] can overrule or alter the decision or its justification only in favour of the suspect'). However, as it turns out, it is not always so because the nature of a time limit can depend on its normative context. The regulation under Article 237 § 2, second sentence, CPC can be an example of a situation in which a court has five days to issue a decision of approval of a prosecutor's ruling to apply telephone tapping in an urgent case. It might seem that it is an instructive time limit. However, the fact that lack of approval implies the necessity of destroying all recordings and it concerns recognition whether tapping, as a painful interference into the sphere of citizens' freedoms, is legal at all (without a court's decision approving the use of this measure, it is only conditionally legal) may justify the assumption that we deal with a statute of repose concerning a very important guarantee-related issue.[28] However, such an interpretation may be recognised as controversial because the statutory regulation is not unambiguous.

Similar thoughts come to mind in relation with the time limit for verification activities. Serious guarantee-related reasons can justify the treatment of this time limit as a statute of repose. On the other hand, the practical reasons and the fact that it is a time limit addressed to a procedural body can constitute arguments for attributing the features of instruction to it.

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[28] Compare similar arguments in J. Skorupka, *Krytycznie o stanowisku Sądu Najwyższego w kwestii legalności kontroli rozmów telefonicznych*, Prokuratura i Prawo 4, 2011, pp. 16–17.

The term 'instructive time limit' covers different deadlines, missing which does not result in any negative consequences in the procedural sphere; however, failure to meet them can potentially carry disciplinary sanctions. Many time limits assigned to a body conducting criminal proceedings to perform a procedural action are instructive time limits. It should be noticed that the legislator uses different words to specify them. In the case of the time limit for developing an indictment or taking another decision concluding preparatory proceedings, the legislator uses the verbs: 'develops', 'approves', 'issues', i.e. forms that are not categorical in nature (Article 331 § 1 CPC). On the other hand, in the case of regulating the issue of adjourning the development of the justification of a decision, a phrase 'can […] for a period of seven days' is used (Article 98 § 2 CPC). A higher level of rigorous approach is noticed in relation to the time limit assigned to the development of the justification of a sentence ('The justification of a sentence should be developed within the period of 14 days […]', but this rigour is softened by the possibility of extending this time limit for a period determined by the president of a court (Article 423 § 1 CPC)).

However, the examples of presented instructive time limits differ from the time limit for verification activities because the provisions regulating them do not use phrases assigning categorical nature to them or the context of the regulation does not indicate that there is no possibility of performing an activity in a later period. At the same time, the time limit prescribed in Article 307 § 1 CPC seems to be final in the sense that the 30-day period should be evidently treated as maximal. On the other hand, the phrase 'at the latest' can be certainly interpreted through the prism of law enforcement bodies mobilisation to perform their activities faster because disciplinary sanctions are designed as a guarantee of meeting the deadline. It is evident that in the light of the presented examples of a statute of repose, in the case discussed under Article 307 § 1 CPC, the level of categorical and final nature is lower.

How can this dilemma be resolved then? Probably, an instructive time limit is regulated in the quoted provision. This conclusion, however, has a minimal edge over the opinion that it has the features of a statute of repose.

One can have doubts whether assigning this time limit the features of a statute of repose would not be a too far-reaching solution in the sense that the possibility of conducting verification activities would be totally blocked in case all potential doubts were not explained within the 30-day period. The above-mentioned example presented by one of the authors that concerns a few days needed to resolve the issue of grounds for or admissibility of the instigation of proceedings is quite distinct in this area. One can consider the extension of the time limit to 40 days and giving it the features of a statute of repose. In such a situation, however, there is a fear that it can sometimes lead to demobilisation of a law enforcement body because the time for performing verification activities is relatively long. In other words, activities that can be performed in 20 days can take 40 days.

One can also consider a solution assuming the instructive nature of the time limit discussed but with a possibility of extending it by ten days in particularly justified cases when the necessity of explaining the circumstances of the case requires that. In order to avoid too frequent and unjustified extension of the verification procedure, the admissibility of this extension should be limited by the application of precise

and definite linguistic phrases and by listing the situations in which it is possible (e.g. waiting for the findings of an inspection, inability to interview a person who has reported an offence due to objective obstacles, etc.). However, if the time limit remained instructive, then the rule that an activity performed after the deadline would be effective should remain applicable and it could happen that verification activities would continue after 40 days. Apart from that, the adoption of a statutory possibility of extending the verification procedure would have to be connected with other than the present regulation of a prosecutor's supervision of proceedings.

An optimal solution would be to assign the status of another definite time limit to the time limit under discussion but in the number of 35 or 40 days, with a clear reservation that in case of missing it and failure to conclude verification activities within this time frame, the instigation of an inquiry or investigation should be refused. The awareness that in case of failure to establish grounds for instigating preparatory proceedings and to complete all activities the expiry of the deadline will result in the necessity of refusing to prosecute should induce efficient dealing with and analysing the reports on offences. However, then it would be necessary to 'extend' the starting point for filing complaints about inaction based on Article 306 § 3 CPC, i.e. to move the beginning of the time limit from which the entitled entity can complain about the inaction. Taking into account that the time limit for verification activities would be subject to statutory extension but to a minimal or insignificant extent, the starting point would also be slightly changed.

As it has been seen, there are no ideal solutions for the discussed issue. Each of the proposed options has advantages and disadvantages. The conducted analysis seems to show that the last of the presented solutions (another definite time limit) has most features of a compromise taking into account all axiological arguments concurring in the light of verification activities. It gains some approval expressed bearing in mind that the issue discussed in the paper will certainly continue to be the subject of debate.

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LEGAL NATURE OF THE TIME LIMIT FOR VERIFICATION ACTIVITIES (ARTICLE 307 § 1 CRIMINAL PROCEDURE CODE)

Summary

The article concerns the issue of verification activities which precede the institution of criminal proceedings and are aimed at determining legitimacy or admissibility of the criminal proceedings. The author focuses on the presentation of this problem from the viewpoint of the

legal nature of the time limit for the said proceedings. The article adopts a dogmatic and legal method. The existing regulation has been analysed, its defects identified and amendments proposed. The general goal of the discussion is to postulate the development of solutions that would result from proper balancing of protected interests of the administration of justice and the necessity to respect human rights.

Keywords: verification activities, time limit, criminal proceedings, institution of criminal proceedings

CHARAKTER PRAWNY TERMINU CZYNNOŚCI SPRAWDZAJĄCYCH (ART. 307 § 1 K.P.K.)

Streszczenie

Artykuł jest poświęcony zagadnieniu czynności sprawdzających poprzedzających wszczęcie postępowania karnego, służących ustaleniu zasadności lub dopuszczalności wszczęcia procesu. Autor analizuje tę problematykę z punktu widzenia kwestii dotyczącej charakteru prawnego terminu prowadzenia wspomnianych czynności. W opracowaniu przyjęto metodę dogmatyczno-prawną. Dokonano oceny obowiązującej regulacji normatywnej i sformułowano propozycje zmian. Całość rozważań ujętych w artykule jest podporządkowana postulatowi kreowania takich rozwiązań, które stanowią rezultat odpowiedniego zbilansowania ochrony dobra wymiaru sprawiedliwości oraz potrzeby poszanowania praw człowieka.

Słowa kluczowe: czynności sprawdzające, termin, proces karny, wszczęcie postępowania karnego

EL CARACTER LEGAL DEL PLAZO DE LA PRÁCTICA DE DILIGENCIAS DE AVERIGUACIÓN (ART. 307 § 1 DEL CÓDIGO DE PROCEDIMIENTO PENAL)

Resumen

El artículo versa sobre las diligencias de averiguación que preceden la incoación del procedimiento penal. Sirven para determinar la admisibilidad de incoación del proceso. El autor analiza esta problemática desde el punto de vista del caracter legal del plazo de la práctica de dichas diligencias. En la obra se utiliza el método dogmático-legal. Se valora la regulación normativa vigente y se propone modificaciones. Se postula crear soluciones que serán el resultado de equilibrio entre la protección del bien de justicia y la necesidad de respetar los derechos humanos.

Palabras claves: diligencias de averiguación, plazo, procedimiento penal, incoación del proceso penal

ПРАВОВОЙ ХАРАКТЕР ПРЕДЕЛЬНОГО СРОКА ДЛЯ ОСУЩЕСТВЛЕНИЯ ПРОВЕРОЧНЫХ ДЕЙСТВИЙ (СТ. 307 § 1 УПК)

Аннотация

Статья посвящена проверочным действиям, проводимым до возбуждения уголовного дела с целью выяснения обоснованности либо допустимости уголовного производства. Автор анализирует проблему с точки зрения правового характера предельного срока для осуществления таких действий. В работе применен догматически-правовой метод. Автор приводит оценку действующих нормативных положений и формулирует предложения по их изменению. При написании статьи автор руководствовался необходимостью поиска таких правовых решений, которые позволили бы соблюсти надлежащий баланс между интересами правосудия и необходимостью уважать права человека.

Ключевые слова: проверочные действия, предельный срок, уголовный процесс, возбуждение уголовного дела

DIE RECHTLICHE NATUR DER FRIST FÜR UNTERSUCHUNGSHANDLUNGEN (ARTIKEL 307 § 1 DER POLNISCHEN STRAFPROZESSORDNUNG)

Zusammenfassung

Der Artikel befasst sich mit der Frage der Untersuchungshandlungen, die der Einleitung eines Strafverfahrens vorangehen und die darauf abzielen, die Rechtmäßigkeit bzw. Zulässigkeit der Einleitung des Verfahrens festzustellen. Der Autor analysiert diese Problematik unter dem Gesichtspunkt der Frage nach dem rechtlichen Charakter der Frist für die Durchführung der genannten Handlungen. Zur Untersuchung der Frage wurde die dogmatisch-juristische Methode angewandt. Die geltende normative Regelung wird einer Beurteilung unterzogen und es werden Änderungsvorschläge gemacht. Alle in dem Artikel angestellten Überlegungen sind der dem Gebot der Schaffung von Lösungen untergeordnet, durch die ein entsprechendes Gleichgewicht zwischen dem Schutz des Interesses der Rechtspflege und der Notwendigkeit einer Achtung der Menschenrechte erreicht wird.

Schlüsselwörter: Untersuchungshandlungen, Frist, Strafverfahren, Einleitung des Strafverfahrens

NATURE JURIDIQUE DU DÉLAI POUR LES ACTIVITÉS DE VÉRIFICATION (ART. 307 § 1 DU CODE DE PROCÉDURE PÉNALE)

Résumé

L'article est consacré à la question des activités de vérification précédant l'overture d'une procédure pénale, afin de déterminer la légitimité ou la recevabilité de l'ouverture d'un procès. L'auteur analyse cette question du point de vue de la nature juridique du délai de réalisation de ces activités. L'étude adopte une méthode dogmatique et légale. La réglementation normative actuelle a été évaluée et des modifications ont été proposées. Toutes les considérations

contenues dans l'article sont subordonnées au postulat de création de solutions qui résultent d'un équilibre approprié entre la protection du bien de la justice et la nécessité de respecter les droits de l'homme.

Mots-clés: activités de vérification, délai, procès pénal, ouverture d'une procédure pénale

CARATTERE GIURIDICO DEL TERMINE DELLE ATTIVITÀ DI VERIFICA (ART. 307 § 1 DEL CODICE DI PROCEDURA PENALE)

Sintesi

L'articolo è dedicato alla questione delle attività di verifica che precedono l'avvio di un procedimento penale, finalizzate a stabilire la fondatezza o l'ammissibilità dell'avvio del procedimento. L'autore analizza tale problematica dal punto di vista della questione riguardante il carattere giuridico del termine di conduzione delle richiamate attività. Nell'elaborato si è utilizzato il metodo dogmatico-giuridico. È stata effettuata la valutazione delle regolamentazioni giuridiche vigenti ed è stata formulata una proposta di modifiche. Tutte le riflessioni contenute nell'articolo sono subordinate al postulato della creazione di tali soluzioni che costituiscano il risultato di un adeguato bilanciamento tra la tutela della giustizia e la necessità del rispetto dei diritti umani.

Parole chiave: attività di verifica, termine, procedimento penale, avvio di un procedimento penale

Cytuj jako:

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LEGAL NATURE OF THE SUPREME COURT RESOLUTIONS

ZBIGNIEW KWIATKOWSKI*

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The activity of passing resolutions by the Supreme Court, which is a body of the judicial power appointed to uphold the administration of justice, constitutes one of its most important tasks that aim to ensure that common and military courts' judgments are uniform and in compliance with the law (*arg. ex* Article 1 para. 1(a) Act on the Supreme Court[1]).

A question is raised in what way the Supreme Court can unify common and military courts' case law. Analysing this issue it is necessary to notice that the Supreme Court, within its functional competence, adjudicates questions of law that require fundamental interpretation of a statute; in case a legal question arises when an appeal is heard, the court of appeal can adjourn a trial and refer it to the Supreme Court for adjudication (*arg. ex* Article 441 § 1 Criminal Procedure Code, henceforth CPC); it resolves questions of law connected with a particular case; if hearing a cassation or another appellate measure it has serious doubts concerning the interpretation of the provisions of law that are grounds for a judgment, it refers the legal question to a bench of seven judges of the Court (*arg. ex* Article 82 Act on the Supreme Court); and it passes resolutions if discrepancies concerning interpretation of the provisions of law that are grounds for a judgment occur between common and military courts' and the Supreme Court's case law (*arg. ex* Article 83 § 1 Act on the Supreme Court).

Thus, the provisions of Article 441 § 1 CPC, Article 82 and Article 83 § 1 Act on the Supreme Court constitute normative grounds for passing resolutions by the Supreme Court.

* Prof., PhD hab., Head of the Department of Criminal Procedure Law, Faculty of Law and Administration of the University of Opole; e-mail: zkwiatkowski@uni.opole.pl; ORCID: 0000-0003-2838-6550

1 Act on the Supreme Court of 8 December 2017 (Dz.U. of 2018, item 5, as amended).

The activity of passing resolutions by the Supreme Court has not been directly regulated as judicial supervision in the Act on the Supreme Court due to the content of Article 183 para. 1 Constitution of the Republic of Poland,[2] which stipulates that 'The Supreme Court shall exercise supervision over common and military courts regarding judgments'. Monika Zbrojewska[3] rightly highlighted that 'in order to avoid a construct that the Supreme Court exercises supervision over its own activity, the legislator assumed that it upholds the administration of justice [*arg. ex* Article 1 para. 1 Act on the Supreme Court – the author's annotation]'.

There is another question concerning the legal nature of the Supreme Court resolutions. In other words, a question is raised whether they have the same features as judgments and rulings that allow one to recognise them as judgments or they constitute another type of solutions. There are three different approaches to the issue in the legal doctrine. According to one of them, 'the Supreme Court resolutions are judgments'.[4] Stefan Kalinowski[5] assumed that 'the Supreme Court resolutions constitute a separate group of judgments because they are not court judgments concerning directly the subject matter of a trial and do not conclude it; some of them are issued in connection with a particular trial, e.g. a resolution passed in accordance with Article 390 of the former CPC, at present Article 441 § 1 CPC [the author's annotation], and concern legal issues that require fundamental interpretation of a statute and bind courts that hear particular cases'. Edward Skrętowicz[6] stated that 'the Supreme Court resolutions concerning legal questions and issued in accordance with Article 441 CPC do not belong to the category of judgments. These resolutions bind a common or military court in a certain case, which means that a court cannot judge in this case in a way different from the Supreme Court's answer to the legal question'. One can encounter a statement that 'a resolution is a special form of judgment issued by the Supreme Court (Article 441 § 3 CPC)'.[7] It seems that literal interpretation of this stand can lead to a conclusion that the Supreme Court resolutions constitute one of the forms of a judgment because it is assumed in the literature on a trial[8] that 'the decisions are declarations of will that are imperative in nature and that, unlike legal norms which are abstract, concern particular cases, thus they also include judgments'.

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

[3] M. Zbrojewska, *Rola i stanowisko prawne Sądu Najwyższego w procesie karnym*, Warszawa 2013, p. 171; also see L. Garlicki, *Sąd Najwyższy – regulacja konstytucyjna i praktyka*, [in:] W. Skrzydło (ed.), *Sądy i trybunały w Konstytucji i w praktyce*, Warszawa 2005, pp. 15–16.

[4] A. Kordik, F. Prusak, Z. Świda, *Prawo karne procesowe. Część ogólna*, Wrocław–Szczecin 1994, p. 104; K. Marszał, *Proces karny. Zagadnienia ogólne*, 2nd edn supplemented, Katowice 2013, p. 308; L.K. Paprzycki, [in:] L.K. Paprzycki, J. Grajewski, *Kodeks postępowania karnego z komentarzem*, Sopot 2000, p. 164; S. Waltoś, *Wprowadzenie i próba podsumowania*, [in:] S. Waltoś (ed.), *Jednolitość orzecznictwa w sprawach karnych*, Zakamycze 1998, p. 15.

[5] S. Kalinowski, *Polski proces karny w zarysie*, Warszawa 1981, pp. 141 and 341.

[6] E. Skrętowicz, [in:] R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, 6th edn, Warszawa 2006, p. 274.

[7] Z. Świda, [in:] Z. Świda, R. Ponikowski, W. Posnow, *Postępowanie karne. Część ogólna*, Warszawa 2008, p. 240.

[8] M. Lipczyńska, *Polski proces karny. Zagadnienia ogólne*, Warszawa 1986, pp. 113–114.

Looking for the answer to the question concerning the legal nature of resolutions passed by the Supreme Court, one should conclude that from the normative point of view, it is hard to classify them as judgments in the strict sense.[9] The provisions of the Criminal Procedure Code do not divide judgments into sentences and decisions. The provision of Article 93 § 1 CPC only lays down that 'if a statute does not require the issue of a sentence, a court shall take a decision' and Article 441 § 1 CPC determines when an appellate court can adjourn hearing a case and ask a legal question to the Supreme Court. That is why, the dominating opinions in the legal doctrine[10] are for traditional division of judgments into sentences and decisions and does not cover the Supreme Court resolutions. On the other hand, some representatives of the doctrine of criminal procedure[11] classify the Supreme Court resolutions as judgments, however, this is applicable only to resolutions that are answers to legal questions referred to the Supreme Court, in accordance with Article 441 §§ 1 and 3 CPC, and does not concern the Supreme Court resolutions passed in accordance with Article 82 and Article 83 Act on the Supreme Court. This point of view, however, does not supply precise criteria justifying the classification of the Supreme Court resolutions as judgments, but it emphasises that 'resolutions are passed within the non-instance-related supervision and concern interpretation of the provisions of law'.[12] This shows their interpretative nature. As a result, a question is raised whether defining the precise criteria is possible at all. It seems that determination of positive criteria indicating similarity of the Supreme Court resolutions to judgments can be difficult. On the other hand, providing negative criteria excluding the assumption that the Supreme Court resolutions are judgments is possible and these can include:

1) The inability to recognise a resolution as an imperative judgment on the subject matter of a trial, and thus the liability of the accused;[13]
2) Resolutions are not amenable to review, unlike judgments, which can be appealed against in accordance with the provisions of the Criminal Procedure Code: Article 444 and Article 506 § 1 in the case of a sentence and Article 459 in the case of a decision;
3) The lack of regulation in the Criminal Procedure Code concerning:
   a) the course of a consultation and voting on a resolution,
   b) developing and signing resolutions,

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[9] R.A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych*, Zakamycze 2001, p. 339; *idem*, *Rodzaje rozstrzygnięć Sądu Najwyższego w przedmiocie pytań prawnych*, Wojskowy Przegląd Prawniczy 3–4, 2000, p. 55.

[10] M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984, p. 53; W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Vol. II, Bydgoszcz 2001, p. 33; T. Grzegorczyk, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, 4th edn amended and supplemented, Warszawa 2003, p. 386; H. Paluszkiewicz, [in:] K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, 3rd edn, Warszawa 2017, p. 216; J. Skorupka, [in:] D. Gruszecka, K. Kremens, K. Nowicki, J. Skorupka (ed.), *Proces karny*, Warszawa 2017, p. 333.

[11] K. Marszał, *Proces karny*, *supra* n. 4, p. 308; S. Waltoś, [in]: S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2016, p. 47; A. Kordik, F. Prusak, Z. Świda, *supra* n. 4, p. 104.

[12] Thus, A. Kordik, F. Prusak, Z. Świda, *supra* n. 4, p. 104.

[13] R.A. Stefański, *Instytucja*, *supra* n. 9, p. 339.

c) the possibility of dissenting, even from the justification of the resolution; in the case of a judgment, such a possibility is laid down in Article 114 § 2 CPC,
d) adjourning the issue of a resolution,
e) correction of obvious clerical errors.

4) The lack of a statutory regulation concerning the elements a resolution should contain.

It is worth mentioning that after the present Criminal Procedure Code entered into force, a question was asked in the doctrine[14] whether the CPC provisions concerning, e.g. the secrecy of consultation and voting, the possibility of dissenting, the mode of signing and announcing resolutions or serving them, correcting obvious errors, etc., are applicable to the Supreme Court resolutions. At the same time, attention is drawn to the fact that 'reference made in Article 458 CPC concerning "application by analogy" of the provisions regarding proceedings before a court of first instance in appellate proceedings does not seem sufficient because it is placed in Chapter 49 entitled Appeal, while the provisions concerning legal questions (Article 441 CPC) are in Chapter 48 entitled General provisions, and the reference can be applicable only by means of far-reaching analogy'.[15] Jerzy Bratoszewski[16] rightly notices that 'it constituted an unquestioned statutory defect, and there was an attempt to eliminate it in a normative act of a lower rank, i.e. Regulation of the President of the Republic of Poland of 29 March 1991,[17] which constitutes the so-called rules and regulations of the Supreme Court'. It was intended to introduce a regulation stipulating that the provisions concerning judgments are applicable to resolutions by analogy to one of the bills of the Code of Criminal Procedure. However, in the course of legislative work, the idea was abandoned.[18] The above-mentioned legal state resulted in amendments to the Supreme Court Rules and Regulations of 27 September 1984,[19] and a change in the regulation concerning the possibility of dissenting from a resolution, substituted by a ban on it (§ 40(2) of the Supreme Court Rules and Regulations), which was justified by the fact that a resolution is not a judgment, thus the provisions of Articles 113 and 114 CPC are not applicable.[20]

At present the above issues are provided for in Regulation of the President of the Republic of Poland of 29 March 2018: the Supreme Court Rules and Regulations.[21]

The provision of § 111(1) of the Supreme Court Rules and Regulations stipulates that a resolution must be passed after a closed session of the adjudicating panel. The session consists of a report presented by a reporting judge, a discussion, voting, a discussion of the fundamental motives behind the judgment, and the development of a resolution. All judges must sign the resolution. A judge who dissents can report

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[14] J. Bratoszewski, *Działalność uchwałodawcza Sądu Najwyższego. Wybrane problemy*, [in:] T. Nowak (ed.), *Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci profesora Wiesława Daszkiewicza*, Poznań 1999, p. 184.

[15] *Ibid*.

[16] *Ibid*., pp. 184–185.

[17] Dz.U. No. 34, item 153.

[18] J. Bratoszewski, *supra* n. 14, p. 185.

[19] Monitor Polski of 30 October 1984, No. 24, item 165.

[20] J. Bratoszewski, *supra* n. 14, p. 185.

[21] Dz.U. of 30 March 2018, item 660.

his/her voice of dissent by making a relevant annotation when signing the resolution (§ 111(3) Supreme Court Rules and Regulations).

A resolution must be announced straight after it has been passed. In extraordinary situations, the Court can adjourn the announcement of the resolution for 14 days. The presiding judge announces the resolution in the presence of the adjudicating bench also when its announcement has been adjourned. On the request of a judge reporting a voice of dissent, the presiding judge announces this fact (§ 112(1) and (2) Supreme Court Rules and Regulations). The presiding judge develops justification of a resolution within 30 days (§ 112(3) Supreme Court Rules and Regulations). He is not obliged to develop justification of a resolution to which the voice of dissent has been reported. All judges, without exception, including those who have been outvoted or who have reported a voice of dissent, sign a resolution. If a judge cannot sign the justification, the presiding judge or the judge with the longest tenure annotates the reason for the lack of such signature. The moment when the justification of a resolution is being signed, a judge can report his/her voice of dissent to the justification (Article 112(6) *in principio* Supreme Court Rules and Regulations).

With reference to point (4) in the above listing, such a regulation is provided for in relation to a sentence (Article 413 §§ 1 and 2 CPC) and a decision (Article 94 § 1 CPC). Despite the lack of a clear regulation concerning the elements of a resolution in the Criminal Procedure Code, it is assumed in the doctrine[22] that a resolution should contain:

– the indication of a court, judges, a prosecutor and a minute taker,
– the date and place of resolving a legal question,
– the given name and surname of the accused and the legal classification of an act one is charged with,
– the indication of a court that has asked a legal question,
– the legal grounds for asking a legal question,
– the content of a legal question,
– the resolution of a legal question,
– the justification.

Thus, the part of the resolution that constitutes a default rule should contain a thesis. The resolution should contain justification providing an explanation that the requirements for asking a legal question have been met and the issue referred by an appellate court really requires fundamental interpretation of a statute, and it should substantiate the answer given with relevant arguments therefor. The content of the explanation cannot be limited to quoting the thesis of a resolution but the justification must indicate a given relation between an interpretative decision taken as a result of the interpretative process and a norm that is subject to interpretation and grounds for giving this interpretation.[23] Thus, Ryszard A. Stefański[24] is right to state that 'the justification of a resolution should be treated as its integral part because

[22] R.A. Stefański, *Instytucja*, *supra* n. 9, p. 340.
[23] *Ibid*., p. 340 and the literature referred to therein.
[24] *Ibid*., p. 341 and the literature referred to therein.

a sentence alone does not fulfil a preventive function'. Not only the justification of a resolution is of key importance but also the way in which it is developed; and the strength of the resolution impact depends on that to a great extent.[25]

The above discussion leads to a conclusion that it is hard to classify as judgments the Supreme Court resolutions passed in accordance with Article 441 § 1 CPC or Article 82 § 1 Act on the Supreme Court, due to the above-mentioned criteria that are grounds for their assessment provided within the scope of judgments. They do not constitute judgments in the precise sense as those are imperative in nature and, as it has been raised earlier, adjudicate on the subject matter of particular proceedings, a procedural or an incidental issue. They are rather the Supreme Court's procedural decisions on a legal issue that requires fundamental interpretation of a statute or solving a legal issue in a situation when there are serious doubts concerning the interpretation of provisions of law being grounds for a judgment.

Resolutions express the Supreme Court's opinions concerning not only how the provisions of a statute should be interpreted; thus, they are acts of knowledge and not of will.[26] They are only similar to an imperative declaration because the interpretation provided by the Supreme Court in a given case is binding (*arg. ex* Article 441 § 3 CPC). This concerns resolutions passed in accordance with Article 441 CPC, however, a judgment in a given case in which a legal question has arisen, required fundamental interpretation of a state, and has been referred to the Supreme Court is within the competence of a court *ad quem*, which is hearing such case.

In the light of the above, it should be assumed that the Supreme Court resolutions constitute procedural decisions that are interpretative in nature and do not have features of a decision passed as a judgment of an imperative judicial act containing a solution resulting from categorisation. They do not decide on the procedural consequences of a particular established fact[27] but indicate proper interpretation of legal provisions that raise serious doubts in judicial practice.

It is emphasised in the Constitutional Tribunal case law[28] that 'in the state ruled by law, an interpreter must always first of all take into account the linguistic meaning of a legal text. If the linguistic meaning of such text is clear, then, in accordance with the *clara non sunt interpretanda* principle, there is no need to look for another, non-linguistic method of interpretation'.

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[25] For more on the topic, see *ibid*., p. 341.

[26] W. Daszkiewicz, *Proces karny. Część ogólna*, 3rd edn updated and supplemented, Poznań 1996, p. 248. In literature concerning civil procedure law, the resolutions are called 'interpretative decisions'. See S. Włodyka, *Wiążąca wykładnia sądowa*, Warszawa 1971, pp. 11–13. Kazimierz Piasecki also classifies them as decisions (although not judgments) and states that the interpretation provided in resolutions concerning particular cases have judicial features; they are 'an element of a future judgment and are a factor for a court's decision', see K. Korzan, *Orzeczenia sądowe i ich podział*, [in:] *System Prawa Procesowego Cywilnego. Postępowanie rozpoznawcze przed sądem pierwszej instancji*, Wrocław–Kraków–Gdańsk–Łódź 1987, Vol. II, p. 270 (citation after W. Daszkiewicz, *Proces karny*, *supra* n. 26, p. 247).

[27] E. Skrętowicz, [in:] R. Kmiecik, E. Skrętowicz, *supra* n. 6, p. 274.

[28] See the Constitutional Tribunal judgment of 8 June 1999, SK 12/98, OTK 5/1999.

Therefore, a rule was formulated in the doctrine[29] and case law[30] that 'specifies the sequence of application of various interpretation methods: linguistic interpretation, systemic interpretation, functional (purpose-related) interpretation, and sometimes historic interpretation used as an auxiliary method [the author's annotation]. In accordance with the *interpretatio cessat in claris* principle, it is not always necessary to apply all those methods successively, in particular there is no need to use purpose-related directives if proper interpretation results can be obtained, i.e. the meaning of a norm can be established, with the use of linguistic or linguistic and systemic directives'. It is rightly noticed in the doctrine[31] that 'the Supreme Court has repeatedly emphasised that, in accordance with the adopted principles concerning the interpretation of law, the basic method shall be linguistic (grammatical) interpretation, however, it cannot be the only one when there are doubts concerning the fairness and justice of a provision. Interpreting a text written in the legal language, an interpreter should rely on the results of the linguistic interpretation and then, if it leads to doubts that cannot be eliminated, he can use the systemic interpretation, and if this method also fails to eliminate interpretative doubts, the functional interpretation can be applied'. In some cases, the Supreme Court raises that it is not authorised to substitute for the legislator and cannot provide interpretation because it would mean typical legislation.[32] It seems that such a conclusion can be a signal sent to the legislator indicating the need to make particular amendments to the law.

The Supreme Court passes a resolution that contains an answer to a legal question in a particular case in an open session and, in other cases, in a closed session. A body that has filed a motion can also take part in the session (§ 107(1) Supreme Court Rules and Regulations). The Supreme Court resolutions, as it has already been mentioned above, are not amenable to review. In a situation when they are passed in particular cases, they are sent to particular appellate courts, which notify parties to the proceedings of their content (*arg. ex* Article 100 § 5 CPC). It is so because the provisions concerning judgments are applied to them by analogy.[33]

In the Supreme Court's practice of passing resolutions,[34] it is assumed that resolutions are not judgments in the exact sense; however, they influence lower-instance court judgments and have impact on the Supreme Court case law uniformity. In the doctrine[35] of criminal procedure, they are rightly recognised as non-instance-related judicial supervision exercised by the Supreme Court as a result of an initiative of a court of higher instance hearing an appeal. However, in the legal system in which

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[29] L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002, pp. 116–117.

[30] See the Supreme Court judgment of 8 May 1998, I CKN 664/97, OSNC 1997, No. 1, item 7; the Supreme Court ruling of 1 July 1997, V KZ 31/99, OSNKW 1999, No. 9–10, item 63.

[31] M. Pilarska-Gumny, *Konkretne pytania prawne do Sądu Najwyższego w sprawach karnych*, Ius Novum 2, 2013, p. 74 and the opinions of the legal doctrine and the Supreme Court case law referred to therein.

[32] See justification of the Supreme Court resolution of 23 January 2020, BSA-I-4110-1/2020, LEX No. 2770251.

[33] J. Bratoszewski, *supra* n. 14, p. 185.

[34] *Ibid*.

[35] R.A. Stefański, *Instytucja*, *supra* n. 9, p. 151 and the opinions of the legal doctrine referred to therein.

the Supreme Court is a court of second instance hearing an appeal against judgments passed in a voivodship court of first instance,[36] it has been assumed that the Supreme Court resolution passed in such cases when a legal issue has raised doubts contains elements of instance-related supervision because, as a rule, a common court adjudicating in a particular case concerning an appeal usually requests it from a bench of seven judges.[37] It is true that a legal question asked in order to obtain a resolution has its source in a particular case because it arises in connection with hearing an appeal, however, this remains with no influence on the legal nature of a resolution concerning the issue, especially as it is not passed by a court of second instance. It is due to the fact that solving a legal issue in the form of a resolution takes place before a court of second instance passes a judgment on the appeal, which prevents the issue of an erroneous judgment by that court. It is rightly highlighted in the case law[38] that the role of those resolutions consists in 'preventing the issue of defective judgments that are not amenable to review within standard appellate measures […]. It is simply aimed at avoiding situations in which an appellate court, having doubts concerning the way of interpreting the provisions of law that it plans to apply, has to judge a matter on its merits and pass a final judgment despite unresolved doubts'.

Due to the above, the Supreme Court resolutions are classified in the doctrine[39] also in the category of preventive measures. This is because they constitute an important means of the Supreme Court's influence on ensuring uniformity and conformity with lower-instance courts' right to judge, and they considerably affect the consistent interpretation of law.[40]

In the light of the discussed issues, it is also necessary to consider the legal nature of the Supreme Court resolutions passed in the case of discrepancies between the interpretation of the provisions of law that are grounds for judgments issued by common or military courts or the Supreme Court (Article 83 § 1 Act on the Supreme Court). The issue was a matter of argument even in the context of the Act on the Supreme Court of 1962. There were different opinions on this issue presented in literature. According to one of them, 'resolutions were legal opinions for bodies authorised to file motions to issue them'.[41] According to Stanisław Włodyka[42], 'the Supreme Court resolutions passed in accordance with Article 29 para. 1 Act on the Supreme Court of 1962 were a measure ensuring proper judgments of the Supreme Court itself and showed elements of both a legal opinion and a means of judicial supervision, thus, from this point of view, were mixed in

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[36] M. Rybicki, *Pozycja ustrojowa Sądu Najwyższego w PRL (Geneza, ewolucja, perspektywy)*, Państwo i Prawo 5, 1980, p. 24.

[37] H. Kempisty, *Ustrój sądów. Komentarz*, Warszawa 1966, pp. 42–43.

[38] See the Supreme Court ruling of 19 February 1997, I KZP 31/97, unpublished.

[39] R.A. Stefański, *Instytucja*, *supra* n. 9, p. 152 and the opinions of the legal doctrine referred to therein.

[40] S. Włodyka, *Organizacja sądownictwa*, Kraków 1959, p. 263.

[41] M. Waligórski, *Proces cywilny. Funkcja i struktura*, Warszawa 1947, p. 696.

[42] S. Włodyka, *Organizacja sądownictwa*, *supra* n. 40, p. 275; *idem*, *Organizacja wymiaru sprawiedliwości w PRL*, Warszawa 1963, p. 166; *idem*, *Funkcje Sądu Najwyższego*, Kraków 1965, p. 136; *idem*, *Wiążąca wykładnia*, *supra* n. 26, p. 132.

nature'.[43] Marian Cieślak[44] classified those resolutions as the measures of judicial supervision over lower-instance courts' judgments. Kazimierz Marszał[45] expressed an opinion that 'resolutions passed in accordance with Article 29 para. 1 Act on the Supreme Court belong to the measures of non-instance-related supervision that let the Supreme Court supervise common and special courts' judgments and eliminate discrepancies between the interpretation of provisions in force, and their basic function is to ensure proper judgments of the Supreme Court itself'.

Article 13 para. 3 Act on the Supreme Court of 20 September 1984[46] stipulated that the Court should perform its functions inter alia by passing resolutions aimed at explaining legal provisions that raise doubts in practice or the application of which has caused discrepancies in case law. The above-mentioned Act on the Supreme Court did not determine the legal nature of resolutions passed in accordance with Article 13 para. 3. That is why, it was claimed in literature[47] that the legal nature of those resolutions was not unquestionable and, as a result, it was assumed[48] that 'resolutions passed in accordance with Article 13 para. 3 Act on the Supreme Court of 1984 were aimed at explaining legal provisions raising doubts or the application of which caused discrepancies in case law, or when particular provisions (a provision) raised doubts in case law, and at ensuring uniformity of the interpretation of law and judicial practice'. In the opinion consistently presented by K. Marszał,[49] 'the Supreme Court resolutions passed in accordance with Article 13 para. 3 Act on the Supreme Court of 1984 belonged to non-instance-related measures of supervision exercised by the Supreme Court, which were aimed to explain legal provisions raising doubts or the application of which caused discrepancies in case law. The interpretative directive included in the resolution passed in accordance with Article 13 para. 3 Act on the Supreme Court of 1984 was "a norm in a norm".' The above author took a similar stand with reference to Article 60 § 1 Act on the Supreme Court of 23 November 2002[50] and assumed that 'resolutions passed in accordance with the above-mentioned provision aim to ensure uniformity of the interpretation of law in the Supreme Court as well as in common and military courts'.[51]

According to M. Zbrojewska,[52] 'what is a characteristic feature of resolutions, passed in accordance with Article 60 § 1 Act on the Supreme Court of 2002 [the author's annotation], is the fact that they do not constitute a measure of direct judicial supervision because they are not addressed to lower courts and do not bind

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[43] S. Włodyka, *Organizacja wymiaru sprawiedliwości*, *supra* n. 42, p. 166; *idem*, *Funkcje Sądu Najwyższego*, *supra* n. 42, p. 136; *idem*, *Ustrój organów ochrony prawnej*, Warszawa 1968, p. 149; *idem*, *Wiążąca wykładnia*, *supra* n. 26, p. 132 et seq.

[44] M. Cieślak, *Pojęcie i rodzaje nadzoru w procedurze karnej na tle obowiązującego prawa*, Państwo i Prawo 8–9, 1963, p. 249.

[45] K. Marszał, *Zagadnienia ogólne procesu karnego*, Vol. I, Katowice 1984, pp. 255–256.

[46] Dz.U. No. 45, item 241.

[47] W. Sanetra, *Wyjaśnianie przepisów prawnych przez Sąd Najwyższy a zagadnienie powszechnej wykładni ustaw*, Przegląd Sądowy 4, 1992, p. 24.

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

[49] K. Marszał, *Proces karny*, 2nd edn amended and supplemented, Katowice 1995, p. 129.

[50] Dz.U. No. 240, item 2052, as amended.

