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SPIS TREŚCI

SOCIAL HARMFULNESS OF OFFENCES COMMITTED AGAINST GOODS ACQUIRED THROUGH IMMORAL MEANS

MAREK KULIK*, MAREK MOZGAWA**

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1. The inspiration for writing this text was a case (or rather multiple cases) we came across when performing our professional duties. The facts of these cases were all similar in that the perpetrators recorded, copied and then distributed on-line pornographic works (legally produced and distributed) to which wronged party X had exclusive property rights. The acts committed by the perpetrators met the statutory criteria of crimes under Article 116(3) in conjunction with Article 117(2) of the Act of 4 February 1994 on copyright and related rights[1] (hereinafter referred to as "ACRR") in conjunction with Article 12 of the Polish Penal Code (hereinafter "PC"). The Public Prosecutor's Office has consistently refused to initiate proceedings in these cases, or when initiated, the proceedings used to be terminated on the grounds of the negligible degree of social harmfulness.[2] However, without going into the details of the justification behind these decisions, it is worth quoting some

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1 Journal of Laws of 2021, item 1062, consolidated text.

2 One of the cases was as follows: the proceedings were discontinued by the Police under decision of 30 September 2016 – Police office in OS (file no. 866/16) due to failure to meet the criteria of a criminal offence. Pursuant to a decision issued by the District Court in W. (II Kp 1144/66) of 29 March 2017, the interlocutory appeal filed by the wronged party was accepted and the case was remanded to the District Prosecutor's Office in T. The District Court, with the decision of 29 June 2017 (Ds. 433.2017) again discontinued the proceedings due to finding that the social harmfulness of the act in question was negligible. As a result, wronged party X filed a subsidiary indictment with the District Court in W. With a decision of 12 December 2017

of them in order to explain the reasoning adopted by the prosecutors. For instance, the substantiation of the decision of 29 June 2017 on discontinuation of the inquiry carried out by the District Prosecutor's Office in T.[3] stated that

> "the conduct of the wronged party ... is not socially beneficial, valuable or having any socially acceptable positive effect. On the other hand, the negative social effect of pornography is obvious when it comes to the impact on the psyche of young people, on the perception of sex by adults, on relationships between partners, on the condition of the family as a social unit, on demography, which also affects the state of the social security system etc. The hedonistic pleasure of a few members of society who use this kind of visually drastic pornography cannot be regarded as a value (social interest). Therefore, the question of whether such attitudes are protected by criminal law or, more precisely, whether actions that undermine the financial benefits from such practices can be regarded as socially harmful to a greater than negligible extent should be considered as crucial in these proceedings. In the view of the arguments put forward above, the answer to this question must be 'no'. And, while the wronged party may subjectively feel affected by the loss of earnings, no apparent harm has been caused by the act under the inquiry to society and the values protected in society. Of course, the production of pornographic films is not an illegal, forbidden activity. These products are therefore protected under civil law and it is through civil law suit that X should seek redress for the losses claimed."

The case was brought before the District Court in W. (as a result of the filing of a subsidiary indictment by X), and this court discontinued proceedings pursuant to Article 17 § 1(3) of the Criminal Procedure Code stating *inter alia* that

> "acts detrimental to the attainment of financial benefit from production of pornographic content are difficult to find socially harmful in a greater degree than negligible. It is beyond dispute that a pornographic film producer may suffer loss as a result of the dissemination of his proprietary works owned by other unauthorised entities, but nevertheless the small degree of social harmfulness of such an act prevents considering it a criminal offence and, consequently, speaks against punishing for it. There is no doubt that, in the case in question, the property rights of the subsidiary accuser have been infringed, but it should be borne in mind that these rights concern pornographic films, which, as has already been pointed out on several occasions, are a socially harmful and undesirable phenomenon. Thus, assuming a view that the dissemination of such films without authorisation or against its conditions constitutes an act whose degree of social harm is higher than negligible would lead to an odd situation."

2. According to Article 1 ACRR, a copyrightable work is considered to be any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and manner of expression. It is an intangible legal good, which should be distinguished from a tangible object (material carrier of the work – *corpus mechanicum*), on which it is usually recorded.[4] To qualify as a work within the meaning of Article 1(1) ACRR, a specific intangible product should cumulatively meet the following conditions: (a) to be a result of human (author's)

(II K 665/16) the District Court in W. discontinued the proceedings pursuant to Article 17 § 1(3) of the Criminal Procedure Code.

[3] PR Ds 433.2017.

[4] Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa, 2011, p. 18.

work; (b) to be a manifestation of creative activity; (c) to be of an individual character; (d) to be established.[5] Pursuant to the wording of Article 1, the following circumstances are of no importance: the manner in which the work is expressed, the completion of any formalities concerning the work, its scientific or artistic value, its suitability to satisfy a particular need (thus, subject to protection are not only high quality works, but also works of very low artistic level, as well as those which are denied any artistic value); the purpose of the work (aiming at satisfying aesthetic or practical needs connected with the development of science). As rightly pointed out by Barta and Markiewicz "also bad and 'cheesy' novels, trashy paintings, obviously false scientific treatises are all protected".[6] The same authors, in another work, explicitly indicate that "pornographic works are also subject to copyright".[7] Therefore, there can be no doubt that a pornographic film (even if it shows drastic scenes and is negatively assessed by the audience) is a work within the meaning of Article 1(1) of the Act on copyright and related rights and as such is subject to both civil-law and criminal-law protection. This is so because the protection in question is not limited by any moral judgements, but by objectively verifiable properties of the work as indicated above. It is therefore irrelevant what the nature of the work is, and thus whether it presents content perceived as acceptable or morally positive from the point of view of judgement of the public. Even in cases where it presents features which are downright unacceptable, it remains a work within the meaning of the ACRR.

It is therefore beyond doubt that the conduct involving the unlawful distribution of others' copyrightable works in order to earn a financial benefit constitutes a prohibited act even where that distribution relates to pornographic material, regardless of how pornography as such can be assessed. The content of the work is irrelevant for establishing that an act constitutes an infringement of copyright. Doubts may arise as to whether, and if so in what circumstances, an act consisting in an infringement of property and non-property rights by unlawful distribution of a work for the purpose of earning a financial benefit may be regarded as having a negligible degree of social harmfulness (possibly deprived of the characteristics of social harmfulness at all) due to its pornographic content.

3. Article 115 § 2 PC lists a number of elements to be taken into account when assessing the degree of social harmfulness, and therefore reprehensibility, of an act that formally meets the statutory criteria of an act prohibited under penalty. It should be pointed out that not all of the factors listed in that provision which influence the

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[5] Cf. in more detail Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, op. cit., p. 19 et seq.; Poźniak-Niedzielska, M., in: Poźniak-Niedzielska, M., Szczotka, J., Mozgawa, M., *Prawo autorskie i prawa pokrewne. Zarys wykładu*, Bydgoszcz–Warszawa–Lublin, 2007, p. 16 et seq.; Barta, J., Markiewicz, R., *Prawo autorskie*, Warszawa, 2013, p. 29 et seq.; Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, Warszawa, 2011, p. 21 et seq.

[6] Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne. Komentarz*, p. 19; cf. also the judgment of the Polish Supreme Court of 30 May 1972, II CR 137/72, not published: "The protection of copyright is enjoyed by a product of individual human thought, which is established in any form, regardless of the value it objectively represents".

[7] Barta, J., Markiewicz, R., *Prawo autorskie i prawa pokrewne*, Warszawa, 2011, p. 22.

assessment of the degree of social harmfulness must occur in every case assessed, since this depends on the specific facts of the case. In the case under analysis, the conditions of the type and nature of the goods infringed, as well as the amount of damage caused and threatened, are first and foremost taken into account.

In the first place, it is necessary to refer to the protected good and define what it is in the event of an infringement of the author's rights to pornographic creations. At first glance, two views would be possible here. First of all, it could be considered that the object of protection includes only the rights of the author, both moral rights and property rights. Secondly, it could be considered that this object includes, apart from the rights of the author, some considerations of a more general nature, goods of a supra-individual nature related to the values that a given work presents for the general public. It should be added that in the analysed case it is impossible to completely exclude the author's rights.

The second of those views does not seem justifiable. In the case of protection of copyright against distribution of a work for the purposes of earning a financial benefit, no general value is protected, but only the private property belonging to the wronged party. It should be noted that in the event of conduct taken by an offender who unlawfully distributes a someone else's work to the public in order to earn a financial benefit, the work reaches the audience, is presented to them. If it were to protect that audience from any socially unacceptable content contained in this work, the criminal prohibition thus structured would not be able to achieve such an objective. Since the provision does not prohibit the distribution of the given content in general but merely the distribution which infringes the rights of the wronged party, the structure of the provision shows that it is primarily about property rights, it cannot be assumed that considerations such as public morality constitute at least a secondary object of protection.

If so, it must be assumed that, where appropriate, only property rights and moral rights to the work are protected. However, this statement does not exhaust the subject. It must be considered whether, in the case of a pornographic work, the protection of the author's rights may be limited due to the very nature of the work being distributed. It must therefore be considered whether the attack on the author's property rights and moral rights to a pornographic work will not be characterised by a lower degree of social harmfulness than the attack on the rights of authors of works which are perceived as socially beneficial.

It is necessary to determine whether the protection of a good such as non-property rights and, above all, property rights to a work, may be limited by the very content of that work, which may be more or less acceptable from the point of view of social assessments. First of all, it should be noted that it does not appear that any legal protection may be granted to income from a work which contains criminal content, i.e. from a film involving child pornography, presentation of violence or the use of an animal. In such a case, anyone who distributes such content for any purpose commits a crime and any proceeds derived from it shall be forfeited, either directly or indirectly, as a consequence of the offence. The question of the liability of those who further distribute such a work without the author's consent in order to obtain a financial benefit will be largely reduced to the penal code provisions on the dissemination of pornography.

Another example are pornographic, though legal creations. These are indeed works of a more or less morally acceptable or unacceptable nature, but still permitted by law. The proceeds derived from the rights to them are not a benefit derived from an offence but a legal income. The assets accumulated from those proceeds are subject to legal protection in the same way as any other.

There is no doubt that a copyright infringement committed for earning a financial benefit constitutes an attack on property. In this case, the infringed good is among those whose protection appears to be obvious. The question arises whether, in a situation where the property originates from a legitimate but morally controversial activity, something changes as regards the protection granted to that property, in particular whether such origin of the property leads to the conclusion that an attack on it can be regarded as having a negligible degree of social harmfulness.

To answer this question, it is necessary to start with the reason for which property rights in a work of art are protected – is it because of the interest of the injured party or is it directly related to the interest of the state expressed in the promotion by these works of art of certain values accepted by the state.

One should start with the statement that in the legal sense, a good is anything that people consider valuable and would like to possess. A good is given the status of a legal good if the legislature covers it with legal protection.[8] In view of the above, a so-called social good is not a legal good until the legislature decides that it must be legally protected. On the other hand, social goods themselves exist independently of the legislature's decision and depend on the social assessment of certain values as valuable for the public or not.[9] There is no doubt that author's rights, both property and non-property ones, are legal goods, also in the situation when they include content that is controversial from the point of view of social assessments.