[51] K. Marszał, *Proces karny*, *supra* n. 4, p. 190.

[52] M. Zbrojewska, *supra* n. 3, p. 174.

those courts, nevertheless, they are a form of general interpretation of law aimed at indicating a proper line of judgment'. The Supreme Court took a stand that 'resolutions passed in accordance with Article 60 Act on the Supreme Court of 2002 are a measure of judicial supervision aimed at ensuring uniformity of judgments issued by common and military courts as well as the Supreme Court'.[53] The stand should be fully approved of.

Referring to the *de lege lata* state, it should be noticed that both in the doctrine[54] and the case law[55] there is an established uniform stance that passing resolutions by the Supreme Court in accordance with Article 83 § 1 Act on the Supreme Court takes place only when there are discrepancies in the interpretation of the provisions of law that are grounds for judgments, and the explanation of those discrepancies aims to ensure uniformity of case law. The aim can be achieved thanks to the Supreme Court's interpretation of the provisions of law. In such a situation, the interpretation is not connected with a particular case and thus it is abstract in nature.

The Supreme Court provides the interpretation within the measures of non-instance-related supervision,[56] which leads to a conclusion that the Supreme Court resolutions passed in accordance with Article 83 Act on the Supreme Court constitute a measure of non-instance-related judicial supervision. Their nature is not changed by the fact that they are not addressed directly to lower-instance courts and they do not bind them, and that only resolutions passed by the full composition of the Supreme Court, joint chambers and the full composition of the chamber at the time when they are passed, have the power of legal principles binding exclusively the Supreme Court benches.[57] As a result, this means that they cannot decide in conflict with a legal principle, unless the legal state changes or the Supreme Court, following a relevant procedure, abandons the particular legal principle.

Summing up the above discussion, it should be stated that the Supreme Court resolutions do not constitute judgments in the precise sense, which are imperative in nature, adjudicating the subject matter of a particular trial both with respect to procedural and incidental issues, but they are procedural decisions of the Supreme Court resolving a legal issue that requires fundamental interpretation of a statute or resolving a legal question in a situation when doubts have been raised concerning the interpretation of provisions of law that are grounds for issuing judgments.

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[53] See justification of the resolution of seven judges of the Supreme Court of 27 October 2005, I KZP 38/05, OSNKW 2005, No. 11, pp. 4–5.

[54] K. Marszał, [in:] R. Koper, K. Marszał, J. Zagrodnik (ed.), K. Zgryzek, *Proces karny*, Warszawa 2019, pp. 175–176; K. Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz*, Warszawa 2018, p. 434 et seq.

[55] See the Supreme Court ruling of 22 September 2004, III CZP 25/04, OSNC 2005, No. 7–8, item 146; the Supreme Court ruling of 25 February 2005, I KZP 33/04, LEX No. 142537; the Supreme Court ruling of 24 February 2006, III CZP 91/05, LEX No. 180669; the Supreme Court ruling of 27 January 2009, I KZP 24/08, OSNKW 2009, No. 2, item 12; justification of the resolution of seven judges of the Supreme Court of 20 June 2012, I KZP 8/12, OSNKW 2012, No. 7, item 71; resolution of seven judges of the Supreme Court of 29 October 2012, I KZP 17/12, OSNKW 2012, No. 12, item 123.

[56] K. Marszał, [in:] R. Koper, K. Marszał, J. Zagrodnik (ed.), K. Zgryzek, *supra* n. 54, p. 176.

[57] K. Szczucki, *Ustawa o Sądzie Najwyższym*, *supra* n. 54, p. 453.

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LEGAL NATURE OF THE SUPREME COURT RESOLUTIONS

Summary

The article presents the issue of the legal nature of the Supreme Court resolutions. The nature is a matter of argument in the doctrine. There are three diverse viewpoints on this issue. According to one of them, 'the Supreme Court resolutions are judgments'. Another stance is that 'the Supreme Court resolutions constitute a separate group; however, they are not court judgments that concern the subject matter of a trial because they do not adjudicate directly on its subject matter'. The third opinion is that 'the Supreme Court resolutions passed in accordance with Article 441 § 1 CPC and resolving legal issues do not belong to the category of judgments'. The analysis conducted in the article results in a conclusion that the Supreme Court resolutions do not constitute judgments in the precise sense, that are imperative in nature, that adjudicate on the subject matter of a particular trial with regard to both procedural and incidental issues, but they are the Supreme Court's procedural decisions that resolve a legal issue requiring fundamental interpretation of a statute or resolve a legal issue in a situation when doubts have been raised concerning the interpretation of provisions of law being grounds for issued judgments.

Keywords: Supreme Court, judicial supervision, non-instance-related supervision, judgment, sentence, decision, resolution

CHARAKTER PRAWNY UCHWAŁ SĄDU NAJWYŻSZEGO

Streszczenie

Przedmiotem opracowania jest charakter prawny uchwał Sądu Najwyższego. Charakter ten jest sporny w doktrynie. W tym zakresie występują trzy odmienne stanowiska. Według jednego z nich „uchwały Sądu Najwyższego są orzeczeniami". Drugie stanowisko przyjmuje, iż „uchwały Sądu Najwyższego stanowią odrębną grupę orzeczeń, nie są jednak orzeczeniami sądu, które dotyczą przedmiotu procesu, ponieważ nie rozstrzygają wprost o jego przedmiocie". Trzeci kierunek głosi, że „uchwały Sądu Najwyższego, wydawane na podstawie art. 441 § 1 k.p.k., rozstrzygające zagadnienia prawne, nie należą do kategorii orzeczeń". Przeprowadzone rozważania w niniejszym artykule prowadzą zatem do konkluzji, że uchwały Sądu Najwyższego nie stanowią orzeczeń *sensu stricto* o charakterze imperatywnym, rozstrzygającym o przedmiocie konkretnego procesu, zarówno co do kwestii procesowej, jak i w kwestii incydentalnej, lecz są decyzją procesową Sądu Najwyższego, rozstrzygającą zagadnienie prawne, wymagające zasadniczej wykładni ustawy lub rozstrzygają zagadnienia prawne w sytuacji, gdy zostały powzięte wątpliwości co do wykładni przepisów prawa będących podstawą wydanego rozstrzygnięcia.

Słowa kluczowe: Sąd Najwyższy, nadzór judykacyjny, nadzór pozainstancyjny, orzeczenie, wyrok, postanowienie, uchwała

CARÁCTER LEGAL DE ACUERDOS DEL TRIBUNAL SUPREMO

Resumen

El artículo analiza el carácter legal de acuerdos del Tribunal Supremo, que es discutido en la doctrina. Existen tres posturas diferentes. Una de ellas considera acuerdos del Tribunal Supremo como resoluciones judiciales. La segunda postura admite que los acuerdos del Tribunal Supremos constituyen un grupo separado de resoluciones judiciales, pero no son resoluciones judiciales del tribunal las que se refieren al objeto de proceso, porque no resuelven directamente sobre su objeto. Según la tercera opinión, los acuerdos del Tribunal Supremo expedidos en virtud del art. 441 § 1 del código de procedimiento penal que resuelven sobre cuestiones prejudiciales, no pertenecen a la categoría de resoluciones judiciales. El análisis llevado a cabo en el presente artículo lleva a la conclusión que los acuerdos del Tribunal Supremo no son las resoluciones judiciales *sensu stricto* de carácter imperativo que resuelven sobre objeto de proceso en concreto, tanto en cuanto a la cuestión procesal como incidental, sino que son decisiones procesales del Tribunal Supremo cuando se pronuncia sobre cuestiones prejudiciales que requieran la interpretación fundamental de la ley o sobre cuestiones prejudiciales en caso haya dudas sobre la interpretación de la ley que constituya fundamento de la resolución expedida.

Palabras claves: el Tribunal Supremo, control judicial, control fuera de la instancia, resolución judicial, sentencia, auto, acuerdo

ПРАВОВАЯ ПРИРОДА РЕЗОЛЮЦИЙ ВЕРХОВНОГО СУДА

Аннотация

Работа посвящена вопросу, вызывающему разногласия в юридической доктрине, а именно: правовой природе резолюций Верховного суда. В этом отношении преобладают три различных подхода. Согласно первому из них, «резолюции Верховного суда являются судебными решениями». Второй подход предполагает, что «хотя резолюции Верховного Суда и образуют особую группу судебных решений, они не являются судебными решениями по предмету процесса, так как в них не содержится непосредственное разрешение предмета разбирательства». Согласно третьему подходу, «резолюции Верховного суда, принятые на основании ст. 441 § 1 УПК для разрешения юридических проблем, не относятся к категории судебных решений». Рассмотрев данный вопрос, автор приходит к выводу, что резолюции Верховного суда, строго говоря, не являются судебными решениями, носящими императивный характер и разрешающими предмет конкретного процесса в процедурном или побочном аспекте. Резолюцию Верховного суда следует рассматривать как процессуальное решение по юридическому вопросу, требующему фундаментального толкования закона, либо в ситуации, когда возникли сомнения относительно толкований положений закона, на основании которых было принято судебное решение.

Ключевые слова: Верховный суд, судебный надзор, внесудебный надзор, судебное решение, приговор, постановление, резолюция

DIE RECHTSNATUR DER BESCHLÜSSE DES POLNISCHEN OBERSTEN GERICHTS

Zusammenfassung

Gegenstand der Untersuchung ist die Rechtsnatur der Beschlüsse des Obersten Gerichts (Sąd Najwyższy), der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen. Über diese rechtliche Natur solcher Beschlüsse herrscht in der Rechtslehre keine Einigkeit. So werden in dieser Frage drei verschiedene Positionen vertreten. Einer von ihnen zufolge sind „Beschlüsse des polnischen Obersten Gerichts Urteile". Demgegenüber wird in der zweiten Position davon ausgegangen, dass „Beschlüsse des Obersten Gerichts eine eigene Gruppe von Urteilen darstellen, es sich dabei aber nicht um Gerichtsurteile handelt, die sich auf den Gegenstand des Verfahrens beziehen, da sie nicht unmittelbar über den Prozessgegenstand entscheiden". Die dritte Sicht ist, dass „Beschlüsse des polnischen Obersten Gerichts, die auf der Grundlage von Artikel 441 § 1 der polnischen Strafprozessordnung ergehen und über Rechtsfragen entscheiden, nicht in die Kategorie der Gerichtsurteile fallen". Die im Artikel angestellten Erwägungen führen so zu dem Schluss, dass die Beschlüsse des polnischen Obersten Gerichts streng genommen keine Gerichtsurteile mit Bindungswirkung sind, die – in Bezug auf die verfahrensrechtlichen Fragestellungen oder einen Zwischenstreit – über den Gegenstand eines bestimmten Verfahrens entscheiden, sondern einen auslegenden Beschluss des Gerichtshofs zu einer juristischen Frage darstellen, die eine grundlegende Gesetzesauslegung erfordert oder über eine Rechtsfrage entscheiden, wenn Zweifel hinsichtlich der Auslegung der Rechtsvorschriften bestehen, die der erlassenen Entscheidung zugrunde liegen.

Schlüsselwörter: polnisches Oberstes Gericht, richterliche Kontrolle, außerinstanzliche Aufsicht, Gerichtsurteil, Urteil, Entscheidung, Beschluss

NATURE JURIDIQUE DES RÉSOLUTIONS DE LA COUR SUPRÊME

Résumé

Le sujet de l'étude est la nature juridique des résolutions de la Cour suprême. Cette nature est contestée dans la doctrine. Il existe trois positions différentes à cet égard. Selon l'une d'elles, «les résolutions de la Cour suprême sont des jugements». La deuxième position part du principe que «les résolutions de la Cour suprême constituent un groupe distinct de jugements, mais ce ne sont pas des décisions judiciaires qui se rapportent à l'objet du procès parce qu'elles ne déterminent pas directement son objet». La troisième position est que «les résolutions de la Cour suprême rendues sur la base de l'art. 441 § 1 du code de procédure pénale, qui résolvent des questions juridiques, n'entrent pas dans la catégorie des jugements». Par conséquent, les considérations formulées dans cet article conduisent à la conclusion que les résolutions de la Cour suprême ne constituent pas des jugements impératifs statuant strictement sur le sujet d'un procès spécifique, tant en ce qui concerne les questions de procédure que les incidents, mais constituent une décision de procédure de la Cour suprême résolvant une question juridique, exigeant une interprétation fondamentale de la loi ou résolvant des questions juridiques dans les cas où des doutes ont surgi quant à l'interprétation des dispositions juridiques sous-tendant la décision rendue.

Mots-clés: Cour suprême, contrôle judiciaire, contrôle extrajudiciaire, décision, jugement, arrêt, résolution

CARATTERE GIURIDICO DELLE DELIBERE DELLA CORTE SUPREMA

Sintesi

Oggetto dell'elaborato è il carattere giuridico delle delibere della Corte Suprema. Tale carattere è controverso nella dottrina. In tale ambito sono presenti tre diverse posizioni. Secondo una di esse "le delibere della Corte Suprema sono sentenze". La seconda posizione sostiene che "le delibere della Corte Suprema costituiscono un gruppo distinto di sentenze, non sono tuttavia sentenze del tribunale inerenti al merito del processo, in quanto non si pronunciano direttamente circa il suo merito". La terza posizione sostiene che "le delibere della Corte Suprema, emesse sulla base dell'art. 441 § 1 del Codice di procedura penale, che si pronunciano su questioni giuridiche, non fanno parte della categoria delle sentenze". Le riflessioni condotte nel presente articolo portano alla conclusione che le delibere della Corte Suprema non costituiscono sentenze in senso stretto di carattere imperativo, che si pronunciano in merito a un determinato processo, sia per quanto riguarda le questioni procedurali che quelle incidentali, ma sono una decisione processuale della Corte Suprema, che si pronuncia su una questione giuridica che richiede un'interpretazione sostanziale della legge, oppure che si pronuncia su una questione giuridica nella situazione in cui siano stati sollevati dubbi circa l'interpretazione delle norme di legge che costituiscono la base della pronunciazione emessa.

Parole chiave: Corte Suprema, controllo della magistratura, controllo giuridico, sentenza, ordinanza, delibera

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LEGAL NATURE OF AN OFFICIAL ACT OF THE PRESIDENT OF THE REPUBLIC OF POLAND PRONOUNCING RETIREMENT OF THE SUPREME COURT JUDGE

ZBIGNIEW CZARNIK*

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1. RETIREMENT OF THE SUPREME COURT JUDGE AS A CONDITION FOR PRESIDENT'S OFFICIAL ACT

The retirement of a judge is a complex issue due to the reasons for the change in a judge's service relationship and the form of the its pronouncement. In addition, there are juridical complications in this area because the Polish legal system does not lay down uniform rules of confirming a judge's retirement. The solutions adopted in relation to common court judges differ from those applicable to judges of the Supreme Court and the Supreme Administrative Court. In this respect, many doubts are raised and they are reflected in the disputes that arise at present. Arguments raised in them do not always refer to the legal regulations in force and, as a result, they become unjustified statements made as a result of political and not legal debates. The analysis herein aims to present this issue from a normative perspective, i.e. rules adopted in law and these presented in case law. It focuses on one of its aspects, namely that connected with the legal status of the President of the Republic of Poland in the procedure of recognising that a judge has retired or has been retired because, in accordance with the law in force, the President formally pronounces both of the above-mentioned circumstances. Thus, the considerations presented concern the formal aspect of retirement and this means that substantive conditions for retirement are treated as those of minor importance and in a general way, which is necessary for proper illustration of the applicable retirement proce-

* PhD hab., Professor of the WSPiA University of Rzeszów, judge of the Supreme Administrative Court in Warsaw; e-mail: zbigniew.czarnik@wp.pl; ORCID: 0000-0001-8459-1108

dural institutions. Such an approach seems justified because the substantive context of retirement has been discussed in many theoretical papers recently.[1]

Undoubtedly, the statutory reduction of the retirement age of judges that was introduced in the Act on the Supreme Court[2] provides the foundations for discussion connected with retirement; however, it seems that the form in which this fact is confirmed by relevant bodies is not less important. The adoption of appropriate legal solutions in the area has influence on their assessment from the point of view of conformity with the Constitution of the Republic of Poland and international standards. Complex evaluation of the issue would go beyond the framework delimited by the title of this paper, however, the adopted solutions applicable to judges of the Supreme Court and the Supreme Administrative Court can be universal in nature. Thus, in the case of adequate application of the solutions to the status of every judge makes it possible to refer these formulated also to judges of common courts. Although in their case, the body in charge, i.e. one issuing relevant acts, is the Minister of Justice and the normative approach to his competences is a little different from those of the President of the Republic of Poland based on the Act on the Supreme Court, in order to maintain structural cohesion of the activities of the two bodies and the uniform nature of retirement, it should be assumed that such activities cannot be interpreted diversely.

Judges' retirement is a legal state within their service relationship in which a judge's situation is as a result of circumstances prescribed by the law. Its essence consists in the inability to hold the office.[3] Thus, the state is similar to an employee's retirement but different from it in general because it is connected with the continuation of the judge's service relationship, although without the competence to adjudicate.[4] Thus, the state of retirement only changes the legal nature of a judge's relationship without dissolution of the ties resulting from the act of appointment. The definition of this characteristic feature of the state of judges' retirement is essential because of the need to determine a certain and unambiguous moment when the relationship created by the act of appointment changes. It is all the more important when we consider that the moment a judge retires, he or she does not only lose the power to adjudicate but also, as a person inactive in the service, he or she cannot act in the area related with the current operation of courts. It is also worth mentioning that many activities of this type are procedural and directly involve the issue of judgments. That is why, an act issued by the President of the Republic of Poland pronouncing the change in a judge's service relationship becomes an important element of the properly operating system of justice.

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[1] See M. J. Zieliński, *Obniżenie ustawowej granicy przechodzenia w stan spoczynku przez sędziów sądów powszechnych, administracyjnych i Sądu Najwyższego w świetle przepisów dyrektyw 2000/78/WE oraz 2006/54/WE*, Przegląd Sądowy 10, 2018, pp. 5–25; also: A.M. Świątkowski, *Prawny spór o zgodność z Konstytucją RP regulacji i ich następstw osiągnięcia „wieku emerytalnego" przez sędziów Sądu Najwyższego*, Palestra 10, 2018, pp. 5–12.

[2] Act on the Supreme Court of 8 December 2017 (Dz.U. 2020, item 190).

[3] See B. Stępień-Załucka, *Sędziowski stan spoczynku. Studium konstytucyjnoprawne*, Warszawa 2019, pp. 79–80.

[4] For more, I. Raczkowska, *Stan spoczynku sędziów i prokuratorów*, Warszawa 2003, p. 17 et seq.

In jurisprudence[5] and case law[6], there are no doubts that judges' retirement is inseparably connected with judicial independence. According to the Constitution of the Republic of Poland, it is a type of privilege consisting in judges' discretion and independence.[7] Although it does not give grounds for stating that there is a need to treat this professional group in a special way, it makes it possible to maintain far-reaching independence even after a judge has stopped holding the office. It is connected with the right to statutory remuneration as well as the obligation to take care of the dignity of a judge's post. The reasons for judges' retirement can be of a different nature but should be determined in statute because only this approach guarantees the constitutional value of judicial independence. Some of the reasons are a form of privileges because they are connected with a judge's retirement at his/her request; others are obligatory in nature as they result from the statutory requirements, e.g. reaching a particular age or health condition.

The category of privileges but also rights should include such reasons that enable a judge to retire when he/she reaches a certain age but not the maximum one prescribed as a basis of the right to retire, and those that depend on a judge's will and are laid down in statute. The law in force recognises all reasons that can optionally result in retirement, i.e. those that depend on a judge's request. At present, in the case of judges of the Supreme Court and the Supreme Administrative Court, these include retirement of women when they reach the age of 60 and before the age of 65, in accordance with Article 37 § 5 Act on the Supreme Court, and the submission of a declaration within six months of the date when the Act on the Supreme Court entered into force, in accordance with Article 111 § 2 of the statute. On the other hand, retirement is obligatory when a judge of the Supreme Court and the Supreme Administrative Court reaches the maximum retirement age.

Under such obligatory conditions of retirement, there is no uniform situation, in particular after the judgment of the Court of Justice of the European Union (CJEU),[8] because there are at least two rules functioning in the legal system, i.e. the age of 70 in the case of judges of the Supreme Court and the Supreme Administrative Court who entered into the service relationship before 1 January 2019[9] and the age of 65 in the case of those who started their judicial service after the date. Obviously, the assumption presented above and concerning those two rules is a certain simplification because as a result of the amendment to the Act on the Supreme Court, which reinstated the retirement age laid down in the Act on the Supreme Court of 2002,[10] the situation is complicated due to the retirement rules connected with the

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[5] See B. Stępień-Załucka, *supra* n. 3, p. 28.

[6] Constitutional Tribunal judgment of 12 December 2001, SK 26/01, OTK 8/2001, item 258.

[7] See B. Mik, *Kilka refleksji na temat artykułu B. Wagner o sędziowskim stanie spoczynku*, Prokuratura i Prawo 9, 2014, pp. 30–32.

[8] The CJEU judgment of 24 June 2019, C-619/18, *Commission v. Poland*; also the CJEU judgment of 5 November 2019, C-129/18, *Commission v. Poland*, and of 19 November 2019, C-585/18, C-624/18 and C-625/18 (curia.europa.eu).

[9] In accordance with Article 1 paras 4 and 6 of the Act of 21 November 2018 amending the Act on the Supreme Court (Dz.U. 2018, item 2507); hereinafter amendment to Act on the Supreme Court.

[10] Act on the Supreme Court of 23 November 2002 (Dz.U. 2016, item 1254, as amended).

service lengthened beyond the age of 70 that was in force in the former legal state. However, it seems that from the point of view of the analysis conducted such an assumption is possible and admissible because it is not important for the nature of the act pronouncing retirement, i.e. the formal aspect of the issue discussed.

In addition, it should be indicated that comments made on the issue have a broader scope because Article 39 Act on the Supreme Court stipulates that the date the Supreme Court judge retires or is retired is determined by the President of the Republic of Poland. Thus, the content of the provision unambiguously indicates that the President's act must be interpreted in the same way in both situations. It should be noticed here that obligatory retirement of the Supreme Court judge is not uniform and different from voluntary retirement. It can take place on request of the judge involved or the court and is not less controversial than retirement as a result of reaching the retirement age. One can even formulate a thesis that from the constitutional point of view, the issue is even more sensitive than old-age retirement because it is connected to a greater extent with the activities of various state bodies, which can radically interfere into judicial independence.[11] Therefore, from the point of view of the legal nature of an act issued by the President of Poland, there is no difference between voluntary and obligatory retirement of a judge of the Supreme Court, although the law in general specifies the two institutions differently as far as the substantive conditions of retirement are concerned.

2. PRESIDENT OF THE REPUBLIC OF POLAND AS A PUBLIC ADMINISTRATION BODY

Recognising the President of the Republic of Poland as a public administration body is not obvious in jurisprudence and case law.[12] It mainly results from the emphasis placed on his constitutional role and position in the state political system. Consequently, the thesis that the administrative nature of this body specified in the Act on the Supreme Court stems from the constitutional analysis of his role in the procedure regulating retirement and not the view that dominates theoretical considerations concerning the position of the President of the Republic of Poland in the state system. The approach to the role of the President of the Republic of Poland in relation to the state system consists in detailed determination of the Polish President's position in which the state-related nature of that body and its constitutional role are emphasised.[13] From this point of view, as a rule, the executive context of the body's activity is ignored or the analysis is limited to issues connected with foreign

[11] For more, see M. Masternak-Kubiak, *Przesłanki i tryb przechodzenia sędziego sądu powszechnego w stan spoczynku*, [in:] J. Jaskiernia (ed.), *Transformacja systemów wymiaru sprawiedliwości*, Vol. 2: *Proces transformacyjny i dylematy wymiaru sprawiedliwości*, Toruń 2011, p. 63 et seq.; also, B. Stępień-Załucka, *supra* n. 3, pp. 183–203.

[12] The Czech law stipulates it differently, see J.M. Passer, M.J. Nowakowski, *Prezydent Republiki jako organ administracji publicznej – z orzecznictwa Najwyższego Sądu Administracyjnego Republiki Czeskiej*, Wydawnictwo NSA, Warszawa 2016, pp. 27–30.

[13] See R. Mojak, *Instytucja Prezydenta RP w okresie przekształceń ustrojowych 1989–1995*, Lublin 1995, p. 92; also, J. Ciapała, *Prezydent w systemie ustrojowym Polski (1989–1997)*, Warszawa 1999,

policy or the security of the state.[14] Nevertheless, apart from those standpoints, there are opinions that the content of Article 126 of the Constitution of the Republic of Poland, which stipulates that the President is the supreme representative of the Republic of Poland and the guarantor of the continuity of the State authority ensuring observance of the Constitution and safeguarding the sovereignty and security of the State, has a considerable interpretative potential and provides a normative content for the provisions granting the President particular powers.[15]

Working on such an assumption, it is necessary to confront the content of this regulation with the powers held by the President based on the Act on the Supreme Court. Under those provisions, the President of the Republic of Poland acts in two normatively independent spheres. The first one is connected with the occurrence of a service relationship, i.e. the appointment of a judge. As this is concerned, it is commonly assumed,[16] both in jurisprudence[17] and the judicature[18], that an official act of appointment of a judge, as the President's prerogative stipulated in Article 144 para. 3(17) Constitution of the Republic of Poland, is not subject to judicial control. The opinion remains up-to-date, although serious arguments for a different stance can be also presented. The belief that the President's act of appointment is not subject to judicial control developed based on the present Constitution can also be supported by an assumption that the exclusive nature of this competence is conducive to ensuring judicial independence, which especially at present can be important for involving judicial circles in public discussion about the justice system reform. In the realities developed this way, judicial independence might be infringed not only by the executive power but also by judicial circles' influence exerted on official acts of appointment.

The other sphere of the President's of the Republic of Poland activity with respect to judicial relationships is the development of the content of the existing service relationship, i.e. activities that can be undertaken by this body after a judge's appointment. Within this scope, the role of the President must be perceived in a different way than at the stage of appointment. First of all, it should be taken into account that since judicial independence should consist in being independent of any power in the scope other than laid down in the Constitution of the Republic of Poland and statutes, it

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p. 394 et seq.; in particular P. Tuleja, K. Kozłowski, [in:] M. Safjan, L. Bosek (eds), *Konstytucja. Komentarz*, Vol. II, Warszawa 2016, pp. 563–576, hereinafter *Komentarz II*.

[14] See P. Sarnecki, *Prawo konstytucyjne*, Warszawa 2008, p. 350 et seq.

[15] For more, see P. Tuleja, K. Kozłowski, *Komentarz II*, *supra* n. 13, p. 576.

[16] Based on the dispute concerning the reform of the justice system in the period 2015–2020, the stance that the President of the Republic of Poland has exclusive power to appoint judges and there is no control over this process by other state bodies has been contested by some scientific and judicial circles, which does not seem surprising, unless the authors present opinions that control is inadmissible. In the past, opinions on admissibility of control were divided. Some stated that an act of appointment could be subject to control, e.g. J. Sułkowski, *Uprawnienia Prezydenta RP do powoływania sędziów*, Przegląd Sejmowy 4, 2008, pp. 55–65, others presented different opinions, e.g. R. Piotrowski, *Sędziowie a władza wykonawcza. Wybrane problemy konstytucyjne*, Studia Iuridia 48, 2008, p. 215.

[17] See the Constitutional Tribunal ruling of 19 June 2012, SK 37/08, OTK 6/2012, item 69.

[18] See D. Dudek, *Autorytet Prezydenta a Konstytucja Rzeczypospolitej Polskiej*, Lublin 2013, p. 62 et seq.; similarly K. Kozłowski, *Komentarz II*, *supra* n. 13, p. 700.

should be recognised that no power can perform its activities in relation to the existing relationships without judicial control. Such a conclusion is not only a logical consequence of judicial independence but also results from the legal regulation in force. Thus, judicial independence means impartiality in relation to the object of and parties to proceedings, being independent of non-judicial institutions, being autonomous in relation to other judicial bodies and being free from the influence of social factors.[19]

Judicial independence interpreted this way can only be exercised when each case of legal interference into the existing judicial relationship is given a guarantee of a court's control. Guaranteeing such protection is an inalienable condition of judicial independence because it should be taken into account that such independence cannot be identified with the right or privilege attributed to a judge. It must also be perceived as an obligation addressed at a judge; thus, he/she must be provided with mechanisms of efficient protection of this independence.[20] Therefore, each activity of a state body relating to the existing judicial relationship should be subject to control, which means that such body must be interpreted as a broadly understood public administration referred to in Article 184 Constitution of the Republic of Poland. Ensuring such protection for judicial service relationships is not only aimed at proper exercising of the constitutional standard of judicial independence but is mainly supposed to guarantee the independence of a court as a sentencing body. In addition, this makes it possible to ensure that a judge can exercise the right to a fair trial because it is hard to assume that Article 45 para. 1 Constitution of the Republic of Poland can be non-applicable to judges. The consequences would be such if one assumed that official acts determining the Supreme Court judges' service relationships are beyond control because they have the features of the President's prerogatives and their nature results from an official act of appointment. Apart from that, before the Act on the Supreme Court of 2017 entered into force, the President of the Republic of Poland had not performed a role in a judge's service relationship at all because the First President of the Supreme Court had been entitled to take all legal steps in relation to such a person, which undoubtedly meant the organ was administrative within the constitutional meaning.

Recognition of the President as a public administration entity and imposing judicial control over his official acts issued for the existing judge's service relationship requires that a few facts should be established. First of all, what must be determined are legal grounds for the position of this body in the constitutional order and the determination of the competence of a court examining the issued acts.

Article 1 LPAC[21] stipulates that administrative courts are competent to control public administration and other matters to which LPAC is applicable in accordance with special provisions. On the other hand, Article 1 § 1 LACS[22] stipulates that

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[19] See A. Murzynowski, A. Zieliński, *Ustrój wymiaru sprawiedliwości w przyszłej konstytucji*, Państwo i Prawo 9, 1992, p. 5.

[20] See the Constitutional Tribunal judgment of 24 June 1998, K 3/98, OTK 4/1998, item 52.

[21] Act of 30 August 2002: Law on proceedings before administrative courts (Dz.U. 2019, item 2325); henceforth LPAC.

[22] Act of 25 July 2002: Law on administrative courts system (Dz.U. 2019, item 2167); henceforth LACS.

administrative courts administer justice via the control over public administration. The content of both regulations must be interpreted through the prism of Article 184 Constitution of the Republic of Poland, which lays down the competence of the Supreme Administrative Court and other administrative courts to control public administration activities within the scope determined in statutes. Therefore, the indicated legal regulations must initially be the legal framework of judicial control over official acts of the President of Poland issued in relation to judges.

Their content undoubtedly stipulates that administrative courts have the right and obligation to control public administration in their legal activities. However, the assumption of their efficiency requires that the President of the Republic of Poland be proved to be one of public administration bodies within the meaning of those provisions. The indication of the feature of the President is possible only by reference of the solutions indicated in the two statutes to the content of Article 184 Constitution of the Republic of Poland, because only when this is assumed, it is possible to determine the scope of control over administration exercised by administrative courts. In the legal doctrine there are no doubts about the stance that under Article 45 para. 1 Constitution of the Republic of Poland everyone has the right to a hearing of one's case before a court if it requires that a judgment concerning the rights of a given party should be issued.[23] The resolution of a dispute constitutes the administration of justice. In accordance with Article 175 para. 1 Constitution of the Republic of Poland, the administration of justice is exercised by, inter alia, administrative courts. In a situation when a dispute in which an individual is involved results from public administration activities, the right laid down in Article 45 para. 1 Constitution, i.e. the right to a hearing before a court, takes the form of the right to a hearing before an administrative court.[24]

There is no doubt that neither the Constitution of the Republic of Poland nor statutes define the general concept of public administration. Such definition appears in normative acts and adopts a particular meaning typical of the area of regulation stipulated in them. The provisions of the Constitution of the Republic of Poland lay down duties within the field of public administration (Article 63) and a body of public administration (Article 79 para. 1). In addition, there is a concept of self-government administration provided for in those provisions (Article 16 para. 2). Based on those systemic regulations, it is assumed that the concept of public administration refers to government administration subordinate to the President of the Council of Ministers, self-government administration performed by local government bodies and non-government state administration.[25] Thus, in accordance with Article 184 Constitution of the Republic of Poland, public administration means all entities that should be classified as government, non-government and self-government administration, i.e. broadly understood executive power.[26]

On the other hand, the concept of a public administration body appears in Article 79 para. 1 Constitution of the Republic of Poland, however, without specifying

[23] Constitutional Tribunal judgment of 10 May 2000, K 21/99, OTK 4/2000, item 109.
[24] See M. Wiącek, *Komentarz II*, *supra* n. 13, p. 1092.
[25] Constitutional Tribunal judgment of 15 June 2011, K 2/09, OTK 5/2011, item 42.
[26] See M. Wiącek, *Komentarz II*, *supra* n. 13, p. 1096.

features typical of such an entity. According to the Constitutional Tribunal case law, a public administration body means any entity, regardless of whether it is formally classified within the structure of administration, i.e. executive power, if it has powers to issue decisions that determine an individual's legal situation.[27] Therefore, public administration bodies include non-public entities that have public power given by statutes, i.e. functional organs in the procedural meaning (Article 1 para. 2 CAP[28]). Thus, the Constitutional Tribunal case law adopts an autonomous idea of a public administration body and this meaning is compliant with Article 184 Constitution of the Republic of Poland. If so, public administration is performed by many bodies of the authorities and entities that are not such organs, which means that the systemic position of a body is not significant for determining the scope of judicial control over public administration.[29] For this reason, in some types of cases, from the constitutional point of view, legislative and judiciary bodies, and the President of the Republic of Poland should be recognised as public administration bodies within the scope in which their activities consist in the performance of public administration, as this activity must be specified in a functional way.[30]

Summing up, it should be stated that the activity of public administration includes various forms of actions involving decision-taking by all the above-mentioned entities, including the President of the Republic of Poland, in cases when those actions shape the sphere of rights and obligations of an individual and have not been specified as the President's prerogatives. Thus, the right to pronounce the date of the Supreme Court judge's retirement is such an action. In accordance with Article 39 Act on the Supreme Court, the President pronounces the date of a judge's retirement. In relation to the regulation in force, doubts may arise as to the scope of application of Article 39 Act on the Supreme Court because, while there are no reservations about its application to retirement pursuant to the premises of Article 37 §§ 1 and 5 of the statute, there can be grounds to state that it is not applicable to transitional provisions. However, the practice to date and jurisprudence are in favour of the extended scope of application of Article 39 Act on the Supreme Court.[31]

It seems to be a well-grounded solution because an official act issued by the President unambiguously determines the date of the Supreme Court judge's retirement and this is of enormous legal significance, because a retired judge cannot exercise jurisdictional power. Therefore, in the case of a judge's declaration of retirement on request in accordance with the provisions of the Act on the Supreme Court, the President of the Republic of Poland is obliged to issue an official act pronouncing the fact. It should be noticed that the President's act pronouncing

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[27] See the Constitutional Tribunal judgment of 29 November 2007, SK 43/06, OTK 10/2007, item 130.

[28] Act of 14 June 1960: Code of Administrative Procedure (Dz.U. of 2020, items 256, 695); hereinafter CAP.

[29] See J. Drachal, J. Jagielski, R. Stankiewicz, [in:] R. Hauser, M. Wierzbowski (eds), *Prawo o postępowaniu przed sądami administracyjnymi*, Warszawa 2011, p. 42.

[30] See M. Wiącek, *Komentarz II*, *supra* n. 13, p. 1097.

[31] See K. Szczucki, *Komentarz do art. 39 ustawy o Sądzie Najwyższym*, LEX.

the Supreme court judge's retirement on request is a decision, although a declaratory one, because it confirms the will expressed in the declaration. Its authoritative nature results from the wording in which the legislator gives the body the right to 'pronounce' the date of retirement. The situation differs from that in common courts in which the Minister of Justice just announces the fact. Thus, if the legislator clearly differentiates the concepts used in similar situations and the legislator is rational, the decision is intentional, and this means that the fact must result in various legal consequences, and this circumstance must be taken into account when interpreting relevant provisions. The stance can be found in abundant and uniform opinions of representatives of the legal doctrine and judicature, who believe that the use of the phrase 'shall pronounce' always means an authoritative nature of the body's action.

Due to that, in accordance with the Act on the Supreme Court, the President of the Republic of Poland must be treated as a public administration body in the meaning of Article 184 Constitution of the Republic of Poland, and his activity or inactivity are subject to control by administrative courts for the above-mentioned reasons. The assumption of judicial control over the President's activities does not infringe the constitutional nature of this body as the Head of State. In accordance with Article 126 para. 3 Constitution of the Republic of Poland, the President exercises his duties within the scope of and in accordance with the principles specified in the Constitution and statutes. The role that the President holds in particular normative situations depends on the positive regulation of his rights. Taking on the role of an administrative body, pursuant to Article 39 Act on the Supreme Court, opens the way to judicial control over the President's activities in the case of deciding the legal status of the Supreme Court's judges.

A different interpretation of the provisions in force would lead to the infringement of the principles resulting from Articles 2 and 45 Constitution of the Republic of Poland because the Supreme Court judge would be, in fact, deprived of a possibility of judicial control over activities that have influence on the scope of his/her rights and obligations resulting from the legal relationship between him/her and the state. The systemic argument also supports the presented stance. Regardless of the approach to the President's act, whether it is a decision, which is admissible in jurisprudence[32] or an act within the meaning of Article 3 § 2(4) LPAC, in both cases judicial administrative control over the President's activities is possible in the light of Article 50 § 1 LPAC. In accordance with the content of this provision, when the case concerns control over public administration, everyone who has legal interest in it has the right to file a complaint.