The literature on the subject points out that legal goods include, on the one hand, goods protected to secure their use by their holders and, on the other hand, goods protected due to general interest. These are individual and supra-individual goods.[10] A given good is classified as one of these categories depending on whether it belongs to the individual interest or to the public interest. The fact that a given good is protected due to individual interest does not mean that its value is lower than goods of the community. On the contrary, an attack on a good of a personal nature may be characterised by a significant degree of social harmfulness.[11]

4. There should be no doubt that property rights and non-property rights in a work, regardless of its content, are rights protected by reasons of individual interest. Protection is granted to them regardless of its supra-individual value they have, if

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[8] Gizbert-Studnicki, T., 'Konflikt dóbr i kolizja norm', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 1989, No. 1, p. 1 et seq.; Plebanek, E., *Materialne określenie przestępstwa*, Warszawa, 2009, p. 100.

[9] Buchała, K., Zoll, A., *Polskie prawo karne*, Warszawa, 1994, p. 124.

[10] See Czerwiński, S., 'Zgoda pokrzywdzonego jako czynnik wyłączający karalność czynu przestępnego', *Głos Sądownictwa*, 1935, No. 7–8, p. 537 et seq.

[11] Zawłocki, R., *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa, 2007, p. 143.

any. The fact that legal protection is granted to such specific goods was decided by the legislature constructing the types of acts prohibited by Articles 116 and 117 of the Copyright Law. This circumstance means that the assessment of the degree of social harmfulness of a prohibited act, made pursuant to Article 115 § 2 PC, should not refer to the assessment of the degree of violation or exposure of legal assets other than the object of protection, but to the degree of exposure or violation of this legal property, which is the object of protection in the case of a criminal act committed by the perpetrator.

The fact that the provision refers to the type and nature of the infringed good means that in the case of certain legal goods, such as, for example, human life and health, even a small degree of infringement makes it impossible to consider the act as socially harmful to a negligible extent, and in the case of others the degree of infringement may be lower, because there are more valuable and less valuable goods.[12] However, this does not change the fact that the object of protection may be valued in criminal law using another good. This occurs primarily at an earlier stage – when considering the issue of illegality. At this stage, however, it is necessary and possible only to determine whether the infringement or exposure of the good was of a minor nature, justifying the conclusion that the social harmfulness of the act is either negligible or more serious.

If the perpetrator had violated another legal interest alongside the object of protection, his/her conduct would have been more socially harmful. On the other hand, if the perpetrator were to act in order to protect a protected good, other than the object of protection of the type of offence concerned, this should also be taken into account. If, therefore, the offender had committed, for example, an offence under Article 119 ACRR in order to prevent the demoralization of minors, the possibility of applying Article 26 PC (state of necessity) should be considered. In such a case, a legal good other than the object of protection would appear and the need to protect it could prove to be more important than the object of protection. However, this would be a case of a legal excuse, and thus a situation that is beyond the area of this analysis. In the cases which gave rise to this analysis, the case in question is that the statutory elements of the act under Article 116 (3) in conjunction with Article 117 (2) ACRR, which does not involve a legal excuse, but the lack of punishability is under consideration because of the negligible social harmfulness of the offence. It is not therefore a case of protection of a protected good other than the object of protection. The conflict of goods is a characteristic arrangement for a legal excuse, and therefore of a circumstance excluding unlawfulness of an act committed. It consists in the occurrence of a collision between two legally protected goods.[13]

As indicated, the situation in question arises at the stage of establishing whether the offender's conduct is unlawful. In the case when it is so established, it is necessary to refer to the object of protection of the offence committed.[14] It is also

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[12] See Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 404.

[13] Cieślak, M., *Polskie prawo karne*, Warszawa, 1990, p. 232; Zoll, A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982, p. 101 et seq.

[14] Zawłocki, R., *Pojęcie i funkcje…*, op. cit., pp. 198–199.

explicitly stated in the literature on the subject that the degree of social harmfulness is negligible when there is no probability of causing consequences of a certain significance for the interests safeguarded by criminal law; this applies to the social relations conveyed by the offence whose criteria are met by the offender's conduct.[15] This is so because Article 115 § 2 PC refers to the type and nature of the infringed good, i.e. the good attacked by the perpetrator. In view of the fact that the prevailing view among scholars in the field and judicature is that Article 115 § 2 PC contains a closed-ended list of circumstances affecting the degree of social harmfulness of the act,[16] it should be noted that when assessing the social harmfulness of perpetrator's conduct, elements not contained in the above-mentioned provision should not be introduced. The provision refers to a good infringed by the perpetrator, and not by the good anticipated by the perpetrator through his/her conduct. The latter may appear in the assessment of social harmfulness in a secondary way – through the motivation of the perpetrator. The issue of motivation may be discussed later, but first it should be noted that the only goods that can be identified as affecting the level of social harmfulness of perpetrator's conduct are non-property and property rights to a work. This is because they are indicated by the provisions describing the behaviour, the criteria of which have been met by the perpetrator.

In the case under analysis, the good in the form of rules of morality and decency could appear at the stage of deciding on unlawfulness. It would be so, if the perpetrator acted in order to protect some legal good. Then it would be necessary to consider the need to use the institution of state of necessity. However, the perpetrator did not act to protect any legal good. Irrespective of the fact that the materials in question were controversial and their dissemination could be perceived as behaviour against the widely adopted principles of morality, it should be noted that the conduct of the perpetrator, who disseminates the materials without authorisation or contrary to authorisation, must be assessed from the point of view of moral principles in the sphere of morality in the same way as the behaviour of the wronged party. The perpetrator does not act to protect any moral good that is or may be violated by the dissemination of pornographic material, because the perpetrator himself/herself disseminates the material. He therefore violates the same social good that is violated by the wronged party, who legally distributes the materials in question. Therefore, it is difficult to say that the act of the perpetrator, involving dissemination of pornographic materials with infringing the rights of the entitled person, is characterized by a negligible degree of social harmfulness only due to the fact that the materials are of such character. After all, any accusations that could be made against the wronged party because of what materials he disseminates can also be made against the perpetrator. He is not acting for any positively assessable purpose. He does not wish to exclude the availability of material which he judges

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[15] Kaczmarek, T., *Społeczne niebezpieczeństwo czynu i jego bezprawność jako dwie cechy przestępstwa*, Wrocław, 1966, p. 34; Zawłocki, R., *Pojęcie i funkcje…*, op. cit., p. 283.

[16] See Majewski, J., in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny. Część ogólna. Tom I*, Warszawa, 2016, p. 949; Judgment of the Supreme Court of 01.04.2009, V KK 378/08, Lex No. 507961, Judgment of the Supreme Court of 04.03.2009, V KK 22/09, Lex No. 495325, Judgment of the Supreme Court of 09.09.2008, WZ 53/08, Lex No. 458865.

to be controversial, but wishes to gain a pecuniary advantage from its continued dissemination in violation of the wronged party's rights. If it were otherwise, this should of course be taken into account when assessing the degree of social harmfulness of perpetrator's conduct. It is rightly believed that the original essence of social harmfulness should be sought in the violation of values that form the foundations of criminal law prohibitions.[17] However, in the case under analysis, there is only one legal good at stake – property and non-property copyrights. The perpetrator assaults these rights, and in doing so does not act to protect any legal good, nor does he protect such good. While it is true that the perpetrator attacks the work whose content must be regarded as unacceptable from the point of view of social assessment, the perpetrator does not reduce or remove the negative features of the work by committing the attack. On the contrary, the perpetrator distributes the work.

It is worth noting at this point that also in the situation in question this perpetrator's motivation is significant for the assessment of the degree of social harmfulness of the perpetrator's act. It should be noted that the perpetrator of the offence in question acts in order to obtain an unlawful financial gain. The striving for profits, on the other hand, is traditionally and rightly considered in the scholarly opinion and jurisprudence as a circumstance that increases the degree of social harmfulness of an act.[18] At the same time, the motivation of the perpetrator is not to seek to eliminate a content that he/she considers immoral and actually controversial, which could actually be assessed as a circumstance that reduces the level of social harmfulness.[19] On the contrary, the perpetrator distributes the same content, doing in this sense exactly what the wronged party did.

Moreover, it should be stressed that the conduct of the wronged party does not fulfil the statutory elements of any criminal act. In a situation in which pornographic content is distributed non-publicly and in such a way that it cannot impose its reception on a person who is not willing to view it, and is not prohibited because of the unlawful content, the person who distributes it does not commit any criminal offence. Thus, in the present case, there is no conflict of legal rights, because the perpetrator does not act in order to avert any danger threatening the protected good.

5. To sum up the findings made so far, it should be emphasised that the legal good attacked by the perpetrator is not the very content of the work, but the author's property and non-property rights to the work. By attacking them, the offender does not do so in order to eliminate the threat to any protected good, nor does he/she act for any other socially acceptable purpose, but in order to obtain benefits which can be assessed as being as controversial in terms of the principles of morality as

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[17] Kaczmarek, T., *Społeczne…*, op. cit., p. 26; Zoll, A., 'Aksjologiczne podstawy prawa karnego', in: Czech, B. (ed.), *Filozofia prawa a tworzenie i stosowanie praw*, Katowice, 1992, p. 306; Zawłocki, R., *Pojęcie i funkcje…*, op. cit., p. 225.

[18] Budyn-Kulik, M., *Umyślność w prawie karnym i psychologii*, Warszawa, 2015, p. 276 et seq.

[19] See Konarska-Wrzosek, V., *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, p. 90; Zawłocki, R., *Pojęcie i funkcje…*, op. cit., p. 207; Plebanek, E., *Materialne…*, op. cit., p. 268.

in relation to the wronged party. The degree of social harmfulness of a criminal act is assessed once it has been established that the act committed meets the statutory criteria of the criminal act and is unlawful and, therefore, there is no circumstance excluding criminality (consisting in the collision between the good protected by the formally infringed provision and any other property protected by law), it must be considered that the influence of the nature and character of the infringed good on the degree of social harmfulness must be considered in reference to the good protected under the provision breached. The assessment of the degree of social harmfulness of an offence must therefore depend not on the content of the work, the rights to which they were infringed, but on the degree of infringement of those rights. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights.

Therefore, if such a perspective were to be adopted, it would be considered as hardly socially harmful not only to disseminate such content, but, for example, to steal the media containing them, the equipment used to produce them or the money obtained from their sale. Moreover, the theft of money earned by prostitution could be treated similarly, since prostitution must be assessed negatively, as the legislature itself indirectly states, since it does not tax the income from prostitution. Indeed, it could be argued that, since the conduct by which the victim receives a given income is immoral or indecent, the attack on the good belonging to the victim is not socially harmful. However, there is no doubt that the conduct in question constitutes criminal offences.

The examples presented above are *reductio ad absurdum* of the assumption that attacks on property comprising rights to goods containing controversial content from the point of view of the principles of morality, or attacks on property resulting from lawful but indecent behaviour, are characterised by a lesser degree of social harmfulness than attacks on property otherwise created.

It should be noted that it does not matter whether a given right was created in a morally acceptable way, provided that it was created legally. If it is created lawfully, such property shall be protected like any other property. This means that in order to determine whether the nature and character of the infringed good allows recognising whether the act is socially harmful to a greater degree than negligible or is negligible, the moral assessment of the manner in which that right arises or the related phenomena is irrelevant when they are legally permitted, even if they are socially disadvantageous.

It should be added that interpreting the analysed prohibition as a restriction due to the content of a work would be in fact nothing else than introducing into the provisions of Article 116(3) in conjunction with Article 117(2) ACRR the content which is not there. In fact, the court would introduce to the statutory description of conduct a negative criterion that does not exist therein: it would exclude protection in the situation where the work contains morally dubious content. Meanwhile, there is no doubt that social harmfulness of an act does not determine the content of the prohibition, i.e. does not constitute a criterion of the prohibited act, but only

allows for an assessment of the gravity of the committed act according to its social harmfulness, which in each type of act may occur to a different extent.[20] However, the very content of the prohibition is determined solely on the basis of those provisions that describe the statutory criteria of the prohibited act.

The foregoing considerations relate to the type and nature of the good infringed as a condition for assessing the degree of social harmfulness. It is of a qualitative nature. Its assessment shows that the object of protection in the present case is not the content of the work. If that were the case, account should be taken of the fact that the content, although permitted by law, is highly controversial in moral terms, and as such probably does not deserve a high assessment, and therefore its protection would have to be of low intensity. However, in the case at issue, the rights to the work are concerned, including both non-property and property rights. The latter are considered a relatively valuable object of protection. What's more, they are quantifiable and can be defined in money. The act committed by the perpetrator causes a certain financial damage, which is quite easy to assess. In itself, the amount of the actual and potential damage is a separate condition for assessing the degree of social harmfulness caused. In the present case, it plays a dual role in some sense, since it is not only self-contained but is closely linked to the object of protection, it enables it to be specified and the extent of its infringement to be assessed. As a general rule, it must be assumed that the greater the actual and potential damage, the greater the degree of social harmfulness caused by the offence committed. It should be emphasized that in a situation in which property rights, i.e. rights measurable in money, are protected, the value of actual and potential damage is an important factor in assessing the degree of social harmfulness caused by the offence.

It is worth noting that the degree of social harmfulness of a prohibited act may be regarded as negligible, when a specific act has an unusually low degree of social harmfulness, as compared to other acts that meet the statutory criteria of prohibited acts specified in the same provision or provisions.[21] It does not seem that in the situation where the perpetrator's behaviour concerned pornographic works, the harmfulness would be significantly lower than in the case of other typical infringements of property and non-property rights. Since the infringement consisted in unauthorised dissemination of works and making profits from it, there is no difference between this and other infringements of this kind, not concerning pornographic works, which, taking into account the purpose of the provisions, would justify the statement that this is an atypical situation. From the point of view of the ACRR, in this case an unlawful distribution of works in order to achieve financial gain took place. The assessment whether the social harmfulness of such dissemination is or is not negligible depends not on what content was disseminated, but on the intensity of the infringement of copyright. This means that the fact that the act consisted in dissemination of somebody else's pornographic work does

[20] Zawłocki, R., *Pojęcie i funkcje…*, op. cit., p. 225.
[21] See Zoll, A., 'Materialne określenie przestępstwa', *Prokuratura i Prawo*, 1997, No. 2, p. 12.

not constitute grounds for determining that the social harmfulness of the act is negligible. What matters is only the degree of copyright infringement.

6. The discussion presented above leads to the following conclusions:
   A. Films, whatever their nature, are works within the meaning of the Copyright Law. This also applies to pornographic films. The protection of their rights is not limited by any moral assessments, but by objectively verifiable features of the work.
   B. For legal pornographic works, while their content itself may be regarded as controversial or even unacceptable from the point of view of social norms, the assessment of the social harmfulness of the act is determined not by the content but by the degree of the infringement of the object of protection. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights.
   C. Protected goods other than those provided for in the provision describing the offence attributed to the offender may be relevant on the basis of possible state of necessity. However, to find that this state of necessity occurs, it would be necessary to establish that the perpetrator acted towards eliminating a threat posing to a certain good protected by law. Where the perpetrator disseminates a someone else's pornographic work, it is not the case of such a good. The conduct of the perpetrator must be assessed from the point of view of the principles of morality in the same way as the conduct of the wronged party. The perpetrator does not act to protect any moral good that is or may be violated by the dissemination of pornographic material, because the perpetrator himself/herself disseminates the material. He/she therefore violates the same social good that is violated by the wronged party, who legally distributes the materials in question.
   D. The perpetrator strives to earn an unlawful financial benefit. The striving for profits, on the other hand, is traditionally and rightly considered in the scholarly opinion and jurisprudence as a circumstance that increases the degree of social harmfulness of an act.
   E. The degree of social harmfulness of a prohibited act may be regarded as insignificant, when a specific act has an unusually low degree of social harmfulness, as compared to other acts that meet the statutory criteria of prohibited acts specified in the same provision or provisions. Between the infringement of the rights to a pornographic work and those relating to other works there is no difference, which in the light to the purpose of the provisions infringed would justify the finding that it is an unusual situation.
   F. The fact that the act consisted in dissemination of somebody else's pornographic work does not constitute grounds for determining that the social harmfulness of the act is negligible. What matters is only the degree of copyright infringement.

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SOCIAL HARMFULNESS OF OFFENCES COMMITTED AGAINST GOODS ACQUIRED THROUGH IMMORAL MEANS

Summary

The article discusses the issue of the degree of social harmfulness of acts detrimental to goods obtained through immoral means (specifically, infringement of copyright to legally produced pornographic films). All film productions (also those of a pornographic nature) are works within the meaning of the Polish Act of 4 February 1994 on Copyright and Related Rights. The protection of rights to them is not limited by any moral assessments, but by objectively verifiable features of the work. For legal pornographic works, while their content itself may be regarded as controversial or even unacceptable from the point of view of social norms, the assessment of the social harmfulness of the act is determined not by their content but by the degree of the infringement of the object of protection. The moral assessment of the content contained in the work is irrelevant, if the content is in itself legal and disseminated lawfully, because the protection of non-property rights and, in particular, property rights to a work is not about the protection of the content of those works, but about the author's rights. The finding that the act involved the dissemination of a someone else's pornographic work cannot serve as a basis for considering the degree of social harmfulness of the offence as negligible. It is only the degree of copyright infringement that matters in the specific case.

Keywords: social harmfulness, pornographic works, moral assessment, copyright infringement

O SPOŁECZNEJ SZKODLIWOŚCI CZYNÓW GODZĄCYCH W DOBRA UZYSKANE NA DRODZE NIEMORALNEJ

Streszczenie

Artykuł dotyczy kwestii stopnia społecznej szkodliwości czynów godzących w dobra uzyskane na drodze niemoralnej (a konkretnie naruszenia praw autorskich do legalnie produkowanych filmów pornograficznych). Wszelkie produkcje filmowe (także o charakterze pornograficznym) są utworami w rozumieniu ustawy z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych. Ochrona praw do nich nie jest bowiem ograniczona żadnymi ocenami moralnymi, lecz obiektywnie sprawdzalnymi cechami dzieła. W wypadku legalnych utworów o charakterze pornograficznym, mimo że sama treść może być postrzegana jako kontrowersyjna, a wręcz nieakceptowalna z punktu widzenia norm obyczajowych, o ocenie społecznej szkodliwości czynu decyduje nie treść, ale poziom naruszenia przedmiotu ochrony. Nie ma znaczenia moralna ocena treści zawartych w utworze, jeżeli tylko treści te są same w sobie legalne i rozpowszechniane są w legalny sposób. W wypadku ochrony niemajątkowych, a zwłaszcza majątkowych praw do utworu nie chodzi bowiem o ochronę treści zawartych w tych utworach, lecz praw twórcy. Ustalenie, że czyn polegał na rozpowszechnianiu cudzego utworu o charakterze pornograficznym nie może być podstawą do stwierdzenia znikomego stopnia społecznej szkodliwości czynu ustalenie, Znaczenie ma tylko to, jaki był w konkretnej sprawie poziom naruszenia praw autorskich.

Słowa kluczowe: społeczna szkodliwość, utwory o charakterze pornograficznym, ocena moralna, naruszenie praw autorskich

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INCEST. PENAL-LAW AND CRIMINOLOGICAL ASPECTS

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INTRODUCTION

The prohibition of incest is one of the oldest and most widespread norms that have accompanied man since the beginning of the development of societies. In the legal systems of other countries, the penalisation of voluntary sexual relations between adult family members is quite common, although it is possible to identify countries in which this crime does not occur at all (e.g. Azerbaijan, Belarus, Georgia, Latvia, Mongolia, Russia) as well as those in which it does not occur, but sexual relations with close family members are the statutory features of the definition of the crime of rape or other acts of sexual nature (Estonia, France, Kazakhstan, Lithuania, Malta, Tajikistan, Turkey, Uzbekistan, Ukraine, Spain). It is also important to point to legal systems (Bulgaria, Croatia) in which incest as an independent type of offence is also accompanied by the offence of incestuous rape.[1] Such an approach is also provided for in the Polish Penal Code currently in force.

1. ANALYSIS OF THE STATUTORY FEATURES OF THE OFFENCE OF INCEST

In the Polish legal system incest was penalised in the first Penal Code of 1932 in Chapter XXXII "Criminal Sexual Conduct" in Article 206 ("Whoever mates with a relative with lineal consanguinity, brother or sister, shall be punished by imprisonment

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[1] More on this topic, see Nazar, K., *Kazirodztwo. Studium prawnokarne i kryminologiczne*, Lublin, 2019, pp. 67–95.

of up to 5 years")[2] and in the Penal Code of 1969, in Article 175 ("Whoever undertakes a sexual intercourse with a relative with lineal consanguinity, brother or sister or a person related by adoption shall be punished by imprisonment of 6 months to 5 years")[3] which is included in Chapter XXIII "Offences against morality". At present, the prohibition of incest provided for in Article 201 of the Penal Code of 1997 is set out in Chapter XXV "Offences against sexual freedom and morality" and, as a rule, deviate from the arrangements provided for in Article 175 of the Penal Code from 1969.[4] The offence referred to in Article 201 PC involves committing a sexual intercourse with respect to an ascendant, descendant, adoptive parent, adoptive child, brother or sister and is punishable by imprisonment of 3 months to 5 years.

The problem of determining the protected interest in the case of incest has existed since the beginning of the development of contemporary Polish criminal law. The justification of penalisation of incest has been subject to changes over the years, which was reflected in the statutory approach to its defining elements. In the Penal Code of 1932, the use of the term "mates" in Article 206 and narrowing the circle of persons subject to punishment only to close relatives determined the adoption the of eugenic justification for the criminality of incest.[5] Eugenic aspects of the justification for the criminality of incest were also stressed under the Penal Code of 1969, although in the 1950s and 1960s, in the course of work on the amendment of the criminal law, it was noticed that, in addition to eugenic reasons, incest is also a serious threat to the functioning of the family.[6] It is not easy to clearly point to rational arguments justifying the existence of the prohibition of incest. Currently, the prevailing view among scholars of penal law is that the protected value of the crime under Article 201 of the Penal Code is morality, and the sexual intercourse of the persons mentioned in this provision is perceived as reprehensible and immoral.[7] The proper functioning of

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[2] Mating consisted not in any criminal sexual act, but only a natural sexual act, i.e. an activity, which may lead to fertilization and birth of the offspring. Therefore, the term ("mating") meant only a normal heterosexual intercourse. The provision was intended to protect the species from endogamy leading to degeneration of the breed.

[3] The scope of incest was largely extended in Article 175 of the Penal Code of 1969 (compared to Article 206 of the Penal Code of 1932) to persons under the legal relationship of adoption and homosexual relationships, not penalized before, and other ways of satisfying heterosexual sex drive. The term "mating" used in Article 206 PC of 1932 was replaced by the term "sexual intercourse".