The concept of public administration for the need of determining the legal nature resulting from Article 39 Act on the Supreme Court can be established only by means of interpretation with reference to Article 184 Constitution of the Republic of Poland. This means that the systemic status of a body cannot be an obstacle to exercising control over this body's activities because, from the point of view of Article 184 Constitution of the Republic of Poland, it is irrelevant that the President

[32] See K. Kozłowski, *Komentarz II*, *supra* n. 13, p. 700.

is the Head of State, and thus some of his official acts can be classified as activities of public administration, and there are no reasons why they should not be subject to administrative courts' control.[33]

Article 184 Constitution as well as LPAC and LSAC indicate that control over public administration is admissible only within the scope specified in statutes. Thus, in the light of this condition, there can also be a doubt concerning admissibility of appealing against the President's act issued in accordance with Article 39 Act on the Supreme Court. However, regardless of the fact that the Constitutional Tribunal case law admits the possibility of excluding some public administration bodies' acts from judicial control,[34] it is consistent in its stance that such exclusion is admissible but only under the condition that a court's control is not connected with the exercise of an individual's right to a hearing before a court, i.e. it is the nature of the legal relationship that results in the possibility of arbitrary judgment on an individual's legal situation.[35] Obviously, such a situation cannot take place in relation to a judge because it would be against the constitutional principle of judicial independence. For this reason, the lack of relevant procedure of challenging the President's actions under Article 39 Act on the Supreme Court cannot constitute an argument for inability to submit an administrative act issued based on this provision to a court for control.

3. PRESIDENT'S ACT PRONOUNCING THE DATE OF A JUDGE'S RETIREMENT AND THE MODE OF ITS CONTROL

The legal nature of a judge's service relationship is complex.[36] It has not been unambiguously specified in jurisprudence and case law, however, there is no doubt that the moment the Supreme Court judge is appointed, the relationship between a judge and the State (the Supreme Court) becomes a service-related one that has public and labour law aspects. As far as the public law aspect is concerned, the relationship exists between a judge and the State on behalf of which the President of the Republic of Poland and the First President of the Supreme Court act as a party entering this relationship and altering it. In the case of common court judges, the President, the Minister of Justice and presidents of particular common courts act on behalf of the State. Thus, various bodies act on behalf of the State as parties in those relationships, however, the appointment is always the President's prerogative. The principle adopted in the Act on the Supreme Court stipulating that the President acts by confirming a judge's retirement cannot lead to developing such a legal situ-

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[33] See J. Trzciński, *Kształtowanie się kognicji sadów administracyjnych od 1980 do 2013 roku*, [in:] D. Waniek, K. Janik, (eds), *Droga ku zmianom. Księga jubileuszowa w sześćdziesiątą rocznicę urodzin Prezydenta Aleksandra Kwaśniewskiego*, Vol. I, Warszawa–Kraków 2014, pp. 110–111.

[34] Constitutional Tribunal judgment of 26 April 2005, SK 36/03, OTK 4/2005, item 40.

[35] Constitutional Tribunal judgment of 10 May 2000, K 21/99, OTK 4/2000, item 109.

[36] For more, see B. Stępień-Załucka, *supra* n. 3, pp. 114–146; also K. Gonera, [in:] R. Piotrowski (ed.), S. Dąbrowski, K. Gonera, A. Górski, M. Laskowski, A. Łazarska, Ł. Piebiak, W. Sanetra, M. Strączyński, *Pozycja ustrojowa sędziego*, Warszawa 2015, LEX 2015, electronic version.

ation of the Supreme Court judge in which this party is deprived of the right to appeal against an official act pronouncing his/her retirement.

In the light of the above, if the President of the Republic of Poland acting under Article 39 Act on the Supreme Court is *ex lege* obliged to issue an official act (a decision) pronouncing the date of the Supreme Court judge's retirement, the issue of such a statement is the Head of State's duty. The President's obligation to act in the area results from Article 142 para. 2 Constitution of the Republic of Poland and Article 39 Act on the Supreme Court. Based on those regulations, it should be assumed that the President issues a decision on a judge's retirement. This type of resolution is a form of the State's actual authority. There is no doubt in jurisprudence that the President's decisions are acts of a different nature that is always connected with the type of matter they concern. It is also beyond dispute that they can be issued only by the President within his individual powers. As a result, no other entity can substitute for this body, i.e. no one can be authorised to issue the decisions pursuant to Article 268a CAP, even if they concern individual matters and are similar to administrative decisions.[37] It is due to the fact that the President does not judge in an administrative case within the meaning of Article 1 CAP. And even if we assumed that the decision, in the substantive meaning, is an administrative one, it is not issued by a public administration body within the systemic sense but by another State body, an administrative one in the functional meaning, and the application of the Code of Administrative Procedure to such situations must directly result from the provisions regulating the given area.

The complex nature of a judge's service legal relationship dominated by public law aspects is not conducive to determination of the proper form of its protection. It can be observed with reference to the Act on the Supreme Court of 2017; however, it should be mentioned that former regulations did not provide an unambiguous approach to the issue, either. The model of protection binding then was an effect of practice rather than explicit statutory solutions. Undoubtedly, its characteristic feature was the assumption that the Supreme Court was competent to make statements concerning the rights and duties developed within its scope. From the point of view of the experience gained as a result of the introduction of the Act on the Supreme Court of 2017, a doubt can arise whether the solution was right. Although it was supported in numerous various court judgments, it seems a certain systemic context was not noticed, namely, that Article 184 Constitution clearly indicates that administrative courts are competent to exercise control over public administration. Obviously, such control can be exercised in the scope specified in statutes, which does not exclude the necessity of interpreting the law in force in the way that is in systemic conformity with the type of cases assigned to competent courts, either civil or administrative ones.

The lack of consistency in the area resulted in adoption of, in general, a civil law way of exercising control over acts issued by various bodies in relation to the judges' existing service relationships. It should be mentioned that before the Act on the Supreme Court entered into force, the President had not been such a body

[37] See K. Kozłowski, *Komentarz II*, *supra* n. 13, p. 700.

because he did not use to have any powers concerning the legal relationship resulting from the act of appointment. Such a solution was defective because it did not result directly from the provisions of law, which undoubtedly occurred in relation to the Supreme Court judges but also was systemically coherent. It departed from the established stance that 'service' relationships with a dominating public element developed, e.g. as a result of appointment, are subject to the cognition of administrative courts,[38] unless control over them has been exercised by a civil court in accordance with a clear statutory provision. This is because jurisdiction of this court cannot be derived from Article 1 CCP,[39] which stipulates that civil procedure is applicable to cases other than broadly understood civil and social insurance ones only when a special provision stipulates so.

Thus, the adoption of civil courts', and consequently the Supreme Court's, jurisdiction over acts issued by state bodies in relation to judges', including those of the Supreme Court, service relationship was based on weak normative grounds, and did not create a positive image because it actually led to a situation in which judges made judgments concerning their 'own' rights and duties. It is worth noticing that even the Rules and Regulations of the Supreme Court[40] under § 13(1) stipulate that the Labour and Social Insurance Chamber, within the limits and in the mode specified in relevant provisions, exercises control over judgments issued by courts and other bodies in the field of labour and social insurance relationships, cases concerning inventions, and administrative cases concerning employment and social insurance law, as well as in matters referred to them based on special provisions. The Chamber was also authorised to hear cases referred to the Supreme Court in accordance with the acts: on state-owned enterprises, on the improvement of a state-owned enterprise's management and its bankruptcy, on a state-owned enterprise's staff self-government, on trade unions, on social and professional farmers' organisations, and the Law on the bar and solicitors.

The Regulation of the President of the Republic of Poland of 29 March 1991 on the organisation and rules of the Supreme Court's internal procedures[41] does not change this state in general, because the Administrative, Labour and Social Insurance Chamber was created under the former legal state, i.e. the Act on the Supreme Court of 1984 and, inter alia, cases concerning complaints about administrative decisions came under its jurisdiction. The successive Rules and Regulations issued by the General Assembly of the Supreme Court Judges on 1 December 2003[42] stipulated in § 30 that the Labour, Social Insurance and Public Affairs Chamber was competent to hear cases concerning labour law, social insurance and public affairs, including cases relating to protection of competition, energy regulations, telecommunications and rail transportation, and appeals against the decisions of the Chairman

[38] For instance, the Supreme Administrative Court judgment of 27 October 2011, I OSK 504/11, CBOSA.

[39] Act of 17 November 1964: Code of Civil Procedure (Dz.U. 2019, item 1460); hereinafter CCP.

[40] Resolution of the Council of State concerning the Rules and Regulations of the Supreme Court of 27 September 1984 (Monitor Polski No. 24 of 1984, item 165).

[41] Dz.U. of 1991, No. 34, item 153.

[42] Monitor Polski No. 53, 2003, item 898.

of the National Broadcasting Council, as well as remuneration claims of inventors, authors of utility models, industrial designs and integrated circuit layout designs, and registry matters, except the registry of entrepreneurs and the registry of pledges. The Chamber also had jurisdiction over complaints about lengthiness of proceedings in those cases before an administrative court and complaints about lengthiness of proceedings before an administrative court and the Supreme Court. The analysis of the regulations results in a conclusion that in the listed cases, it is only possible to indirectly assume that the Supreme Court was competent to hear cases concerning judges' retirement in the scope of public law nature of a judge's service relationship.

The Act on the Supreme Court of 2002[43] did not mark a turning point in the approach to the features of the Labour, Social Insurance and Public Affairs Chamber. Article 3 § 2 stipulates that the Rules and Regulations determine the internal organisation and detailed division into chambers. At the same time, the statute does not indicate the general competence of particular chambers at all, which results in a situation where the issue of competence to hear particular types of cases has been transferred to the level of an act that is not a source of law even if these are the Rules and Regulations of the Supreme Court. Such a state should be disapproved of because the Supreme Court, i.e. in fact the judges of that court, was authorised to determine the Supreme Court chambers' competence. That is why, until the Act on the Supreme Court of 2017 entered into force, the determination of the competence to hear a case concerning a judge's retirement was highly questionable, which was not a desirable state in the light of the necessity of protecting judicial independence. This competence could be determined by making a general statement that there is a chamber in the Supreme Court that has jurisdiction, firstly, over cases concerning administrative decisions and, secondly, over public affairs. However, there has never been a direct rule resulting from positive law.

The issues discussed did not become clearer based on the Act on the Supreme Court of 2017. Although the statute stipulates the competence of the Supreme Court chambers, it does not introduce unambiguous regulations concerning judges' retirement. The content of Article 27 § 1(3) Act on the Supreme Court indicates that the Disciplinary Chamber hears cases concerning the Supreme Court judges' retirement but it is not precisely established which department of this Chamber is competent. Although Article 27 § 3 of the statute makes it possible to draw a conclusion that Department I of the Disciplinary Chamber is competent, this statement is not so obvious as the Disciplinary Chamber also deals with cases concerning labour and social insurance of the Supreme Court judges. The legislator's use of the general term 'the Supreme Court judges' to determine the competence of Department I of this Chamber gives grounds for an assumption that cases concerning a judge's retirement should be heard by this department. Another interpretative problem occurs under Article 1 Act on the Supreme Court, which does not indicate that the court is authorised to hear this type of cases, while other cases listed in the closed catalogues are laid down in the provisions determining the competence of other Supreme Court chambers. In the light of the above-mentioned regulations, one can

[43] Dz.U. 2016, item 1254, as amended.

see inconsistence, namely that assigning cases concerning the Supreme Court judges' retirement to the jurisdiction of the disciplinary Chamber does not correspond to the scope of the Supreme Court activities. Such a state raises serious doubts whether the Supreme Court is a court of first instance, i.e. a court that hearing the Supreme Court judge's retirement case adjudicates on its merits, or perhaps a cassation court, which results from the position of the Supreme Court in the court system.

The lack of an unambiguous solution to the problem in the provisions of the statute leads to serious systemic consequences because it differentiates the method of legal protection in case of obligatory retirement. A linguistic interpretation of the provisions results in a conclusion that the method depends on judges' organisational status. If these are the Supreme Court judges, their retirement is under the control of the Supreme Court. It is not completely certain if the rule applies to the Supreme Administrative Court judges because the provisions of the Act on the Supreme Court are applied to them by analogy. It is obvious, however, that the rule is not applicable to other judges of both common courts and administrative courts because the Act on the Supreme Court is not applicable to them. This way a system of controlling obligatory retirement that has no rational justification is created. In addition, it gives grounds for serious constitutional doubts as to the principle of equality and the protection of judicial independence.

However, determination whether this type of control is possible before the Supreme Court is a more important issue than correct specification of the competence of the Supreme Court chamber to assess the activities of bodies in connection with a judge's retirement. The doubt is raised when it comes to the regulations adopted in the Act on the Supreme Court. Certainly, Article27 § 1(3) Act on the Supreme Court indicates the competence of the Disciplinary Chamber in cases concerning the Supreme Court judge's obligatory retirement. Article 180 paras 3 and 5 Constitution determine the rules of a judge's obligatory retirement due to illness or infirmity which prevents him/her discharging the duties of his/her office, and reorganisation of the court system or changes to the boundaries of court districts. At the same time, Article 180 para. 4 Constitution stipulates that a judge goes into retirement when he/she reaches an age limit established by statute. Thus, the constitutional lawmaker differentiates voluntary and obligatory retirement. The Act on the Supreme Court confirms the distinction because Article 37 §§ 1 and 5 and Article 111 § 2 determine the conditions for the Supreme Court judges' voluntary retirement, and Article 38 §§ 1 and 3 indicate grounds for the judges' obligatory retirement. Therefore, from the normative point of view, voluntary and obligatory retirement constitute two different legal situations. Moreover, the Act on the Supreme Court regulates the appellate proceedings only in case of the Supreme Court judge's obligatory retirement. In accordance with Article 38 § 4 of the statute, in cases concerning a judge's obligatory retirement, the National Council of the Judiciary passes a resolution upon a judge's request or on the Supreme Court Board motion, and the resolution can be appealed against at the Supreme Court, which directly results from Article 38 § 5 of the statute. Therefore, the competence of the Disciplinary Chamber to hear the appeal, although not appropriately determined in Article 27 § 1 Act on the Supreme Court, is precisely defined in Article 38 § 5, and

due to that it can be rightly assumed that the Supreme Court is competent to deal with the judge's obligatory retirement. Obviously, the solution does not eliminate formerly raised systemic doubts concerning the competence of the Supreme Court in such cases, however, as a detailed solution it guarantees the principle of legalism is adhered to.

The situations resulting from Article 37 §§ 1 and 5 and Article 111 § 2 of the statute, which refer to a judge's voluntary retirement, should be assessed differently. Due to the fact that from the linguistic point of view, voluntary and obligatory retirement cannot be treated as identical, it is necessary to assume that they constitute separate legal states. Retirement results from meeting statutory premises. If they occur, the President of the Republic of Poland pronounces that in an official act issued in accordance with Article 39 Act on the Supreme Court. It should be noticed that the provision is applicable to voluntary and obligatory retirement because the act issued based on it is to pronounce the date of a judge's retirement, which is clearly indicated in its content.

4. CONCLUSIONS

The above-presented analysis of the legal nature of the President's official act pronouncing the Supreme Court judge's retirement results in a conclusion that this act issued in accordance with Article 39 Act on the Supreme Court is an authoritative and declaratory one. Its content confirms the occurrence of statutory premises that result in a judge's retirement. The basic reason for retirement is reaching the age determined by law and then retirement is obligatory, unless the law stipulates extraordinary situations which allow a judge to remain in office under certain conditions. Apart from this situation, a judge's retirement can take place in accordance with statutory conditions, and if it is not connected with old age, it must always be taken upon a judge's request, i.e. in accordance with Article 111 § 2 Act on the Supreme Court. In each of the situations, the President of the Republic of Poland, acting in accordance with Article 39 Act on the Supreme Court, is obliged to pronounce the date of a judge's retirement. Within the scope of this obligation, the President acts as a public administration body in its functional meaning because it is connected with the change of a judge's service relationship and is not subject to the President's prerogative under Article 144 para. 3(17) Constitution of the Republic of Poland, which applies to a judge's appointment and as such is not subject to control by courts and tribunals. Therefore, as far as the pronouncement of a judge's retirement is concerned, the President's action matches the features of administrative activities in the meaning of Article 184 Constitution, and this means that official acts of this type, as ones being part of public administration activities, are subject to control by administrative courts. The administrative judicial control over those decisions does not infringe the provisions laid down in the Act on the Supreme Court concerning the rules of this court's control over the Supreme Court judges' obligatory retirement. The retirement referred to in the Act on the Supreme Court results in another type of act issued by the President because the substantive law requirements in this case are different.

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LEGAL NATURE OF AN OFFICIAL ACT OF THE PRESIDENT OF THE REPUBLIC OF POLAND PRONOUNCING RETIREMENT OF THE SUPREME COURT JUDGE

Summary

The analysis of the legal nature of an official act of the President of the Republic of Poland pronouncing the Supreme Court judge's retirement results in a conclusion that the act of the President issued in accordance with Article 29 of the Act on the Supreme Court is authoritative and declaratory. Its content stipulates a solution concerning legal premises that result in a judge's retirement. In this scope, the President of the Republic of Poland acts as a public

administration body in the functional meaning because the solution pronounces the change of the judge's service relationship. The President's action in this respect is not a presidential prerogative under Article 144 para. 3(17) of the Constitution of the Republic of Poland. This means that this type of an official act issued as part of public administration activities, stipulated under Article 184 of the Constitution, is subject to control by administrative courts.

Keywords: acts of the President of the Republic of Poland, declaration of retirement, public administration body, jurisdiction of the court

CHARAKTER PRAWNY AKTU PREZYDENTA RZECZYPOSPOLITEJ POLSKIEJ STWIERDZAJĄCEGO PRZEJŚCIE SĘDZIEGO SĄDU NAJWYŻSZEGO W STAN SPOCZYNKU

Streszczenie

Przedstawiona analiza charakteru prawnego aktu Prezydenta Rzeczypospolitej Polskiej stwierdzającego przejście sędziego Sądu Najwyższego w stan spoczynku prowadzi do wniosku, że akt Prezydenta RP wydawany na podstawie art. 39 ustawy o Sądzie Najwyższym jest aktem władczym i deklaratoryjnym. W jego treści znajduje się rozstrzygnięcie o zaistnieniu przewidzianych prawem przesłanek, które skutkują przejściem sędziego w stan spoczynku. W tym zakresie Prezydent RP działa jak organ administracji publicznej w znaczeniu funkcjonalnym, gdyż rozstrzygnięcie stwierdza przekształcenie stosunku służbowego sędziego. Działanie Prezydenta RP w tym zakresie nie jest prerogatywą prezydencką z art. 144 ust. 3 pkt. 17 Konstytucji Rzeczypospolitej Polskiej. Zatem w zakresie stwierdzenia przejścia w stan spoczynku działanie Prezydenta RP wyczerpuje znamiona działania administracji w rozumieniu art. 184 Konstytucji RP, a to oznacza, że akty tego typu jako wydane w zakresie działań administracji publicznej podlegają kontroli sądów administracyjnych.

Słowa kluczowe: akty Prezydenta RP, stwierdzenie stanu spoczynku, organ administracji publicznej, właściwość sądu

CARÁCTER LEGAL DE ACTO DEL PRESIDENTE DE LA REPÚBLICA DE POLONIA QUE CONFIRME LA JUBILACIÓN DEL MAGISTRADO DEL TRIBUNAL SUPREMO

Resumen

El análisis del carácter legal de acto del Presidente de la República de Polonia que confirme la jubilación del magistrado del Tribunal Supremo lleva a la conclusión que el acto del Presidente de la República de Polonia expedido en virtud del art. 39 de la ley del Tribunal Supremo es un acto de carácter declarativo e imperativo. Contiene la decisión sobre existencia de requisitos previstos legalmente que conducen a la jubilación del magistrado. En este ámbito, el Presidente de la República de Polonia actúa como órgano de administración pública en el sentido funcional, ya que la decisión modifica el estatus del servicio del magistrado. El acto del Presidente de la República de Polonia en este sentido no está incluido como prerrogativa del Presidente en el art. 144 ap. 3 punto 17 de la Constitución de la República de Polonia. Por

tanto, el acto del Presidente de la República de Polonia en cuanto a la jubilación cumple con los requisitos de la actuación de la administración conforme con el art. 184 de la Constitución. Entonces, el control de este tipo de actos en cuanto a la actuación de administración pública corresponde a los tribunales de administración.

Palabras claves: Actos del Presidente de la República de Polonia, órgano de administración pública, competencia de tribunales

ПРАВОВАЯ ПРИРОДА УКАЗА ПРЕЗИДЕНТА РЕСПУБЛИКИ ПОЛЬША О ПЕРЕХОДЕ ДЕЙСТВУЮЩЕГО СУДЬИ ВЕРХОВНОГО СУДА В СТАТУС СУДЬИ В ОТСТАВКЕ

Аннотация

Предложенный в статье анализ правовой природы указа президента Республики Польша, объявляющего о переходе судьи Верховного суда в статус судьи в отставке, позволяет сделать вывод о том, что указ президента, изданный на основании ст. 39 Закона «О Верховном суде», является как актом власти, так и декларативным актом. В нем содержится констатация возникновения предусмотренных законом предпосылок для перехода действующего судьи в статус судьи в отставке. В этом случае президент выступает как орган государственной администрации в функциональном значении, поскольку в указе устанавливается факт изменения трудовых отношений судьи. Действия президента в данном случае не относятся к прерогативе президента, предусмотренной в ст. 144 пар. 3 п. 17 Конституции Республики Польша. Таким образом, констатация президентом перехода действующего судьи в статус судьи в отставке имеет все признаки акта государственной администрации в понимании ст. 184 Конституции РП. Акты такого рода, издаваемые Президентом в рамках деятельности в сфере государственной администрации, подлежат контролю со стороны административных судов.

Ключевые слова: указы Президента Республики Польша, констатация перехода действующего судьи в статус судьи в отставке, орган государственной администрации, юрисдикция суда

DIE RECHTSNATUR DES AKTS DES PRÄSIDENTEN DER REPUBLIK POLEN ZUR FESTSTELLUNG DES ÜBERTRITTS VON RICHTERN DES POLNISCHEN OBERSTEN GERICHTS IN DEN RUHESTAND

Zusammenfassung

Die vorgestellte Analyse der Rechtsnatur des amtlichen Akts des polnischen Staatspräsidenten, mit dem die Versetzung von Richtern des polnischen Obersten Gerichts (Sąd Najwyższy), der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, in den Ruhestand festgestellt wird, führt zu dem Schluss, dass es sich bei dem auf der Grundlage von Artikel 39 des polnischen Gesetzes über das Oberste Gericht erlassenen Rechtsakt des Präsidenten um einen deklaratorischen Hoheitsakt handelt. Er beinhaltet die Entscheidung darüber, ob die rechtlich vorgesehenen Voraussetzungen erfüllt sind, die dazu führen, dass ein Richter in den Ruhestand eintritt. Der polnische Staatspräsident fungiert hier als Behörde im funktionellen Sinne, da mit der Entscheidung die Umwandlung des Dienstverhältnisses

des betreffenden Richters festgestellt wird. Das diesbezügliche Handeln des Präsidenten ist keine präsidiale Prärogative nach Artikel 144 Abschnitt 3 Punkt 17 der polnischen Verfassung und somit erfüllt das Vorgehen des Präsidenten der Republik Polen bei der Feststellung des Übertritts eines Richters in den Ruhestand die Merkmale einer Handlung der öffentlichen Verwaltung im Sinne von Artikel 184 der polnischen Verfassung. Das bedeutet, dass Amtsakte dieser Art als im Bereich der öffentlichen Verwaltung erlassene Akte der Kontrolle durch die Verwaltungsgerichte unterliegen.

Schlüsselwörter: Akte des Präsidenten der Republik Polen, Feststellung des Übertritts in den Ruhestand, öffentliche Verwaltungsbehörde, Zuständigkeit des Gerichts

NATURE JURIDIQUE DE L'ACTE DU PRÉSIDENT DE LA RÉPUBLIQUE DE POLOGNE CONFIRMANT LE DÉPART À LA RETRAITE D'UN JUGE DE LA COUR SUPRÊME

Résumé

L'analyse de la nature juridique de l'acte du Président de la République de Pologne confirmant le départ à la retraite d'un juge de la Cour suprême conduit à la conclusion que l'acte du président de la République de Pologne délivré conformément à l'art. 39 de la loi sur la Cour suprême est un acte impératif et déclaratoire. Son contenu comprend la décision sur l'existence des conditions préalables prévues par la loi, qui entraînent la retraite du juge. À cet égard, le président de la République de Pologne agit en tant qu'organe d'administration publique au sens fonctionnel, car la décision confirme la transformation du rapport de service du juge. L'action du président de la République de Pologne à cet égard n'est pas une prérogative présidentielle en vertu de l'art. 144 alinéa 3 point 17 de la Constitution polonaise. Par conséquent, en ce qui concerne la déclaration de départ à la retraite, l'action du président de la République de Pologne comporte les éléments constitutifs de l'action administrative au sens de l'art. 184 de la Constitution polonaise, ce qui signifie que les actes de ce type, délivrés dans le cadre d'activités d'administration publique, sont soumis au contrôle des tribunaux administratifs.

Mots-clés: actes du président de la République de Pologne, déclaration de la retraite, un organ de l'administration publique, ressort du tribunal

CARATTERE GIURIDICO DELL'ATTO DEL PRESIDENTE DELLA REPUBBLICA DI POLONIA CHE DICHIARA IL COLLOCAMENTO A RIPOSO DI UN GIUDICE DELLA CORTE SUPREMA

Sintesi

L'analisi presentata del carattere giuridico dell'atto del Presidente della Repubblica di Polonia che dichiara il collocamento a riposo di un giudice della Corte Suprema porta alla conclusione che l'atto del Presidente della Repubblica di Polonia emesso sulla base dell'art. 39 della legge sulla Corte Suprema è un atto decisorio e declaratorio. Nel suo contenuto vi è la constatazione dell'esistenza delle condizioni che determinano il collocamento a riposo del giudice. In tale ambito il Presidente della Repubblica di Polonia opera come autorità della pubblica

amministrazione nel senso funzionale, in quanto la constatazione rileva la trasformazione del rapporto lavorativo del giudice. L'azione del Presidente della Repubblica di Polonia in tale ambito non costituisce una prerogativa presidenziale ai sensi dell'art. 144 comma 3 punto 17 della Costituzione della Repubblica di Polonia. Quindi, nell'ambito della dichiarazione di collocamento a riposo, l'azione del Presidente della Repubblica di Polonia costituisce un atto amministrativo ai sensi dell'art. 184 della Costituzione della Repubblica di Polonia e ciò significa che gli atti di questo tipo, in quanto emessi nell'ambito dell'attività della pubblica amministrazione, sono soggetti al controllo dei tribunali amministrativi.

Parole chiave: atti del Presidente della Repubblica di Polonia, dichiarazione di collocamento a riposo, autorità della pubblica amministrazione, competenza del tribunale

Cytuj jako:

Czarnik Z., *Legal nature of an official act of the President of the Republic of Poland pronouncing retirement of the Supreme Court judge [Charakter prawny aktu Prezydenta Rzeczypospolitej Polskiej stwierdzającego przejście sędziego Sądu Najwyższego w stan spoczynku]*, „Ius Novum" 2020 (14) nr 2, s. 120–139. DOI: 10.26399/iusnovum.v14.2.2020.17/z.czarnik

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ESTABLISHMENT OF A TRIAL PERIOD IN AGENCY CONTRACTS: COMMENTS IN THE CONTEXT OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 19 APRIL 2018

ROBERT STEFANICKI*

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1. INTRODUCTION

Commercial agency contracts have a long tradition. Their economic importance in the cross-border space was a decisive factor for adopting Directive 86/653/EEC.[1] It is clear from the wording of the preamble that its primary objective is to protect commercial agents in their relationships with principals, to increase the security of economic transactions and to facilitate trade in products between the member states by approximating their legal systems. Although the explanatory memorandum to the act is not a source of law, it is relevant to the process of its interpretation. In agency contracts the principal is typically considered to have an economic and negotiating advantage. As such, there is a risk of the principal abusing its stronger position. Therefore, in the process of interpreting the regulations governing this matter, special emphasis is put on protecting the agent as a weaker party. As any generalisation, the above assessment may be affected by the risk of error due to the fact that the commercial agent, similarly to the principal, is a skilled, professional entity, often specialising in agency.[2] It is therefore questionable whether this inclina-

* Prof., PhD hab., Faculty of Law, Administration and Economics of the University of Wrocław; e-mail: robert.stefanicki@uwr.edu.pl; ORCID: 0000-0002-6087-4231

[1] Dated 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (Polish special edition OJ EU 2004, Chapter 6, Vol. 1, pp. 177–181); henceforth the Directive.

[2] It is noted that in its Report of 23 July 1996 (concerning the application of Article 17 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the

tion of the Directive is justified in private law. Although the implementation of the Directive by the member states has been accompanied by considerable preliminary case law of the Court of Justice for several decades, there are various interpretative issues relating to its provisions. It is worth noting that the case law of the Court of Justice is also evolving from a formalistic approach in its interpretations of the EU regulations towards more in-depth analyses that meet the needs of modern trading.[3] This is partly understandable given the fact that the law is supposed to be a living matter, not just a static order. The practice of its implementation must keep in line with the changing environment and the needs of economic transactions. The increasing complexity of the relations existing in the contemporary exchange, and the intensification of market competition cause even the interpretation of the EU acts to be based on values by referring to axiology. In the context of the issue addressed herein, this will concern in particular the reading of the provisions of the Directive with reference to its objectives in terms of the widest possible application of the safeguard mechanisms provided for by the Directive, also to non-standard commercial agency contracts, i.e. those which do not necessarily fit into the stability of contractual relationships.

From this point of view, the CJEU judgment of 19 April 2018 merits attention.[4] It was issued in connection with the main proceedings pending before a court of a member state, in which the referring court had concerns regarding the classification of a commercial agency contract concluded for a trial period of twelve months, in the context of the assessment of its nature and legal effects, as defined by the Directive. The contract provided for the possibility of its early termination upon giving one month's notice (stating the reasons for termination). The principal (a party to the dispute) decided to terminate the creditor-debtor relationship after five months, subject to the prescribed period. The grounds for the early termination of the contract was the fact that the agent had caused only one contract to be concluded.[5] In the opinion

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Member States relating to self-employed commercial agents, COM(96) 364 final), the European Commission, with regard to the interpretation of the equity clause, set out circumstances such as diligence in the performance of the contract in question, the pursuit of activities for other entities and the relationship to the competition clause, see E. Rott-Pietrzyk, *Umowy odnoszące się do świadczenia usług. Umowa agencyjna*, [in:] J. Rajski (ed.), *Prawo zobowiązań – Część szczegółowa. System Prawa Prywatnego*, Vol. 7, Warszawa 2018, nb. 267.

[3] An example of changes in the approach and taking into account the axiological context in the study of phenomena in the protection of competition law is recent case law, including the CJEU judgment of 6 September 2017 in the case *Intel v. Commission*, C-413/14, ECLI:EU:C:2017:632. For example, the EU legislator had no intention to adopt the meaning of 'access to the file' in such a way as to allow the authority to apply a subjective approach to the collection of evidence and discretion in registering and disclosing the same to undertakings suspected of having violated the competition rules without any normative and evaluative justification. For more details, see W.P.J. Wils, *The Judgment of the EU General Court in Intel and the So-called 'More Economic Approach' to Abuse of Dominance*, World Competition: Law and Economics Review 4, 2014, p. 405 et seq.; I. Bodenstein, *Intel Corporation Inc. und Post Danmark II – Die Weichen für die zukünftige Bewertung von Rabatten nach Art. 102 AEUV sind so gut wie gestellt!*, Zeitschrift für Wettbewerbsrecht Vol. 4, 2015, p. 403 et seq.

[4] *Conseils et mise en relations (CMR) SARL*, C-645/16, ECLI:EU:C:2018:262.

[5] The reasons for termination should be sufficiently justified. On the other hand, whether such a situation has arisen in a particular case is subject to the discretionary power of the national

of the commercial agent, when terminating the contractual relationship, the principal failed to comply with the normative standards as to the reasons for termination. In those circumstances, it brought an action before the national commercial court for payment of compensation and damages.

2. TRIAL PERIOD CONTRACT AND LEGAL RELATIONSHIP OF THE AGENCY

In the law of the member state requesting a preliminary ruling, commercial agency contracts providing for a trial period binding on the parties were not covered by the safeguard mechanisms of Directive 86/653. The general principles of freedom of contract and the content of the concluded contract applied to the conditions governing their performance and termination. Although there is ample preliminary case law of the Court of Justice relating to the application of this secondary legislation, agency contracts containing trial period clauses have not yet been the subject of its interpretation. This does not mean, however, that this type of contract is ancillary and as such unworthy of legal consideration from the point of view of assessing the need to secure the protection of the agent in the light of the provisions of the act in question. There are some arguments supporting the conclusion of commercial contracts stipulating a trial period which the contracting parties, in particular service providers, take into account. Such a period allows verification of the usefulness of an agent, facilitates termination of such contract, and thus flexible shaping of the contractual terms. However, this formula can entail not only the indicated advantages but also negative phenomena such as attempts to circumvent the safeguard regulations concerning a commercial agent. This raises a question to what extent the mechanism conditionally binding the parties can be included in the protective safeguards of the Directive or whether it applies to such contracts altogether. Formally, it would be difficult to include such a contract in the definition of commercial agency whose constitutional element is the stability of a relationship.[6] However, the emphasis of the preliminary rulings to date has already been on the actual performance of the contracts rather than on their name.

In accordance with the general framework provided for the member states in the Treaty on the Functioning of the European Union,[7] the Directive binds them as to the result to be achieved. It leaves the national authorities leeway as regards the form and means, this being subject, however, to ensuring the effectiveness of

court before which the proceedings are pending. For more details on the legal position of the agent in the context of French law, see M. Kozak, *Umowa agencyjna w świetle artykułu 101 TFUE (Jak gonić króliczka, aby go nie złapać)*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 4(1), 2012, p. 33, and also S. Majkowska-Szulc, *Prawo agenta do odszkodowania z tytułu rozwiązania umowy agencyjnej w świetle prawa francuskiego*, [in:] E. Bagińska (ed.), *Współczesne problemy prawa prywatnego*, Gdańskie Studia Prawnicze Vol. XXXIX, 2018, p. 387.

[6] Regarding agency in a broad sense, see T. Świerczyński, *Charakter prawny umowy o pośrednictwo*, Przegląd Prawa Handlowego 1, 1999, p. 15.

[7] Article 288, third paragraph, OJ C 326, 26.10.2012, p. 47 et seq.

that order. The CJEU's interpretation under Article 267 TFEU is based on the provisions of a Union act, which is intended to enable national courts to resolve legal uncertainties that have arisen in connection with specific proceedings pending in a member state. The Union law does not, in principle, interfere with the choice of instruments for implementing acts that are binding on the member states and cannot predetermine the appropriateness of the way in which it is implemented in the internal legal order. The Directive establishes for the member states shared minimum standards for the protection of a commercial agent.[8] This convergence is to be facilitated by the Directive's arrangements as regards the content of the key concepts and the nature of the institutions provided for therein. In the light of the considerations in this article, a departure from the definitions defining the subjective and objective scope of the Directive should be considered appropriate.[9] Pursuant to Article 1(2), the term 'commercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.[10] It has been consistently held in the case law of the Court of Justice that, in order to determine properly the object and role of individual provisions of a given act, their content, context and objectives must be taken into account.[11] From the perspective of the assumptions of the Directive under discussion and the CJEU case law interpretation of its provisions, the protection of a commercial agent comes to the foreground. It is not absolute, with its primary objective remaining the equality of opportunities and benefits.

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[8] In the reasons for the judgment of 17 July 2007 (P 16/06, 79/7/A/2007), the Constitutional Tribunal noted that the interpretation of the limits of freedom of contract, including the agency contract, should take into account the way of interpretation which is, as close as possible, in line with the solutions envisaged under the EU law.

[9] Among others, the CJEU judgments of 17 October 2013, *Unamar*, C-184/12, EU:C:2013:663, para. 37; of 3 December 2015, *Quenon*, C-338/14, EU:C:2015:795, para. 23, and the case law cited therein. See also D.C. Aguado, *Régimen jurídico de las operaciones internacionales de consumo en los servicios turísticos digitales*, Dykinson, Madrid 2018, p. 144; P. Hollander, *L'arrêt Unamar de la Cour de justice: une bombe atomique sur le droit belge de la distribution commerciale?*, Journal des tribunaux 2014, p. 297 et seq.; G. Rühl, *Commercial Agents, Minimum Harmonization and Overriding Mandatory Provisions in the European Union: Unamar*, Common Market Law Review 1, 2016, p. 216.

[10] The definitions of a commercial agency set out above are broadly in line with the provisions of *Draft Common Frame of Reference*, Book IV, part II, Chapter III, IV.E.-3:101, [in:] Ch. von Bar, E. Clive, H. Schulte-Nölke et al. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) Outline Edition*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law, Munich 2009, p. 352.

[11] As regards the latter, see D. Bucior, *Komentarz*, [in:] M. Fras, M. Habdas (eds), *Kodeks cywilny. Komentarz. Zobowiązania. Część szczególna (art. 535–764(9))*, Vol. IV, Warszawa 2018, comment to Article 758 Civil Code, para. 6. The external creditor-debtor relationship is functionally related to the internal relationship, see R. Stefanicki, *Odpowiedzialność zakładu ubezpieczeń za szkodę wyrządzoną przez agenta*, Wiadomości Ubezpieczeniowe 7–8, 2004, p. 31, which affects the interpretation.