[4] Some differences in the wording of the two provisions are merely of an editorial nature. In Article 201 of the Penal Code of 1997, the phrase "relatives with lineal consanguinity" was replaced by the corresponding terms "ascendant" and "descendant" and the term "persons under the legal relationship of adoption" was replaced by the terms "adoptive parent" and "adoptive' child".

[5] Makarewicz, J., *Kodeks karny z komentarzem*, Lwów 1932, pp. 253–254. See also: Peiper, L., *Komentarz do kodeksu karnego, prawa o wykroczeniach, przepisów wprowadzających obie te ustawy*, Kraków, 1936, p. 427, and Papierkowski, Z., *Prawo karne (część szczególna)*, Lublin, 1947, p. 111.

[6] Cf. Skupiński, J., 'Problematyka kodyfikacji przestępstw "nierządu"', *Palestra,* 1960, No. 10, p. 53, see also: *Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny*, Warszawa, 1968, p. 141.

[7] Surkont, M., *Prawo karne. Podręcznik dla studentów administracji*, Sopot, 1998, p. 173; Górniok, O., in: Górniok, O., Hoc, S., Kalitowski, M., Przyjemski, S.M., Sienkiewicz, Z., Szumski, J., Tyszkiewicz, L., Wąsek, A., *Kodeks karny. Komentarz, t. 2: Art. 117–363*, Gdańsk, 2005, p. 210; Wąsek, A., 'W kwestii tzw. odmoralizowania prawa karnego', *Studia Filozoficzne,* 1985,

the family is also sometimes considered to be the protected value.[8] It is also argued that the reasons for the penalisation of incest are of an emotional nature, the reason for this emotion being not entirely clear.[9] Moreover, it should be noted that although looking for eugenic reasons as a ratio legis behind incest prohibition is rare, it has not completely disappeared.[10] The analysis of available empirical research and the views of geneticists does not unequivocally confirm or deny that children from incestuous relationships are at greater risk (than children of unrelated people) from genetic defects. Existing studies only confirm the thesis that incest is only one of the causes of the diseases found in children. Similarly, in the genetic literature a view is presented that an increase in the frequency of occurrence of recessive hereditary diseases is present in the interbreeding between relatives, but it is not supported by any studies.[11] The above allows us to assume that the *ratio legis* of the prohibition of incest cannot be based only on a supposition. It should be clearly stated that it is inappropriate to draw any conclusions solely on the basis of an assessment of the health condition of children from incestuous relationships, without examining the health condition of their parents. It is almost certain that if the parents (or one of them) are mentally handicapped, their child is, more likely than the child of healthy parents, to be handicapped and this does not necessarily involve parental consanguinity.[12] As J. Godlewski noted, the percentage

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No. 2–3, p. 232; Bielski, M., in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny. Część szczególna*, *t. 2: Komentarz do art. 117–211a*, Warszawa, 2017, p. 780; Filar, M., 'Przestępstwa seksualne w nowym kodeksie karnym', *Nowa Kodyfikacja Karna. Kodeks Karny. Krótkie Komentarze*, 1997, Vol. 2, p. 45. Cf. also: Banasik, K., 'Karalność kazirodztwa jako naruszenie wolności seksualnej', in: Dymińska, Z. (ed.), *Konteksty prawa i praw człowieka*, Kraków, 2012, p. 37 et seq.; Płatek, M., 'Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona', in: Mozgawa, M. (ed.), *Kazirodztwo*, p. 136, in more detail: pp. 126, 133–134. A very original approach to justifying the criminalization of incest is represented by V. Konarska-Wrzosek. See Konarska-Wrzosek, V., 'Przedmiot ochrony przy typie przestępstwa kazirodztwa', in: Pohl, Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, pp. 290–292.

[8] Baranowski, J., 'Ratio legis prawnokarnego zakazu kazirodztwa', *Przegląd Prawa Karnego*, 1990, No. 3, p. 67; Zoll, A., 'Ochrona prywatności w prawie karnym', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2000, Vol. 1, p. 225; Rodzynkiewicz, M., in: Zoll, A. (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 117–277*, Kraków, 2006, p. 659; Tomkiewicz, M., 'Kazirodztwo a prawnokarna ochrona rodziny w Polsce', *Profilaktyka Społeczna i Resocjalizacja*, 2013, No. 21, p. 31; Hypś, S., in: Grześkowiak, A., Wiak, K. (eds.), *Kodeks karny. Komentarz*, Warszawa, 2018, p. 1040. See also: Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2018, p. 975.

[9] Gardocki, L., *Prawo karne*, Warszawa, 2017, p. 278.

[10] As proposed by e.g. Kubik, A., *Specyficzne zaburzenia życia seksualnego*, Warszawa, 2011, pp. 41–42, and Bojarski, M., in: Bojarski, M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa, 2012, p. 546.

[11] See, e.g.: Winter, P.C., Hickey, G.I., Fletcher, H.L., *Genetyka*, translated by Augustyniak, J., Warszawa, 2000, pp. 213, 218; Joachimiak, A., *Genetyka*, Kraków, 1998, p. 24; Szibor, R., 'Inzestund Konsanguinität – Eine Übersichtsoziologischen, klinisch-genetischen und rechtsmedizinischen Aspekten', *Rechtsmedizin*, 2004, Bd. 14, pp. 391–392; Bennett, R.L., Motulsky, A.G., Bittles, A.H., Hudgins, L., Uhrich, S., Doyle Lochner, D., Silvey, K., Scott, C.R., Cheng, E., McGillivray, B., Steiner, R.D., Olson, D., 'Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors', *Journal of Genetic Counselling*, 2002, Vol. 11(2), pp. 97–119; Kliemannel, K., *Beischlafzwischen Verwandten. Eineinterdisziplinäre Betrachtung*, Halle-Wittenberg, 2014, pp. 11–13.

[12] W. Makowski pointed that "the issue of degeneration in the offspring from incestuous relationships (where there are no symptoms of disease in the parents) is a matter of debate in

of handicapped children from incestuous relationships is relatively high (according to the data provided by the author – 66%), however, the very prohibition of incest is breached by individuals among whom there is a high percentage of handicapped persons.[13] A similar view is presented by G. Simson and F. Geerds, who claim that in a genetically healthy and mentally not susceptible family, the mating among relatives, if not being a long-term process, is probably harmless, and even – as in the case of animal cross-breeding – can cause above-average biological and breeding effects. However, if there are recessive psychophysical deficiencies in the family – and this is the rule, because the tendency to incestuous acts is manifested primarily by people with defects – as a result of incest these will multiply as negative hereditary factors.[14]

The actus reus of the offence of incest consists in "committing sexual intercourse" by the persons specified in Article 201 of the Penal Code. The term "commits" should be understood as an act that has the character of the so called perpetration with one's own hands. "Committing", and not "undertaking an intercourse", determines that this crime is committed by all persons who voluntarily interact with each other, and not only by the person who has taken the initiative of intercourse. Both the scholarly opinion and judicial decisions agree that the element "sexual intercourse" includes the so-called proper sexual intercourse (mating), as well as surrogates of sexual intercourse, i.e. all forms of sexual contact equivalent to mating that may lead (like mating) to satisfying the sex drive, i.e., oral and anal intercourses.[15] The prohibition under Article 201 PC concerns only sexual intercourse. The undertaking of "other sexual activities" remains outside the scope of the penalisation under this provision. This means that stimulating or satisfying sexual drive between the closest family members (in the form of e.g. acts of mutual masturbation carried out with mutual consent) is legally irrelevant.[16] The notion of sexual intercourse also does not include touching the genitals, as such behaviour constitutes "another sexual activity". It should be assumed, however, that any other act, exceeding mere touching, and involving the penetration of genitals, e.g. with a finger or another

science." See Makowski, W. (ed.), *Encyklopedia podręczna prawa karnego (prawo karne materialne i formalne, karne skarbowe i administracyjne; socjologja i psychologja kryminalna; medycyna i psychjatrja sądowa; kryminalistyka i więziennictwo), t. 2: Egipt – międzynarodowe prawo karne*, Warszawa, 1934–1936, p. 710.

[13] Godlewski, J., 'Kilka uwag na temat szczególnych cech kazirodztwa i transseksualizmu', *Psychiatria Polska*, 1976, No. 5, p. 560.

[14] Simson, G., Geerds, F., *Straftaten gegen die Person und Sittlichkeitsdelikte in rechtsvergleichender Sicht*, München, 1969, p. 414.

[15] See Judgement of the Appellate Court of Lublin, of 24 August 2011, II AKa 154/11, LEX No. 1108586; Judgement of the Appellate Court of Katowice of 2 June 2011, II AKa 142/11, LEX No. 1001359; Judgement of the Appellate Court of Katowice of 13 May 2004, II AKa 75/04, KZS 2004, No. 9, item 58.

[16] Daniluk, P., Nowak, C., 'Kazirodztwo jako problem karnoprawny (dwugłos)', *Archiwum Kryminologii*, 2007–2008, Vol. 29–30, p. 476. It should be noted that this concerns acts of mutual masturbation, which are not combined with inserting e.g. a finger into the vagina or anus, as this behaviour is covered by the definition of sexual intercourse. Similarly, the use of an inanimate object by one of the partners to penetrate the body of the other one constitutes sexual inetrcourse, but the penetration of one's own genitals with such an object does not.

inanimate object, will fall under the category of sexual intercourse.[17] Thus, all those activities which are not of a penetrating nature and consist in bodily contact between the participants of such an activity, involving the physical engagement of the intimate spheres of the body of at least one of them, or at least the physical engagement of the intimate spheres of the body of one of them, which will be of a sexual nature, i.e. can be considered a form of satisfying or stimulating natural sex drive, are considered "other sexual activities." Such activities include non-penetrative contact with genitals or anus, touching, kissing them, touching breasts, mutual masturbation (which is not connected with inserting e.g. a finger into the vagina or anus).[18] Limiting the penalisation of incest only to sexual intercourse raises doubts from the point of view of the protected value under Article 201 PC. The proposal *de lege ferenda* to extend the scope of penalisation under Article 201 PC to other sexual activities seems to be justified. From the point of view of the protected value of the discussed offence, namely morality, it should be stated that it is no less indecent than sexual intercourse to undertake other sexual activities by the closest family members.

Incest is a formal type of offence (no result is necessary) which occurs when sexual intercourse is undertaken. Its defining elements do not include any result such as e.g. fertilization or birth of the offspring. The object of the action of perpetration in the offence under Article 201 PC is the body of the partner of the incestuous intercourse, or more specifically the body of both partners of such an intercourse, since both persons commit the crime. The body of one of the perpetrators is therefore also the object of the act in relation to an offence committed by the other participant of the incestuous sexual intercourse. Of course, when referring to the action of perpetration, only about the persons referred to in Article 201 PC are meant.

Incest is a proper individual offence which can only be committed by a person who is in the relationship referred to in Article 201 PC, with the other person (with whom he or she is engaged in sexual intercourse) that is, in a relationship of an ascendant, descendant, adoptive child, adoptive parent, brother or sister. Scholars in the field indicate that the offence of incest is an example of the so-called necessary joint participation. In cases of voluntary incestuous intercourse, each participant in such an act shall be considered the perpetrator of the offence. There are two perpetrators in this arrangement and there is no victim, which allows incest to be classified into the victimological category of the so-called victimless crimes. First of all, the provision of Article 201 PC identifies relatives as the perpetrators of the offence. The prohibition of incest applies to lineal consanguinity without any restrictions with regard to the degree of this consanguinity. Consanguinity is

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[17] Judgement of the Supreme Court of 24 June 2008, III KK 47/08, LEX No. 438423; Judgement of the Appellate Court of Katowice of 9 November 2006, II AKa 323/06, KZS 2007, No. 1, item 62. See also Judgement of the Appellate Court of Katowice of 19 April 2007, II AKa 40/07, KZS 2007, No. 11, item 25.

[18] For more detail, see Nazar, K., *Kazirodztwo*…, op. cit., p. 203; Bielski, M., 'Wykładnia znamion "obcowanie płciowe" i "inna czynność seksualna" w doktrynie i orzecznictwie sądowym', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2008, No. 1, p. 211 et seq.; Budyn-Kulik, M., 'Inna czynność seksualna. Analiza dogmatyczna i praktyka ścigania', *Prawo w Działaniu,* 2008, No. 5, pp. 159–160.

commonly understood as a relationship that takes place between persons connected by blood bonds (biological bonds).[19] Relatives are persons who come directly or indirectly from each other or who come from a particular common ancestor. "Descendants" are relatives from a common ancestor in a straight line (children, grandchildren, great-grandchildren). "Ascendants" are relatives preceding a given person in a chain of kinship in a straight line (parents, grandparents, great-grandparents).[20] These are persons who are the biological ancestors of the perpetrator and those who have been legally equated with them, i.e. those persons who have been correctly entered on the child's birth certificate as parents or persons whose fatherhood or motherhood has been determined by other means and has not been denied should be regarded as father or mother. The terms "adoptive child" and "adoptive parent" refer to the legal relationship of adoption. It is a relationship based on legal fiction, the equivalent of which is the relationship between parents and children (Article 121(1) of the Family and Guardianship Code). The institution of adoption aims to create a family relationship which is the strict equivalent of a natural parental relationship.[21] The terms "brother" and "sister" refer to collateral consanguinity and include a relationship between two persons in which at least one parent is their common ancestor (ascendant). The concept of siblings therefore includes full siblings, half-siblings (that is, children of the same mother and another father or of the same father and another mother) and extramarital ones. However, there will be no required relationship and thus no crime of incest in the case of sexual intercourse between the children of siblings.[22] Doubts arise in cases in which one child is a natural child and the other has been adopted.

From the mens rea point of view, incest is an intentional crime, which can only be committed with direct intent. Some authors accept the possibility of committing incest with a conditional intention,[23] while others argue that from the ontological point of view sexual intercourse with *dolus eventualis* is impossible.[24] It seems that it is possible to adopt a quasi-*dolus eventualis* when people engage in sexual intercourse without being certain of the actual existence of the consanguinity or adoptive ties between them while accepting the possibility of their existence. It seems that most scholars in the field assume that both direct intent and quasi-*dolus eventualis* may occur.[25]

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[19] See Szczekala, A., 'Przeszkody małżeńskie pokrewieństwa i przysposobienia oraz ustalenie stanu cywilnego a zakaz kazirodztwa', in: Mozgawa, M. (ed.), *Kazirodztwo*, Warszawa, 2016, p. 242.

[20] Smyczyński, T., *Prawo rodzinne i opiekuńcze*, Warszawa, 2016, pp. 6–8.

[21] Ignatowicz, J., Nazar, M., *Prawo rodzinne*, Warszawa, 2016, p. 467.

[22] Bielski, M., in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny*…, op. cit., p. 783.

[23] As proposed by: Hypś, S., in: Grześkowiak, A., Wiak, K. (eds.), *Kodeks karny*…, op. cit., p. 1042.

[24] Kłączyńska, N., in: Giezek, J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2014, p. 552.

[25] Góral, R., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warszawa, 2005, p. 319; Filar, M., in: Andrejew, I., Kubicki, L., Waszczyński, J. (eds.), *System Prawa Karnego, t. 4, cz. 2: O przestępstwach w szczególności*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1989, p. 195; Wojciechowska, J., in: Kunicka-Michalska, B., Wojciechowska, J. (eds.), *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności*

2. EMPIRICAL RESEARCH OF INCEST

My empirical research on the offence of incest is the most recent and, in principle, the only study on this issue as regards Polish criminal law. The first empirical research on the issue of incest was carried out in the period 1960–1965,[26] while the subsequent studies concerned the analysis of finalisted court proceedings in the years 1970–1975.[27]

Addressing this issue was primarily to identify the criminological picture of the offence of incest and its scale compared to total crime figures in Poland and the policy of punishing. The next aim of the research was to characterise the families, in which incestuous acts took place, and thus to answer the key questions in this context: whether incest is a factor determining the so-called family pathology or maybe it is a phenomenon conditioned by it and whether it occurs spontaneously or is connected with sexual violence in the family.

The research material was the files of cases under Art 201 PC registered in all public prosecutor's offices in Poland in 2013–2014. The analysis covers not only judicial cases in which criminal proceedings were initiated during this period, but also those in which there was a refusal to initiate proceedings or the proceedings were discontinued.[28] The entire research material consisted of 389 cases. The following procedural decisions were made in these cases: 1) 83 refusals to initiate criminal proceedings, 2) 209 discontinued cases, 3) 91 cases were referred to courts with indictments, 4) 6 cases were settled in a different way (referral to a family court – 4 cases, suspension of proceedings – 2 cases). The research covered all cases, except for those 6 that were settled in a different way, i.e. 383 cases covering 506 criminal acts. It should be noted that the number of cases remained relatively stable throughout the period concerned. In 2013, there were 43 refusals to initiate criminal proceedings, 109 decisions to discontinue the proceedings and 53 cases in which the indictment was

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cielesnej. Rozdziały XXIII, XXIV, XXV i XXVII Kodeksu karnego. Komentarz, Warszawa, 2001, p. 116; Warylewski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2018, p. 1329; Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 709; Marek, A., *Kodeks karny. Komentarz*, Warszawa, 2010, p. 460.

[26] At the first stage, it covered an analysis of nationwide materials contained in the prosecutorial files of incest cases, while at the second stage, 24 visits were made to those families, in which – according to information obtained at the first stage of research – children from incestuous relationships were born. For more detail, see Pilinow, A., 'Kazirodztwo – geneza zakazu i skutki', *Problemy Rodziny,* 1969, No. 3, pp. 62–68; eadem, 'Teoretyczne i empiryczne wersje kazirodztwa', *Kultura i Społeczeństwo,* 1968, No. 3, pp. 181–187.

[27] See Ślusarczyk, B., 'Z problematyki kazirodztwa (charakterystyka rodzin, w których ujawniono fakty współżycia kazirodczego)', *Studia Kryminologiczne, Kryminalistyczne i Penitencjarne,* 1977, Vol. 6, pp. 131–140.

[28] The fact that there has been no criminal proceeding or it has been discontinued does not always mean that the act was not committed and that all the cases of these groups analysed are an example of false reporting of a crime. This applies in particular to cases where proceedings have not been initiated or discontinued on the grounds of statutes of limitation or the death of the suspect (Article 17(1)(5) and (6) of the Code of Criminal Procedure). – there were a total of 22 of them. It is worth noting one of the cases that ended in the discontinuation due to the suspect's death. The grounds for the decision state clearly that, with a near-certainty probability, the victim was sexually abused by her father from an early childhood.

brought to the court. In 2014, there were 40, 100 and 38 such cases, respectively. For all procedural decisions, the analysis covered: the territorial distribution of criminal proceedings; place where the act was committed; who notified law enforcement authorities about the committed crime; what the prohibited conduct consisted of (and what was the legal classification applied); what kind of family relationship linked the participants of incestuous behaviour. In the first two groups of the discussed procedural decisions, the basis for refusal or discontinuation of criminal proceedings was specified. In the case of discontinued cases and those in which the indictment was filed with the court, the issues of expert opinions invoked were also taken into account (only 1 opinion was issued for the refusal to initiate proceedings). In the last group of cases (indictments), the perpetrator was characterized in terms of his/her education, employment, age, marital status, etc., as well as the type of preventive measures, penalties and penal measures applied, and the course of court instances in criminal proceedings. Since incestuous behaviour may be conditioned by a particular situation, psychopathologically, homosexually or related to paedophilia and family pathology, the research focused also on factors such as mental retardation, alcohol addiction, sexual preference disorders and the general characteristics of the family (including family being under social care due to poor social and family situation, educational failure, conflicts between the parents/cohabitants).

The conducted analysis led to the conclusion that most often the fact of committing a crime (either actual or alleged[29]) was notified by the victim's mother (67 cases), the victim himself/herself (56) or the social welfare centre (38) – this is respectively 17.49%, 14.62% and 9.92% of all cases. It is worth noting that the data on the place where the crime was committed is not typical in comparison with the geography of Polish crime, as 80% of crimes are committed in cities/towns. In the case of incest, on the other hand, it is also often committed in cities/towns and villages, with a small percentage dominance of urban environment (52% to 48%).

As regards the relationship between the participants in incestuous behaviour (both voluntary and non-voluntary), most numerous were the cases of father-daughter sexual intercourse (262),[30] then the cases of brother-sister intercourse (135);

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[29] The presumption of the commission of a criminal offence takes place in cases which ended in a refusal or discontinuation of proceeding. In those cases, the motivation behind reporting the crime included conflicts between the reporting person and the alleged perpetrator (e.g. property-related conflict between ex-spouses who have accused each other of poor custody of children), gossips, confabulations, revenge or a desire to get back (e.g. a husband getting back at his wife because she divorced him). The source of informing authorities, which can undoubtedly be combined with both conflict and the desire to get back, was slander. In this context, it is worth pointing out that in only one case of false accusation, the material on false statements has been excluded to form separate proceedings. The reports of crime were also made by people in a state of intoxication, under the influence of drugs or suffering from mental disorders. In single cases, the reporting of the offence was connected with persistent harassment (so-called stalking).

[30] Similar conclusions result from the analysis of court proceedings concluded with a final decision, conducted in the years 1970–1975 concerning 310 incestuous relations. In 75%, they concerned father-daughter relations. Cf. more in: Ślusarczyk, B., 'Z problematyki kazirodztwa…', op. cit., pp. 131–140. Cf. Gromska, J., Masłowski, J., Smoktunowicz, I., 'Badanie przyczyn kazirodztwa na podstawie analizy opinii sądowych', *Psychiatria w Praktyce Ogólnolekarskiej*, 2002, No. 4, p. 269.

these figures constitute, respectively, 51.78% and 26.68% of all the cases examined. It should be stressed that when it comes to cases of voluntary incestuous intercourse, the brother-sister relationship prevails,[31] while the perpetrators of forced incestuous behaviour are usually fathers and their victims are daughters.

In the cases under consideration, expert opinions were very often presented (502 opinions in all cases examined). This is understandable given the specificity and importance of the cases under analysis (involving crimes of high social harmfulness, such as paedophilia or rape). In these cases, it was often necessary to diagnose not only the perpetrators, but also the victims. Psychological and psychiatric opinions were most frequent ones (a total of 362 opinions were issued – they represent 72.11% of all opinions issued in the cases studied).

The results of the research show that the so-called "regular incest" (voluntary on both sides), qualified only under Article 201 PC, is relatively rare in the practice of the judiciary. Most of the incestuous sexual intercourse cases took place in the context of paedophilia or rape. These results seem to confirm the thesis that incest is rarely the only committed offence, but is most often related to domestic sexual violence. In all the cases, as noted, there were altogether 506 acts, of which 182 were qualified only under Article 201 PC, which constitutes 35.97% of all acts. The remaining acts, constituting 64.03%, were related to paedophilia (Article 200 § 1 PC), taking advantage of the victim's helplessness or the relationship of dependence (Article 198 PC or Article 199 PC) or rape (including incestuous rape).