3. NATURE AND NORMATIVE EFFECTS OF ESTABLISHING A TRIAL PERIOD

It follows from the definition quoted above that agency contracts should be permanent. An integral element of such contracts is their durability and, in particular, their objectives that are expressed in the efforts to solicit and retain customers and, thus, also to benefit the principal after the termination of the contract and the agent's right to indemnity. On the other hand, the exclusion of contracts which contain a trial period clause from the scope of the Directive may give rise to a significant risk of harming the agent[12] as a result of 'early termination'. The national court, seeking a preliminary ruling, and the principal in a dispute with its commercial agent submitted that a contract providing for a trial period is not definitive and as such does not fall within the scope of the Directive. As the Advocate General rightly pointed out,[13] it does not contain any specific provisions as regards national measures for its implementation. Nor does it provide for a general exclusion of these contracts from its scope. In view of the essential purpose of the Directive and the content of its provisions, the context in which they occur, and the effect of the EU law cannot, in the opinion of the Advocate General, be 'negated' by the exclusion of the contracts at issue from its scope of application merely because they provided for a trial period. Such a negative effect could also arise if agency contracts are excluded from the scope of the Directive, where a commercial agency is only ancillary[14] or if the same parties are bound by other provisions that are not ancillary to the commercial agency in addition to the agency contract. The latter issue is touched upon in the interpretation of the act in question by the Court of Justice in its judgment of 21 November 2018,[15] in which the Court ruled, inter alia, that:

> Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person not only performs activities consisting in the negotiation of the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities,

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[12] That is considered the weaker party to this contract. It is even indicated that this is comparable to the protection enjoyed by an employee with regard to, inter alia, the termination of the employment contract, J. Huet, *Traité de droit civil*, [in:] G. Decocq, C. Grimaldi, J. Huet, H. Lécuyer, *Les principaux contrats spéciaux*, Paris 2012, p. 1099. Nowadays, the inclusion of 'employees' in the context of civil law in the protective standards is seen as an implementation of the principle of social justice, Z. Hajn, *Regulacja prawna zatrudnienia agentów*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000, p. 138; M. Szabłowska-Juckiewicz, M. Wałachowska, J. Wantoch-Rekowski (eds), *Umowy cywilnoprawne w ubezpieczeniach społecznych*, Warszawa 2015, pp. 20, 27 et seq., with statements by representatives of science, practitioners.

[13] Point 34 of the opinion submitted on 25 October 2017, *Conseils et mise en relations (CMR) SARL*, C-645/16, ECLI:EU:C:2017:806.

[14] This applies to situations where a member state has not exercised its discretionary power to exclude them in the implementation of the Directive. By setting common minimum standards for approximation, the Directive allows the exclusion in internal systems of persons who carry out agency activities on an ancillary basis. Few countries have made use of this clause, which means that agents carrying out activities ancillary to their main business are also covered by the safeguard mechanism of the Directive.

[15] *Zako SPRL v. Sanidel SA*, C-452/17, ECLI:EU:C:2018:935.

> does not preclude that person from being classified as a 'commercial agent' within the meaning of that provision, provided that this fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.

The Court of Justice has consistently emphasised in its preliminary case law that the Directive's provisions should be read by reference to its objectives. The literature on the subject[16] correctly argues that stressing the teleological argumentation in legal reasoning is to prevent formalism, and also the limitations of legal discourse and the weakening of ethical liability for the law. However, the setting of the law enforcement methodology is dependent on the regulation method. It would be difficult to do so, especially if the rules are excessively casuistic, and in particular when taking advantage of the closed nature of the element making up the regulation of a particular matter. The EU legislator has recently abandoned this technique, and rightly so. Having regard to the objectives of the Directive, the interpretation of its provisions in the preliminary rulings of the Court of Justice is targeted at the protection of commercial agents.[17] This does not mean, however, that the interpretation which would lead to an imbalance in the actual position of the parties to the relationship in question is correct.[18] The objective is to secure real standards of formal justice in the process of applying the law and provide safeguards in the field of substantive justice. In order to achieve such aims, the use of undefined phrases or equity clauses of a general nature should be used in structuring an act. The content of the latter serves the purpose of resolving a specific dispute. Such a regulatory model leads to an increased importance of case law.[19] The reasons of equity[20] have been placed in the structure of the act in question in the regulations governing the right of a commercial agent to indemnity.[21] Balancing on the basis of

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[16] A. Bator, P. Kaczmarek, *Kim ma być wychowanek akademii prawniczej? O perspektywach budowania edukacji prawniczej wokół konstytucji*, Krytyka Prawa Vol. 10(2), 2018, p. 22.

[17] Judgment of 17 May 2017, *ERGO Poist'ovňa*, C-48/16, EU:C:2017:377, para. 41. The system established for this purpose in the Directive 86/653 is mandatory, see judgments of the Court of Justice: of 9 November 2000, *Ingmar*, C-381/98, EU:C:2000:605, para. 21; of 23 March 2006, *Honyvem Informazioni Commerciali*, C-465/04, EU:C:2006:199, para. 22.

[18] As regards the formalistic approach to law implementation (*Vorverständnisse*, *denkender Gehorsam*); for more details, see B. Hüpers, K. Larenz, *Methodenlehre und Philosophie des Rechts in Geschichte und Gegenwart*, Berlin 2010, pp. 354–355; N. Reich, *Full Harmonisation of EU Consumer Law*, [in:] R. Stefanicki (ed.), *Aktualne tendencje w prawie konsumenckim*, Wrocław 2010, p. 158.

[19] As regards its far-reaching role, see K. Topolewski, *Umowa agencyjna według Kodeksu cywilnego. Wybrane problemy de lege ferenda*, [in:] A. Olejniczak, J. Haberko, A. Pyrzyńska, D. Sokołowska (eds), *Współczesne problemy prawa zobowiązań*, Warszawa 2015, p. 712 et seq.

[20] One sees fairness, on the one hand, as a principle or grounds for judgment-giving formulated in the law, and on the other hand, as one of the 'most important directives for giving judicial decisions in civil cases', see A. Górski, *Słuszność w orzekaniu sędziego cywilisty*, Białostockie Studia Prawnicze 17, 2014, p. 115 et seq.; H. Ciepła, *Dochodzenie odszkodowań z czynów niedozwolonych na zasadzie słuszności*, Białostockie Studia Prawnicze 17, 2014, p. 57 et seq.; as well as comments in the context of Article 417^2 of the Civil Code in G. Bieniek, J. Gudowski, [in:] J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Vol. III, WKP, Warszawa 2018, in particular paras 7–8 with literature referred to therein.

[21] J. Jezioro, [in:] E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz*, Legalis 2017, commentary on Article 764^3 of the Civil Code, paras 1–2. It is, by all means, obligatorily taken into account in the process of examining the conditions for granting an indemnity to

these criteria allows a solution that is in line with the principles of legal axiology.[22] The equity criteria referred to in the regulations in question make it possible to find a flexible, taking into account all the circumstances,[23] approach to each individual case and avoid schematism.[24] The notion of all circumstances covers not only the grounds set out in the already cited provisions, relating to the conditions of indemnity, but also other components that are not expressly stipulated by the legislator. In that regard, the preliminary ruling of 3 December 2015[25] is worth noting, in which the CJEU held that Article 17(2) of Council Directive 86/653 must be interpreted as not precluding national legislation under which, as a result of the termination of an agency contract, an agent has the right to an indemnity following the acquisition of customers, limited to a maximum of one year's remuneration and, if that indemnity does not cover the entirety of the loss actually incurred, to the award of additional damages. However, the Court of Justice makes a reservation that this cannot lead to double compensation for loss of commission as a result of termination of the contract. Agent protection is not absolute. He is bound by certain standards of professional diligence and loyalty to the principal.[26] The latter requirement, identified as fairness in relationships with the other party,[27] is combined with a credit of trust,[28] which is also a decisive factor in reducing transaction costs.[29] Failure to comply with

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a commercial agent; see A. Konert, [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, commentary on Article 764^3 of the Civil Code, para. III.4.

[22] The reasons of equity may ultimately be the grounds for granting an indemnity to an agent, determining its amount or tilting the balance to the other party to the contract in question. It is a *sui generis* benefit, based on the principle of equity. This demonstrates that a commercial agent participates in the benefits resulting from the effects produced by it during the contractual term; see K. Kopaczyńska-Pieczniak, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz. Zobowiązania – część szczególna*, Vol. III, Warszawa 2014, para. 14. D. Bucior (*supra* n. 11, commentary on Article 758 Civil Code, para. 5) correctly points out that the Court of Justice applied the same premise of a loss to the compensation and the indemnity, whereas it is relevant only in the former case.

[23] M. Grochowski (*Umowa agencyjna w orzecznictwie sądów powszechnych*, Prawo w Działaniu. Sprawy Cywilne 20, 2014, pp. 362–363) points at the need to take into account the criterion of proportionality and, as such, the different circumstances of the relationship between the parties which would make the attribution of liability for a breach of an obligation economically unreasonable or inequitable. The set of economic interests typical of the agency relationship may be modified in various circumstances.

[24] T. Wiśniewski, [in:] J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część szczegółowa*, Vol. V, Warszawa 2017, para. 9.

[25] *Quenon*, C-338/14.

[26] Considering the average moral level appropriate for a decent working and economic life; see A. Kraus, F. Zoll, *Polska ustawa o zwalczaniu nieuczciwej konkurencji – komentarz*, Poznań 1929, p. 173.

[27] See the comments of the European Commission in its Report of 23 July 1996 (*supra* n. 2) on the presentation of a faithful, clear increase in the value of the principal's business obtained through the work of a commercial agent through a commission.

[28] A. Konert, [in:] M. Załucki, *supra* n. 21, commentary to Article 764^3 of the Civil Code, para. VII.12.

[29] See in this respect Article 3 of the Directive, which makes direct reference to the requirements to be met by a commercial agent. The general rule binding on counterparties is not only their assumed professionalism in operation (G. Kühne, *Rechtswahl und Eingriffsnormen in der Rechtsprechung des EuGH*, [in:] J.Ch. Cascante, A. Spahlinger and S. Wilske (eds), *Global Wisdom on Business Transactions*, International Law and Dispute Resolution, München 2015, p. 451 et seq.),

the above requirements may justify termination of the contract by the principal, whether or not a trial period is provided for in the contract. The requirement of loyalty also binds the other party to the agreement in question.[30] However, if the requisite standards of fairness in a commercial agent's activities are met – which should be established by the national court on the basis of all the circumstances – it would be contrary to the axiology of the Directive to exclude it a priori from the safeguard guaranteed by that Community (now the EU) legislation.[31]

4. EFFECTIVENESS OF STANDARDS SET BY DIRECTIVE 86/653

The Directive lays down minimum standards common to the member states for commercial agency contracts. In order to ensure the transparency of the scope of its impact, the regulation also points out the derogations which the member states are free to make use of when transposing this instrument. The discretionary power of the member states lies in the possibility of including agency contracts other than the commercial representation defined therein in the special safeguard mechanisms under the Directive. The main focus of the EU case law is on safeguarding actual and not only potential standards in the national order.[32] A derogation to the detriment of the agent would be the general adoption of the principle that the establishment of a trial period in an agency contract means that such an agent is excluded from the rights guaranteed by the Directive, including as regards the compensation and indemnity provided for in Article 17 thereof. With the same results in the performance of the agency contract, the agent could be granted or refused compensation on the sole ground that a trial period has been stipulated in the agency contract. In that regard, the Court of Justice has already ruled[33] that Articles 17 and 18 of the

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but also compliance with the requirements of loyalty, understood as compliance with ethical standards of professional integrity (I. Mycko-Katner, *Umowa agencyjna*, Warszawa 2012, p. 170). It is correctly assumed that the requirements of fair trading essentially permeate into all elements of the relationship between the parties to the contract in question, for instance, they are relevant in assessment of indemnity granted to the agent by reference to the principles of equity; see E. Rott-Pietrzyk, *supra* n. 2, nb. 267.

[30] See the grounds for the Supreme Court judgment of 25 May 2018, I CSK 478/17, LEX No. 2504292.

[31] Thus, it makes it possible to find a common point of reference for the member states' acquis, which in turn serves to approximate standards for the implementation of agency contracts in a cross-border space. See *Unamar*, C-184/12, judgment (*supra* n. 9) in which the CJEU referred to Articles 3 and 7(2) of the Convention on the law applicable to contractual obligations; more generally in G. Rühl, *supra* n. 9, p. 216; M. Mataczyński, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Kraków 2005, II.1.4. Regarding special jurisdiction, see M. Świerczyński, [in:] J. Gołaczyński (ed.), *Jurysdykcja, uznawanie orzeczeń sądowych oraz ich wykonywanie w sprawach cywilnych i handlowych. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1215/2012. Komentarz*, Warszawa 2015, p. 34 et seq.

[32] The Supreme Court was right to hold in its judgment of 25 May 2018 that the implementation of the Directive gives rise to an obligation on the part of the Polish courts to interpret it in such a way as to make its wording and objectives effective to the fullest possible extent.

[33] Judgment of 17 October 2013 in *Unamar*, C-184/12, para. 39.

Directive are of crucial importance as they define the level of protection which the European Union legislature considered reasonable to grant commercial agents in the course of the creation of the single market. The standards set by these provisions are present in the context of Article 19 of the Directive. The latter stipulates that the parties may not derogate from the provisions of Articles 17 and 18 to the detriment of the agent before the expiry of the agency contract. Similarly to its counterpart in the Civil Code, this provision constitutes *ius semidispositivum*.[34]

It should be borne in mind that the equity criteria apply not only to the granting of the indemnity itself or not, but also to the methodology for determining the amount of benefits. These requirements perfectly fit in with the view of the Supreme Court presented in the statement of reasons for the judgment of 25 May 2018, in which the Court stated that fulfilment of the requirements of effective security of indemnity claims, resulting from the Directive in question, to the same extent depends on the adoption of the method of calculation of the benefit amount and the use of Article 322 of the Civil Procedure Code only exceptionally. As such, the requirements of fair trading essentially permeate into all elements of the relationship between the parties to the contract in question, including they are relevant in measuring the granting of indemnity to the agent by reference to the principles of equity. This is an illustration of a more reflective approach to the diversity of forms of conclusion and performance of agency contracts and the assessment of their admissibility through the prism of the axiology of the EU law, which is not to exclude from its scope the benefits accruing to commercial agents of contracts concluded and performed in good faith.[35] The safeguard standards focused on the rights of the commercial agent apply to both potential rights and actual guarantees which determine the effectiveness, i.e. the results of the EU order. The latter is apparently affected by the methodology of providing indemnities.[36] There are some symptoms of making the law open to its ethical dimension. A huge role in reaching for the axiology of law rests in judicial decisions.

5. CONCLUSION

It can be concluded from the interpretation of agency contracts by the Court of Justice for the purposes of a court of a member state that the assumption that no indemnity is payable in the event of termination of the agency contract during a trial period

[34] Similar principles result from Article 764^5 of the Civil Code; see P. Mikłaszewicz, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, commentary on Article 764^3 of the Civil Code, para. 4.

[35] As regards the origin, see M. Pilich, *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej*, Studia Prawnicze 4, 2006, p. 49.

[36] In this respect see, inter alia, the CJEU judgment of 26 March 2009, *Turgay Semen*, C-348/07, ECLI:EU:C:2009:195, and the opinion of the Advocate General of 19 November 2008 presented in this case, ECLI:EU:C:2008:635. It stated, inter alia, that the method of calculation of lost commissions is to reflect the actual amount of the commissions in the period following the termination of the contract, thus making it possible to take into account the benefits derived by the principal from the agent's activities. See also N. Godin, P. Kileste, *Contrat d'agence commercial*, Bruxelles 2017, p. 32, and the above-mentioned Supreme Court judgment of 25 May 2018.

is incompatible with the mandatory nature of the system established by Article 17 in conjunction with Article 19 of the Directive 86/653. The interpretation of the act in question, which consists in making the commercial agent's safeguard mechanisms dependent on the nature of the contract itself – with the general exclusion of contracts providing for a trial period – regardless of the agent's performance, is an interpretation which is not justified in the light of its objectives. The agent cannot be a priori deprived of the benefits to which it is entitled, simply because the contract binding the parties stipulated the trial period. In its reply to the member state's request, the Court of Justice stated that the interpretation of Article 17 of the Directive, according to which no compensation or indemnity is payable if the agency contract is terminated during the trial period, is contrary to its purpose. The interpretation of the act in question given by the Court of Justice in the present judgment, as in its earlier case law on the classification of various forms of agency activity, seeks to cover as broadly as possible the scope of the Directive in question, different commercial agency contracts, irrespective of the name of the contract and the clauses contained therein, if agency activities are actually carried out on such basis. These considerations of the Court of Justice overshadow the efficiency and reliability of the agent that are relevant to the other party. These issues remain under examination at the national level. The requirements of equity in the implementation of the Directive are not limited to a reference, expressed explicitly in the provision governing the conditions for granting the indemnity, but also permeate all the matters governed by it. The general principles that are enshrined in the basic law set out a general framework for axiological choices aimed at an equitable outcome, including those relating to contracts containing a trial period clause. The decision of the Court of Justice on that point constitutes an important indication for the national decision.

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ESTABLISHMENT OF A TRIAL PERIOD IN AGENCY CONTRACTS: COMMENTS IN THE CONTEXT OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 19 APRIL 2018

Summary

Commercial agency contracts are of great economic importance and have a long tradition of normative regulation. Minimum standards of protection common to the EU member states are laid down in the Directive 86/653/EEC on self-employed commercial agents. The constant changes in the legal environment mean something more than just 'interpretation of a norm', the need to reach for its well-established, uniform, common understanding expressed in the case law and judicial decisions. The importance in this respect must unquestionably be attached to the preliminary rulings of the Court of Justice. An interesting point in its case law is the recent reference to the question of whether agency contracts concluded for a trial period are bound by the provisions of that act. Although this is the first time when the Court of Justice has addressed this issue, the direction of the interpretation, presented in favour of resolving the national court's doubts, is more broadly based on the desire to extend the protective mechanisms of the Directive to commercial agents that are bound by contracts which do not fully comply with the classic agency format. Based on the analyses carried out in the paper, it can be concluded that the trend to deformalise the law is correct and should be the subject of broader legal discourse.

Keywords: commercial agent, agency contract, trial period contract, teleological interpretation, indemnity

USTANOWIENIE OKRESU PRÓBNEGO W UMOWACH AGENCYJNYCH – UWAGI NA TLE WYROKU TRYBUNAŁU SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ Z 19 KWIETNIA 2018 R.

Streszczenie

Umowy przedstawicielstwa handlowego mają duże znaczenie gospodarcze i długie tradycje normatywnego ich regulowania. Wspólne dla państw członkowskich minimalne standardy ochrony zostały ustanowione dyrektywą dotyczącą przedstawicieli handlowych działających na własny rachunek. Dokonujące się ustawicznie zmiany otoczenia prawa oznaczają coś

więcej niż tylko „odczytanie normy", potrzebę sięgania po utrwalony, jednolity, powszechny sposób jego rozumienia wyrażony w judykaturze. Niewątpliwe znaczenie w tym zakresie przypisywać należy wyrokom prejudycjalnym Trybunału Sprawiedliwości. Interesującym wątkiem w tym orzecznictwie jest podjęcie ostatnio kwestii związania postanowieniami tego aktu umów agencji zawartych na okres próbny. Wprawdzie Trybunał Sprawiedliwości zajął się tym zagadnieniem po raz pierwszy, ale kierunek interpretacji, przedstawiony na rzecz rozstrzygnięcia wątpliwości sądu krajowego, ma znaczenie szersze, wiąże się bowiem z dążeniem do objęcia mechanizmami ochronnymi dyrektywy przedstawicieli handlowych, związanych umowami nie do końca wpisującymi się w klasyczną formułę agencji. Z analiz przeprowadzonych w poniższym materiale wypływa wniosek, że kierunek na odformalizowanie prawa jest trafny i powinien być przedmiotem szerszej dyskusji prawniczej.

Słowa kluczowe: przedstawiciel handlowy, umowa agencyjna, umowa na okres próbny, wykładnia celowościowa, świadczenie wyrównawcze

LA FIJACIÓN DE PERIODO DE PRUEBA EN CONTRATO DE AGENCIA, COMENTARIOS A LA LUZ DE LA SENTENCIA DEL TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA DE 19 DE ABRIL 2018

Resumen

Los contratos de representación mercantil tienen significado económico importante y larga tradición normativa de su regulación. Los estándares mínimos de protección son establecidos para los Estados Miembros mediante la directiva relativa a los representantes comerciales que actúan por su propia cuenta. El cambio permanente del entorno legal significa algo más que sólo la "lectura de la norma", es necesario utilizar la interpretación común, uniforme, consolidada, expresada en la jurisprudencia. Sin duda alguna, las sentencias prejudiciales del Tribunal de Justicia de la Unión Europea son importantes. Últimamente se ha tratado la cuestión relativa a estipulaciones de contrato de agencia por el periodo de prueba. Es la primera vez que el Tribunal de Justicia de la Unión Europea trata este problema, sin embargo la interpretación de dudas del tribunal nacional tiene significado más amplio, ya que trata de incluir en los mecanismos de protección de la directiva a los representantes comerciales con contratos que no exactamente vistan la forma de contrato de agencia. Del análisis llevado a cabo en esta obra resulta que dejar de formalizar el derecho es un rumbo acertado y debe de ser objeto de discurso legal más amplio.

Palabras claves: representante comercial, contrato de agencia, contrato por periodo de prueba, interpretación teleológica, prestación compensatoria

УСТАНОВЛЕНИЕ ИСПЫТАТЕЛЬНОГО СРОКА В РАМКАХ АГЕНТСКИХ ДОГОВОРОВ: ЗАМЕЧАНИЯ НА ФОНЕ РЕШЕНИЯ СУДА ЕВРОПЕЙСКОГО СОЮЗА ОТ 19 АПРЕЛЯ 2018 ГОДА

Аннотация

Договоры о коммерческом представительстве имеют большое значение для экономической деятельности, и поэтому неудивительно, что законодательное регулирование таких договоров

имеет давние традиции. Минимальные стандарты защиты, общие для государств-членов ЕС, изложены в Директиве в отношении независимых коммерческих агентов. В условиях постоянно изменяющейся правовой среды недостаточно просто «понять» ту или иную норму права; необходимо постоянно обращаться к устоявшемуся, унифицированному, общепринятому пониманию данной нормы, выраженному в судебной практике. Несомненно, большое значение в этом отношении имеют преюдициальные постановления Суда Европейского союза. Особый интерес вызывает недавнее рассмотрение Судом ЕС вопроса о том, применимы ли положения Директивы к агентским договорам, заключенным на испытательный срок. Суд впервые обратился к этому вопросу, отвечая на преюдициальный запрос суда одной из стран-членов. Тем не менее, заданное Судом направление толкования имеет значение и в более широком контексте, так как в нем отражено стремление распространить защитные механизмы, предусмотренные в Директиве, на коммерческих агентов, работающих по договорам, которые не вполне соответствуют классической формуле агентских отношений. Из приводимого в статье анализа можно сделать вывод, что тенденция к деформализации права является шагом в правильном направлении и заслуживает более широкого обсуждения в рамках юридического дискурса.

Ключевые слова: коммерческий представитель, агентский договор, договор с испытательным сроком, телеологическое толкование права, компенсационная выплата

DIE VEREINBARUNG EINER PROBEZEIT IN HANDELSVERTRETERVERTRÄGEN, ERWÄGUNGEN VOR DEM HINTERGRUND DES URTEILS DES GERICHTSHOFS DER EUROPÄISCHEN UNION VOM 19. APRIL 2018

Zusammenfassung

Handelsvertreterverträge haben außerordentlich große wirtschaftliche Bedeutung und blicken auf eine lange Tradition der normativen Regulierung zurück. Den Mitgliedstaaten gemeinsame Mindestschutzstandards wurden durch die europäische Richtlinie über selbständige Handelsvertreter festgelegt. Durch das ständigen Änderungen unterworfene rechtliche Umfeld ist mehr als ein reines „Ablesen der Norm" gefordert und es bedarf eines fest etablierten, einheitlichen und allgemein geltenden Verständnisses, das in der Rechtsprechung zum Ausdruck kommt. Zweifellos ist den Vorabentscheidungen des Europäischen Gerichtshofs diesbezüglich große Bedeutung beizumessen. Ein interessanter Aspekt dieser Rechtsprechung ist die kürzlich aufgegriffene Frage, ob die Bestimmungen dieses Gesetzes auch auf Agenturverträge anwendbar sind, die für eine Probezeit abgeschlossen wurden. Zwar hat sich der Gerichtshof dieses Themas zum ersten Mal angenommen, doch kommt der präsentierten Auslegung, die vorgelegt wurde, um Zweifel des einzelstaatlichen Gerichts zu beseitigen, eine breitere Bedeutung zu, da sie mit dem Streben verbunden ist, die Schutzmechanismen der Richtlinie auf Handelsvertreter auszudehnen, die an Verträge gebunden sind, die nicht ganz dem klassischen Modell der Handelsvertretung entsprechen. Aus den durchgeführten Analysen lässt sich ableiten, dass die eingeschlagene Richtung einer Informalisierung des Rechts richtig ist und Gegenstand eines breiter angelegten juristischen Diskurses sein sollte.

Schlüsselwörter: Handelsvertreter, Handelsvertretervertrag, Vertrag auf Probezeit, teleologische Auslegung, Ausgleichszahlung

STIPULATION D'UNE PÉRIODE D'ESSAI DANS UN CONTRAT D'AGENCE COMMERCIALE, OBSERVATIONS DANS LE CONTEXTE DE L'ARRÊT DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE DU 19 AVRIL 2018

Résumé

Les accords de représentation commerciale ont une grande importance économique et une longue tradition de réglementation. Les normes minimales de protection communes aux États membres ont été établies par la directive sur les agents commerciaux indépendants. Un environnement juridique en constante évolution signifie plus que la simple «lecture de la norme», la nécessité de parvenir à une manière bien établie, uniforme et commune de la comprendre exprimée dans la jurisprudence. Il ne fait aucun doute que l'importance à cet égard doit être attribuée aux décisions préjudicielles de la Cour de justice. Un fil intéressant de cette jurisprudence est la récente question de lier les contrats d'agence conclus pour une période d'essai aux dispositions de cette directive. Bien que cette question ait été traitée par la Cour de justice pour la première fois, la direction d'interprétation présentée pour résoudre les doutes de la juridiction nationale a une signification plus large, car elle est liée à la volonté d'étendre les mécanismes de protection de la directive aux représentants commerciaux liés par des contrats pas tout à fait conformes à la formule classique de l'agence. D'après les analyses effectuées dans ce document, il s'ensuit que la direction de la déformalisation du droit est appropriée et devrait faire l'objet d'un discours juridique plus large.

Mots-clés: représentant commercial, contrat d'agence, contrat de période d'essai, interprétation téléologique, prestation compensatoire

ISTITUZIONE DEL PERIODO DI PROVA NEI CONTRATTI DI AGENZIA, NOTE SULLO SFONDO DELLA SENTENZA DELLA CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA DEL 19 APRILE 2018

Sintesi

I contratti di agenzia commerciale hanno una grande importanza commerciale e una lunga tradizione normativa che li regolamenta. Gli standard minimi di tutela comuni per gli Stati membri sono stati stabiliti nella Direttiva sugli agenti commerciali indipendenti. Le modifiche che avvengono continuamente nel quadro giuridico significano qualcosa di più di una semplice "rilettura delle norme", indicano la necessità di raggiungere una modalità costante, uniforme e universale di comprensione, espressa nella giurisprudenza. Un'importanza indubbia in tale ambito va attribuita alla sentenza pregiudiziale della Corte di giustizia. Un tema interessante in tale sentenza è l'aver ultimamente trattato la questione legata alle norme dei contratti di agenzia stipulati per un periodo di prova. In effetti la Corte di giustizia si è occupata di tale questione per la prima volta, ma la direzione interpretativa, presentata per risolvere i dubbi del tribunale nazionale, ha un'importanza più ampia e si lega infatti al tentativo di comprendere i meccanismi di tutela della direttiva sugli agenti commerciali indipendenti, legati da contratti che non del tutto rientrano nella formula classica del contratto di agenzia. Dall'analisi condotta nel materiale seguente emerge la conclusione che la direzione per la deformalizzazione del diritto è cogliente, e dovrebbe essere oggetto una più ampia discussione giuridica.

Parole chiave: agenti commerciali, contratto di agenzia, contratto per un periodo di prova, interpretazione teleologica, indennità

Cytuj jako:

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PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY IN THE CONTEXT OF AMENDMENTS TO EU LAW AND NATIONAL LEGISLATION

PRZEMYSŁAW OSTOJSKI*

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1. INTRODUCTION

The law[1] constantly changes as it aspires to be an instrument that shapes the reality.[2] The addressees of legal norms must come to terms with changes in law, which may be driven or even enforced by a change in social or economic conditions.[3] It is indicated in judicial case law that one cannot talk about guaranteed immutability of the law or about a justified expectation of its immutability, correlated with such a guarantee, particularly when it comes to the 'eternality' of certain rights and privileges.[4]

A change in law entails a transformation of social relations while, at the same time, the powers and responsibilities of the subjects of the law are changed. This

* PhD hab., Professor at the School of Management and Banking in Poznań; e-mail: przemyslaw.ostojski@gmail.com; ORCID: 0000-0001-6552-8162

1 The law in its simplest understanding, widespread in the European continental legal culture, used by legal practice: regarded as a set of norms of conduct, enacted or recognised by the competent public authorities; see S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2002, p. 7. The author omits here the disputes around the ontological complexity of law; see R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 1996, p. 23 et seq.

2 See Ch. Waldhoff, *Der Verwaltungszwang. Historische und dogmatische Studien zu Vollstreckung und Sanktion als Mittel der Rechtsdurchsetzung der Verwaltung* (manuscript of habilitation dissertation), München 2002, p. 1.

3 See the Supreme Administrative Court judgments: of 28 October 2015, II GSK 1616/15; of 18 November 2015, II GSK 2373/13; of 28 June 2018, II GSK 2199/16, published: http://orzeczenia.nsa.gov.pl. (accessed 23.06.2020).

4 See the Supreme Administrative Court judgment of 19 July 2016, II GSK 129/15, http://orzeczenia.nsa.gov.pl. (accessed 23.06.2020).

situation is a source of uncertainty as to the legal position of individuals as well as their rights and obligations.[5] People perceive the law as one element of the reality of persons and objects placed in time and space (institutional reality), where the existence and functioning in such reality could be a source of tensions.[6] Such tensions may arise from individuals' expectations towards the actions undertaken by public authorities, including the law-making bodies. Under the conditions of the rule of law, not all expectations from public authorities can, or should, be fulfilled; this should apply only to those expectations that can be considered legitimate. Otherwise, it would not be possible for the legislator to fulfil its fundamental role, having received democratic legitimacy to do so.[7] The principle of legal certainty, derived from the rule of law, does not prohibit amendments to legislation.[8]

I will confine my discussion to selected case law problems concerning amendments to the EU directives and ordinary laws of the EU member states. My reflections will be limited to the so-called prior effectiveness of the EU directives and the retroactivity of the law, using as an example selected judgments of the Court of Justice of the European Union (CJEU) and, additionally, decisions of the Supreme Administrative Court in Poland.

The intention behind the discussion that follows is to delineate the temporal boundaries of the principles of legitimate expectations and legal certainty in the sphere of amendments to the EU directives and ordinary laws of the EU member states. In order to pursue this objective, I will review the claim that the principle of legitimate expectations towards an EU directive or national law allows one to assume that:

– during the transposition period (before the deadline for its implementation) in an EU member state, an EU directive may be a source of legitimate expectations,
– it is permissible to invoke legitimate expectations for the protection against retroactive effects of a law,
– the scope of application of the principle of protecting legitimate expectations goes much further than issues related to intertemporal law or transitional law. This remains without prejudice to the principle of legal certainty or other principles of the EU law.

2. CONCEPTS OF CHANGE OF LAW, PRIOR EFFECTIVENESS AND RETROACTIVITY OF THE LAW

The doctrine of law knows multiple, often interrelated, ways of using the concept of 'change of law'. From the theoretical perspective, this term refers, among others,

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[5] Similarly, J. Mikołajewicz, *Prawo intertemporalne w państwie prawnym*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4, 2015, p. 14.

[6] *Ibid*.

[7] See H.P. Rill, H. Schäffer, *Art. 7 B-VG*, [in:] B. Kneihs, G. Lienbacher (eds), *Rill-Schäffer-Kommentar. Bundesverfassungsrecht*, Wien 2018, p. 59.

[8] See the CJEU judgment of 11 June 2015, C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, ECLI:EU:C:2015:386.

to transformations in a set of normative acts containing legal regulations, changes in a set of legal regulations or changes to the content of legal norms.[9] In practice, change of law is understood as a logical sum of the aforementioned ways of understanding; for a correct reporting definition of this term, one must capture all circumstances relating to changes in the set of legal regulations, legal norms and normative acts.[10] I will use this very meaning of change of law later in this paper. Regardless of the aforementioned categorisation of changes of law, when one analyses this term, one can refer to the legal situations of individuals. In such a case, the relation between the new law and the previously existing legal situations may consist in the modification or abolition of these situations, or the new law may impose different legal consequences with reference to previous events versus the situation before its entry into force vis-à-vis the moment when these events occurred. In the latter case, one can talk about retroactivity of the law.[11]

The issues related to the implementation of a new law and its impact on pre-existing situations are very broad. They cannot be exhausted by talking about intertemporal law, understood either as legal issues related to broadly understood legal situations, where a change of law has occurred, or about an objectified set of solutions that specify which set of rules – the 'old' or the 'new' ones – should be applied to pre-existing situations.[12] The Polish literature adopts the notion of intertemporal law which, in a broad sense, may also include transitional rules containing elements of a material norm, independent of the content of the old and new legal regime.[13] It is the so-called transitional law, which should comprehensively cover the issues related to the implementation of the new law. According to the view proposing a narrow definition of intertemporal law, transitional law is a broader category: apart from intertemporal law, it also includes adaptive law.[14]

It should be pointed out that it is disputed in the Polish legal doctrine whether intertemporal law comprises the category of retroactivity of law or not.[15] It consists in putting the legal relations that were 'closed' under the old law into the scope of

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[9] For a detailed discussion on this subject, see: J. Mikołajewicz, *Prawo intertemporalne. Zagadnienia teoretycznoprawne*, Poznań 2000, p. 39 et seq.; *idem*, *Zmiana prawa*, [in:] *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza i funkcje*, Warszawa 2015, p. 111 et seq.

[10] It should be noted that the applicability of legal regulations in the system is treated as a derivative of the applicability of normative acts, whereas the applicability of the basic body of legal norms is viewed as a derivative of the applicability of legal regulations, see J. Woleński, *Z zagadnień analitycznej filozofii prawa*, Kraków 2012, p. 104 et seq.

[11] J. Mikołajewicz, *supra* n. 5, p. 20.

[12] See *ibid*., p. 17. Cf. definition proposed by Marcin Kamiński in *Prawo administracyjne intertemporalne*, Warszawa 2011, pp. 16–17.

[13] W. Jakimowicz, *Kilka uwag na temat metod regulacji intertemporalnej w kontekście sytuacji prawnej jednostki*, [in:] J. Korczak (ed.), *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, Wrocław 2016, p. 155.

[14] J. Mikołajewicz, *supra* n. 5, p. 19.

[15] Among the principles of intertemporal law, Wojciech Jakimowicz mentions the principle of (prohibition of) retroactive action of the law – see *idem*, *supra* n. 13, p. 156. On the other hand, Jarosław Mikołajewicz argued that functional, psychological and historical relations between the issue of retroactivity of law and intertemporality do not allow retroactive law to be treated as a form of intertemporal law, see *idem*, *supra* n. 5, p. 19 et seq.

the new legal norm. As already mentioned, in such a situation the new regulation extends new legal effects onto factual states emerging and completed under the old law, before the new law has entered into force. The prohibition of retroactivity of national law, especially in the perspective of constitutional law,[16] is indisputable. Literature rarely refers to the EU perspective on this issue, which is particularly noteworthy within the case law of the CJEU, where the principles of legitimate expectations and legal certainty are applied.

Some authors representing the doctrine of Swiss and German law have proposed an even broader understanding of intertemporal law than the one presented above (covering only the norms that have already entered into force), suggesting that this category should also include the issue of the so-called 'prior effectiveness of law' (*Vorwirkung*) and 'subsequent effectiveness of law' (*Nachwirkung*).[17] The former concept means, *in genere*, that the assessment of the current factual states takes into account the future law (which has not yet entered into force, or which has not yet had legal effect).[18] The latter concept refers to a situation where a law produces effects after it has lost its binding force.[19] With regard to the former issue, at the level of the EU law, the CJEU concluded that individuals cannot derive legitimate expectations from the wording of the provisions of a draft regulation which differ from the provisions of the finally adopted legal act.[20] In judicial case law, the question of prior effectiveness of an EU directive (*Vorwirkung einer EU-Richtlinie*) is also relevant from the perspective of the protection of legitimate expectations and legal certainty and the analysis of the change of law. This category essentially refers to the legal validity of a directive before the end of the transposition period in a member state. There may be varied cut-off points for the initial moment when the effectiveness of an EU directive is considered. The narrow approach points to the moment when the directive enters into force, whereas the broad approach refers to the moment of the directive's publication in the relevant Official Journal of the European Union.[21] In any case, the concept of *Vorwirkung* concerns the admissibility of a situation where – when assessing the existing legal situations of individuals – one takes into account a legal act which has either not yet entered

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[16] See the Polish Constitutional Tribunal judgments: of 31 March 1998, K 24/97, OTK ZU 2/1998, item 13; of 9 June 2003, SK 12/03, OTK ZU 6a/2003, item 51; of 25 May 2004, SK 44/03, OTK ZU 5a/2004, item 46.

[17] In the Swiss doctrine: L. Weiss, *Zeitlichkeit und Recht*, Zürich 1968, p. 53; M. Thommen, *Zur Problematik der Vorwirkung insbesondere im öffentlichen Recht*, Basel 1979, p. 24. In the German doctrine: A. Guckelberger, *Vorwirkung von Gesetzen im Tätigkeitsbereich der Verwaltung. Eine rechtsvergelichende Studie des deutschen und schweizerischen Rechts*, Berlin 1997, p. 24.

[18] P. Tschannen, U. Zimmerli, M. Müller, *Allgemeines Verwaltungsrecht*, Bern 2014, p. 205; A. Guckelberger, *supra* n. 17, pp. 14–15.

[19] M. Kloepfer, *Vorwirkung von Gesetzen*, München 1974, p. 5; M. Thommen, *supra* n. 17, p. 20; C. Oertel, *Der Zeitfaktor im öffentlichen Wirtschaftsrecht*, Köln 1992, p. 66.

[20] See the CJEU judgment of 5 October 1993 in Joined Cases C-13, C-14, C-15 and C-16/92, *Driessen en Zonen, A. Molewijk, Motorschiff Sayonara Basel AG and vof Fa. C. Mourik en Zoon v. Minister van Verkeer en Waterstaat*, ECR 1993/9-10/I-4751.