Obviously, the most important cases are those concluded with bringing the indictment to the court, therefore they should be distinguished from those concluded with a refusal to initiate or discontinuation of criminal proceedings. In this group of cases, there were 150 acts (related to incest), of which only 38 acts were qualified solely under Article 201 PC, which constitutes 25.33% of all acts. The remaining acts, constituting 74.67%, were related to paedophilia (Article 200 § 1 PC), taking advantage of the victim's helplessness or the relationship of dependence (Article 198 PC or Article 199 PC) or rape (including incestuous rape). Only 23 people were convicted under Article 201 PC, for 2 persons the proceedings were discontinued (pursuant to Article 17 § 1 point 3 of the Criminal Procedure Code in conjunction with Article 1 § 2 PC), one person was acquitted.

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[31] As H.J. Albrecht notes, incestuous relationships among siblings constitute a special group of cases which have not received special attention so far. All studies have focused on father-daughter and mother-son relationships. The author claims that the voluntary nature of sexual contacts between siblings results from structural equality in siblings. It is different in the case of sexual relations between children and adults, which are always characterised by a relationship of dependence. In fact, the only research from the first half of the 20th century on the criminal prosecution of incest cases in Germany has shown that incestuous relationships among siblings, compared to father-daughter incest cases, are exceptions in judicial and police practice. The individual cases of incest between siblings that have been identified in these studies speak in favour of an "older brother – younger sister" combination. See Albrecht, H.J., *Inzest und Strafrecht. Ein rechtsvergleichendes und empirisches Gutachten*, www.ethikrat.org/fileadmin/PDF-Dateien/Veranstaltungen/Albrecht.pdf [accessed on: 20.03.2022].

The analysis of cases concluded with a court verdict made it possible to characterize the perpetrator[32] (and to some extent also the victim). Of course, in the case of "regular" incest (voluntary on both sides) it is not possible to speak of a victim of this offence, however, due to the fact that in most cases the actual concurrence of provisions took place (and the cumulative qualification, for example, with Article 201 PC, Article 198 PC or Article 199 PC), the use of the term "victim" in these situations is justified. Taking this into account, the following categories of victims can be distinguished in the 91 analysed cases concluded with an act indictment directed to the courts: perpetrator's daughter: 52 (of which 39 were under the age of 15, while 6 of them were also sexually abused after the age of 15), perpetrator's sister: 27 (of which 12 were under the age of 15); perpetrator's brother: 3 (of which 2 were under the age of 15); perpetrator's son: 4 (of which 2 were under the age of 15, and 1 of them also just above the age of 15); perpetrator's mother: 3; perpetrator's granddaughter: 2 (both under 15 years of age); perpetrator's niece: 1 (under 15 years of age); female perpetrator's father: 1. It should be noted that among the victims there were 12 mentally handicapped people (6 cases – sisters, 5 cases – daughters, 1 case – brother).

In cases where "regular" incest (qualified under Article 201 PC) was involved (38 acts), in each case the perpetrator's behaviour was defined by the statutory phrase "sexual intercourse" (in the form of: "had sexual intercourse" or "committed sexual intercourse"). In 7 cases, it was specified what the sexual intercourse consisted of (the following terms appeared twice in the description of the act: "vaginal intercourse" and "sexual intercourse"; 1 case for each of the following: "oral intercourse", "vaginal penetration with fingers" and "fellatio"). In the case of the qualification in connection with Article 12 PC, the following additional terms were used: "repeatedly" or "acting in circumstances of continuity of action".

The analysis of data also allowed creating a picture of a typical defendant. The typical defendant is a man (89.42%), in more than half of the cases not exceeding the age of 40 (62.5%), much more often he is an unmarried person (69.23%), unpunished (65.38%), with children (69.23%). More than half of defendants do not plead guilty (57.69%), and three-fourths of defendants are poorly educated (primary, lower secondary and vocational education – 78.85%).[33]

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[32] The characteristics of the defendants included a total of 104 persons – 93 men and 11 women.

[33] The image of a typical perpetrator of incestuous acts (from a psychiatric point of view) is presented by J. Gromska, J. Masłowski and I. Smoktunowicz. According to them: "The average Polish perpetrator of incestuous acts is characterized by a definitely low level of education and a reduced level of intelligence. He comes from the countryside, from a single-parent family, and often abuses alcohol. He was incorrectly educated about sexual matters and had a family history of deviations. He could have suffered mental, physical or sexual injuries. He had a conflict with the law, despite the strict upbringing. He was intimidated, embarrassed, or subject to attempted seduction in childhood, he may have developed inconsistently with the phases of libido development, he may have experienced regression or fixedness, and he may have experienced identification disorders. His development was anti-social and against the norms. The Polish perpetrator of incestuous acts has an immature personality, psychopathic features, may have a characteropathy, neurosis or libido disorders, he is characterized by impaired self-esteem,

In practice, incestuous relations are maintained for a long time. The analysis of examined cases, in which acts of indictment were directed to the court (91 in total) leads to the conclusion, that only in 23 cases there were single acts concerned. In the remaining 68 cases, the court had to deal with multiple deeds conducted in a continuous manner or with several acts occurring in one case, but in a fairly large time span. Very often, the duration of unlawful conduct was long: over 1 year was observed in 46 cases (50.54% of all cases concluded with an act of indictment), whereas if to take into consideration the period exceeding 5 years, these were 22 such cases (24.17% of all cases).[34]

Preventive measures were often applied: in two thirds of cases where indictments were directed to courts (65.93%) and against more than half of the defendants (62.5%). It should be noted that this is not a consequence of perceiving incest as an act with particularly high load of social harmfulness, but the fact that incest was usually cumulatively qualified with another provision describing a more serious offence, threatened with a more severe penalty (mainly Article 200 § 1 PC [paedophilia] or Article 197 PC [rape]) or the fact that the same perpetrators committed at the same time other (more severe) offences, which were in actual concurrence of offences. Where the offender was only accused of committing the offence of incest, preventive measures were not usually taken. These were only applied in 6 cases (against 7 perpetrators[35]).

In view of the severity of the sentence imposed on perpetrators of acts which consist of consensual incest only, it must be stated that the courts are not strict in this regard.[36] In such cases, suspended custodial sentences prevailed, mostly oscillating

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complexes and poor self-control. He's rather an extrovert." See Gromska, J., Masłowski, J., Smoktunowicz, I., 'Badanie przyczyn…', op. cit., p. 269.

[34] Studies by other authors also confirm the fact of long periods of unlawful incestuous behaviour, e.g. A. Pilinow points out that periods of unlawful sexual relations sometimes last up to several years – more than 2 years – 22.5% of the population studied. Pilinow, A., 'Kazirodztwo…', op. cit., p. 66.

[35] In 4 cases it was a pre-trial detention, and in 3 cases – police supervision (including 2 cases with a ban on leaving the country and a ban on issuing a passport).

[36] Where only the provision of Article 201 PC was applicable, the courts issued the following rulings: – 23 sentenced persons; – in relation to 2 persons, the proceedings were discontinued; – 1 person was acquitted. As for the convictions, 1 person was sentenced to a fine (20 x 20 PLN) with a conditional suspension for 1 year, whereas 17 people were sentenced to imprisonment with a conditional suspension: in 4 cases for 3 months (in 2 cases for the probation period of 2 years, and in 2cases – 3 years), in 2 cases for 6 months (suspended for 2 and 3 years), in 2 cases for 7 months (suspended for 2 years), in 2 cases for 10 months (suspended for 2 and 3 years), in 3 cases for 1 year (suspended for 3 years), in 4 cases for 2 years (suspended for 5 years). In 5 cases, probation officer supervision was also imposed, in 1 – the convict was obliged to actively look for a job, and in 4 – to pay a fine alongside a conditionally suspended sentence of imprisonment (in 2 cases 80 x 10 PLN, 80 x 15 PLN, 50 x 10 PLN). In 1 case, apart from the conditionally suspended sentence, the court ruled on a punitive measure in the form of a prohibition to approache the victim (sister). On 3 perpetrators custodial sentences were imposed: – in two cases, for 1 year (and in the first case, it was forbidden to contact the victim and to approach her at a distance of not less than 10 meters for a period of 3 years, in the second – an order to leave the premises and a ban on approaching the victim at a distance of no less than 20 meters for 2 years), – in one case for 6 months. In 1 case, concerning 2 perpetrators and 6 acts qualified under Article 201 PC (3 assigned to each of the perpetrators), an actual concurrence of

at the lower limit of the penalty range provided for in Article 201 PC. The highest sentence of those imposed was 2-years imprisonment (suspended for 5 years) – in 4 cases, and the lowest sentence was the penalty of 3-months imprisonment (also in 4 cases – for two the probation period was 2 years, for another two – 3 years). On three (out of 23) offenders a custodial sentence was imposed (in 2 cases for 1 year and in 1 case for 6 months in prison). In the case of cumulative qualification under Article 201 PC and other provisions of the Penal Code, a custodial sentence was most often imposed. This is understandable, since, in the case of an actual concurrence, the penalty was based on a provision with a much higher penalty than the one for incest. The level of punishment in this group of cases varied. However, the sentence of three-years imprisonment was the most frequent. In cases where suspended sentences have been imposed, their level also varied. In relation to 4 (out of 10) convicted persons, this was a sentence of 1 year (in 2 cases suspended for 5 years, in one 1 case 4 years and in one case 3 years). Three offenders were sentenced to 2 years in prison with a conditional suspension for 5 years. In the event of an actual concurrence of offences, it is difficult to draw any conclusions on the sentence imposed due to the multiplicity of acts, often additionally being in an actual proper concurrence of provisions. The sentences in these cases are based on the provisions containing stricter penalties than those provided for in Article 201 PC. For that reason, the examination of those cases does not make it possible to define unequivocally the criminal policy on the offence of incest.

CONCLUSIONS

As previously indicated, "regular" incest (voluntary for both parties), qualified only under Article 201 PC, is relatively rare in the judicial practice. This conclusion confirms the view expressed by J. Leszczyński that incest concerns the most intimate sphere of human life and as such will represent a large "dark figure", and the actual number of these acts cannot be determined. The public is aware of the most drastic cases (rape, pregnancy, etc.), while voluntary incest relationships are rarely disclosed.[37]

The psychosociological and cultural reflection on domestic sexual violence leads to the search for conditions for this phenomenon. They include the "pathological structure" of the family. In this context, the question arises whether incest is

offences was assumed and an aggregate sentence was issued (3 individual sentences of 8-months imprisonment) of 1 year and 8 months of imprisonment with a conditional suspension of its execution for 4 years, a fine (100 x 10 PLN) and probation officer supervision.