[21] For more on this, see V.I. Gronen, *Die „Vorwirkung" von EG-Richtlinien. Auswirkungen Europäischer Richtlinien auf die nationale Legislative und Judikative im Zeitraum zwischen Richtlinienvorschlag und Ablauf der Umsetzungsfrist*, Baden-Baden 2006, *passim*.

into force at all or is in the process of transposition and cannot have effects on individuals.

The aforementioned categories of *Vorwirkung* evoke certain expectations among individuals, embedded not only on the legal plane but also at the factual level. The task of the judiciary and its decisions is to decide whether these expectations are justified *ad casu* and whether they deserve legal protection.

3. PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY *IN GENERE*

In the CJEU case law, the principles of legitimate expectations and legal certainty are recognised as general principles of the European Union law, falling within the so-called *acquis communautaire*, classified as primary legislation of the EU.[22] Therefore, an act or omission of a national authority or an EU authority which has been demonstrated as going against one of these principles should be regarded as an infringement of the provisions of the treaties.[23] The legal doctrine explores the origins of the principle of the protection of legitimate expectations by looking at the principle of the protection of trust (*Vertrauensschutz*),[24] developed in German doctrine and jurisprudence, although this principle is also known in the legal systems based on the common law tradition (legitimate expectations).[25] When looking at this EU principle in the context of the Polish legal system, one should also compare it with the principle of protection of trust, derived from the rule of law (Article 2 of the Polish Constitution). Also, in the doctrine of Austrian law, the protection of legitimate expectations is seen as an element of protection of trust. When legitimate

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[22] See, first of all: P. Craig, *EU Administrative Law*, Oxford 2006, p. 607 et seq.; J. Schwarze, *European Administrative Law*, London 1992, *passim*. In Polish literature, see, first of all: J. Lemańska, *Uzasadnione oczekiwania w perspektywie prawa krajowego i regulacji europejskich*, Warszawa 2016, p. 41 et seq.; D. Kornobis-Romanowska, *Pewność prawa w Unii Europejskiej. Pomiędzy autonomią jednostki a skutecznością prawa UE*, Warszawa 2018, *passim*.

[23] See the CJEU judgment of 3 May 1978, 112/77, *August Töpfer & Co. GmbH v. Commission of the European Communities*, ECLI:EU:C:1978:94.

[24] See, e.g. H. Maurer, *Kontinuitätsgewähr und Vertrauensschutz*, [in:] J. Isensee, P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band III. Das Handeln des Staates*, Heidelberg 1996, p. 212 et seq.; D. Birk, *Kontinuitätsgewähr und Vertrauensschutz*, [in:] H.-J. Pezzer (ed.), *Vertrauensschutz im Steuerrecht. 28. Jahrestagung der Deutschen Steuerjuristischen Gesellschaft e.V., Graz, 15. u. 16. September 2003*, Köln 2004, p. 9 et seq.; S. Muckel, *Kriterien des verfassungsrechtlichen Vertrauensschutzes bei Gesetzesänderungen*, Berlin 1989, p. 13 et seq.; S.M. Ebner, *Vertrauensschutz und Kontinuitätsgewähr in der höchstrechtlichen Rechtsprechung am Beispiel des Steuerrechts: eine Untersuchung untere besonderer Einbeziehung des Beschlusses des Grossen Senats des BFH vom 17.12.2007, GrS 2/04 (Keine Vererblichkeit von Verlustvortägen)*, Frankfurt am Main 2009, *passim*.

[25] See J. Supernat, *Zasada ochrony uzasadnionych oczekiwań w angielskim prawie administracyjnym*, [in:] Z. Czarnik, Z. Niewiadomski, J. Posłuszny, J. Stelmasiak (eds), *Studia z prawa administracyjnego i nauki o administracji. Księga jubileuszowa dedykowana prof. zw. dr. hab. Janowi Szreniawskiemu*, Przemyśl–Rzeszów 2011, p. 721 et seq.; R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Oxford–Portland, Oregon 2000, *passim*; J.S. Schonberg, *Legitimate Expectations in Administrative Law*, Oxford 2000, *passim*.

expectations of an individual with regard to changes in the law are taken into account in certain circumstances, this is viewed as an exception to the law-making competence[26] granted to the legislator under the constitution. In this sense, the principle in question is related to the issue of continuity in law (*Rechtskontinuität*).[27]

The jurisprudence of Polish Constitutional Tribunal indicates that the principle of individuals' trust in the state and in the law enacted by the state enables individuals to decide on their behaviour based on the full knowledge of the rules guiding the state authorities and the legal consequences that individual actions may entail. An individual should be able to determine the consequences of specific behaviour and events on the basis of the law in force at a particular moment, and may reasonably expect that the legislator will not change those consequences in an arbitrary manner.[28] It is stressed, however, that the principle of the protection of trust does not exclude changes in the legal system. Individuals must take into account that a change in social or economic conditions may justify changes in the applicable law, or may even entail an immediate implementation of new legal regulations. Therefore, when examining the consistency of normative acts with the aforementioned principle, one should determine whether individuals can reasonably expect that they will not be exposed to legal effects which they could not have foreseen at the time of making decisions and actions, considering the content of previous regulations and the singularities of the sphere of life regulated by these provisions of law.[29]

With regard to the protection of legitimate expectations, criteria have been formulated in the CJEU case law allowing its application *ad casu*. First of all, there must be an act or other behaviour of the authority which makes or applies the law, which has generated a 'legal expectation' on the part of the individual. Secondly, legitimate expectations may only arise on the part of a reasonable and prudent subject of law (objectification of a legal effect). Thirdly, the protection of legitimate expectations cannot be contrary to public interest underlying the contested act or other behaviour.[30]

The principle of the protection of legitimate expectations is a specific case of the principle of legal certainty.[31] The latter principle is based on the fundamental premise that subjects of law must know the current law in order to be able to plan

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[26] See H.P. Rill, H. Schäffer, *supra* n. 7, p. 60.

[27] Less than twenty years ago, German literature stated that, under current German constitutional law, there was an injunction that in every case of legal changes or progressive legal evolution there should be a continuation between the previous and the new legal status, and that discontinuation should be allowed in objectively justified exceptional situations, see A. Leisner, *Kontinuität als Verfassungsprinzip unter besonderer Berücksichtigung des Steuerrechts*, Tübingen 2002, p. 165.

[28] See, inter alia, the Polish Constitutional Tribunal judgment of 14 June 2000, P 3/00, OTK ZU 5/2000, item 138, p. 690.

[29] See, inter alia, the Polish Constitutional Tribunal judgments: of 7 February 2001, K 27/00, OTK ZU 2/2001, item 29, p. 164; of 3 October 2007, P 28/06; published: http://trybunal.gov.pl. (accessed 23.06.2020).

[30] See Ł. Prus, *W kwestii ochrony uzasadnionych oczekiwań w prawie administracyjnym UE – glosa do wyroku TS z 19.05.1992 r. w sprawach połączonych: C-104/89 i C-37/90 J. Mulder i inni v. Rada i Komisja*, Europejski Przegląd Sądowy 3, 2012, p. 36.

[31] T. Tridimas, *General Principles of EC Law*, Oxford 2003, p. 163.

their actions in compliance with the law in force at a particular time. This principle becomes particularly important in relation to the law governing the economic activity of individuals, as anyone conducting such activity must inevitably 'plan for the future'. Clearly and precisely formulated legal provisions facilitate the proper conduct of any activity, especially in business. In accordance with the principle of legal certainty, the effect of a norm of the EU law must be predictable for the addressees. Obligations imposed on individuals under the EU law must be clear and understandable, and any doubts as to the 'language of the law' must be interpreted in favour of the individual.[32]

4. SELECTED PROBLEMS IN THE CONTEXT OF JUDICIAL CASE LAW

4.1. PRIOR EFFECTIVENESS OF A DIRECTIVE

The problem of prior effectiveness of an EU directive, in the aforementioned narrow sense, should entail the following question: is it permissible, after a directive has entered into force (hereafter 'a new directive') and before its transposition has ended,[33] to apply this directive directly or interpret national acts in accordance with the content of that (new) directive?[34] In other words, can a government agency or an individual at this stage rely on the provisions of the new directive against a provision of national law where the latter is, to a greater or smaller extent, incompatible with the new directive, based on the need to ensure the effectiveness of the provisions of the directive or to protect the rights of individuals?[35]

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[32] For more on this, see D. Kornobis-Romanowska, *supra* n. 22, p. 53 et seq. See also the CJEU judgment of 7 June 2005, C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, ECLI:EU:C:2005:518.

[33] It should be noted that the term 'transposition' (Latin *transpositio* – transposition, *transponere* – to transpose) should be distinguished from 'implementation', which has a broader meaning, including the process depicting the entire environment for the effective introduction, implementation of a legal act (usually a directive). Apart from establishing legal norms, implementation involves formal and practical actions, including the establishment of relevant institutions and bodies to effectively enforce the law. Transposition is narrower than implementation: it is an element of implementation, involving the transfer of the provisions of another legal act (a directive) to the national legal order, and, to this end, the adoption of a new legal act, an amendment or annulment of the previous act. See, inter alia: B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków 2004, *passim*; M. Szwarc-Kuczer, *Zasada bezpośredniej skuteczności*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Vol. 2: *Zasady – orzecznictwo – piśmiennictwo*, Warszawa 2007, p. 141; M. Domańska, *Implementacja dyrektyw unijnych przez sądy krajowe*, Warszawa 2014, p. 23 et seq.; E. Golewska, *Implementacja dyrektyw telekomunikacyjnych*, Warszawa 2007, p. 23 et seq.; A. Kunkiel-Kryńska, *Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych*, Monitor Prawniczy 18, 2007, p. 989 et seq. In the Polish legal system, an act of law or other generally applicable national act is a form of transposition.

[34] M. Pechstein, *Urteil des Gerichtshofes vom 14. Juni 2007, C-422/-5 Kommissin v. Belgien*, Deluxe aus Luxemburg – der aktuelle Fall im Europarecht 7, 2007, p. 1, https://www.rewi.europa-uni.de (accessed 9.10.2018).

[35] For more on this subject, see S. Prechal, *Direct Effect Reconsidered, Redefined and Rejected*, [in:] J.M. Prinssen, A. Schrauwen (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*,

The period for transposing an EU directive is intended to give the member states time to adapt their internal law to the guidance provided by the directive. Before the expiry of that period, a member state cannot be accused of not having implemented the directive. This allegation can only be effectively raised after the transposition period has expired. The CJEU case law assumes that a provision which is directly effective is one which is sufficiently clear, precise, unconditional and capable of being applied independent of the member states' discretionary powers.[36] It is also pointed out that a provision of a directive has direct effect if the time limit laid down in the directive has expired and the national law has no provisions that are in conformity with the directive.[37] In the latter case, problems arise in relation to the admissibility of direct application of the directive, the interpretation of national acts in conformity with the directive and liability of the state under the EU law.[38]

However, according to established CJEU case law, a member state should refrain from issuing provisions which could seriously undermine the achievement of the objective of the (new) directive when the period for transposition is still running.[39] There has been an evolution in the CJEU's views with regard to the legal consequences of a situation where the law of a member state thwarts the achievement of the objective of the new EU directive. Until 2007, the prevailing view was that a directive has a 'blocking effect' (in German *Sperrwirkung*) during its transposition period, in the sense that its entry into force prevents a member state from enacting legislation which is incompatible with the directive, and if that happens, the courts and government agencies must not apply such legislation. It follows from the CJEU judgment of 14 June 2007 in Case C-422/05, *Commission v. Kingdom of Belgium*[40] that the adoption of the concept of prior effectiveness of the directive in terms of a 'blocking effect' was too far-reaching.

In the factual state underlying this judgment, Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports[41] entered into force on 28 March 2002. The Directive introduced guidelines for the imposition of noise-related operating restrictions at the Union airports. The Directive required member states to establish appro-

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Groningen 2002, p. 120; V.I. Gronen, *supra* n. 21, p. 49 et seq.; M. Domańska, *supra* n. 33, p. 23 et seq.

[36] See the CJEU judgment of 5 February 1963, 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1; K. Wójtowicz, *Bezpośredni skutek przepisów prawa wspólnotowego w porządku prawnym RP*, Kwartalnik Prawa Publicznego 2, 2004, p. 43 et seq.

[37] K. Wójtowicz, *supra* n. 36, p. 43 et seq.; Ch. Timmermans, *Application of Community Law by National Courts: (Limits to) Direct Effect and Supremacy*, [in:] R.H.M. Jansen, D.A.C. Koster, R.F.B. von Zutphen (eds), *European Ambitions of the National Judiciary*, Hague–London–Boston 1997, p. 30.

[38] M. Pechstein, *supra* n. 34 (accessed 9.10.2018).

[39] See, in particular, judgments of 18 December 1997, C-129/96, *Inter-Environnement Wallonie*, para. 45, ECLI:EU:C:1997:628; and of 14 September 2006, C-138/05, *Stichting Zuid-Hollandse Milleufederatie*, para. 42, ECLI:EU:C:2006:577.

[40] ECLI:EU:C:2007:342.

[41] On the day of the judgment: OJ L 85, p. 40.

priate national legislation to implement the Directive by 28 September 2003. On 14 April 2002, the Kingdom of Belgium issued a Royal Decree regulating night flights of certain types of civil subsonic jet aircraft,[42] which entered into force on 1 July 2003. The Decree introduced night-time operating restrictions at all airports in Belgium for certain categories of civil subsonic jet aeroplanes. In June 2002, the European Commission approached the Belgian authorities for information on the Royal Decree of 14 April 2002. The Commission considered that the measures taken within the period prescribed for transposing the Directive were seriously undermining the outcome prescribed by the Directive and thus infringed the Directive and the second paragraph of Article 10, in conjunction with the third paragraph of Article 249 EC Treaty.[43] The Commission was not satisfied with subsequent explanations by the Belgian authorities and therefore it brought an action before the Court of Justice of the EU on 28 September. The CJEU concluded that the Commission's position was well founded.

On the basis of the aforementioned judgment, literature has pointed out that during the transposition of a directive one should rather talk about the obligation of member states not to issue regulations which undermine the achievement of the objective of the new directive, in the sense that it is prohibited to make its effects (application) illusory (literally, there is the prohibition of frustration, *Frustrationsverbot*), in the understanding of this prohibition in public international law.[44] As a result, a breach of this prohibition may be declared as such under infringement proceedings.[45]

From the perspective adopted in this study, i.e. the applicable principles of protection of legitimate expectations and legal certainty, it is crucial to consider the CJEU judgment of 7 April 2016 in Case C-324/14, *Partner Apelski Dariusz v. Zarząd Oczyszczania Miasta*.[46] The Court indicated that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[47] was not applicable *ratione temporis* in the main proceedings. However, in the Court's view, the application of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC[48] before the expiry of its transposition period would result in member states and contracting authorities not having sufficient

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[42] Moniteur belge of 17 April 2002, p. 15570.

[43] Currently Article 288 of the Treaty on the Functioning of the European Union of 25 March 1957, OJ 2004, No. 90, item 864[2], which provides: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. […] A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

[44] Article 18 *in principio* of the Vienna Convention on the Law of Treaties of 23 May 1969, OJ 1990, No. 74, item 439, provides: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty.'

[45] M. Pechstein, *supra* n. 34 (accessed 9.10.2018).

[46] ECLI:EU:C:2016:214.

[47] OJ 2004 L 134, p. 114. This act was transposed to the Polish legal order by virtue of the Public Procurement Law, Dz.U. of 2013, item 907, as amended.

[48] OJ 2014 L 94, p. 65.

time to adapt to the new provisions introduced by that directive (which, as follows from its very title, repeals Directive 2004/18/EC). Article 63 of that Directive introduces substantial changes with regard to the economic operator's right to rely on the capacities of other entities in connection with a public contract. This provision introduces new grounds, not envisaged in the previous legal system. In this situation, the said provision of Directive 2014/24/EU cannot be used as a criterion for the interpretation of Article 48(3) of Directive 2004/18/EC, since it is not a question of resolving doubts of interpretation concerning the content of the latter provision. The Court pointed out that a different approach might in some way incorrectly anticipate the application of the new legislation which differs from that laid down by Directive 2004/18/EC, and it would be manifestly contrary to the principle of the legal certainty for economic operators.

In the context of the aforementioned CJEU judgment, it should be added that apart from the need to guarantee the implementation of the principle of legal certainty, the conditions for the application of the principle of the protection of legitimate expectations were present in the analysed case. In the circumstances of that case, the person concerned could have expected that there would be no changes in the law in the course of the proceedings which he could not have foreseen when the proceedings were initiated, despite exercising caution required of diligent economic operators.

4.2. RETROSPECTIVE APPLICATION OF A NORMATIVE ACT

The definition of the (national and EU) *lex retro non agit* principle is relatively less problematic than prior effectiveness of a directive. This principle assumes the non-application of the new provisions of law to the factual situation and relationships established under the previous provisions. *Argumentum a contrario*, we speak of the retroactive effect of law when the new law applies to events that were 'concluded in the past' and completed before the new provisions entered into force.[49] In this understanding, retroactivity is distinguished from the retrospective effect of the law, which occurs when the provisions of a new law regulate events or legal relationships of an 'open', 'continuous' nature that have not yet reached their completion ('relationships in progress'), and began or emerged under the old law and still continue after the entry into force of the new law.[50]

Except in situations governed by criminal law, the *lex retro non agit* principle is subject to numerous exceptions and, additionally, in the case of a new member state, this principle may be considered together with the principle of immediate effect of the EU law.[51] According to the CJEU, a legislative act may exceptionally have a retroactive effect if two conditions are met: this is required by the objective

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[49] See the Polish Supreme Administrative Court judgment of 29 June 2016, II OSK 2663/14, http://orzeczenia.nsa.gov.pl. (accessed 23.06.2020).

[50] See the Polish Constitutional Tribunal judgments: of 5 November 1986, U 5/86, OTK 1986, item 1; of 28 May 1986, U 1/86, OTK 1986, item 2.

[51] See S.L. Kaleda, *Przejęcie prawa wspólnotowego przez nowe państwo członkowskie. Zagadnienia przejściowe i międzyczasowe*, Warszawa 2003, p. 116 et seq.

of the provision, and the legitimate expectations of the stakeholders (addressees) are duly protected.[52] These conditions must be met even where the retroactive nature of the provision is not clearly defined in its wording but arises from the nature of the legal norm it contains.[53] The need to meet these conditions is excluded where the purpose of the retroactive provision is to ensure the protection of the rights of an individual.[54]

The relevant criteria triggering the retroactive effect of legal provisions were indicated by the Supreme Administrative Court in its judgment of 20 April 2016, I GSK 1259/14.[55] The circumstances underlying that judgment were connected with the protection of the EU market against imports of certain underpriced goods. In this case, the expectations of the individual who was party to the proceedings could not be regarded as legitimate and, as such, deserving protection, since the transaction conducted by that individual was intended to circumvent the EU law which intended, through sufficiently high duties, to eliminate the dumping applied by the People's Republic of China in respect of those goods.

The admissibility of introducing institutions with retroactive effect in the EU law or national law does not preclude the obligation to take into account certain rules designed to protect the interests of individuals. The CJEU case law highlights, inter alia, the need to consider the entitlements exercised by an individual, as well as the obligation to publicise the content of a legislative act. While this case law, by way of exception, considers it acceptable to apply the technique of giving retroactive effect to a law to protect the general interest, it also emphasizes the specific situations or legal mechanisms that should be associated with the protection of legitimate expectations of an individual. In the judgment of 8 June 2000 in Case C-396/98, *Grundstücksgemeinschaft Schloßstraße GbR v. Finanzamt Paderborn*,[56] and judgment of 26 April 2005 in Case C-376/02, *Stichting Goed Wonen v. Staatssecretaris van Financiën*, two cases were distinguished. Firstly, that was a situation where, because of the retroactive VAT exemption pertaining to real property rental (this term was also understood as covering, e.g. the use of real property), the taxable person had already deducted the VAT paid before the amended legislation, retroactively introducing an exemption, became effective, and, secondly, a situation where, under similar circumstances, the amending law, because of its retroactive effect, became effective before the taxable person made the VAT deduction. The CJEU indicated that in the former situation it is necessary to protect the legitimate expectations of the taxable

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[52] See the CJEU judgments: of 25 January 1979, 98/78, *A. Racke v. Hauptzollamt Mainz*, ECLI:EU:C:1978:223; of 25 January 1979, *Weingut Gustav Decker KG v. Hauptzollamt Landau*, ECLI:EU:C:1979:15.

[53] See the CJEU judgment of 11 July 1991, C-368/89, *Antonio Crispoltoni v. Fattoria autonoma tabacchi di Città di Castellow*, ECLI:EU:C:1991:307.

[54] See judgment of the Court (Fourth Chamber) of 18 January 1990, C-345/88, *Bundesamt für Ernährung und Forstwirtschaft v. Butterabsatz Osnabrück-Emsland eG*, ECLI:EU:C:1990:22.

[55] See also the Polish Supreme Administrative Court judgments: of 16 October 2014, I GSK 1174/13; of 22 October 2014, I GSK 1482/13; of 21 January 2015, I GSK 1421/13; of 22 October 2015, I GSK 257/14; of 17 December 2015, I GSK 818/14; of 11 February 2016, I GSK 1095/14; of 24 February 2016, I GSK 806/14; of 5 April 2016, I GSK 1012/14; published: http://orzeczenia.nsa.gov.pl. (accessed 23.06.2020).

[56] Both judgments published at: http://curia.europa.eu. (accessed 23.06.2020).

person. In the latter situation, the protection would only have been available if the content of the communications informing individuals about the proposed amendment to the legislation had not been clear enough to enable economic operators carrying out relevant economic activities to understand the effects of the proposed amendment on their activities.

5. CONCLUSIONS

As an inherent feature of democracy, laws can be amended at any time. In a democratic country governed by the rule of law, individuals are not entitled to a guarantee that the laws or their powers will remain unchanged.[57] Instead, individuals may expect that public authorities will exercise their powers in such a way so as to ensure that this will not affect situations and relationships arising under the applicable law in a way that reasonable and diligent individuals could not reasonably expect. In other words, the principle of legal certainty does not require that there is no legislative change but, instead, requires the legislator to take into account the specific situation of economic operators and to adapt the application of the new legislation accordingly, whenever necessary.[58]

The application of these principles is broader than the norms of intertemporal or transitional law. The protection of legitimate expectations and legal certainty applies to the admissibility of direct legal effects produced by the new law: either before such new law becomes binding on individuals (applicability) or retroactively, with regard to factual states concluded in the past (before the promulgation of a legal act). In the former case, one deals with the so-called prior effect of a legal act (*Vorwirkung*). A particular variety of this institution is the prior effectiveness of an EU directive during the phase of its transposition (*Vorwirkung einer EU-Richtlinie*). In the latter case, one deals with a retroactive effect of a new law.

A conclusion that arises from this analysis is that, firstly, an EU directive during its transposition in an EU member state cannot be a source of legitimate expectations of an individual. This is opposed to the principle of legal certainty, which, in this case, ensures not only the protection of individual rights but also the protection of the public interest. In this way, the principle of legal certainty limits the application of the principle of the protection of legitimate expectations, while ensuring that the guarantees contained therein are fulfilled.[59]

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[57] See the CJEU judgments: of 15 July 2004 in Joined Cases *Di Lenardo Adriano Srl* (C-37/02) and *Dilexport Srl* (C-38/02) *v. Ministero del Commercio con l'Estero*, ECLI:EU:C:2004:38; of 7 September 2006, C-310/04, *Kingdom of Spain v. Council*, ECLI:EU:C:2006:521.

[58] See the CJEU judgments: of 7 June 2005, C-17/03, *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, ECLI:EU:C:2005:362; of 10 September 2009, C-201/08, *Plantanol GmbH & Co. KG. v. Hauptzollamt Darmstadt*, ECLI:EU:C:2009:539; of 17 September 2009, C-519/07, *Commission of the European Communities v. Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556.

[59] See K. Vogel, *Rechtssicherheit und Rückwirkung zwischen Vernunftrecht und Verfassungsrecht*, Juristenzeitung 18, 1988, p. 833 et seq.

Secondly, it is admissible for an individual to invoke legitimate expectations for protection against the retroactive effects of a new (whether the EU or national) law if the conditions for the application of that principle are met. This does not apply to cases where a person seeks to circumvent, abuse or breach the law through their actions and, therefore, it is necessary to retroactively implement mechanisms aimed at protecting the public interest.

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PRINCIPLES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY IN THE CONTEXT OF AMENDMENTS TO EU LAW AND NATIONAL LEGISLATION

Summary

This paper concerns selected problems related to the complex topic of changes to the EU law and national legislation. It deals with the so-called prior effectiveness of the EU directives and the retroactivity of (ordinary) laws adopted by the EU member states. The research perspective

focuses on the functioning of these institutions vis-à-vis the principles of legitimate expectations and legal certainty. The article is primarily based on the analytical method, as well as the empirical method, drawing on the extensive case law of the Court of Justice of the European Union and the Supreme Administrative Court in Poland. Based on the research carried out by the author, it must be concluded, firstly, that an EU directive during its transposition period in an EU member state cannot be a source of legitimate expectations of an individual. Secondly, the principle of legal certainty is not negated when a normative act receives retroactive effect by way of an exception in order to protect the public interest, provided that legitimate expectations of individuals are guaranteed.

Keywords: principle of legitimate expectations, principle of legal certainty, change of law, retroactivity of law, directive

ZASADY UZASADNIONYCH OCZEKIWAŃ I PEWNOŚCI PRAWA A ZMIANY PRAWODAWSTWA UNIJNEGO I KRAJOWEGO

Streszczenie

Niniejszy artykuł dotyczy wybranych problemów związanych ze złożoną tematyką zmian prawodawstwa unijnego i krajowego. Rozważania w nim ujęte skupiają się na tzw. uprzedniej skuteczności dyrektywy unijnej oraz na retroaktywności ustaw (zwykłych) stanowionych przez kraje członkowskie UE. Perspektywa badawcza koncentruje się na funkcjonowaniu tych instytucji w obliczu obowiązywania zasad uzasadnionych oczekiwań i pewności prawa. W artykule zastosowano przede wszystkim metodę analityczną, a także metodę empiryczną, korzystając z bogatego orzecznictwa Trybunału Sprawiedliwości UE oraz Naczelnego Sądu Administracyjnego. W wyniku przeprowadzonych badań należy stwierdzić, po pierwsze, że źródłem uzasadnionych oczekiwań jednostki nie może być dyrektywa unijna w okresie jej transpozycji w państwie członkowskim UE. Po drugie, zasadzie pewności prawa nie sprzeciwia się wyjątkowe nadanie aktowi normatywnemu mocy wstecznej, z uwagi na konieczność ochrony interesu publicznego, o ile zagwarantowane są uzasadnione oczekiwania jednostek.

Słowa kluczowe: zasada uzasadnionych oczekiwań, zasada pewności prawa, zmiana prawa, retroaktywność prawa, dyrektywa

LOS PRINCIPIOS DE EXPECTATIVAS FUNDADAS Y SEGURIDAD JURÍDICA EN RELACIÓN CON MODIFICACIONES DE DERECHO COMUNITARIO Y NACIONAL

Resumen

El presente artículo se refiere a problemas selectos relativos a temática compleja de modificaciones de legislación comunitaria y nacional. Se centra en cuestiones de la eficacia anticipada de la directiva y la retroactividad de las leyes promulgadas por los Estados Miembros de la UE. La investigación se concentra en funcionamiento de estas instituciones desde la perspectiva de los principios de expectativas fundadas y seguridad de derecho. En el artículo se emplea sobre todo el método analítico, así como el método empírico, utilizando la jurisprudencia abundante del Tribunal de Justicia de la Unión Europea y del Tribunal Supremo de Administración.

Como conclusión hay que destacar, primero que directiva comunitaria durante el periodo de su trasposición en el Estado Miembro de la UE no puede constituir la fuente de expectativas fundadas de individuo; segundo, el principio de seguridad de derecho no queda vulnerado por la retroactividad excepcional, dado la necesidad de proteger el interés público, siempre que queden garantizadas las expectativas fundadas de individuos.

Palabras claves: principio de expectativas fundadas, principio de seguridad de derecho, cambio de ley, retroactividad de derecho, directiva

ПРИНЦИПЫ ЗАКОННЫХ ОЖИДАНИЙ И ПРАВОВОЙ ОПРЕДЕЛЕННОСТИ В КОНТЕКСТЕ ПОПРАВОК К ЗАКОНОДАТЕЛЬСТВУ ЕС И НАЦИОНАЛЬНОМУ ЗАКОНОДАТЕЛЬСТВУ

Аннотация

В статье рассмотрены некоторые вопросы, связанные с внесением изменений в европейское и национальное законодательства. Рассуждения автора в значительной степени основаны на так называемом ретроактивном характере директив ЕС и на обратном действии (обычных) законов, принимаемых в государствах-членах ЕС. Автор фокусирует внимание на функционировании этих институтов в контексте принципов законных ожиданий и правовой определенности. При написании статьи использован, главным образом, аналитический метод. Кроме того, в рамках эмпирического метода проанализирована обширная судебная практика Суда Европейского союза и Высшего административного суда Польши. По результатам проведенного исследования следует сделать вывод, что, во-первых, источником законных ожиданий гражданина не может быть директива ЕС во время ее транспонирования в государстве-члене ЕС. Во-вторых, обратная сила, придаваемая законодательному акту в порядке исключения и в связи с необходимостью защиты общественных интересов, не противоречит принципу правовой определенности при условии гарантирования законных ожиданий граждан.

Ключевые слова: принцип законных ожиданий, принцип правовой определенности, изменения законодательства, придание обратной силы законодательным актам, директива

GRUNDSÄTZE DES VERTRAUENSSCHUTZES UND DER RECHTSSICHERHEIT IM ZUSAMMENHANG MIT ÄNDERUNGEN DES EU-RECHTS UND DER NATIONALEN GESETZGEBUNG

Zusammenfassung

Dieser Artikel befasst sich mit ausgewählten Fragen im Zusammenhang mit dem komplexen Thema der Änderungen des Unionsrechts und der nationalen Rechtsvorschriften. Die in dem Beitrag dargelegten Überlegungen konzentrieren sich auf die sogenannte vorherige Wirkung einer europäischen Richtlinie und die Rückwirkung von (gewöhnlichen) Gesetzen, die von EU-Mitgliedstaaten verabschiedet wurden. Die wissenschaftliche Sicht richtet sich auf die Funktionsweise dieser Institutionen angesichts der geltenden Grundsätze des Vertrauensschutzes und der Rechtssicherheit. In dem Artikel finden hauptsächlich das Analyseverfahren und die empirische Methode Anwendung, wobei auf die umfangreiche

Rechtsprechung des EU-Gerichtshofs und des Obersten Verwaltungsgerichts der Republik Polen zurückgegriffen wird. Im Ergebnis der durchgeführten Untersuchungen ist zum einen festzustellen, dass die Umsetzung dieser EU-Richtlinie in einem Mitgliedstaat nicht Quelle berechtigter Erwartungen des Einzelnen und des Vertrauensschutzes sein kann. Zweitens steht, wird einem normativen Rechtsakt ausnahmsweise Rückwirkung zuerkannt, um das öffentliche Interesse zu schützen, dies nicht dem Grundsatz der Rechtssicherheit entgegen, sofern die berechtigten Erwartungen des Einzelnen und damit der Vertrauensschutz gewährleistet sind.

Schlüsselwörter: Grundsatz des Vertrauensschutzes, Grundsatz der Rechtssicherheit, Änderung der Rechtsvorschriften, Rückwirkung des Rechts, Richtlinie

PRINCIPES DE CONFIANCE LÉGITIME ET DE SÉCURITÉ JURIDIQUE DANS LE CONTEXTE DES MODIFICATIONS DU DROIT DE L'UE ET DE LA LÉGISLATION NATIONALE

Résumé

Cet article aborde certaines questions liées au thème complexe des changements dans la législation européenne et nationale. Les considérations qu'il contient se concentrent sur ce que l'on appelle l'efficacité antérieure de la directive de l'UE et sur la rétroactivité des lois (ordinaires) adoptées par les États membres de l'UE. La perspective de recherche se concentre sur le fonctionnement de ces institutions face aux principes de confiance légitime et de sécurité juridique. Dans l'article, la méthode analytique ainsi que la méthode empirique ont été principalement utilisées par l'auteur, qui s'est appuyé sur la riche jurisprudence de la Cour de justice de l'UE et de la Cour administrative suprême. À la suite des recherches menées, il convient de préciser, tout d'abord, que la source des attentes légitimes de l'individu ne peut pas être la directive de l'UE lors de sa transposition dans un État membre de l'UE. Deuxièmement, le principe de sécurité juridique n'est pas empêché par l'effet rétroactif exceptionnel d'un acte normatif, étant donné la nécessité de protéger l'intérêt public, à condition que la confiance légitime des individus soit garantie.

Mots-clés: confiance légitime, sécurité juridique, modification de la loi, rétroactivité de la loi, directive

PRINCIPI DI LEGITTIMO AFFIDAMENTO E CERTEZZA DEL DIRITTO NEL CONTESTO DELLE MODIFICHE AL DIRITTO DELL'UE E ALLA LEGISLAZIONE NAZIONALE

Sintesi

Il presente articolo riguarda problemi scelti legati alla complessa tematica delle modifiche della legislazione comunitaria e nazionale. Le riflessioni in esso contenute si concentrano sulla cosiddetta efficacia anteriore della direttiva comunitaria nonché sulla retroattività delle leggi (ordinarie) promulgate dagli Stati membri dell'UE. La prospettiva di analisi si concentra sul funzionamento di queste istituzione alla luce dell'applicazione del principio del legittimo affidamento e della certezza del diritto. Nell'articolo è stato utilizzato soprattutto il metodo analitico, e anche il metodo empirico, utilizzando la ricca giurisprudenza della Corte di

giustizia dell'Unione europea e della Corte suprema amministrativa. In seguito alle analisi condotte bisogna affermare in primo luogo che la fonte del legittimo affidamento dei singoli non può essere una direttiva comunitaria in fase di trasposizione presso lo Stato membro dell'UE. In secondo luogo il principio della certezza del diritto non è in contrasto con il conferimento eccezionale di effetto retroattivo ad un atto normativo, a motivo della necessità di tutela dell'interesse pubblico, purché sia tutelato il legittimo affidamento dei singoli.

Parole chiave: principio del legittimo affidamento, principio della certezza del diritto, modifica del diritto, retroattività del diritto, direttiva

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RESIGNATION OF VOIVODSHIP MARSHAL FROM THEIR FUNCTION IN THE LIGHT OF VOIVODSHIP SELF-GOVERNMENT ACT

KATARZYNA KACZMARCZYK-KŁAK*

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The Voivodship Self-Government Act of 5 June 1998[1] stipulates that 'if a voivodship marshal tenders a resignation, its acceptance occurs by a simple majority of votes' (Article 38 para. 1). Accordingly, this article gives the voivodship marshal the possibility of 'resigning' from their function. Article 37 para. 4 likewise explicitly states that a voivodship marshal may make a 'statement' regarding their 'resignation'. The Act also regulates the possible case when a 'resignation' is 'tendered' by a member of the voivodship board other than its chair (Article 40 para. 1). Similarly, the chair or deputy chair of the voivodship assembly may also 'tender a resignation' (Article 20 para. 5). At the same time, no temporal restrictions were imposed on 'tendering a resignation', and consequently there are no obstacles for making this move at any time following the election.

The cited Act does not offer a legal definition of 'resignation'. The provisions referred to above suggest that a resignation is 'tendered' (as evidenced by the words 'if a voivodship marshal tenders a resignation'), and also define who is entitled to 'tender' the relevant statement (chair and deputy chair of the voivodship assembly, voivodship marshal, member of the voivodship board other than its chair). In this manner, the law names both the object ('tendering' and 'resignation') and the subject of these provisions. It should be noted that the Act distinguishes between 'tendering a resignation' and its 'acceptance' (Articles 38 para. 2, 40 para. 1, and 20 para. 5 VSGA), which means that when a statement is tendered by the eligible person, this triggers a procedure ending with 'acceptance of resignation'. If a resolution

* PhD hab., Professor of the Kujawy and Pomorze University in Bydgoszcz; e-mail: kkklak@interia.pl; ORCID: 0000-0001-6135-7677

[1] Consolidated text, Dz.U. of 2019, item 512, as amended; hereinafter VSGA, the Act.

on this matter is not adopted, the Act provides for the legal fiction of 'acceptance of resignation' (Articles 38 para. 3, 40 para. 2, 20 para. 6 VSGA). The statement of 'tendering a resignation' does not, therefore, have the legal consequence of bringing the voivodship marshal's term to an end.

In the absence of the legal definition of 'resignation', one should first resort to a linguistic interpretation, which consists in determining the meaning and scope of phrases used in the legal text in relation to the language in which they have been expressed.[2] As evidenced by the Dictionary of the Polish Language, in Polish 'resignation' means 'renouncing or forbearing to do something',[3] as well as 'withdrawing from something', 'stepping back'.[4] Within this meaning, the dictionary provides example collocations of the word such as 'resign from a post, a job, a function', distinguishing 'tendering a resignation' from 'accepting a resignation'.[5] There are no grounds for assuming that the word 'resignation' used in the Voivodship Self-Government Act should be construed otherwise. Following the directive of terminological consistency (resulting in the prohibition of homonymous interpretation),[6] this term should be understood identically whenever used in the Voivodship Self-Government Act.[7] This is because a notion should have the same meaning in all contexts in which it appears.[8]

In light of the above comments, the resignation of the voivodship marshal referred to in Articles 38 para. 1 and 37 para. 4 VSGA means renouncing their function. With respect to 'renouncing', the Dictionary of the Polish Language highlights that such a statement is made 'voluntarily'.[9] Therefore, legal literature authors are right in stressing that Article 38 VSGA permits the marshal to tender a resignation, i.e. voluntarily declare their will to step down from their position.[10] However, the Act does not enumerate the circumstances that justify tendering a resignation. Literature authors, favourably assessing the effective regulation, note that some personal circumstances may cause a clash between exercising this function and other obligations for legal (such as being elected to parliament or appointed a local government appeal board member) or factual (such as health condition, family circumstances, other employment offers) reasons, adding that in the latter case the provision allows one to leave their office in a honourable way, without waiting for resulting conflicts to appear that will affect the marshal's work as a public administration body and the chair of the voivodship board.[11] This view is partially dispensable because, pursuant to the currently effective wording of Article 31 para. 3 VSGA, the office of a voivod-

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[2] K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, p. 246.

[3] https://sjp.pwn.pl/sjp/rezygnacja;2574255.html (accessed 13.01.2020).

[4] *Słownik Języka Polskiego*, M. Szymczyk (ed.), Vol. III, Warszawa 1984, p. 56.

[5] *Ibid*.

[6] Cf. S. Wronkowska, M. Zieliński, *O korespondencji dyrektyw redagowania i interpretowania tekstu prawnego*, Studia Prawnicze 3–4, 1985, p. 310.

[7] Cf. L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002, p. 145.

[8] Cf. J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1988, p. 134.

[9] https://sjp.pwn.pl/slowniki/zrzec-się.html (accessed 13.01.2020); *Słownik Języka Polskiego*, *supra* n. 4, p. 1061.

[10] Cz. Martysz, [in:] B. Dolnicki (ed.), *Ustawa o samorządzie województwa. Komentarz*, Warszawa 2012, thesis 1 to Article 38.

[11] *Ibid*.

ship board member cannot be combined with that in another self-government body or with employment in government administration, or with being elected to either chamber of parliament (first sentence); the office in the voivodship board terminates on the date of election or employment (second sentence). Accordingly, when a member of the voivodship board (including its executive) is elected a member of parliament, termination of office in the voivodship board occurs *ex lege* on the election date. The Act therefore recognizes the mechanism of *ex lege* termination of office in the voivodship board and links this to election to parliament (as of the election date) or employment in government administration (as of the employment date). In such cases, the voivodship marshal (or another board member – the Act does not distinguish between them) does not tender a resignation referred to in Article 38 para. 1 VSGA, because they cease to be a voivodship board member (and thus also an executive) as of the date of election or employment referred to in Article 31 para. 3 VSGA. Accordingly, the Act distinguishes between resignation from a position and termination of office in the voivodship board, which occurs by operation of law as a result of the circumstances listed in Article 31 para. 3 VSGA. Putting Articles 38 para. 1 and 31 para. 3 side by side clearly shows that resignation is voluntary, being subject to the will of the resigning person, while termination of office in the voivodship board occurs regardless of the member's will, as a consequence of a specific legal fact.

The motives for tendering a resignation are not important (thus being legally irrelevant), and the resigning person need not make any statement (release) in this respect, as this is not included in the scope of resignation itself as understood under the Voivodship Self-Government Act. As already noted, resignation is an act of renouncing a function and, from a linguistic viewpoint, this notion does not require the resigning person to reveal their motivation. Speaking colloquially, resignation is not tied to any rational explanation and needs not be justified in any manner, but it is a free exercise of will. Its voluntary nature, in turn, involves exercising one's will, without any compulsion[12] and without being obliged to reveal the conditions which have affected and prompted this act. Such an obligation would be essentially contrary to freely exercising one's will, because the need to reveal the motivation underlying one's decision appears to involve a measure of compulsion and might affect the decision itself, since one would consequently have to disclose their reasons. Motivation indeed plays a role in making a decision to resign, but only as the internal thought process of the resigning person who may exercise their right due to being guided by various considerations. The Act does not explicitly require that such considerations be revealed. Accordingly, since the Act does not specify what reasons may underlie a resignation, it appears logical that the resigning person is under no obligation to explain what circumstances have influenced their decision. Consequently, it is also logical that the Act does not provide for any procedure to assess the reasonableness of the statement made by the voivodship marshal, as no measuring standard (statutory reasons for tendering a resignation) exists in this case.

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[12] https://sjp.pwn.pl/sjp/dobrowolny;2452715.html (accessed 13.01.2020); *Słownik Języka Polskiego*, M. Szymczak (ed.), Vol. I, Warszawa 1983, p. 405.

Hence, in order to be valid, the act of resignation does not require anything but the voivodship marshal expressing their will to cease exercising their previous function. When tendering a resignation, the voivodship marshal does not need to convince anyone that it is reasonable, because they do not submit an application to be released from a function but a statement. Although the mere submission of this statement does not have the legal consequence of termination of office in the voivodship board and termination of the employment relationship with the voivodship marshal (argument under Article 38 para. 2 VSGA), the voivodship assembly cannot prevent this effect from occurring, as unequivocally follows from Article 38 para. 3 VSGA. The effect, then, manifests itself regardless of the position of the voivodship assembly. The will of the voivodship marshal is therefore decisive and is not subject to any kind of evaluation. Even if the voivodship marshal resolves to reveal the motives behind their decision (which by the way need not be the actual motives), their statement in this respect is not an integral part of the resignation and cannot form the basis for the voivodship assembly's resolution referred to in Article 38 para. 2 VSGA.

The above interpretation is additionally supported by the wording of Article 37 para. 2 VSGA, according to which a motion to dismiss the voivodship marshal must be made in writing together with a justification of the reasons for dismissal and is subject to an opinion of the audit committee. In turn, Article 37 para. 3 VSGA stipulates that the voivodship marshal is dismissed by a majority of at least three-fifths of votes of the statutory composition of the assembly, cast in a secret vote. The dismissal vote is held by the voivodship assembly after examining the opinion of the audit committee during the session taking place after the session when the motion for dismissal has been filed, not earlier, however, than after one month after filing the motion. If the motion to dismiss the marshal did not obtain the required majority of votes, another motion cannot be filed until six months have elapsed from the previous vote. With respect to dismissing the voivodship marshal, the Act requires therefore that the motion contain the reason for dismissal and a justification why such a decision is reasonable. No such measure is provided for in case of resignation. In addition, it should be stressed that the statement of the voivodship marshal to resign from their position is not subject to an opinion of the audit committee. This is because the Voivodship Self-Government Act does not provide for an opinion on the exercise of will of the person entitled to resign. Such an opinion is devoid of any purpose because neither the audit committee nor the voivodship assembly are formally capable of affecting or prompting it. A statement of the voivodship marshal to resign from their function is a legal fact, whose occurrence is dependent on a single and exclusive prerequisite, namely the will of the entitled person to tender a resignation which, if exercised, is not subject to assessment by the audit committee and the voivodship assembly. While a motion to dismiss the voivodship marshal has the nature of a proposal, their resignation statement must be classified as a firm and definite statement that determines the wording of the voivodship assembly's resolution (Article 38 para. 2 VSGA), ultimately producing effects compliant with the statement contents (Article 38 para. 3 VSGA).

In practice, as noted above, the resignation may be caused by health, family, professional or other circumstances of the resigning person. It may also result from

purely political motives, for example, when the voivodship marshal comes to believe that further cooperation with the voivodship assembly is not possible, or it may take place as a result of losing the support of the voivodship assembly. Other causes may include questions of honour or even emotions, for example, when the assembly refuses to support proposed resolutions regarded as the marshal's priorities. The voivodship marshal may also tender a resignation in connection with public criminal, including corruption, charges, or when such charges are brought against the executive in penal proceedings. In situations like these, the voivodship marshal has no statutory obligation to tender the resignation. Such an obligation would be contrary to the essence of resignation as a voluntary act, and thus not urged by legal facts specified in statute. If the legislator believes that such circumstances are important enough to cause the loss of the voivodship board membership, a measure based on Article 31 para. 3 VSGA may be applied.

A person entitled to tender a resignation is the voivodship marshal. A question arises, however, whether the respective statement may be made by a proxy authorised by the executive. The Voivodship Self-Government Act does not explicitly provide for such possibility. Article 46 para. 2 of that Act envisages authorizing deputy executives, other voivodship board members, employees of the marshal's office and voivodship heads of self-government units to issue decisions in individual public administration matters on behalf of the marshal. The objective scope of the authorisation referred to in this provision has been clearly limited to individual public administration matters. As noted by the Regional Administrative Court in Gliwice in its judgment of 18 October 2017, IV SA/GI 776/17,[13] power of attorney is an instrument by which a person participating in legal transactions authorises another person to perform such transactions. A legal transaction performed under the authorisation has direct consequences for the represented person. A legal transaction is a kind of a legal event that mostly applies to civil law relations. As regards public entities, activities undertaken in this branch of law apply most commonly to assets which an entity can dispose of. Public administration bodies acting in the administrative law area may give an employee of an auxiliary institution proxy to exercise executive authority on their behalf. On the other hand, when such bodies act in the civil law area, an administration body may grant an employee power of attorney to perform legal transactions. However, in both areas a legal basis must exist to grant, respectively, proxy or power of attorney. This distinction does not have a nominal nature (the name is not important) but involves identifying the legal basis to grant proxy or power of attorney for the executive or non-executive area of the body's activities, as appropriate. Resignation from a function certainly does not fall within the ambit of Article 46 para. 2, because this provision does not apply to statements of the voivodship marshal that are not classified as 'individual cases in the field of public administration'. On the contrary, it involves a specific matter where a public administration body (in the case under consideration – the voivodship marshal) is competent (and at the same time obliged) to decide, based on the provisions of substantive law, on the rights or obligations of a specific entity. An

[13] Published in LEX No. 2390363.

administrative matter is the consequence of an administrative law relationship, i.e. a legal situation in which a party is entitled to demand that an administration body define its individual rights resulting from substantive law.[14] A statement of the voivodship marshal on resigning from their function does not meet these criteria, as it does not resolve the matter of the rights and duties of an individual entity based on substantive law and does not have the nature of an administrative decision. Thus, pursuant to Article 46 para. 2 VSGA, the voivodship marshal cannot authorise another person to submit the statement referred to in Article 38 para. 1 VSGA on their behalf. Nor can the marshal grant power of attorney pursuant to Article 98 of the Civil Code of 23 April 1964.[15] Resignation from a function is, after all, not a legal transaction in the meaning of civil law. The provisions concerning power of attorney are found in Title IV of the Civil Code entitled Legal transactions, Section VI Representation. As noted in legal literature, legal transactions form the basic source of a civil law relationship and belong to the very essence of civil law.[16] A legal transaction can only occur with respect to civil law relations entered into by a civil law entity.[17] In the case referred to in Article 38 para. 1 VSGA, the voivodship marshal does not act as a civil law entity, nor does this provision regulate any civil law relationship. This rules out the possibility that resignation from the function may be tendered by a proxy on behalf of the voivodship marshal. To summarise, Article 38 para. 1 VSGA requires a statement of the voivodship marshal, and no provision of that Act allows a possibility to grant power of attorney (proxy) to perform this action. There is also no reference to Article 98 of the Civil Code. The statement of the voivodship marshal to resign from their function is not a legal transaction in the meaning of civil law, and civil law provisions concerning powers of attorney do not apply to it. Nor can the civil law provisions concerning powers of attorney be cited through Article 300 of the Labour Code[18] of 26 June 1974 in connection with Article 43 para. 1 of the Self-Government Employees Act[19] of 21 November 2008. As it follows from Article 4 para. 1(1)(a) SGEA, the voivodship marshal is a self-government employee by election. In such case, in matters not regulated expressly in the SGEA the provisions of the Labour Code apply accordingly (Article 43 para. 1 SGEA), and the employment relationship can be terminated only when the election term expires (Article 73 § 2 LC in connection with Article 43 para. 1 SGEA). Court decisions state that an employment relationship initiated by election is not subject to provisions concerning termination of an employment agreement upon or without notice, including pursuant to Article 52 LC.[20] This view is also uncontested in literature. By way of example, one should note the standpoint that the separate nature of an employment relationship initiated by election is,

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[14] Cf. the Supreme Administrative Court, Branch in Kraków, judgment of 13 August 2003, II SA/Kr 2361/02, LEX No. 700424.

[15] Consolidated text, Dz.U. of 2019, item 1145, as amended.

[16] M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny.* Vol. I, Warszawa 2005, p. 230.

[17] *Ibid.*, p. 238.

[18] Consolidated text, Dz.U. of 2019, item 1040, as amended; hereinafter LC.

[19] Consolidated text, Dz.U. of 2019, item 1282; hereinafter SGEA.

[20] The Supreme Court judgment of 4 December 1979, I PR 93/79, OSNC 1989, No. 6, item 122.

among others, the result of its cessation, because since this relationship is terminated solely when the election term expires (Article 73 § 2 LC), it is not subject to provisions concerning termination of an employment agreement, among others, upon notice, or for reasons which according to the Labour Code may cause termination without notice, also pursuant to Article 52 LC, or expiration of the employment relationship.[21] Article 73 § 2 LC stresses that an employment relationship initiated by election is of a dependent nature. This is because such a relationship arises in connection with election to a particular position (function), lasts for the term of office of the elected individual, and is terminated when the term ends. The act of election itself is called an administrative act, and the relationship that arises from it is usually referred to by the general name of 'organizational relationship'.[22] In contrast, Jakub Stelina stresses that such relationships are primarily of an administrative law nature.[23] Therefore, since provisions concerning termination of an employment relationship upon or without notice do not apply here, one cannot also assume that the resignation may be tendered by proxy. The Supreme Court, in its judgment of 16 January 2009, I PK 127/08,[24] explicitly allowed that a statement of will terminating an employment relationship without notice may be made by proxy. This view needs to be endorsed, because no labour law provision requires an employee to make such a statement in person. This also applies to termination of an employment relationship upon notice, as in that case no corresponding provision exists, either. This method is, however, not possible in the case referred to in Article 38 para. 1 VSGA. As already noted, the employment relationship of the voivodship marshal is a relationship initiated by election, and its initiation and termination are regulated by the Voivodship Self-Government Act, therefore it is of an administrative law nature. Its beginning and end are not regulated by the provisions of labour law, but by the aforesaid Act on the system of the state. The Act explicitly stipulates that the resignation is 'tendered by the voivodship marshal' (Article 38 para. 1 VSGA) and 'by them', i.e. the marshal (Article 37 para. 4 VSGA). The provisions do not merely define the subject entitled to tender the resignation, but also objectively determine the manner how it may be tendered. The wording used, in connection with the nature of an employment relationship initiated by election, makes it certain that the voivodship marshal tenders the resignation in person. The cited provisions do not only define who can make the respective statement, but also how it is made, i.e. by whom, which is the result of the legislator's use of the word 'by'. The above conclusion is additionally supported by the fact that ending a term of an individual employed on the basis of election occurs in situations provided for in by-laws regulating election to positions in particular institutions.[25] The Voivodship Self-

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[21] B. Ćwiertniak, [in:] K.W. Baran (ed.), *Kodeks pracy. Komentarz*, Warszawa 2018, thesis 5.1 to Article 73.

[22] *Ibid.*, thesis 2.1 to Article 73.

[23] J. Stelina, *Wybór*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego*, Vol. 11: *Stosunek służbowy*, Warszawa 2011, p. 210.

[24] Published in ONSP 2010, No, 15–16, item 183.

[25] T. Zieliński, Ł. Pisarczyk, [in:] L. Florek (ed.), *Kodeks pracy. Komentarz*, Warszawa 2009, p. 437.

Government Act does not offer a possibility of tendering a resignation statement by proxy – which means this situation was not provided for – explicitly stipulating instead that the statement is to be tendered by the voivodship marshal. Resignation from the voivodship marshal position can, therefore, come only from the person who holds it, to the exclusion of any other subject.

Article 57 para. 1 VSGA, stipulating that statements of will on behalf of the voivodship are made by the voivodship marshal together with a member of the voivodship board, unless otherwise provided for in the voivodship statutes, is also not applicable to resignation of the voivodship marshal from their position. The statement referred to in Article 38 para. 1 VSGA is not a one made by the voivodship marshal on behalf of the voivodship, but in their own name, hence the course of action referred to in Article 57 para. 1 VSGA does not apply to it.

As noted in literature, a resignation statement of the voivodship marshal must be tendered unequivocally, leaving no doubt as to the executive's intentions,[26] which view I also share. The essence of resignation of the voivodship's marshal is renouncing the function they hold. This cannot be doubted, as otherwise it would be difficult to recognize that the resignation has been tendered effectively. The Voivodship Self-Government Act does not define the form in which the marshal's statement must be made. It can accurately be said that the statement may be made in writing, as well as verbally (for example, being delivered during a voivodship assembly session). It is also permitted to use an electronic form; as noted, the possibility of tendering a resignation in the form of an electronic document in the meaning of provisions of the Act on computerization of operations of entities carrying out public tasks, delivered by means of electronic communication, cannot be ruled out.[27] A written form has been reserved by the legislator for the motion to dismiss the voivodship marshal (Article 37 para. 2 VSGA), and therefore since Article 38 para. 1 VSGA does not contain such a requirement, it should be concluded that both written and verbal as well as electronic forms are permitted. The Act does not exclude any of these forms. Thus, since there are no limitations in this respect, not only is an electronic document in the meaning of provisions of the Act on computerization of entities carrying out public tasks permitted, but so is any other electronic form. This interpretation is not challenged by the legislator's use of the word 'tender' with respect to resignation. From a linguistic point of view, to 'tender' means to 'communicate something in writing or verbally',[28] to 'announce something officially, advise about something'.[29] This word does not, therefore, refer solely to communication in writing.

A question arises whether the voivodship marshal can tender a resignation in the form of a press release, by a statement announced at a special press conference, or through social media. However, this question is not about the form of the voivodship marshal's statement, but about the manner of tendering their resignation. A prerequisite for the expiration of the voivodship marshal's term is acceptance

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[26] Cz. Martysz, *supra* n. 10, thesis 1 to Article 38.

[27] *Ibid.*

[28] https://sjp.pwn.pl/slowniki/złożenie.html (accessed 13.01.2020).

[29] *Słownik Języka Polskiego*, *supra* n. 4, p. 1034.

of their resignation by means of a resolution of the voivodship assembly (Article 38 para. 2 VSGA). Therefore, it should be concluded that the resignation must be tendered at the competent body, i.e. the voivodship assembly, by being addressed to it. Even public statements about resigning from a function do not meet the condition of effective tendering of resignation, since they are made to the public at large, not to the voivodship assembly as the body entitled to accept it. What matters is not only the ability of the assembly members to examine the marshal's statement (because they can certainly do so via social media, for example), but also to launch a procedure that leads to resignation acceptance (Article 38 para. 2 VSGA). In consequence, the statement must formally reach the body competent to make a decision in this respect. Accordingly, statements made in the public sphere, including in the media, but not tendered at the body competent to accept the resignation cannot be considered an effective tendering of resignation. This position is supported by the necessity to guarantee the certainty of legal transactions.

Article 38 paras 1 and 2 VSGA does not explicitly provide for a possibility of withdrawing the resignation. As noted in literature, it must be remembered that the content of Article 38 para. 1 VSGA obliges the voivodship assembly to accept the resignation, and hence any potential attempts of the marshal to withdraw their statement of will may not be effective. However, a position can also be taken that the marshal may withdraw their statement, regardless of when it has been tendered, not later than before the respective vote takes place.[30] In my opinion, while the Voivodship Self-Government Act does not contain a clear regulation allowing a resignation to be withdrawn, such a possibility cannot be ruled out. The mere renouncement of a function does not, in and of itself, lead in this case to ending the executive's term and termination of employment relationship, as clearly follows from Article 38 paras 2 and 3 VSGA. In that case, the term expires only when the competent body accepts the resignation.[31] Until such time as the vote on resolution to accept the resignation starts, the voivodship marshal can administer their statement of resignation as they see fit, since it has not yet produced a consequence of bringing their term to an end. The voivodship marshal is entitled to tender a resignation, but it is only when accepting this resignation is put to the vote that the stage in which a body competent in this matter is taking its position commences. Since tendering a resignation does not automatically end the term, this means that the voivodship marshal can still exercise their right to resign as they see fit, because it has not produced any results yet (the term continues). While the executive can resign, the Act does not explicitly say that a statement in this respect is final. The right to resign from a function is not exercised by the mere statement of resignation. By resigning, the entitled individual exercises the right vested in them, but they do likewise when they withdraw their original statement. Although resigning from a function is a public law institution, this does not mean that the entitled individual cannot alter a decision once it is made. If the legislator intended to rule out such possibility, the Act would link the end of the term to the mere fact of resigning from a function, or explicitly

[30] Cz. Martysz, *supra* n. 10, thesis 1 to Article 38.
[31] T. Zieliński, Ł. Pisarczyk, *supra* n. 25, p. 437.

prevent withdrawing a statement in this respect. None of these measures has been introduced in the Voivodship Self-Government Act. In the case under consideration, no effects related to the status of the voivodship marshal have been triggered, with the exception of the statutory obligation to hold a vote on accepting the resignation at the forthcoming voivodship assembly session (Article 38 para. 2 VSGA). Denying the voivodship marshal the possibility to alter their decision would also run counter to the voluntary nature thereof, as discussed above. The result of that nature is the right to change one's original expression of will until the effect resulting from the original statement is triggered, i.e. until a vote on accepting the resignation is held.

If the resignation is tendered by the voivodship marshal, it is accepted by a simple majority of votes (Article 38 para. 1 VSGA). In such case, the voivodship assembly should at its next session adopt a resolution on accepting the resignation of the entire voivodship board. The 'next session' of the voivodship assembly should be understood both as a session planned according to the adopted assembly working schedule, and the session on which the executive tendered the resignation. This session does, after all, come next in relation to the date on which the statement on resignation has been tendered. What matters, therefore, is the date on which the executive has tendered the resignation: from this viewpoint, the next session is the one following the statement in this matter. An unfinished assembly session is a session that takes place after the voivodship marshal has tendered the resignation. Hence, adopting the resolution referred to in Article 38 para. 2 VSGA can also occur during the current (pending) voivodship assembly session.

Pursuant to Article 38 para. 3 VSGA, failure to adopt the resolution referred to in Article 38 para. 2 is tantamount to accepting the resignation on the last day of the month in which the assembly session referred to in that provision has taken place. As noted in literature, Article 38 para. 3 introduced a guarantee that a voivodship marshal who has made a statement of will to resign from their function will serve as the executive no later than the last day of the month in which the voivodship assembly session devoted to accepting the resignation has taken place. In addition, the provision stipulates that the assembly is not entitled to adopt a resolution refusing to accept a resignation, however the legislator, foreseeing that such a resolution may be adopted, granted effective protection to the marshal by setting a statutory date on which their duties cease.[32] This provision is important from the point of view of certainty of legal transactions. It can be also concluded that when the voivodship assembly refuses to accept the voivodship marshal's resignation (which it cannot formally do), the resignation has the legal consequence of ending the executive's term, and Article 38 para. 3 stipulates exactly when (at what date) this happens. One has to share the view that on this date the employment relationship with the marshal is terminated and the executive ceases to be a public administration body, loses the right to issue administrative decisions, and no longer heads the marshal's office.[33] This view is firmly grounded in Article 73 para. 2 LC in conjunction with Article 43 para. 1 VSGA.

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[32] Cz. Martysz, *supra* n. 10, thesis 2 to Article 38.

[33] *Ibid*.

Concluding, a voivodship marshal is free to tender a resignation from their function at any time and without giving any reasons, because the Act does not require to reveal them. Resignation is the executive's personal prerogative and the possibility of making a statement by proxy is ruled out. The resignation can be made in writing, verbally as well as in the electronic form, however, in order to be effective, it needs to be addressed to the body competent to accept the resignation, i.e. the voivodship assembly. A statement about resigning from the marshal's function must be explicit. Tendering the resignation in itself does not have the consequence of bringing the voivodship marshal's term to an end; this occurs only when the resignation is accepted by the voivodship assembly. The Act defines the procedure to accept the resignation of the voivodship marshal, and failure to adopt a resolution, referred to in Article 38 para. 2 VSGA, to accept the resignation of the entire board as a result of the voivodship marshal's resignation does not prevent the executive's term from ending, as clearly follows from Article 38 para. 3 VSGA. The Act does not exclude the possibility of the voivodship marshal's withdrawing their resignation due to both the nature of this statement and the reservation that its legal effects occur only following its acceptance by the voivodship assembly. Until that time, the voivodship marshal can administer the statement they have made as they see fit, and guaranteeing them the right to tender a resignation means that their will in this scope needs to be respected and that the statement can be withdrawn until the vote referred to in Article 38 para. 2 VSGA is held. Otherwise, the inherent voluntary nature of the statement to resign from the function is not recognised.

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RESIGNATION OF VOIVODSHIP MARSHAL FROM THEIR FUNCTION IN THE LIGHT OF VOIVODSHIP SELF-GOVERNMENT ACT

Summary

The paper analyses the concept of 'tendering resignation' by a voivodship marshal, referred to in Article 38 para. 1 and Article 37 para. 4 of the Voivodship Self-Government Act. The author interpretes the term 'resignation', explaining its essence and nature. In the author's opinion, only the authorised person, i.e. the voivodship marshal, may submit a statement of resignation, which excludes the possibility of doing this by proxy. The Act does not specify the form in which the statement of resignation is made, which means that it can be submitted both in writing and verbally, as well as in the electronic form. Withdrawal of the tendered resignation is allowed, provided that the voting procedure stipulated in Article 38 para. 2 of the Voivodship Self-Government Act has not been commenced. The paper also analyses the procedure to be followed when accepting the resignation tendered by the voivodship marshal and its effects.

Keywords: voivodship marshal, resignation of voivodship marshal, withdrawal of resignation, acceptance of resignation

REZYGNACJA MARSZAŁKA WOJEWÓDZTWA Z PEŁNIONEJ FUNKCJI W ŚWIETLE USTAWY O SAMORZĄDZIE WOJEWÓDZTWA

Streszczenie

W artykule analizie poddano instytucję „złożenia rezygnacji" przez marszałka województwa, o której mowa w art. 38 ust. 1 i art. 37 ust. 4 ustawy o samorządzie województwa. Autorka dokonała wykładni pojęcia „rezygnacja", wyjaśniając jej istotę i charakter. Zdaniem autorki oświadczenie o zrzeczeniu się pełnionej funkcji może złożyć wyłącznie osoba uprawniona, a więc marszałek województwa, co wyklucza możliwość dokonania tej czynności przez pełnomocnika. Ustawa nie określa formy oświadczenia o rezygnacji, co oznacza, że może ono być złożone zarówno pisemnie, jak i ustnie, a także w formie elektronicznej. Nie jest wykluczone cofnięcie złożonej rezygnacji, pod warunkiem jednak że nie rozpocznie się procedura głosowania, o której mowa w art. 38 ust. 2 ustawy o samorządzie województwa. Artykuł analizuje także tryb postępowania w przedmiocie przyjęcia rezygnacji złożonej przez marszałka województwa oraz jej skutki.

Słowa kluczowe: marszałek województwa, rezygnacja marszałka województwa z pełnionej funkcji, cofnięcie rezygnacji, przyjęcie rezygnacji

DIMISIÓN DE MARISCAL DE VOIVODÍA DE SU FUNCIÓN DESDE LA PERSPECTIVA DE LA LEY DE AUTOGOBIERNO DE VOIVODÍAS

Resumen

En el artículo se analiza la institución de "presentar la dimisión" por el mariscal de voivodía, a la cual se refiere el art. 38 ap. 1 y 37 ap. 4 de la ley de autogobierno de voivodías. La Autora interpreta la noción "dimisión", explicando su naturaleza y caracter. Según la Autora,

la declaración de dimisión de función puede ser prestada sólo por la persona autorizada, o sea, el mariscal de voivodía; queda excluida la ejecución de tal acto por el apoderado. La ley no determina la forma de declaración de dimisión, lo que significa que puede ser presentada tanto por escrito como oralmente, y también en forma electrónica. No queda excluida la posibilidad de retirar la dimisión, siempre que no haya empezado el proceso de votación al que se refiere el art. 38 ap. 2 de la ley de autogobierno de voivodías. El artículo analiza también el proceso de aceptación de la dimisión presentada por el mariscal de voivodía y sus efectos.

Palabras claves: mariscal de voivodia, dimisión de mariscal de voivodía de su función, retirar la dimisión, aceptar la dimisión

УХОД В ОТСТАВКУ МАРШАЛА ВОЕВОДСТВА В СВЕТЕ ЗАКОНА «О ВОЕВОДСКОМ САМОУПРАВЛЕНИИ»

Аннотация

В статье анализируется институт «ухода в отставку» маршала воеводства, о котором говорится в ст. 38 пар. 1 и ст. 37 пар. 4 Закона «О воеводском самоуправлении». Автор приводит истолкование термина «уход в отставку», объясняя его суть и характер. По мнению автора, заявление об отказе от занимаемой должности может сделать только само управомоченное лицо, т.е. маршал воеводства, что исключает возможность совершения данного действия доверенным лицом. В законе не уточняется форма заявления об отставке, что означает, что такое заявление может быть сделано как в письменной, так и в устной форме, а также посредством электронной коммуникации. Отзыв заявления об отставке не исключается при условии, однако, что не началась процедура голосования, предусмотренная ст. 38 пар. 2 Закона «О воеводском самоуправлении». В статье также анализируется процедура принятия отставки маршала воеводства и последствия его отставки.

Ключевые слова: маршал воеводства, заявление маршала воеводства об отставке, отзыв заявления об отставке, принятие отставки

DER RÜCKTRITT EINES WOIWODSCHAFTSMARSCHALLS VON SEINER FUNKTION NACH DEM POLNISCHEN GESETZ ÜBER DIE SELBSTVERWALTUNG DER WOIWODSCHAFTEN

Zusammenfassung

In dem Artikel wird das Rechtsinstitut des „Rücktritts" eines Woiwodschaftsmarschalls nach Artikel 38 Absatz 1 und Artikel 37 Absatz 4 des polnischen Gesetzes über die Selbstverwaltung der Woiwodschaften untersucht. Die Autorin nimmt eine Auslegung des Begriffes „Rücktritt" vor und erläutert Wesen und Charakter des Rechtsbegriffes. Der Verfasserin zufolge kann die Rücktrittserklärung, d.h. die Erklärung über den Verzicht auf die ausgeübte Funktion nur von der dazu befugten Person d.h. dem Marschall der Woiwodschaft, abgegeben werden, wodurch die Möglichkeit ausgeschlossen ist, dass die durch einen Bevollmächtigten erfolgt. Die Form der Rücktrittserklärung ist in dem Gesetz nicht festgeschrieben, was bedeutet, dass diese schriftlich und mündlich oder auch in elektronischer Form abgegeben werden kann. Rückgenommen werden kann ein erklärter Rücktritt, solange, wie das Abstimmungsverfahren nach Artikel 38 Abschnitt 2 des polnischen Gesetzes über die Selbstverwaltung der Woiwodschaften noch nicht

läuft. Eingehend untersucht werden in dem Artikel auch die Verfahrensweise zur Annahme des von einem Woiwodschaftsmarschall eingereichten Rücktritts und dessen Auswirkungen.

Schlüsselwörter: Woiwodschaftsmarschall, Rücktritt eines Woiwodschaftsmarschalls seinem Amt, Rücknahme des Rücktritts, Annahme des Rücktritts

DÉMISSION DU MARÉCHAL DE VOÏVODIE DE SES FONCTIONS À LA LUMIÈRE DE LA LOI SUR L'AUTONOMIE GOUVERNEMENTALE DES VOÏVODIES

Résumé

L'article analyse l'institution de la «démission» par le maréchal de voïvodie, visée à l'art. 38 al. 1 et l'art. 37 al. 4 de la Loi sur l'autonomie gouvernementale des voïvodies. L'auteur a interprété le terme «démission», expliquant son essence et son caractère. Selon l'auteur, une déclaration de renonciation à la fonction ne peut être faite que par une personne autorisée, c'est-à-dire le maréchal de voïvodie, ce qui exclut la possibilité de le faire par procuration. La loi ne précise pas la forme de la déclaration de démission, ce qui signifie qu'elle peut être présentée à la fois par écrit et oralement, ainsi que sous forme électronique. Le retrait de la démission soumise n'est pas exclu, à condition toutefois que la procédure de vote visée à l'art. 38 al. 2 de la Loi sur l'autonomie gouvernementale des voïvodies ne commence pas. L'article analyse également la procédure à suivre pour accepter une démission déposée par un maréchal de voïvodie et ses effets.

Mots-clés: maréchal de voïvodie, démission du maréchal de voïvodie, retrait de la démission, acceptation de la démission

RINUNCIA ALLE SUE FUNZIONI DA PARTE DEL PRESIDENTE DEL VOIVODATO ALLA LUCE DELLA LEGGE SUI VOIVODATI

Sintesi

Nell'articolo si è analizzata l'istituzione della "presentazione di rinuncia", da parte del presidente del voivodato, di cui all'art. 38 comma 1 e all'art. 37 comma 4 della legge sui voivodati. L'autrice ha compiuto un'interpretazione del concetto di "rinuncia", chiarendo la sua essenza e il suo carattere. Secondo l'autrice la dichiarazione di rinuncia alle sue funzioni può essere presentata esclusivamente dalla persona autorizzata, e quindi dal presidente del voivodato, e ciò esclude la possibilità di eseguire tale atto attraverso un rappresentante. La legge non determina la forma della dichiarazione di rinuncia, il che significa che può essere presentata sia per iscritto che verbalmente, e anche in formato elettronico. Non è esclusa la ritrattazione della rinuncia presentata, a condizione tuttavia che non sia iniziata la procedura di votazione di cui all'art. 38 comma 2 della legge sui voivodati. L'articolo analizza anche la procedura di accettazione della rinuncia presentata dal presidente del voivodato e le sue conseguenze.

Parole chiave: presidente del voivodato, rinuncia alla sua funzione da parte del presidente del voivodato, ritrattazione della rinuncia, accettazione della rinuncia

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OBSIGNATIO ET DEPOSITIO OF AN OFFICIALLY OPENED TESTAMENT IN ROMAN LAW

SŁAWOMIR KURSA*

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1. INTRODUCTION**

The safety of legal transactions required the opening of testaments to take on an official form. The procedure was a sequence of activities arising from the nature of the process, with a view primarily to probating the document. Its exhaustive but concise description can be found in the *Pauli Sententiae*.

> PS. 4.6.1: *Tabulae testamenti aperiuntur hoc modo, ut testes vel maxima pars eorum adhibeatur, qui signaverint testamentum: ita ut agnitis signis rupto lino aperiatur et recitetur atque ita describendi exempli fiat potestas ac deinde signo publico obsignatum in archivum redigatur, ut, si quando exemplum eius interciderit, sit, unde peti possit.*

Accordingly, the following steps were involved: (1) confirming of the presence of all or a majority of the witnesses of the testament making; (2) verifying of the authenticity of the seal; (3) cutting of the cord; (4) reading out of the testament contents; (5) making of a copy; (6) resealing of the testament and depositing it in the archive.

The next passage of the *Pauli Sententiae* discusses the resealing and identifies the time and place allocated for the opening of testaments.

> PS. 4.6.2: *Testamenta in municipiis coloniis oppidis praefectura vico castello conciliabulo facta in foro vel basilica praesentibus testibus vel honestis viris inter horam secundam et decimam diei aperiri recitarique debebunt, exemploque sublato ab isdem rursus magistratibus obsignari, quorum praesentia constat apertum.*

* PhD hab., Professor of the SWPS University of Social Sciences and Humanities in Warsaw, Faculty of Law; e-mail: skursa@swps.edu.pl, ORCID: 0000-0001-9327-0728

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Testaments made in cities, in the provinces, in strongholds, at the prefecture, in the countryside, at a castle or the location of popular assemblies were opened during the authorities' office hours in the presence of the competent official at the forum or in the basilica.[1] The nature of those places made it possible for the testament to be read out in public.[2] Opening of a testament elsewhere carried a fine of several thousand sesterces.[3]

The objective of this article is to explain the final stage of the procedure for opening testaments and especially the methods used for protecting the testament once closed again. The activities involved in resealing of the testament will be explained, the official charged with the affixing of the seals (*obsignatio*) and archiving (*depositio*) will be identified and an attempt will be made to determine the location where the resealed testament was archived.[4]

2. CLOSING AND RESEALING OF A TESTAMENT

Fragments concerning the resealing of an opened testament, preserved in PS. 4.6.1–2, mention that after opening and reading testaments were closed again and affixed

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[1] F. Scotti, *Il testamento nel diritto romano. Studi esegetici*, Roma 2012, nn. 36–45, pp. 406–408. To the Romans, the term 'forum' denoted a square around which the life of a city dwellers revolved, where commercial affairs were transacted and above all where justice was administered. Various civil and criminal tribunals officiated at that square, and especially in Rome, where the part of the forum referred to as the *comicium* was the general location of the urban praetor's tribunal until the imperial period; see C. Gioffredi, *s.v. Foro*, [in:] *Novissimo Digesto Italiano*, Vol. 7, Torino 1961, p. 592. Rome's basilicas, on the other hand, were stately buildings, usually containing three aisles and culminating with an apse, housing the palace of justice, banks, commercial spaces, money exchangers and audience halls. They were also constructed in other cities, for similar purposes. Providing shelter from adverse weather conditions, they offered a friendlier space, competing with the forum. Beginning with the emperor Constantine and the taking hold of Christianity, numerous basilicas previously serving as secular buildings were transformed into places of worship, with their internal layout being adapted for the new purpose; see V. Arangio-Ruiz, *s.v. Basilici*, [in:] *Novissimo Digesto Italiano*, Vol. 2, Torino 1958, p. 284; *s.v. Basilica*, [in:] A. Rich, *Dictionnaire des antiquités romaines et grecques*, Paris 2004, p. 77. In the opinion of U.E. Paoli, *Vita romana*, Firenze 1948, pp. 17–18, the public life, whether at the forum or inside the basilicas, reached its apogee around the *hora quinqua*, that is 11 a.m., to decline around the *hora decima*, that is 4 p.m. That was also the activity window of the public offices operating at the forum or the basilica. One of those, starting from the time of Augustus, was the tax office (*statio fisci*). As J. Kamiński notes, [in:] W. Wołodkiewicz (ed.), *Prawo rzymskie. Słownik encyklopedyczny*, Warszawa 1986, p. 143, during the imperial era *stationes fisci* served as territorial branches of the treasury, where income was accounted for and tax was settled. Most probably, they had separate departments holding the *stationes fisci hereditatum et libertatum*, that is for inheritance and emancipations. For accounting transparency, such departments operated in plain public view. That is also where testaments were opened; see B. Biondi, *Successione testamentaria. Donazioni*, Milano 1943, p. 603; R. Levrero, *Il diritto e la giustizia*, Roma 2004, p. 108. Luigi Palumbo identifies the municipal senate as the venue for opening testaments, without, however, citing any source text in support of his assertion; see L. Palumbo, *Testamento romano e testamento longobardo*, Lanciano 1892, p. 150.