[37] Leszczyński, J., 'O projektach reformy przepisów dotyczących przestępstw seksualnych', *Państwo i Prawo*, 1992, Vol. 2, p. 84. The "dark figure" of incest offences is also referred to by L. Lernell, who argues that the number of incest court cases is negligible, almost none and that intimate relationships that take place within close family rarely come to light'. See Lernell, L., 'Liberalizm i rygoryzm seksualny. Zagadnienia współczesne', in: Imieliński, K. (ed.), *Seksuologia kulturowa*, Warszawa, 1980, p. 314. Also K. Grott and M. Szostak write about the "dark figure" of the offence of incest. For more on the topic, see Grott, K., Szostak, M., *Incest. Criminological Studies*, Poznań, 2013, p. 147 et seq.

a factor conditioning the so-called dysfunctionality in the family or whether it is a phenomenon conditioned by the dysfunctionality. I put forward a thesis that incest is a phenomenon conditioned by the already existing dysfunctionality of the family, and not its cause. The thesis is confirmed by the research carried out. Based on the analysis of files of examined cases, in which an act of indictment was directed to the court, it can be concluded that almost half of the families (46.15%), in which incestuous acts occurred, did not function properly. Family dysfunctionality consisted of a number of factors, which very often occurred together. These include: poor social and family situation, causing the family to remain under the care of social assistance services; educational inefficiency and alcoholism; mental disability of people entering into incestuous relationships; conflicts between parents/cohabitants (often after the divorce or split-up). Such families have also often experienced abuse (psychological, physical).[38] Based on these factors, it can be concluded that the cases of endemic incest occurring in the examined cases were both related to family pathology (disturbed family relations occurred in 21 cases) and were psychopathologically conditioned (alcohol addiction, mental disability or immature personality of the perpetrator). Psychopathological disorders were discovered in expert opinions issued for 42 defendants (these were: mental disability, sexual preference disorders, abnormal personality, alcohol addiction). Therefore, such factors occurred in the case of 40% of the defendants. A total of 67 expert opinions were issued, written by specialists in sexology. In cases where no paedophilia or other sexual preference disorders were found, it was indicated that it was an act qualified as the group of substitute contacts.[39] In cases where a decision on refusal to initiate proceedings was issued, it was not possible to determine how the families in which the behaviours indicated in the reports of a crime were functioning, as in most cases the files were limited to the decision on refusal to initiate proceedings. However, such a possibility existed for cases in which criminal proceedings were discontinued. The analysis of these cases made it possible to state that in more than a half of cases (107, which makes 51.19% of all cases) dysfunctionality of families was noted. Despite the fact that they ended with

[38] Ślusarczyk, B. ('Z problematyki kazirodztwa…', op. cit., pp. 138–139) reached similar conclusions as a result of an analysis of finally concluded judicial proceedings in the period 1970–1975.

[39] Only as a side note, it is worth mentioning the image of the perpetrator of sexual violence presented by J. Bradshaw, who considers incest as one of the forms of violence. The author writes that the perpetrators of incest get sexually aroused by children and allegedly they see nothing wrong with satisfying themselves at the expense of children. This is not true in every case, but very often perpetrators of violence see children as having no rights. Most of the perpetrators had been victims of violence themselves. Half of them were sexually abused and the other half were harmed in some other way. Most of these other abuses were related to physical violence. Almost all perpetrators of sexual abuse are sex addicts, although not all sex addicts are paedophiles. Most of them are emotionally immature and feel maladjusted to the adult world. They turn towards children to get respect, affection and satisfaction of sexual needs. The perpetrators are often alcoholics or drug addicts. They have poor impulse control, especially with regard to sex-related behaviour. Most have a weak relationship with a same-sex parent and have very unstable idea about how to be a man or woman. See Bradshaw, J., *Zrozumieć rodzinę*, translated by H. Szczepańska, Warszawa, 1994, pp. 155–156.

discontinuance, "pathological family relations" constitute their background and confirm the thesis. It is worth noting that even the first empirical research on incest in Poland confirmed this as well. As pointed out by its author, A. Pilinow: "In the light of the data gathered, the fact of social harmfulness resulting from breaching the prohibition of incest in the family remains undisputed. Nevertheless, it seems that the general conditions of living and functioning of the family are the main factors in breaching this prohibition. Therefore, the occurrence of incestuous relations in the community under research can be considered a secondary phenomenon".[40] Taking into account the above, it can be concluded that out of the total number of 300 cases (discontinued cases and those referred to court) in 149 there was a family dysfunction diagnosed, which constitutes almost half of the total number of cases in which the indicated procedural decisions were issued (exactly 49.67%).

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[40] Pilinow, A., 'Kazirodztwo…', op. cit., p. 68.

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INCEST. PENAL-LAW AND CRIMINOLOGICAL ASPECTS

Summary

The article discusses the statutory features of the offence of incest in the Polish Penal Code from 1997 (Article 201) and the results of empirical research carried out. Doubts were raised in doctrine about the rationalization of the prohibition of incest and the definition of the object of protection of this crime. The conduct that constitutes the actus reus as well as the subject and the subjective side of the offence of incest were also analysed. The research material was the files of cases under Article 201 of the Penal Code registered in all public prosecutor's offices in Poland in 2013–2014 (389 cases). Research was intended to was primarily to identify the criminological picture of the offence of incest and its scale compared to total crime figures in Poland and the policy of punishing. The next aim of the research was to characterise the families, in which incestuous acts took place, and thus to answer the key questions in this context: whether incest is a factor determining the so-called family pathology or maybe it is a phenomenon conditioned by it and whether it occurs spontaneously or is connected with sexual violence in the family. The results of the research show that the so-called "regular incest" (voluntary on both sides), qualified only under Article 201 of the Polish Penal Code, is relatively rare in the practice of the judiciary. Most cases of incestuous sexual relations were combined with the crime type of sexual abuse of a minor or rape. These results seem to confirm the thesis that incest is rarely the only committed offence, but is most often related to domestic sexual violence. They also support the thesis that incest is a phenomenon conditioned by already existing family dysfunctionality, not its cause.

Keywords: incest, offence, empirical research, sexual intercourse, family members

KAZIRODZTWO. ASPEKTY PRAWNOKARNE I KRYMINOLOGICZNE

Streszczenie

W artykule omówiono ustawowe znamiona przestępstwa kazirodztwa w polskim Kodeksie karnym z 1997 r. (art. 201) oraz wyniki przeprowadzonych badań empirycznych. W doktrynie występują wątpliwości dotyczące racjonalizacji zakazu kazirodztwa oraz określenia przedmiotu

ochrony tego przestępstwa. Analizie poddano również zachowanie stanowiące czynność sprawczą oraz stronę podmiotową przestępstwa kazirodztwa. Materiał badawczy stanowiły akta spraw z art. 201 k.k. zarejestrowanych we wszystkich jednostkach prokuratury w Polsce w latach 2013–2014 (389 spraw). Badania miały na celu przede wszystkim przedstawienie obrazu kryminologicznego przestępstwa kazirodztwa i jego skali na tle ogólnej liczby przestępstw w Polsce oraz polityki karania. Kolejnym celem badań była charakterystyka rodzin, w których dochodziło do czynów kazirodczych, a tym samym odpowiedź na kluczowe w tym kontekście pytania: czy kazirodztwo jest czynnikiem determinującym tzw. patologię rodziny, czy może jest zjawiskiem przez nią uwarunkowanym oraz czy występuje spontanicznie, czy też jest związane z przemocą seksualną w rodzinie. Wyniki badań wskazują, że tzw. kazirodztwo klasyczne (obustronnie dobrowolne), kwalifikowane jedynie z art. 201 k.k., jest stosunkowo rzadko spotykane w praktyce orzeczniczej. Większość przypadków kazirodczych stosunków płciowych łączyła się z typem przestępstwa wykorzystania seksualnego osoby małoletniej lub zgwałcenia. Wyniki te zdają się potwierdzać tezę, że kazirodztwo rzadko jest jedynym popełnianym przestępstwem, ale najczęściej jest związane z przemocą seksualną w rodzinie. Potwierdzają również tezę, że kazirodztwo jest zjawiskiem uwarunkowanym istniejącą już dysfunkcjonalnością rodziny, a nie jej przyczyną.

Słowa kluczowe: kazirodztwo, przestępstwo, badania empiryczne, obcowanie płciowe, członkowie rodziny

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INADMISSIBILITY OF POLICE ENTRAPMENT EVIDENCE IN THE US AND GERMAN TRIALS IN THE LIGHT OF THE CASE-LAW OF THE US SUPREME COURT AND THE ECTHR

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INTRODUCTION

Covert operations using entrapment in the US trial were carried out by FBI agents in the 1930s and their importance grew with the development of organised crime. As a result, other federal agencies involved in fighting crime began to use their entrapment powers in the 1970s. In consequence, in the US trial, active entrapment is permitted in the sense that a secret agent may, under certain circumstances, incite or otherwise actively participate in a criminal activity and then witness the prosecution.[1] To standarize the practice of the legal use of these operations by FBI agents, the Attorney General issued *Guidelines on FBI Undercover Operations* in 1981 (updated several times, including in 2002 for terrorist offenses).[2] Since the institution of entrapment has not developed in state legislation, an important role is played by the US Supreme Court, which in its jurisprudence sets the limits of its legality in undercover operations based primarily on the directives of a fair trial resulting from the 14th Amendment to the US Constitution. With the development of organised crime in Europe at the end of the 20th century, police and secret services in Europe were also equipped with the powers to use covert special operations, including

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1 Wagner, G.A., 'United States' Policy Analysis on Undercover Operations', *International Journal of Police Science & Management*, 2007, Vol. 9, No. 4, pp. 371–379, (here: pp. 372–373).

2 Hochberg, J.R., 'The FBI Criminal Undercover Operations Review Committee', *United States Attorneys' Bulletin*, 2002, Vol. 50, No. 2, pp. 1–2; Sherman, J., 'A Person Otherwise Innocent: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations', *University of Pennsylvania Journal of Constitutional Law*, 2009, Vol. 11, No. 5, pp. 1475–1510, (here: pp. 1587–1510).

police provocation which, however, unlike the US, is passive in nature and should, in principle, be based on the verification of suspicion of the commission of crimes. The analysis of the study covered the German system as a representative example of a continental inquisitorial and adversarial system which differs from the American system, inter alia, with the principle of the legalism of prosecution and the obligation of the court to actively pursue the material truth. In the sphere of evidence, it should be pointed out that there are no formal rules of evidence such as the "*exclusionary rule*" or the non-obligation of the "fruit of the poisonous tree doctrine". The issue analysed in the study should emphasise the statutory definition of the prerequisites for the admissibility of involvement of secret police agents and police informers in combating crime. Since Germany has ratified the ECHR, the fairness of the German trial in the area of, among other things, the application of police entrapment has been the subject of many ECtHR' rulings, and therefore the Strasbourg standard in this regard will constitute an important aspect of consideration in this article.

1. THE LIMITS TO THE LEGALITY OF POLICE ENTRAPMENT IN THE US CRIMINAL TRIAL

In the American doctrine there is a principle called *entrapment*, referring to people who have been subjected to forms of unlawful entrapment. This institution, in a way, excludes the criminal liability of such persons. It has not been introduced in the form of a legal act, but it has been functioning since the US Supreme Court judgement in 1932 in the case of *Sorrells v United States*[3] as a suspect's defence.