[2] For more details, see S. Kursa, *Tempus et locus otwarcia testamentu w prawie rzymskim*, Themis Polska Nova 2, 2018, pp. 5 et seq.

[3] PS. 4.6.2a: *Qui aliter aut alibi, quam ubi lege praecipitur, testamentum aperuerit recitaveritve, poena sestertiorum quinque milium tenetur*.

[4] As for the location of the testament before opening and the duty to disclose the testament, see S. Kursa, *Obligation to Present the Will in the Law of Justinian*, Ius Novum 4, 2017, pp. 15–21.

with the public seal (*ac deinde signo publico obsignatum*) by the same officials in whose presence they were opened (*exemploque sublato ab isdem rursus magistratibus obsignari, quorum praesentia constat apertum*). It can be believed that the seal of the opening magistrate, when affixed to the document after closing it again, corroborated the officiality of its opening.

A special situation concerned opening of a testament in the presence of trustworthy citizens without the attendance of all of the witnesses of its making. According to Gaius, after making a copy and having it authenticated by those present at the opening, the testament was closed again, affixed with seals and thereafter dispatched to the location where the witnesses of its making were staying, for them to recognize and acknowledge their seals.[5] From the words *et post descriptum et recognitum factum ab isdem, quibus intervenientibus apertae sunt, obsignentur* it follows that the testament had to be resealed after closing. The verb *obsignare*, in the plural imperative and separated by commas, could hypothetically refer to the officials before whom the testament was opened, to the citizens present or to both. Any hypothesis that in this extraordinary scenario the duty to affix a seal would have been incumbent only on the magistrate is, however, precluded by the text of the constitution of Valerian and Gallienus of 256 A.D.,[6] which clearly states that a testament opened in the presence of trustworthy men was to be affixed with their seals (*quibus praesentibus aperiantur et ab his rursum obsignentur*).[7] Their seals on the once again closed testament ruled out any arbitrary conduct by the magistrate and confirmed that the testament was opened in extraordinary circumstances. That did not relieve the state official of the necessity of placing his own seal, for his seal, in turn, excluded the possibility of unofficial opening.

Hence, the question arises whether in ordinary circumstances, considering the instructions given in PS. 4.6.1–2, only the magistrate affixed a seal to the newly closed testament. In response, it has to be noted that there is no evidence in any source of law that the testament, after being closed again, was also sealed by those witnesses of its making who were in attendance at the opening, in addition to the public seal.[8] However, that does not appear necessary, as their seals were already present on the testament. Nor does Leo VI's post-Justinian Nov. 82, prescribing a fine of twelve librae for a judge failing to seal a testament opened before him ([…] *Illud porro insuper sancimus, ut si iudicis socordia, ne testamentum denuo obsignaretur factum sit, ipsi in socordiae poenam duodecim librarum mulcta imponatur*). What is problematic is the use of the verb *obsignare* in the passive voice in the phrase *ne*

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[5] D. 29.3.7 (*Gaius libro 7 ad edictum provinciale*): […] *et post descriptum et recognitum factum ab isdem, quibus intervenientibus apertae sunt, obsignentur, tunc deinde eo mittantur, ubi ipsi signatores sint, ad inspicienda sigilla sua*.

[6] C. 6.32.2 (*Valerianus, Gallienus*): *Testamenti tabulas ad hoc tibi a patre datas, ut in patria proferantur, adfirmans potes illic proferre, ut secundum leges moresque locorum insinuentur, ita scilicet, ut testibus non praesentibus adire prius vel pro tribunali vel per libellum rectorem provinciae procures ac permittente eo honestos viros adesse facias, quibus praesentibus aperiantur et ab his rursum obsignentur.*

[7] Similarly, see E. Nisoli, *Die Testamentseröffnung im römischen Recht*, Bern 1949, pp. 50–51; F. Scotti, *supra* n. 2, p. 415.

[8] Cf. M. Amelotti, *Il testamento romano attraverso la prassi documentale. I. Le forme classiche di testamento*, Firenze 1966, p. 187.

testamentum denuo obsignaretur fatum sit ('if it should happen that the testament is not sealed again'), for it does not clearly impose the duty of sealing only on the judge himself, though it is clear that he is the one to be punished if the requirement is not met. Alphonse Berenger translates the last sentence of this novel as follows: *Nous ordonnons en outre, que si le juge néglige d'y apposer un nouveau cachet, il soit condamné, pour sa négligance, à payer douze livres* ('Nonetheless, we ordain that if the judge neglects to affix his seal, he should be punished for his negligence with a fine of twelve librae').[9] His translation, therefore, shows that the practice of affixing only public seals to testaments opened in ordinary circumstances, as highlighted in PS. 4.6.1–2, survived into the rule of the Byzantine emperor Leo VI.

3. PLACEMENT OF THE RESEALED TESTAMENT IN DEPOSIT

After opening, reading, copying and once again closing and sealing, the testament could be deposited in a variety of locations.[10] According to a fragment originating from the nineteenth book of Ulpian's *Libri ad edictum*, the place for keeping the opened and resealed testament was the private archive of the heir[11] or the temple archive.[12]

> D. 10.2.4.3 (*Ulpianus libro 19 ad edictum*): *Sed et tabulas testamenti debebit aut apud eum, qui ex maiore parte heres est, iubere manere aut in aede deponi* […].

Accordingly, while distributing the estate the testament was allotted to the heir with the largest share in the inheritance or deposited in the temple archive (*in aede*). The choice of location belonged to the heir or, if there was a dispute, the magistrate (judge).[13]

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[9] A. Berenger, *Les Novelles de l'Empereur Justinien. Traduites en français par A. Berenger*, Vol. 2, Metz 1810, p. 100.

[10] Archives where the Romans kept public and private documents, including testaments (*tabulae testamentorum*), were called *tabularia*. The term *tabularium* primarily denoted the building containing the state archives at the foot of the Capitol in the north-western part of the Forum Romanum, near the Temple of Concord. That archives building was erected after the fire of Rome in 83 BC. The name was applied, however, to all sorts of archives and collections, for example, to the imperial archive (*tabularium principis*) or the legionary archive in a military camp. Still, those were usually separately designated parts of temples or other public buildings and even individual rooms designated for the purpose. See s.*v. Tabularium*, [in:] J.-L. Lamboley, *Lexique d'histoire et de civilisation romaines*, Paris 1995, pp. 344–345; *s.v. Tabularium*, [in:] A. Rich, *Dictionnaire*, *supra* n. 2, p. 624. *Tabularia* were also the archives created at tax offices and cared for by the *tabularii*, who, apart from archivists, were also scribes and accountants. See G.I. Luzzatto, *s.v. Tabularium*, [in:] *Novissimo Digesto Italiano*, Vol. 18, Torino 1971, Vol. 1021; G. Lafaye, *s.v. Tabularius*, [in:] *Dictionnaire des Antiquités Grecques et Romaines*, Vol. 5, Paris 1919, p. 19. In accordance with the constitution of emperors Arcadius and Honorius of 401 AD, they were to be appointed in every city and province. C. 10.71.3 cf.: (*Arcadius, Honorius*) *Generali lege sancimus, ut, sive solidis provinciis sive singulis civitatibus necessarii fuerint tabularii, liberi homines ordinentur neque ulli deinceps ad hoc officium patescat aditus, qui sit obnoxius servituti.* Cf. C.Th. 8.2.5 (*Arcadius, Honorius*).

[11] Cf. D. 32.92 pr. (*Paulus libro 13 responsorum*).

[12] As suggested by legal and literary sources from the classical period of Roman law; see H. Vidal, *Le dépôt in aede*, Revue Historique de Droit Français et Étranger 43, 1965, pp. 568–569.

[13] In the quoted fragment, Ulpian cites Labeo's opinion that if the inheritance were to be sold, the heir should release a copy of the testament to the buyer and retain the testament himself

Therefore, the question arises what happened to an opened and resealed testament when the co-heirs had equal shares in the estate. Naturally, the magistrate (judge) could make a decision to place the document in the temple archive. Could, however, the testament be entrusted to one of the heirs? It appears that the procedure for this was similar to the one described by Gaius for depositing debt documents referring to the estate's liabilities. In their case, if all co-heirs had equal shares in the inheritance and were unable to agree on which one of them should have the custody of the documents, they could throw lots or select a trusted person (*amicus*), unanimously or by a majority vote, who might agree to keep the deposit.[14]

It must be emphasized that in the case of inheritance disputes or public proceedings relating to testaments,[15] the latter were placed in the *depositum in sequestre*.

> D. 43.5.5 (*Iavolenus libro 13 ex Cassio*): *De tabulis proferendis interdictum competere non oportet, si hereditatis controversia ex his pendet aut si ad publicam quaestionem pertinet: itaque in aede sacra interim deponendae sunt aut apud virum idoneum*.[16]

In that case the magistrate (judge) ordered the testament to be placed, pending litigation, in the temple archive (*in aede sacra*) or with a trustworthy citizen (*apud virum idoneum*). When the judgment became final and no longer appealable, the winning party was entitled to keep the testament.

According to PS. 4.6.1, the testament, sealed by the official before whom it was opened, was placed in the archive (*in archivum*), so that its contents could be inspected if necessary, especially if an interested party did not have a copy.[17] The cited fragment was placed under the title on inheritance tax (*De vicesima*).[18] Perhaps

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or deposit it in the temple archive: […] *Nam et Labeo scribit vendita hereditate tabulas testamenti descriptas deponi oportere: heredem enim exemplum debere dare, tabulas vero authenticas ipsum retinere aut in aede deponere.* H. Vidal, *supra* n. 13, p. 569, demonstrated that the term *aedes*, with reference to a place for depositing documents, including testaments, means the temple archive, even where the noun alone is used rather than the full expression *aedes sacra*.

[14] D. 10.2.5 (*Gaius libro 7 ad edictum provinciale*): *Si quae sunt cautiones hereditariae, eas iudex curare debet ut apud eum maneant, qui maiore ex parte heres sit, ceteri descriptum et recognitum faciant, cautione interposita, ut, cum res exegerit, ipsae exhibeantur. Si omnes isdem ex partibus heredes sint nec inter eos conveniat, apud quem potius esse debeant, sortiri eos oportet: aut ex consensu vel suffragio eligendus est amicus, apud quem deponantur: vel in aede sacra deponi debent.* S. Solazzi, *L'estinzione dell'obbligazione nel diritto romano*, Napoli 1935, pp. 157–158, n. 2, in D. 10.2.4.3 and D. 10.2.5 interpolations consisting in particular in the added passage concerning the deposit *in aede*. On the contrary, see H. Vidal, *supra* n. 13, pp. 568–569.

[15] For example on the basis of *s.c. Silanianum*; see J.C. Naber, *Observatiunculae de iure romano. CXX. Ad edictum de edendo*, Mnemosyne 52, 1924, p. 220.

[16] V. Arangio-Ruiz, *Studii sulla dottrina romana del sequestro*, Archivio Giuridico "Filippo Serafini" 5(76), 1906, pp. 484–485. Concerning interpolations in this text, see also E. Levy, E. Rabel (eds), *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, Vol. 3, Weimar 1935, col. 28.

[17] B. Biondi, *supra* n. 2, p. 604.

[18] Concerning the *vicesima hereditatum*, see S.J. De Laet, *Note sur l'organisation et la nature juridique de la «vigesima hereditatium»*, L'Antiquité Classique 1(16), 1947, pp. 29–36; L. Rodríguez Alvarez, *Algunas notas en torno a la lex de vicesima hereditatium*, *Revue internationale des droits de l'antiquité* 28, 1981, pp. 213–246; M. Kuryłowicz, *Vicesima hereditatum. Z historii podatku od spadków*, [in:] H. Domański et al. (eds), *W kręgu prawa podatkowego i finansów publicznych. Księga dedykowana Profesorowi Cezaremu Kosikowskiemu w 40-lecie pracy naukowej*, Lublin 2005, pp. 217–223; R. Świrgoń-Skok, *Organizacja służb skarbowych w sprawach podatku od spadków w państwie rzymskim*,

the archive referred to in PS. 4.6.1 was the tax-office archive, as Leonard Piętak[19] and Gian Gualberto Archi[20] believe. However, considering that Justinian's compilation did not include PS. 4.6.1, one cannot exclude this could have been any archive. This is because the fact that the compilers only recorded the pronouncements of Ulpian (D. 10.2.4.3) and Iavolenus (D. 43.5.5) contradicts the idea that public archives were the sole place for keeping opened and resealed ordinary testaments.[21]

4. CONCLUSION

In summary, the conclusion is to be made that, after completing the steps involved in opening a Roman testament, the latter was closed again and affixed with seals. It has been determined that the seal, after closing the testament again, was affixed only by the official responsible for the opening procedure, but when, due to the absence of the witnesses of the testament making, the opening took place in the presence of extraordinary witnesses, then such extraordinary witnesses also affixed their seals. Barring any need for verification by absent witnesses, the testament was immediately deposited with the heir regarded as the owner of the testament or placed in the temple archive or the state archive for safekeeping. The purpose of these activities was to ensure due protection for the officially opened testament, in order to enable the contents to be verified if needed.

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[19] L. Piętak, *Prawo spadkowe rzymskie*, Vol. 1, Lwów 1882, p. 384.

[20] G.G. Archi, *Interesse privato e interesse pubblico nell'apertura e pubblicazione del testamento romano (Storia di una vicenza)*, Iura. Rivista internazionale di diritto romano e antico 20.1, 1969, p. 401.

[21] Similarly, see J.C. Naber, *supra* n. 16, p. 220: *Adeo autem iure genuino publica archiva non videbantur testamentis recipiendis destinata*. Compare P. Voci, *Diritto ereditario romano*, Vol. 2: *Parte speciale. Successione ab intestato. Successione testamentaria*, Milano 1963, p. 108.

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OBSIGNATIO ET DEPOSITIO OF AN OFFICIALLY OPENED TESTAMENT IN ROMAN LAW

Summary

The aim of this article is to explain the final stage of the procedure of opening of a testament, in particular, how the testament was protected once it was closed again. An action related to the resealing of a testament is explained, a person who was responsible for its sealing and

storing is indicated, as well as an attempt is made to determine the location where the resealed testament was archived. It has been established that only the official responsible for carrying out the opening procedure would affix the seal to the once again closed testament, and if the testament was opened with the participation of extraordinary witnesses due to absence of witnesses of the testament making, it was also sealed by them. The resealed testament, if verification by absent witnesses was not needed, was immediately deposited with the heir who was considered the testament owner, or placed in the temple archive or the official archive for safekeeping.

Keywords: testament, opening of a testament, sealing of a testament, storing of a testament, witness, archive, Roman law, *Pauli Sententiae*

OBSIGNATIO ET DEPOSITIO URZĘDOWO OTWARTEGO TESTAMENTU W PRAWIE RZYMSKIM

Streszczenie

Celem niniejszego artykułu jest wyjaśnienie końcowego etapu procedury otwarcia testamentu, w szczególności sposobów zabezpieczenia ponownie zamkniętego testamentu. Została w nim wyjaśniona czynność związana z ponownym opieczętowaniem testamentu, wskazano, na kim spoczywały obowiązki związane z jego opieczętowaniem i przechowaniem, a także podjęto próbę ustalenia miejsca przechowywania ponownie zamkniętego testamentu. Ustalono, że pieczęć na ponownie zamkniętym testamencie przykładał tylko urzędnik odpowiedzialny za przeprowadzenie procedury otwarcia, a gdy z powodu braku świadków sporządzenia testamentu testament został otwarty z udziałem nadzwyczajnych świadków otwarcia, był on pieczętowany także przez nich. Ponownie opieczętowany testament, o ile nie zachodziła potrzeba jego weryfikacji przez nieobecnych świadków, oddawano natychmiast w depozyt dziedzicowi, którego uważano za właściciela testamentu, albo przekazywano na przechowanie w archiwum świątynnym lub urzędowym.

Słowa kluczowe: testament, otwarcie testamentu, opieczętowanie testamentu, przechowanie testamentu, świadek, archiwum, prawo rzymskie, *Pauli Sententiae*

OBSIGNATIO ET DEPOSITIO DEL TESTAMENTO ABIERTO OFICIALMENTE EN EL DERECHO ROMANO

Resumen

El artículo tiene por objetivo explicar la parte final del proceso de apertura del testamento, en particular las formas de asegurar el testamento cerrado de nuevo. Se explica la diligencia de sellar el testamento de nuevo, se indica las personas que tenían la obligación de sellar y depositar, así como se intenta determinar el lugar de depósito de testamento cerrado de nuevo. Se ha determinado que sólo el funcionario responsable del proceso de apertura podía poner el sello en el testamento cerrado de nuevo y si no había testigos a la hora de otorgamiento del testamento, el testamento se abría en la presencia de testigos extraordinarios de la apertura, entonces se sellaba también en su presencia. El testamento sellado de nuevo, siempre que no era necesario verificarlo por parte de testigos ausentes, se entregaba inmediatamente al

heredero a quien se consideraba como el propietario del testamento para su depósito o bien se entregaba al depósito en el archivo sacral o archivo oficial.

Palabras claves: testamento, apertura de testamento, sellar testamento, depósito de testamento, testigo, archivo, derecho romano, *Pauli Sententiae*

OBSIGNATIO ET DEPOSITIO ПРИ ОФИЦИАЛЬНОМ ВСКРЫТИИ ЗАВЕЩАНИЯ В РИМСКОМ ПРАВЕ

Аннотация

Цель данной статьи заключается в разъяснении заключительного этапа процедуры вскрытия завещания, а в особенности – способов повторного запечатывания завещания. Автор описывает процедуру повторного запечатывания завещания, указывает, кто отвечал за запечатывание и хранение завещания, а также делает предположения относительно места хранения повторно запечатанного завещания. Установлено, что печать к повторно запечатываемому завещанию прикладывало только должностное лицо, ответственное за процедуру вскрытия документа. В случае, если завещание вскрывалось в отсутствие свидетелей его составления, а при его вскрытии присутствовали свидетели, назначенные в особом порядке, то печати к документу прикладывали и эти свидетели. Повторно запечатанное завещание, если не возникла необходимость в его проверке отсутствующими свидетелями его составления, немедленно передавалось на хранение наследнику, который считался владельцем завещания, либо передавалось на хранение в храмовый или официальный архив.

Ключевые слова: завещание, вскрытие завещания, запечатывание завещания, хранение завещания, свидетель, архив, римское право, *Pauli Sententiae*

DIE *OBSIGNATIO ET DEPOSITIO* EINES AMTLICH ERÖFFNETEN TESTAMENTS IM RÖMISCHEN RECHT

Zusammenfassung

Der Zweck dieses Artikels ist es, die abschließende Phase des Verfahrens zur Testamentseröffnung und insbesondere, wie ein wiederverschlossenes Testament gesichert werden kann, zu klären. In dem Beitrag wird die Handlung der erneuten Versiegelung eines Testaments beschrieben und es wird erläutert, wer für dessen Versiegelung und Aufbewahrung verantwortlich war. Außerdem wird der Versuch unternommen, den Ort der Aufbewahrung eines wiederverschlossenen Testaments zu bestimmen. Es wurde festgestellt, dass das Siegel eines wiederverschlossenen Testaments nur von dem für die Durchführung der Testamentseröffnung zuständigen Beamten angebracht wurde, und wenn ein Testament aufgrund der Nichtanwesenheit von Zeugen bei der Testamentserrichtung unter Beteiligung von außerordentlichen Zeugen geöffnet und von diesen auch versiegelt wurde. Das wieder versiegelte Testament wurde, sofern es keiner Überprüfung durch abwesende Zeugen bedurfte, zur Verwahrung sofort an den Erben, der als Eigentümer des Testaments betrachtet wurde, oder zur Aufbewahrung im Tempelarchiv oder zur Aufnahme in ein amtliches Archiv übergeben.

Schlüsselwörter: Testament, Testamentseröffnung, Versiegelung des Testaments, Aufbewahrung des Testaments, Zeuge, Archiv, Hinterlegungsstelle, römisches Recht, *Pauli Sententiae*

OBSIGNATIO ET DEPOSITIO D'UN TESTAMENT OFFICIELLEMENT OUVERT EN DROIT ROMAIN

Résumé

Le but de cet article est de clarifier la dernière étape de la procédure d'ouverture d'un testament, notamment comment protéger un testament refermé. Il explique l'acte de refermer le testament, indiquant qui était responsable de son scellement et de son dépôt, ainsi qu'une tentative a été faite pour déterminer le lieu de dépôt du testament refermé. Il a été établi que le sceau du testament refermé n'a été appliqué que par le fonctionnaire chargé de la procédure d'ouverture, et lorsque le testament a été ouvert avec des témoins d'ouverture extraordinaires en raison du manque de témoins pour son établissement, il a également été scellé par eux. Le testament rescellé, à moins qu'il ne soit nécessaire de le vérifier par des témoins absents, a été immédiatement remis à l'héritier qui était considéré comme le propriétaire du testament, ou il a été déposé dans les archives du temple ou officielles.

Mots-clés: testament, ouverture du testament, scellement du testament, dépôt du testament, témoin, archives, droit romain, *Pauli Sententiae*

OBSIGNATIO ET DEPOSITIO UFFICIALE DI UN TESTAMENTO APERTO NEL DIRITTO ROMANO

Sintesi

L'obiettivo del presente articolo è il chiarimento della fase finale della procedura di apertura del testamento, in particolare la modalità di protezione del testamento nuovamente richiuso. Nell'articolo è stata chiarita l'attività legata alla nuova sigillatura del testamento, è stato indicato su chi gravavano gli obblighi legati alla sua sigillatura e conservazione e si è anche tentato si stabilire il luogo di conservazione del testamento nuovamente richiuso. È stato stabilito che il sigillo sul testamento nuovamente richiuso veniva apposto solamente dall'ufficiale responsabile della conduzione della procedura di apertura, e se a motivo della mancanza di testimoni della redazione del testamento, il testamento era stato aperto con la partecipazione di testimoni straordinari dell'apertura, veniva sigillato anche da essi. Il testamento nuovamente sigillato, se non era necessaria la sua verifica da parte dei testimoni non presenti, veniva consegnato immediatamente in deposito all'erede, che veniva ritenuto il proprietario del testamento, o veniva trasmesso in deposito nell'archivio del tempio o nell'archivio ufficiale.

Parole chiave: testamento, apertura del testamento, sigillatura del testamento, conservazione del testamento, testimone, archivio, diritto romano, *Pauli Sententiae*

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CULTURAL PROPERTY PROTECTION IN CHINESE LAW

MACIEJ PRZEMYSŁAW SMOLAREK*

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1. INTRODUCTION

China is one of the biggest states that are a source of cultural property in the world and a repository of a big number of unrevealed relics, the historic continuity of which lets one understand the process of development of humanity and civilisation from prehistoric to contemporary times. However, since the middle of the 19th century until now, China has been systematically losing this priceless heritage, either due to plunder or illegal sale or purposeful or accidental damage.

A big part of Chinese cultural property has been dispersed all over the world. Altogether, outside China, inter alia in the United States, Europe and the region of South-East Asia, over ten million relics, including ca. one million first- and second-class items of cultural property can be found.[1] The British Museum alone possesses 23,000 Chinese exhibits. Despite a series of amendments to law that the People's Republic of China has introduced in the field of the protection of cultural property in recent years, the threat of losing the Chinese cultural property is still real.

With the acceleration of reforms and the departure from planned economy, a multi-century tradition of the Chinese market for antiquities showing the Confucian cult and respect for the past has revived.[2] As early as in the period of the Song dynasty (960–1279) it was fashionable to collect ancient bronzes, which was

* MA, graduate of the Central Academy of Fine Arts in Beijing, Faculty of Conservation and Restoration of Works of Art of the Academy of Fine Arts in Warsaw, Faculty of Management and Faculty of Economic Sciences of the University of Warsaw, doctoral student at the SGH Warsaw School of Economics; e-mail: mpsmo@wp.pl; ORCID: 0000-0002-7123-0052

1 Z. Liu, *Repatriation of Cultural Objects: The Case of China*, University of Amsterdam, 2015, p. 25.

2 In the Chinese language, antiques are called *guwan* 古玩, which means an object that is old and significant; and particularly a word *wan* means something good for fun. But there are also antiques that are museum exhibits, which are called *wenwu* 文物. The word symbolises cultural heritage in a broader meaning.

described in specialist literature, and with the growth of prosperity in the late 16th century, collecting antiques stopped being higher classes' entertainment and involved a wide range of consumers.[3]

Today, thanks to dynamic economic growth, demand for both ancient and contemporary Chinese art is systematically increasing and more and more Chinese people can develop their interest in antiques. Ceramics, paintings, bronzes, coins, fossils or old books are offered on bazaars, in antique shops and auction houses.

At present, a series of over 300 statutory provisions and regulations and over 130 national standards constitute the basis of the authorities' policy on cultural property protection.[4] In accordance with the guidelines issued by the Communist Party of China Central Committee and the State Council, plans for further reforms are developed.

2. LEGAL SYSTEM

The most powerful legal act in the Chinese system of sources of law, which introduces fundamental provisions concerning the protection of relics, is the Constitution of the People's Republic of China and the most important statute that comprehensively regulates the protection of cultural property is the Law of the People's Republic of China on the protection of cultural relics.[5] Moreover, in the Chinese legal system there are series of more detailed norms developed by government agencies at different levels aimed at satisfying current needs connected with the protection of particular types of relics or introduction of particular protective measures.

The protection of cultural property in China uses instruments from various branches of law as well as has guarantees in the form of criminal law provisions; thus, reference to protection of cultural relics can be found in property law, criminal law, law on administrative penalties and administrative procedure law. Some provisions concerning relics can also be found in auction law, contract law and forestry law, and they are of considerable importance for their protection.[6]

In the context of dynamic social changes and new threats to cultural property resulting from them, the Chinese government undertakes necessary steps, which results in local and departmental administrative regulations. Administrative provisions concerning the protection of relics include the following acts: the Regulations for the implementation of the law of the People's Republic of China on the protection of cultural relics of 2003, the Regulation on the protection of the Great Wall

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[3] M.L. Dutra, *Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, Asian- Pacific Law & Policy Journal Vol. 5, 2004, p. 69.

[4] http://www.china.org.cn/china/Off_the_Wire/2020-01/10/content_75600657.htm.

[5] http://www.npc.gov.cn/wxzl/gongbao/2015-08/10/content_1942927.htm; http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm.

[6] Auction Law of the People's Republic of China: http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4664.htm; Forestry Law of the People's Republic of China: http://www.gov.cn/banshi/2005-09/13/content_68753.htm; Contract Law of the People's Republic of China: http://www.gov.cn/banshi/2005-07/11/content_13695.htm.

of 2006 and the Regulation on the protection of famous historic cities, towns and villages of 2008.[7]

Departmental provisions concerning the protection of relics are developed in accordance with administrative regulations and directives of the State Council mainly by the departments of the Ministry of Culture, the Ministry of Development and other institutions of the State Council based on their powers and in order to protect real property connected with culture and to manage it. These include interim regulations concerning administrative penal procedure in cases connected with relics formulated by the National Cultural Heritage Administration (2005), the Interim Administrative Measures for Recognition of Cultural Relics (2009)[8] and the Rules on the Administration of Archaeological Excavations (1998)[9] as well as the Administrative measures for the protection of world cultural heritage (2006).[10] In 1994 the Ministry of Development and the National Cultural Heritage Administration adopted 'preliminary requirements' concerning historic cities. In addition, there are also regulations concerning the administration of 'purple lines' aimed at protecting historic architecture, introduced by the Ministry of Development in 2003 and rules on protecting historic cities introduced in 2005.[11]

Local regulations include legal documents developed by the Local People's Congresses and their standing committees in provinces, autonomous regions and counties, which are subordinate directly to central authorities. Those documents, issued in accordance with legislative jurisdiction, constitute a response to the economic situation and practical regional needs. It should be added that the number of local regulations concerning the protection of relics is enormous.[12]

People's Congresses and their standing committees as well as big cities also established legal norms in order to protect relics on their territory.

Local regulations concerning the protection of relics are divided into three categories:

1) Regulations concerning comprehensive protection of all immovable relics, inter alia regional ones, that include the regulations of the provinces of Fujian and Shaanxi and the autonomous region of Guangxi Zhuang,[13]
2) Regulations concerning specific categories of relics, including the regulations of the province of Sichuan concerning the protection of facilities listed as world heritage,[14] measures of protection of historic and cultural elements of the landscape of the city of Beijing and the province of Shandong,[15] the regulations of the autonomous region of Ningxia Hui concerning rock art,[16] measures of

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[7] R. Chai, H. Li, *A Study on Legislation for Protection of Cultural Relics in China: Origin, Content and Model*, Chinese Studies 8, 2019, p. 133.

[8] http://www.lawinfochina.com/display.aspx?lib=law&id=8207&CGid=.

[9] http://www.waizi.org.cn/doc/61038.html.

[10] http://www.gov.cn/flfg/2006-11/23/content_451783.htm.

[11] R. Chai, H. Li, *supra* n. 7, p. 134.

[12] *Ibid*.

[13] http://www.npc.gov.cn/zgrdw/npc/zfjc/wwbhfzfjc/2012-05/30/content_1723724.htm.

[14] http://www.china-npa.org/uploads/1/file/public/201804/20180425155032_tmg4eo0ff1.pdf.

[15] https://www.mct.gov.cn/whzx/qgwhxxlb/sd/202001/t20200108_850155.htm.

[16] http://whhlyt.nx.gov.cn/content_t.jsp?id=15903.

protection of historic and cultural elements of the landscape of the province of Guangzhou and the regulations of the city of Nanjing concerning the protection of underground cultural relics,[17]

3) Regulations concerning particular relics include the regulations of the province of Fujian protecting Fujian Tulou,[18] the regulations of the province of Gansu concerning the protection of the caves of Mogao in Dunhuang[19] and the rules on the protection of the area of Liangzhu of the city of Hangzhou.[20]

Apart from that, there is a series of regulations, e.g. those concerning the use of historic sites for the purpose of filming or television productions or monitoring construction works on protected cultural heritage sites in the city of Beijing or the regulations of the province of Shanxi concerning the procedure in case of danger posed to the security of cultural heritage sites. It should be added that some of the above-mentioned regulations were developed in cooperation with foreign institutions such as, e.g. the Getty Conservation Institute or the Australian Heritage Commission.[21]

China signed and implemented some international conventions for the protection of relics: the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (The Hague Convention), the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, and the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001, which concerns such cultural heritage objects as cities and ports flooded and remaining under water as well as vessels and their cargo.[22]

3. INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF CULTURAL PROPERTY

In accordance with the Law on the protection of cultural relics, the Chinese National Cultural Heritage Administration is an agency responsible for the protection of cultural heritage in China at the national level, and local cultural heritage offices subordinated to local authorities at the county or higher level are agencies involved in the protection of cultural heritage within their administrative territories. The Chinese National Cultural Heritage Administration is not subordinated to the Ministry of Culture and both institutions fulfil their functions independently,

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[17] http://www.jsrd.gov.cn/zyfb/dffg1/201811/t20181128_508757.shtml.

[18] http://www.gov.cn/gzdt/2008-08/14/content_1071876.htm.

[19] http://www.gansucrcp.com.cn/content/whfg/201906/06/content_291496.html.

[20] http://www.nbwb.net/pd_wwbh/info.aspx?id=1129&type=2.

[21] S. Gruber, *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, Legal Studies Research Paper No. 08/93, the University of Sydney, Sydney Law School, August 2008, p. 275.

[22] *Ibid*., pp. 256–257.

although the Director of the Chinese National Cultural Heritage Administration at the same time usually holds a position of the Deputy Minister of Culture.[23] The two institutions share competences within the scope of the protection of relics and the Chinese National Cultural Heritage Administration is responsible for the protection of tangible and the Ministry of Culture for intangible cultural heritage. It should be added that at present there are 767,000 immovable relics, 108 million movable relics in national collections and over 5,000 museums in China.[24] Theoretically, the Chinese National Cultural Heritage Administration is a sub-ministry; however, in practice, thanks to its level of independence, it can operate like a ministry.

The system of administrative protection of relics in China is characterised by a high level of decentralisation. In accordance with the statute, historic facilities of various categories are protected at various levels. The Chinese National Cultural Heritage Administration as a national agency of cultural heritage protection is responsible only for cultural heritage facilities that are real property and are under the protection of the state, and movable relics classified as first-class ones. Local authorities at a given level are responsible for other movable and immovable relics depending on their value and class, which means that most cultural heritage objects in China are under the control of local authorities.[25] Customs offices are responsible for the control over import and export of cultural property and in case of violation of customs regulations, they impose penalties. On the other hand, agencies responsible for trade and industry monitor the market for antiques and manage it, and they can impose penalties on legal antique shops and auction houses. Prevention, detection and fight against the smuggling of cultural property are the duties of a special force of the Chinese customs police subordinated to the Smuggling Prevention Authority.[26] The status of the customs police is laid down in the amendment to the Law of the People's Republic of China on Customs of July 2006. On the other hand, the Criminal Code of the People's Republic of China, the Code of Criminal Procedure of the People's Republic of China and the Customs Law constitute the legal basis for its operations.[27] In accordance with Article 47 Chapter VI Customs Law, activities aimed at avoiding customs control, transport and transfer of cultural property abroad is classified as criminal activity.[28] In case of taking abroad items of contemporary art, artistic craft, paintings and calligraphy, and items made from semi-precious stones, a receipt from a shop or a gallery confirming their legal purchase, but sometimes also an opinion issued by the agency for the export of relics, is required. In the case of antiques, it is necessary to obtain permission to take them abroad issued by the agency for export of antiques of the Chinese National

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[23] Z. Huo, *Legal Protection of Cultural Heritage in China: a Challenge to Keep History Alive*, International Journal of Cultural Policy, 2015, pp. 12–13.

[24] http://www.gov.cn/zhengce/2018-10/10/content_5329128.htm.

[25] Z. Huo, *supra* n. 23, p. 13.

[26] С.Н. Ляпустин, Н.С. Барей, *Антикварный рынок Китая и роль таможенных органов Китая в борьбе с контрабандой культурных ценностей*, Таможенная политика России на Дальнем Востоке № 3(80), 2017, p. 95.

[27] А.М. Николаев, *Борьба таможенных органов КНР с контрабандой*, Таможенная политика России на Дальнем Востоке № 3(68), 2014, p. 110.

[28] С.Н. Ляпустин, Н.С. Барей, *supra* n. 26, p. 94.

Cultural Heritage Administration. Agencies authorised to approve export of relics from China are present in fourteen towns and provinces: Anhui, Beijing, Fujian, Gungdong, Hebei, Henan, Hubei, Jiangsu, Shaanxi, Shandong, Shanghai, Tianjin, Yunan and Zheijiang. In order to obtain permission to take an object abroad, one of those agencies or an authorised expert must examine it. A copy of the permission is a confirmation that an object has been legally taken away from China.[29]

In August 2009, the Ministry of Culture and the Customs Office issued common interim regulations aimed at strengthening operations concerning import and export of art, holding exhibitions of commercial artistic products, promotion of cultural exchange between China and foreign countries, and enriching cultural activity of the people.[30] The regulations extend the scope of control over export and import of paintings, calligraphy, sculptures, textiles, and mass products the number of which does not exceed two hundred items, but with the exception of antiques and artistic craft. In accordance with the regulations that concern also import of art from Hong Kong, Macao and Taiwan, all entities importing or exporting the above-mentioned goods must have a licence issued by the Ministry of Trade, submit to control of cultural authorities and ensure that imported and exported pieces of art originate from legal sources. Applications for permission to do business in the field must be submitted to relevant departments of culture administration at the level of a province, including the departments in autonomous regions and centrally administered cities. Decisions are issued within 15 days from the submission of an application.[31] Foreign commercial organisations that want to organise an exhibition in China must submit an application for permission to the department of culture at the level of a province forty-five days before the scheduled opening of the exhibition but when an exhibition is planned for a period of a hundred and twenty-nine days, it is necessary to obtain permission from the Ministry of Culture.[32]

4. RELIC CLASSIFICATION SYSTEM

China, like some other states (including Japan and South Korea) base the protection of relics on the system of classification.[33] The Law on the protection of relics introduces the system of classification in which all relics are divided into: valuable relics of culture of first-, second- and third-class, and ordinary relics of culture. Their evaluation is conducted based on the Standards of Evaluation of Cultural Relics Collections, which are norms that explain in general terms how the system of classification corresponds to various categories of relics. Objects categorised as first-class are representative relics of culture that have extraordinary historic, artistic or

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[29] https://www.chinabusinessreview.com/the-art-of-importing-chinese-objects/.

[30] P. Potter, *People's Republic of China Provisional Regulations on Art Import and Export Administration*, International Journal of Cultural Property Vol. 18(1), 2011, p. 132.

[31] *Ibid.*, p. 132.

[32] *Ibid*.

[33] http://english.cha.go.kr/html/HtmlPage.do?pg=/classfication/classification.jsp&mn=EN_02_01.

scientific value. The second- and third-class relics and ordinary relics of culture are characterised by 'big', 'relatively big' or 'certain' historic, artistic or scientific value; e.g. ancient legal tenders categorised as first-class relics are of special importance for the history of money in China. In order to take photographs of first-class relics that are owned by cultural institutions for the purpose of publication, the central authorities' permission is required. On the other hand, taking photographs of second- and third-class objects requires that the authorities at the local level approve that.[34]

The above system of classification is also used in criminal law. Export of any relics of culture that were made before 1911 is forbidden. If circumstances of smuggling relics are considerably serious, the offence can be classified in accordance with Article 151 Criminal Code.[35] The system of classification of relics is laid down in the definition of the term 'smuggling of the relics of culture', which can be found in Article 3 of the Explanation of the People's Supreme Court entitled Explanation of some issues concerning the application of law in case of attempted smuggling.[36] The smuggling of up to two third-class relics of culture is treated as the offence of smuggling when the circumstances 'are not serious' and carries a penalty of imprisonment for a period not exceeding five years and a fine.[37] The smuggling of up to two second-class relics or up to eight third-class relics carries a penalty of imprisonment for a period from five to ten years and a fine. The smuggling of one first-class relic or more than three second-class relics, or more than nine third-class relics is treated as the offence of smuggling 'when the circumstances are especially serious' and carries a penalty of life imprisonment, death sentence and forfeiture of property; and after the amendment: a penalty of imprisonment for a period not shorter than ten years or life imprisonment and forfeiture of property.

5. HISTORICAL OUTLINE

The first attempts to regulate the issue of protecting cultural property in China are connected with the reign of the Qing dynasty (1644–1912). The decrees issued then protected the sites of historic and artistic importance but the authorities limited their interventions to situations when it was absolutely necessary. At the end of the Manchu dynasty's reign, the then Ministry of Internal Affairs undertook steps to control cultural property in the whole territory of China, and the protection covered such objects as stelas, statues, bas-reliefs, wall paintings, pagodas, temples, emperors' graves, etc. It also ordered an inspection of the existing historic objects, which was connected with the commission of numerous thefts and smuggling of relics by foreigners. However, only after the establishment of the Republic (1911), did specialist legislation treat the protection of cultural property in a comprehensive way. The regulations introduced in 1916 protected antiques classified into five categories:

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[34] T. Lau, *The Grading of Cultural Relics in Chinese Law*, International Journal of Cultural Property Vol. 18(1), 2011, p. 3.

[35] http://www.npc.gov.cn/wxzl/wxzl/2000-12/17/content_4680.htm.

[36] http://www.people.com.cn/GB/channel1/10/20001009/263204.html.

[37] *Ibid*.

(1) graves of emperors and famous people; (2) defensive walls, fortifications, temples and pagodas, caves, old bridges, wells, etc.; (3) stelas, statues, and bas-reliefs; (4) old trees such as pines from the time of the Han dynasty and plum trees from the Tang period; (5) paintings, calligraphy, objects made of bronze, gems, bamboo, porcelain, silk, etc. In 1928 the National Government appointed the Central Committee for Cultural Property Protection, which was the first specialist agency for managing the cultural heritage of China.

The first Chinese statute regulating the protection of relics was passed on 2 June 1930.[38] A dispute over the right to artefacts found during archaeological excavations was a background of its adoption and was an impulse to take steps aimed at creating the legal framework enabling the state to have control over objects that constitute national cultural heritage. The provisions of the statute, slightly amended and revised over the next years, defined 12 categories of ancient objects of culture, including eight types of movable relics of culture such as paintings, sculptures, drawings, books, legal tenders, clothes, weapons, kitchenware, and primeval creatures, prehistoric remains, buildings and miscellanea.[39] The statute also determined the importance of age, rarity, and historic or artistic value of cultural relics as factors decisive for their position in the system of classification. Although the provisions of the statute recognised private ownership of relics that had already been discovered, they imposed a ban on passing them to foreigners, which carried a penalty of forfeiture or a fine. Antiques in private possession that were classified in accordance with the standards established by the government had to be registered. Failure to fulfil the obligation of registration carried a statutory penalty of a fine. All other relics remaining underground or discovered then were the property of the state. The violation of the rule was treated as theft. Moreover, the provisions also limited the sale of both private and public antiques within the state borders. Taking those objects abroad was only admissible for the purpose of scientific research.

Among some legal acts passed in the period of 1928–1938,[40] i.e. before the Second Sino-Japanese War, apart from the Law on the protection of objects of historic, cultural and artistic value, there were also preliminary provisions concerning fundamental forms and types of objects of historic, cultural and artistic value, a directive banning export of those objects, and regulations concerning the protection of beautiful scenery, historic sites and objects of historic, cultural and artistic value, which also introduced, inter alia, disciplinary penalties for clerks who failed to introduce proper protective measures what resulted in damage to or destruction of historic objects subject to legal protection.[41]

In 1932, in the territory under the control of the Communist Party, regulations were issued in order to protect the Chinese Communist Revolution-related materials

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[38] http://www.unesco.org/culture/natlaws/media/pdf/china/china_law_10_11_1935_eng_orof.pdf (accessed 17.04.2017).

[39] *Ibid*.

[40] The period 1927–1937 marks the end of the second part of the revolutionary Chinese Civil War, which broke out after the revolutionary movement divided as a result of Chiang Kai-shek's coup and formation of a new government in Nanjing.

[41] S. Gruber, *supra* n. 21, p. 272.

and ancient relics. The Constitution of the Republic of China that was in force until 1949 contained a provision (Article 108 § 20)[42] stipulating the authorities' duty to protect ancient books, artefacts and relics that are significant for culture. In 1937 Japan invaded China, which stopped the second civil war started in 1927 and made Kuomintang unite with the communists in order to organise a joint anti-Japanese front. Once the Japanese surrendered in 1945, the third revolutionary civil war started (in 1946) and lasted until 1949 when Chiang Kai-shek's army was defeated and the People's Republic of China was founded.

In 1946, with the aim to abolish feudal ownership of land, under the banner of passing the land to those who cultivate it, the Central Committee of the Communist Party of China passed a resolution of land reform.[43] In the period of 1950–1952, in the territory under the control of the People's Liberation Army since 1946, a land reform was implemented during which 47 million hectares of land were distributed among 300 million peasants. The land reform involved repression of many wealthy landowners and squires (*kulaks*). In 1947, at a special conference held for the purpose of reaching agreement on the implementation of the land reform, an outline of land law was announced, which stipulated that valuable books, ancient objects and works of historic or scientific value confiscated from their owners should be transferred to local authorities. Soon after the foundation of the People's Republic of China was proclaimed in 1949, in order to prevent export of historic objects and books from the country, the Chief Administrative Authority introduced interim measures and published the list of objects subject to a ban, which included, apart from ten categories listed in the statute of 2 June 1930 (weapons and miscellanea were excluded), a new category of relics: Revolution-related documents and artefacts.[44] The movement of objects to foreign exhibitions, for exchange, as presents or for developmental purposes required approval by a special commission and was only possible in case the objects did not have Revolution-related, historic and cultural value or were copies. In accordance with the Standards of Evaluation published in 1960, mainly based on the date of an object's origin, the ban on exportation covered all relics of historic, artistic or scientific value that were created or published before the victory of the Revolution in 1949, all Revolution-related relics of culture regardless of their age, and all those relics of culture that reveal state secrets, present a false or negative view of the nation or can cause negative political consequences.[45] In addition, the ban concerned national minorities' relics of culture created before 1949, artistic works, original manuscripts, etc. connected with the Revolution and the introduction of socialism, having considerable political significance or artistic value. In relation to some categories of relics, two border dates were introduced and the ban covered all objects created before 1795 and all objects created before 1911. In case of objects that were not subject to the above age thresholds, the historic,

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[42] https://www.constituteproject.org/constitution/Taiwan_2005.pdf?lang=en.

[43] G. Jefimow, *Zarys nowożytnej i współczesnej historii Chin*, KiW, Warszawa 1953, p. 447.

[44] State Administration of Cultural Heritage, *Compendium of Laws and Documents Concerning Affairs of Chinese Cultural Property (1949–2009)*, Cultural Relics Publishing House, Beijing 2009, p. 1.

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

artistic or scientific value played a decisive role in approving exportation. Thus, objects subject to the ban found in passengers' (also foreigners') luggage had to be confiscated or taken from them for compensation. However, when seized relics were recognised as ordinary, they had to be registered and returned to the owners. All foreign and common relics of culture, including books, with the exception of rare objects of relatively high scientific, historic and artistic value, could be treated of people's own volition. Moreover, in order to thoroughly determine the ban on exportation, the regulations stipulated additional division of objects into categories based on the date of their creation. In 1961, the authorities approached the issue of the protection of cultural property in a new way, which resulted in the adoption of new regulations in accordance with which the protection covered more general categories, including buildings, remains of buildings, sites of remembrance, etc.[46] connected with historic events, revolutionary activities and important officials, having significance for remembrance and historic value; remains of ancient cultures, ancient tombs, ancient constructions, temples, caves and engravings of historic, artistic and scientific value; valuable works of art, including artistic craft, originating from all periods; Revolution-related documents, ancient texts of historic, artistic or scientific value, and representative objects depicting social systems, manufacturing and social life in all periods. In accordance with the new regulations, all relics of historic, artistic and scientific value were protected by the state, and all relics still undiscovered and remaining underground constituted the property of the state. There were a few state-owned antique shops called *wenwushangdien* at the time and their employees were seconded to rural areas to look for merchandise.[47] The exportation of important objects of historic, artistic and scientific value outside China was allowed only for the purposes of exhibitions and exchange with the state's consent. In case of other relics, the law admitted exportation after evaluation. The violation of the above regulations, depending on the seriousness of circumstances, carried a penalty of imprisonment for a period of three to ten years and a fine in cases of lesser significance. In the circumstances indicating a more serious offence, the penalty prescribed was imprisonment for at least ten years or a life sentence and forfeiture of property, which was stipulated in the criminal law codification of 1979. It should be added that during the Cultural Revolution ideological factors played a decisive role in selecting objects worth protecting and, that is why, many relics recognised as ones representing feudal times were simply destroyed.

In 1978, the National Cultural Heritage Administration issued a directive in accordance with which objects in museum collections that had historic, artistic and scientific value should be divided into three classes, and the following year the State Council approved the report concerning special permission for the exportation of relics and took a stand that controlled export of ordinary relics of culture can be profitable for the country due to the growth in earnings in foreign currencies.[48] In

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[46] T. Lau, *supra* n. 34, p. 23.

[47] S.C.H. Cheung, *Observations on the Antiquities Trade in China: A Case Study of Xiamen Antique Arcade*, Occasional Paper Series 128, Institute of Asia-Pacific Studies, the Chinese University of Hong Kong 2002, p. 7.

[48] State Administration of Cultural Heritage, *Compendium*, *supra* n. 44, p. 94.

the report, ordinary relics referred to in the Standards of Evaluation of 1960 were identical to relics classified below the third-class ones within the new system of classification for museum collections.

In 1982, the fourth Constitution was adopted, which obliged the state to protect famous historic remains, valuable relics of culture and significant historic and cultural heritage (Article 22).[49] In the same year, the rank of illegal exportation of valuable relics was raised to offences carrying a death sentence, which was done by means of amendment to a respective provision of criminal law that laid down that: in cases where circumstances are especially serious, an offence carries a penalty of imprisonment for at least ten years, a life sentence or capital punishment. Also in 1982, a new statute concerning the protection of relics was adopted and replaced all the previous statutes. The scope of relics protected in the new statute, except the introduction of the protection of the fossils of primeval vertebrates and prehistoric people, did not fundamentally differ from former regulations. However, the statute introduced a series of significant changes, e.g. that not only relics remaining below the surface of the earth but also those in the inland waters and territorial seas of the People's Republic of China are the state's property. In accordance with the statute, the state also owns, unless the national law stipulates otherwise, the remains of ancient cultures, ancient tombs and temples, caves, mausoleums, ancient constructions, engravings and relics indicated for protection that can be found in the collections of state agencies, armed forces, state-owned enterprises and trade organisations. Another important provision of the new statute (like in the law of 1930) was the recognition of private ownership of relics and an announcement that the right to ownership of all ancient constructions and relics of culture is subject to protection by national law. In addition, the statute stipulated that an executive body responsible for all matters connected with the protection of relics of culture must determine standards and methodology for their evaluation. As a result, in 1987 the Ministry of Culture developed the system of classification of relics together with the Standards of Evaluation of Collections. Relics were divided into three classes in the new system. The first one contained representative relics of culture of 'special' value; the second and third classes contained objects of 'considerable' and 'certain' value, respectively. Although only the first-class objects were treated as valuable cultural property within the meaning of the statute, some other third-class objects could also be raised to the same category in some circumstances. In the same year, the People's Supreme Court and the People's Chief Prosecution Office redefined the offence of illegal transportation of relics based on the new system of classification.[50] The Court's explanation contains the first definition of the smuggling of relics identified with illegal transportation of valuable relics of culture referred to in criminal law. In accordance with the Court's explanation, illegal transportation of a single relic categorised as third-class one carries a penalty of imprisonment for a period of at least three years and up to five years. In the case of illegal transportation of a single

[49] http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4421.htm.

[50] https://baike.baidu.com/reference/4797088/96156jatbqz6CoKi81RUc2Auvj6dLB8Bl_fqUkZbC3S-ey9-N3p1FFzAPE8EA4EuB9C22233mqtw_0xNlXjzJoLMlbc7UqHoFwvsCg.

second-class object, a penalty prescribed is imprisonment for a period of at least five years and up to ten years. On the other hand, offences of smuggling first-class relics of culture were defined as offences of illegal transportation of valuable relics of culture the circumstances of which are especially serious, thus, in accordance with criminal law, ones that carry a penalty of imprisonment for at least ten years, a life sentence or capital punishment. Depending on the number of transported relics, the penalty can be higher.[51] Transportation of historic objects of no special value was treated as an ordinary smuggling-related offence the classification of which depended on the monetary value of a transported object. In 1992 the authorities published the 'explanation concerning the implementation of the Law on the protection of relics' with the use of the new classification of movable and immovable relics. The new criminal law of 1997 codifies the Court's explanation of 1987 and defines offences involving the smuggling of relics. On the other hand, the definitions of the levels of an offence originate from 2000 and contain answers to questions concerning the application of law in criminal procedure against smugglers. In 2001 the authorities published a new set of standards of evaluation in order to harmonise various systems of classification defined in the explanation concerning the implementation of the Law on the protection of relics and the Standards of Evaluation published in 1987. The 26 newly defined categories are as follows: (1) Products made from jadeite and gem artefacts; (2) Ceramics; (3) Porcelain; (4) Products made of bronze; (5) Products made of iron; (6) Products made of gold and silver; (7) Products made of lacquer; (8) Sculptures; (9) Engravings and tiles; (10) Calligraphy and paintings; (11) Stones for grinding ink; (12) Skeletons and bones; (13) Stamps; (14) Legal tenders; (15) Products made of ivory, bones and horns; (16) Bamboo and wooden sculptures; (17) Furniture; (18) Enamelled products; (19) Fabrics and embroidery; (20) Fine copies of ancient texts; (21) Estampage; (22) Weapons; (23) Post products; (24) Documents and media articles; (25) Archives; and (26) Famous people's possessions. In 2008 the authorities published new rules on evaluating relics for the need of exportation, which replaced the old ones after 47 years of application. In accordance with those rules, export of all relics of culture created before 1911 is banned, which moves the border date in relation to 1795 and, thus, extends the scope of the relics of culture protected against export by ca. 44%.[52] In May 2011, an amendment to criminal law entered into force, which abolished the capital punishment for 13 offences, including the smuggling of relics.[53]

The restructuring of the Chinese economy posed new challenges for the protection of cultural heritage. That is why, the statute of 1982 was repeatedly amended (in 1991, 2002, 2007 and 2013) in order to meet the requirements of the new situation. However, the most important amendments were introduced in 2002. They resulted in the change in the size of the statute from 33 to 80 articles and organised chapters in the following order: Chapter 1 General provisions (Articles 1–12); Chapter 2 Immovable relics of culture (Articles 13–26); Chapter 3 Archaeological excavations

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51 *Ibid*.

52 T. Lau, *supra* n. 34, p. 26.

53 https://gbtimes.com/history-death-penalty-china.

(Articles 27–35); Chapter 4 Objects of culture in public institutions (Articles 36–49); Chapter 5 Objects of culture in private collections (Articles 50–59); Chapter 6 Import and export of objects of culture (Articles 60–63); Chapter 7 Legal liability (Articles 64–79); Chapter 8 Supplementary provisions (Article 80).[54] The government clearly and fully realised the serious threat posed to relics by inappropriate commercialisation and excessive exploitation. That is why, the amendments of 2002 assumed that protection is the authorities' top priority within the field of cultural heritage management instead of what was before, i.e. the use of relics taking into account tasks connected with cultural heritage in the plans of economic and social development, and costs incurred in relation to them included in the budget. Another novelty of the amendment of 2002 was the sanctioning of the activities of official antique shops and auction houses, which was aimed at registering and collecting information about cultural property.[55] Keeping an auction house or an antique shop requires an official certificate and licence, and goods prepared for sale must undergo special control. All auction houses operating in China, both the big and small ones, are either co-owned by the state or subject to strict control.[56]

The law of 1982 totally banned sale of relics and the amendment partially legitimises it, but no individual or organisation other than authorised antique shops or auction houses can deal in cultural property.[57] Nevertheless, the statute allows natural persons, legal persons and organisations to collect cultural property in various ways: by means of inheritance or acceptance of gifts in compliance with law, purchase in antique shops, purchase from an auction house, transfer or exchange of relics that are legally owned by individuals, and other legal methods determined by the state.[58]

6. REGULATIONS BINDING IN PRACTICE

Over the last three decades there has been considerable progress in the quality of legislation in the People's Republic of China. Since 2003, i.e. the moment when the market for antiques started fully legal operations, the demand for works of art from this country has been systematically increasing in the European Union and the USA as well as in Russia. Such huge demand results in the growing number of auction houses in both continental China and Hong Kong. In the period 2003–2010 there was a hundredfold increase in turnover on this market and antiques became largely smuggled goods.[59] The number of offences committed against the Chinese relics of culture also grew considerably.[60]

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[54] http://www.npc.gov.cn/wxzl/gongbao/2015-08/10/content_1942927.htm.

[55] Z. Huo, *supra* n. 23, p. 4.

[56] J.M. Taylor, *The Rape and Return of China's Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China's Cultural Heritage in a Flawed System?*, Loyola University Chicago International Law Review Vol. 3(2), Spring/Summer 2006, p. 252.

[57] Z. Huo, *supra* n. 23, p. 5.

[58] http://www.npc.gov.cn/wxzl/gongbao/2015-08/10/content_1942927.htm.

[59] С.Н. *Ляпустин*, Н.С. Барей, *supra* n. 26, p. 90.

[60] J.M. Taylor, *supra* n. 56, p. 233.

Only in 2016, in Beijing, customs officers foiled the smuggling of 17,000 contraband relics, including porcelain, ancient coins, paintings and calligraphy, books and objects originating from the Neolithic Age.[61] Regardless of unquestionable success, the fight against smuggling in China is a serious problem. There are huge amounts of treasures of culture buried around the impoverished villages in the province of Henan and every year local farmers dig their fields in search of objects valuable for collectors. The temptation to plunder emperors' graves is often too strong to resist because a single big discovery gives the profit equal to an annual income from work in agriculture.[62] With the beginning of fashion and growth in international demand for Chinese classical wooden furniture, since the mid-1980s the trade in antiques, including ancient stone sculptures, has become a common activity of villagers in the region of Minzhong, who did not hesitate to openly admit that they were involved in the prohibited export of objects because mass involvement of local inhabitants in the business seemed to exclude the possibility of holding anybody liable.[63] Also in the province of Fujien earning a living by farmers was strictly connected with trade in antiques, which contributed, inter alia, to fast development of the city of Xiamen, one of the most modern special economic zones on the southern coast of China. The advantages of the region, apart from easy maritime transport and a network of international connections, include a considerable inflow of workforce migrating from rural areas. At the beginning of the 21st century trade in cultural property was a common activity in Xiamen. It was possible to buy antiques from ordinary street sellers as well as elegant shops in shopping precincts of luxurious hotels.[64] However, the biggest antique marketplace was a gigantic shopping centre Bailuzhou Antique Arcade situated in the former fishing village of Bailuzhou, which is now a part of the centre of Xiamen, housing over a hundred antique shops offering cultural property that originate from graves mainly in the rural areas.[65] When in Qixing and Xiangxiang in the province of Hunan, the flood uncovered a big archaeological site, diggers appeared immediately and local farmers started digging the area on dealers' request. The authorities of Qixing and Xiangxiang were informed about the illegal excavations but refused to take any steps; and the participants of the search expressed their admiration for the authorities' passive reaction in the Chinese television coverage of the event.[66]

According to the statistics of the Chinese National Bureau of Cultural Relics, in the period 1998–2003 alone over 220,000 graves were plundered, and relics originating from them reached the international market for works of art.[67] In 2004 the head of security of the museum in Chengde in the province of Hebei was sentenced to death for the theft of 250 objects, one of which was an effigy of Buddha sold at an auction in Hong Kong for 295,000 dollars.[68] The convicted employee kept doing this

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61 С.Н. *Ляпустин*, Н.С. Барей, *supra* n. 26, p. 95.
62 J.M. Taylor, *supra* n. 56, p. 233.
63 S.C.H. Cheung, *supra* n. 47, pp. 3–4.
64 *Ibid*., pp. 12–15.
65 *Ibid*.
66 S. Gruber, *supra* n. 21, pp. 293–294.
67 J.M. Taylor, *supra* n. 56, p. 233.
68 S. Gruber, *supra* n. 21, p. 296.

dirty business for ten years substituting copies for the stolen relics. When demand for stone sculptures on the international auction market increased, 500 thefts of such objects from Buddhist temples and monasteries were reported.[69]

Although Amendment VII to the Criminal Code, considerably mitigating penalties for offences connected with cultural heritage, was highly assessed by lawyers in China and abroad, many Chinese clerks and experts involved in the protection of relics expressed their fears concerning the possible escalation of this kind of offences. However, contrary to the opinions, the court practice after the implementation of the amended Criminal Code of 1997 showed that the deterring nature of death penalty in the case of offences connected with cultural heritage was meagre, which was confirmed by constant inflow of illegally obtained Chinese relics to the international market for works of art.[70] It should be added that the classification of cultural property in China is extremely complicated. In order to improve the management of relics possessed by the public, the authorities published 25 volumes of illustrated Standards for evaluation of cultural property. Those volumes available only in the Chinese language provide information divided into topics, e.g. bronzes, coins (one volume per category), and contain photographs and descriptions justifying the classification of a given object within a particular class.[71] This monumental work is well-known neither among foreign tourists nor the Chinese, and at the same time, ancient coins can be found lying in bowls or in piles in open-air marketplaces and are sold by weight. In 2008 a pensioner from Henan who sent coins in parcels to the USA was accused of smuggling 31 third-class relics of culture, which meant a death sentence.[72] Then his son offered the coins on numismatic websites and became famous for selling big amounts at a low price. The authorities of Henan managed to recover a total of 2,734 numismatic coins.[73]

The failure of international and national mechanisms of preventing illegal export of cultural property made the Chinese authorities ask the United States for assistance. In December 2004, in accordance with Article 9 UNESCO Convention of 1970, China filed a relevant motion, and on 17 February 2005, it was publicly heard before the Cultural Property Advisory Committee of the United States Department of State in order to determine whether the limitation of import of some objects of culture can be accepted by the USA.[74] Indeed, when in 1983 the United States joined the UNESCO Convention of 1970, it adopted the Act on the Implementation of the Convention in accordance with which the states that are parties to it can file motions to the United States Department of State to control import of some categories of archaeological or ethnological materials.

During the debate that took place in February 2005 in the course of public hearing of the Chinese motion, there were attempts to answer the question whether the state fulfils four conditions for positive recommendation, i.e.:

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69 J.M. Taylor, *supra* n. 56, p. 233.
70 Z. Huo, *supra* n. 23, p. 10.
71 https://item.jd.com/10683961.html.
72 T. Lau, *supra* n. 34, p. 4
73 *Ibid*.
74 J.M. Taylor, *supra* n. 56, pp. 250–251.

1) Whether the cultural heritage of China is endangered as a result of plunder of archaeological or ethnological material,
2) Whether China undertook relevant steps in accordance with the UNESCO Convention, i.e. whether it has efficient regulations and gets involved in law enforcement in order to protect its cultural heritage in various ways,
3) Whether other countries that import considerable amounts of Chinese archaeological materials participate in coordinated efforts to tackle import of objects originating from theft,
4) Whether the introduction of import limitation will help to develop legal exchange of cultural material in the way that will not pose threat to the cultural heritage of China.[75]

Among the supporters and opponents of the Chinese motion who took part in the discussion before the Advisory Committee on 17 February 2005, there were employees of auction houses, museum curators, professors, sellers of works of art, lawyers representing dealers and associations of collectors. The opponents argued that China should strengthen its law, which does not protect relics in a sufficient way and that the growth in the Chinese domestic illegal market is a bigger threat to the Chinese cultural heritage than the small illegal market for Chinese antiques in the USA; moreover, the limitation of the export of Chinese cultural property will deprive scientists and international society of the possibility of studying it. On the other hand, the supporters of the Chinese motion emphasised the value of cultural property for archaeological research and demanded the introduction of any limits that could improve the protection of archaeological material because thefts of antiques cause irreversible damage to archaeological sites as removing artefacts from them before a scientific analysis influences the scientific evaluation of those sites and possible new scientific findings at a later stage.[76] In January 2009 China and the United States entered into a bilateral agreement imposing import limitations on some Chinese archaeological materials, and in January 2014 both countries agreed to extend the agreement for the next five years. The significance of the agreement results from the fact that the United States is a destination for ca. half of all Chinese cultural property items sold in the world.[77] However, in spite of the fact that the Standards for Evaluation of 2009 prohibit export of all relics of culture made before 1911, import limitations laid down in the protocol signed by China and the United States had a much smaller scope and allowed import of objects made before 907 (the end of the reign of the Tang dynasty in 618–907).[78] Also, the conclusion of the agreement did not influence the legal status of Chinese works of art that had already been brought to the United States.

The Chinese authorities' intensified attempts to protect cultural property face fast economic and social development of the country resulting in substituting new residential districts for old parts of cities, removing cultural landscape and damaging many relics due to construction projects. The construction of the Three Gorges

[75] *Ibid*.
[76] *Ibid*., p. 252
[77] Z. Huo, *supra* n. 23, pp. 10–11.
[78] T. Lau, *supra* n. 34, p. 26.

Dam, the most expensive construction in the world and the largest power station in history, annihilated 17 big cities, 140 smaller towns, over 3,000 villages and 1,300 archaeological sites.[79]

7. CONCLUSIONS

Since the end of the Cultural Revolution, the Chinese authorities have made consistent efforts to protect cultural heritage, which resulted in considerable improvement to the legal system. However, the heritage of the multi-century civilisation is still endangered and the threat of losing a significant part of the Chinese cultural property is as real as never before. The reason is, inter alia, the lack of possibility of enforcing the existing regulations, which are ignored by local governments. In comparison to the efforts to improve legislation in order to ensure efficient protection of cultural property, it is more difficult to implement an administrative system reform the success of which depends on comprehensive reforms in the political, economic and social fields. Undoubtedly, education of cultural institutions personnel, collectors or sellers as well as farmers is a significant factor influencing the improvement to the protection of relics. The Chinese authorities made a huge leap in the area. The Chinese television offers over 20 programmes on such issues as, e.g. identification of cultural property and its relics kept at home or found during a trip to the country, participation in an auction etc., and since 2006 a special holiday Chinese Cultural Heritage Day has been celebrated every second Saturday of June, which is to remind local authorities about the importance of the protection of cultural heritage in China, and raise people's interest in various types of relics.[80] However, education will not be effective if illegal trade in antiques constitutes the main source of maintenance as it is the case in many Chinese farmers earning huge sums on the black market in comparison to their regular income. The ban on commercial activity in the sector of cultural property is in conflict with cultural tradition and social reality of China, which makes its enforcement unfeasible. Although the authorities realise that private cultural property transactions are common phenomena in China, they are not able to control it due to the size of the illegal market for antiques. The regulations in force undoubtedly need to be improved. The introduction of relevant amendments to the law on the protection of relics, in particular more precise definitions of concepts used therein, will solve many doubts and eliminate difficulties with more efficient application of the Criminal Code provisions, and accurate development of the standards for evaluation of relics of culture will make it possible to unambiguously determine the jurisdiction for their protection. However, the biggest threat to the protection of relics in China does not consist in the lack of relevant regulations but in the problem with their enforcement. The above-presented findings seem to

[79] J. Wiech, *Miliony przesiedleń, miliardowe koszty, zmiana osi Ziemi. 15 lat Zapory Trzech Przełomów*, Energetyka 24, 03.08.2018, https://www.energetyka24.com/miliony-przesiedlen-miliardowe-koszty-zmiana-osi-ziemi-15-lat-zapory-trzech-przelomow-komentarz.

[80] С.Н. *Ляпустин*, Н.С. Барей, *supra* n. 26, pp. 90–91.

indicate the necessity of strengthening local authorities' control, in particular in remote borderland regions where smuggling is most intensive. In order to secure protected areas such as archaeological sites, it would be advisable to enforce the existing regulations in a more decisive way and to strengthen security measures. Many Chinese museums do not have sufficient funds to buy appropriate security devices such as alarm systems, smoke detectors, hygrometers, etc.

The completion of full documentation (including photographic one) of all exhibits in state-owned collections, registering relics that are private property and the publication of a detailed catalogue of losses will undoubtedly be very helpful in the restitution process. Moreover, introduction of obligatory certificates for historic objects introduced for sale should be considered.

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CULTURAL PROPERTY PROTECTION IN CHINESE LAW

Summary

China is one of the biggest states that are a source of cultural property in the world, which has been losing part of its priceless heritage since the middle of the 19th century due to plunder, illegal trade and intentional or accidental damage. Due to multi-century history and ethnic diversity, China adopted a hierarchical system of the protection of relics and a model of legislation based on co-existence of comprehensive and specialist legislation taking into account a special nature of some objects. The People's Republic of China is a country with rich culture and long history which, thanks to the consistent improvement of legislation and integration with the international system of cultural property management, holds an important position in the global movement for the protection of relics. The article aims to present the most important issues concerning legal protection of cultural property in China.

Keywords: protection of relics in China, Chinese art, Chinese law, market for antiques, market for works of art, Chinese culture, history of China, smuggling of cultural property, capital punishment in China, Chinese National Cultural Heritage Administration

ZAGADNIENIA OCHRONY DÓBR KULTURY W PRAWIE CHIŃSKIM

Streszczenie

Chiny są jednym z największych państw źródłowych dóbr kultury na świecie, które od połowy XIX w. traci część bezcennego dziedzictwa na skutek grabieży, nielegalnej sprzedaży oraz celowego lub przypadkowego niszczenia. Ze względu na wielowiekową historię oraz bogactwo grup etnicznych Chiny przyjęły hierarchiczny system ochrony zabytków oraz model legislacji oparty na koegzystencji ustawodawstwa kompleksowego i specjalistycznego, uwzględniającego szczególny charakter niektórych obiektów. Chińska Republika Ludowa jest krajem o bogatej kulturze i długiej historii, który dzięki konsekwentnemu ulepszaniu legislacji oraz integracji z międzynarodowym systemem zarządzania dobrami kultury zajmuje ważne miejsce w globalnym ruchu na rzecz ochrony zabytków. Celem artykułu jest przedstawienie najważniejszych zagadnień związanych z prawną ochroną dóbr kultury w Chinach.

Słowa kluczowe: ochrona zabytków w Chinach, sztuka chińska, prawo chińskie, rynek antykwaryczny, rynek dzieł sztuki, kultura chińska, historia Chin, przemyt dóbr kultury, kara śmierci w Chinach, Chińska Państwowa Administracja Dziedzictwa Kultury

ALGUNAS CUESTIONES SOBRE PROTECCIÓN DE BIENES CULTURALES EN EL DERECHO CHINO

Resumen

China es uno de los mayores países con bienes culturales en el mundo que a partir de la mitad del siglo XIX pierde parte de patrimonio de incalculable valor bien por razones de robo, venta ilegal, destrucción accidental o deliberada. Dado su historia y la riqueza de grupos étnicos, China ha adoptado sistema jerárquico de protección de monumentos y el modelo legislativo basado en la coexistencia de la legislación compleja y especial, que tiene en cuenta el carácter particular de algunos monumentos. La República Popular China es un país con rica cultura y larga historia que gracias a la consecuente mejora de legalización e integración con el sistema internacional de gestión de patrimonio cultural ocupa puesto importante en el movimiento global de protección de monumentos. El artículo presenta las cuestiones más importantes relacionados con la protección legal de bienes culturales en China.

Palabras claves: protección de monumentos en China, arte chino, derecho chino, mercado de antigüedades, mercado de obras de arte, cultura china, historia de China, trafico, contrabando de bienes culturales, pena de muerte en China, Administración China Estatal de Patrimonio de la Humanidad

ВОПРОСЫ ОХРАНЫ КУЛЬТУРНЫХ ЦЕННОСТЕЙ В КИТАЙСКОМ ЗАКОНОДАТЕЛЬСТВЕ

Аннотация

Китай, будучи одним из крупнейших центров культурных ценностей в мире, с середины XIX века постоянно теряет часть своего бесценного наследия как в результате грабежей и незаконной

продажи, так и вследствие преднамеренного либо случайного уничтожения. Принимая во внимание многовековую историю страны и разнообразие этнических групп, Китай создал иерархическую систему охраны памятников культуры. Модель правового регулирования в этой области основана на параллельном действии комплексного и специализированного законодательства, учитывающего специфику отдельных объектов. Китайская Народная Республика – страна с богатой культурой и многовековой историей, которая благодаря последовательному совершенствованию законодательства и включению в международную систему охраны культурных ценностей занимает важное место в мировом движении по охране памятников культуры. В статье рассмотрены основные вопросы, связанные с правовой защитой культурных ценностей в Китае.

Ключевые слова: охрана памятников культуры в Китае, китайское искусство, китайское право, рынок антиквариата, рынок предметов искусства, китайская культура, история Китая, контрабанда культурных ценностей, смертная казнь в Китае, Государственного управления КНР по охране культурного наследия

DIE FRAGE DES SCHUTZES VON KULTURGÜTERN IM CHINESISCHEN RECHT

Zusammenfassung

China ist eines der größten Ursprungsländer von Kulturgütern auf der Welt, das seit Mitte des 19. Jahrhunderts einen Teil seines unschätzbaren Erbes eingebüßt hat – sei es aufgrund von Plünderungen, infolge des illegalen Handels oder vorsätzlicher bzw. versehentlicher Zerstörung. Mit Blick auf die jahrhundertelange Geschichte und die immense Fülle an ethnischen Gruppen hat China ein hierarchisch strukturiertes System zum Schutz seiner Kulturdenkmale eingeführt und sich für ein Gesetzgebungsmodell entschieden, das sich auf die Koexistenz von umfassenden Regelungen und spezifischen Rechtsvorschriften gründet und den Besonderheiten bestimmter Objekte Rechnung trägt. Die Volksrepublik China ist ein Land mit einer langen, ereignisreichen Geschichte und eindrucksvollen Kultur, das dank einer konsequenten Verbesserung der Rechtssetzung und Integration in das internationale System zur Verwaltung von Kulturgütern einen wichtigen Platz in der weltweiten Denkmalschutzbewegung einnimmt. Ziel des Artikels ist es, die wichtigsten Punkte im Zusammenhang mit dem rechtlichen Schutz von Kulturgütern in China herauszustellen.

Schlüsselwörter: Denkmalschutz in China, chinesische Kunst, chinesisches Recht, Antiquitätenmarkt, Kunstmarkt, chinesische Kultur, Geschichte Chinas, Schmuggel von Kulturgütern, Todesstrafe in China, Chinesisches Amt für Kulturerbe

QUESTIONS LIÉES À LA PROTECTION DES BIENS CULTURELS DANS LE DROIT CHINOIS

Résumé

La Chine est l'un des plus grands pays sources de biens culturels au monde, qui depuis le milieu du XIXe siècle a perdu une partie de son patrimoine inestimable, que ce soit à cause du pillage, de la vente illégale ou de la destruction intentionnelle ou accidentelle. En raison de l'histoire séculaire et de la richesse des groupes ethniques, la Chine a adopté un système

hiérarchique de protection des monuments et un modèle de législation fondé sur la coexistence d'une législation globale et spécialisée, tenant compte de la nature spécifique de certains objets. La République populaire de Chine est un pays à la culture riche et à la longue histoire qui, grâce à l'amélioration constante de la législation et à l'intégration avec le système international de gestion des biens culturels, occupe une place importante dans le mouvement mondial pour la protection des monuments. Le but de cet article est de présenter les questions les plus importantes liées à la protection juridique des biens culturels en Chine.

Mots-clés: protection des monuments en Chine, art chinois, droit chinois, marché des antiquités, marché de l'art, culture chinoise, histoire chinoise, contrebande de biens culturels, peine de mort en Chine, Administration d'État du patrimoine culturel de Chine

QUESTIONI DI TUTELA DEI BENI CULTURALI NEL DIRITTO CINESE

Sintesi

La Cina è uno dei più grandi stati fonti di beni culturali nel mondo, che a partire dalla metà del XIX secolo perde parte del suo inestimabile patrimonio, sia in conseguenza di furti e vendite illegali che di distruzione pianificata o accidentale. A motivo della storia secolare e della ricchezza dei gruppi etnici la Cina ha assunto un sistema gerarchico di tutela dei beni culturali e un modello di legislazione basato sulla coesistenza della legislazione complessiva con quella specialistica, che tiene conto del carattere particolare di alcuni siti. La Repubblica Popolare Cinese è un paese di ricca cultura e di lunga storia, che grazie al coerente miglioramento della legislazione e all'integrazione con il sistema internazionale di gestione dei beni culturali occupa un posto importante nel movimento globale per la tutela dei beni culturali. Lo scopo dell'articolo è la presentazione delle questioni più importanti legate alla tutela dei beni culturali in Cina.

Parole chiave: tutela dei beni culturali in Cina, arte cinese, diritto cinese, mercato dell'antiquariato, mercato delle opere d'arte, cultura cinese, storia della Cina, contrabbando di beni culturali, pena di morte in Cina, Amministrazione Statale del Patrimonio Culturale Cinese

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NOTES ON THE AUTHORS

Brunon Hołyst	Prof. PhD hab., Dr.h.c., Director of the Institute of Forensic Science and Criminology, Faculty of Law and Administration of Lazarski University in Warsaw
Mirosława Melezini	Prof., PhD hab., Department of Law and Administration, Faculty of Social Sciences and Humanities of Łomża State University of Applied Sciences
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Mirosława Melezini	prof. dr hab., Katedra Prawa i Administracji na Wydziale Nauk Społecznych i Humanistycznych Państwowej Wyższej Szkoły Informatyki i Przedsiębiorczości w Łomży
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Sławomir Kursa	dr hab., profesor SWPS Uniwersytetu Humanistycznospołecznego w Warszawie, Wydział Prawa
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Oficyna Wydawnicza
Uczelni Łazarskiego
02-662 Warszawa, ul. Świeradowska 43
tel.: (22) 54 35 450
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e-mail: wydawnictwo@lazarski.edu.pl
www.lazarski.pl


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