In this judgement, the US Supreme Court stated that "it is not appropriate to impose criminal sanctions on a person who would not be involved in a crime if the government had not tried to induce such behaviour". However, the US Supreme Court judges have been divided on how to understand the justification for *entrapment defence*. Some judges have adopted a "subjective" approach to entrapment, according to which defendants should be able to defend themselves if they can show that they are not "predisposed" to commit a crime or the crime with which they are accused. The subjective position is based on the intuitive assumption that police actions have triggered a desire and intention to commit a crime and that the provoked persons would have no intention of committing a crime which would not have happened in the absence of those provocative police actions. Therefore, people who are not predisposed and who have succumbed to police persuasion should be acquitted, even though they committed the crime charged. Other judges represented an "objective" view of entrapment, which does not focus on the mental state of the defendant, but on the conduct of the state officials. For this reason, defendants should have the right to defend against an entrapment if they can show that the police went too far from merely presenting the possibility of committing one or more crimes, to more actively persuading or enticing the defendant. From an objective point of view, whether or not the defendant was predisposed to

[3] *Sorrells v United States*, 287 U.S. 435, 441, 53 S.Ct.310, 77 Ed. 413 (1932).

commit the crime, overly intrusive police action is considered to be a key factor in committing the crime. In the absence of such police action, the crime would not have occurred and the defendant should therefore be acquitted.[4]

The next U.S. Supreme Court ruling on entrapment did not come until twenty years later in *Sherman v United States*.[5] In this case, a drug addict, an informant of federal agents urged Sherman (a recovering drug addict) to obtain drugs for him. Sherman then, having relapsed, repeatedly carried out drug transactions with federal agents. As a result, he was accused of violating the Federal Drugs Act and his case went to the grand jury to decide on his *entrapment defence* based on the position of the US Supreme Court in the *Sorrells v United States* case, expressed by a majority of its judges, on the question of 'whether the informant convinced an unwilling person to commit a crime or whether that person [Sherman] was already predisposed to commit a crime'. The grand jury sentenced Sherman, because of among other things his previous convictions for drug offences. Ultimately, however, the Supreme Court in the *Sherman* case overturned the conviction, and Chief Justice Earl Warren, who was in charge of the case, briefly stated that although law enforcement agencies can and often must use "deception and strategy" to prevent crimes and detain perpetrators, nevertheless, […] "*a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.*"[6]

In the Sherman case, the US Supreme Court proposed a two-step test for the validity of entrapment defence: First, it examines whether there was an inappropriate incentive from the government, and thus whether the government employs overreaching method that excessively persuades or exploits an individual's non-criminal motives. Secondly, it is important to check whether the defendants were not ready and willing to commit a crime regardless of government inducement.

In *Jacobson v United States* case[7] Supreme Court generally favoured a subjective approach to the entrapment doctrine in federal matters, which most state legislation has also adopted. In this case, two government agencies made repeated efforts through five official organisations over two years to investigate Jacobson's willingness to violate the 1984 Child Protection Act by ordering pornographic images of children through the mail. The Supreme Court set aside Jacobsen's conviction on the grounds that zealous law enforcement prevents government agents from initiating a crime, implanting in an innocent person an order to commit a criminal act and then inducing him to do so, so that the government can prosecute him. The Court referred to the *Sorrells v US* ruling and accepted that it is the responsibility of the prosecution to prove beyond reasonable doubt that the defendant had been willing to commit the act before the government agents first approached him. As to

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4 Lippke, R.L., 'A limited defense of what some will regard as entrapment', *Legal Theory*, 2017, Vol. 23, No. 4, pp. 283–306, (here: pp. 285–289).

5 *Sherman v United States*, 356 U.S., 369, 386 (1958).

6 Roth, J.A., 'The Anomaly of Entrapment', *Washington University Law Review*, 2014, Vol. 91, pp. 979–1034, (here: p. 998).

7 *Jacobson v United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992).

predisposition, the Court ruled that, although after twenty-six months of repeated dispatches and messages from the government agents, Jacobson finally became predisposed to commit the alleged crime, it concluded that the government failed to prove that Jacobson's predisposition was self-sustaining and not the result of prolonged government pressure.

However, the US Supreme Court, in the Jacobsen judgement, did not indicate exactly how you should understand predisposition and therefore how the prosecutor should prove that predisposition.

As the doctrine and jurisprudence of the American courts points out, there is a choice between: (1) understanding predisposition as a purely mental state of *willingness* to engage in a crime at the first opportunity or (2) when predisposition means not only willingness but also having the necessary skills to commit the crime ("*positional predisposition*").

Therefore, the case-law of the US Federal Courts of Appeal has formulated at least three different standards for confirming predisposition to a crime.[8]

1. The First Circuit Court of Appeals in its judgement of *United States v Gendron*[9] adopted the "ordinary opportunity" test, which means that the government only has to demonstrate that, in the absence of government *inducement*, the defendant would have committed a crime if there had been an "ordinary" *inducement*. Indeed, Judge Breyer suggested that the standard set by the Jacobson judgment only implies that the government cannot, in an attempt to induce a person provoked to commit a crime, confront them with circumstances that are different from those of a normal private inducement.[10]
2. The Seventh Circuit Court of Appeal, in turn, adopted a "position" test which requires the government to prove not only that the defendant was mentally ready or willing to commit the crime, but also that the defendant was capable of committing the crime. This understanding of predisposition was accepted by a judge of that Court, R.A. Posner, in the case of *Hollingsworth v United States*.[11] The ruling is based on the concept of "*positional predisposition*", which means that the government should prove that, on the basis of the education, skills, experience or profession of the defendant, it is reasonable to assume that he/she would be able to commit the crime, even if the government had not induced him/her to do so. As indicated in the doctrine, *this approach would not only successfully separate the "unwary innocent" from the "unwary criminal," it would also ensure that defendants receive justice*.[12]
3. Another position was taken by the Ninth Circuit Court of Appeal in the case of *United States v Thickstun*.[13] It adopted a standard which requires the government to

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[8] Schultz, C., 'Victim or the Crime: The Government's Burden in Proving Predisposition in Federal Entrapment Cases', *DePaul Law Review*, 1999, Vol. 48, No. 4, pp. 949–987, (here: pp. 967–976).

[9] *United States v Gendron* (18 F.3d 955, 966 (1st Cir. 1994).

[10] Schultz, C., 'Victim or the Crime…', op. cit., pp. 982–983.

[11] *Hollingsworth v United States*, 27 F3d 1196, 1215, (7th Cir. 1994). See McAdams, R., 'Reforming Entrapment Doctrine in United States v Hollingsworth', *University of Chicago Law Review*, 2007, Vol. 74, Special Issue, pp. 1795–1812.

[12] Schultz, C., 'Victim or the Crime…', op. cit., p. 986.

[13] *United States v Thickstun*, 110 F.3d 1394, 1398 (9th Cir.), 118 S. Ct. 305 (1997).

prove predisposition by means of a multi-element test which examines (1) the nature and reputation of the defendant; (2) whether the government initially suggested the crime; (3) whether the defendant was involved in a gainful activity; (4) whether the defendant showed any dislike; and (5) the nature of the government's incentive. This standard was previously used by other courts as well.[14]

On the other hand, the drafters of the Model Penal Code (MPC) agreed, as "objective test" fit better with the more progressive agenda of having juridical, and more mechanical, regulation of law enforcement. As states adopted portions of the MPC into their own statutes, several included the MPC's "objective test" for entrapment. a few states, most notably Florida, have attempted to use both approaches simultaneously.[15]

It is worth adding that the jurisprudence of the federal courts sometimes recognises *derivative entrapment defence* as applies when a government agent acts through an unsuspecting intermediary to induce the defendant, who is the right target, to commit a crime.[16]

Despite relatively restrictive U.S. Supreme Court jurisprudence based on the entrapment doctrine, in areas with high levels of drug abuse, police often employ schemes to buy drugs from dealers and others and then arrest them, or, more rarely, police officers sell drugs themselves and arrest those who buy them, or, less frequently, police officers sell drugs themselves and detain those who buy them, or, for example, in districts particularly affected by theft, police officers run a pawn shop and buy stolen goods. Some judges even claim that such police action does not prevent crime, but even create it. However, many courts accept or even support operations based on police entrapment (e.g. the New Jersey Court of Appeal in the case of *State v Long*[17] upheld a conviction in a criminal case which started as a result of a police decoy operation.[18]

It is worth noting that, the premises of entrapment defence are, in accordance with the specific nature of the US adversarial trial, verified by the court at the request of the defence, and their existence has the strong effect of acquitting the defendant on the basis, in particular, of the 14th Amendment to the US Constitution, which provides for a *due process* directive. As the comments on this amendment raise, the subjective presentation of entrapment defence follows a two-pronged analysis: "First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

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[14] Schultz, C., 'Victim or the Crime…', op. cit., pp. 974–975 and the Federal Courts' judgments cited therein.

[15] Stevenson, D., 'Entrapment by Numbers', *University of Florida Journal of Law and Public Policy*, 2005, Vol. 16, No. 1, pp. 1–6, (here: pp. 10–11).

[16] Leonardo, T.J., 'Criminal Law – Derivative Entrapment Defense Applies When Government Agent Acts through Unsuspecting Middleman to Induce Targeted Defendant – United States v Luisi', *Suffolk University Law Review*, 2008, Vol. 41, No. 2, pp. 379–386.

[17] *State v Long*, N.J. Super. App. Div., 523 A.2d, 672,678, (1987).

[18] Colquit, J.A., 'Rethinking Entrapment', *American Criminal Law Review,* 2004, Vol. 41. No. 4, pp. 1389–1437, (here: pp. 1396–1400).

If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement. On the other hand, "[when the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[19]

2. POLICE ENTRAPMENT IN THE GERMAN LEGAL SYSTEM

Even before 1990, German police services (primarily BKA – German Federal Criminal Police) were authorised to use secret agents in their operational work, who – as part of special operations – used the institution of entrapment. The uniform powers of the German services in this area, regulated by the *Organised Crime Prevention Act* (OrgKG),[20] came into force in 1992. There is no legal definition of entrapment in German legislation and, as in other legal systems, there is rather a definition of the nature of illegal entrapment or of the requirements that entrapment should meet in order to be lawful. The concept itself was created on the basis of the regulations of § 110a–110b and § 110c introduced on 15 July 1992 into the German Code of Criminal Procedure (*Strafprozeßordnung – StPO*), concerning the powers of an undercover officer (*verdeckter Ermittler – VE*).
It should be pointed out here that § 110a of StPO defining in section I. the basic premise for using in the criminal trial of this institution with the aim of explaining the circumstances of committing a crime, namely the existence of a reasonable factual basis (*zureichende tatsächliche Anhaltspunkte*) for assuming that a crime of significant importance from the list of crimes was committed: illegal trade in narcotics, arms trafficking, counterfeiting of cash and means of payment, a crime against national security, a crime committed professionally, out of habit or in an organised group or in an organised manner.

The institution of secret agents may also be used in cases of crimes, if there is a justified fear of returning to such a crime (§ 110a II sentence 1 of StPO).

This provision also formulates a subsidiarity clause, as this measure can be used only when solving the case by other means would be impossible or much more difficult.[21] As a result, if an undercover police officer (NOEP) using a false identity performs a specific action, in a short period of time, e.g. a fake purchase, he cannot be considered a secret agent.[22] Thus, a change of identity alone should not be the

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[19] *The Constitution of the United States of America: Analysis and Interpretation*, Thomas, K.R. (editor in chief), Washington, 2014, pp. 2003–2004.

[20] Gesetz zur Bekämpfung des illegalen Raushgifthandels und anderer Erscheinungsformen der Organisiarten Kriminalität, 1992.

[21] Cf. Schmitt, B., Meyer-Goßner, L., *Strafprozessordnung. Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München, CH Beck, 2017, pp. 493–495; Hegmann, S., in: Graf, J.P. (org.), *Strafprozessordnung. Mit Gerichtsverfassungsgesetz und Nebengesetzen. Kommentar*, München, CH Beck, 2010, pp. 377–378.

[22] Schmitt, B., Meyer-Goßner, L., *Strafprozessordnung*, op. cit., pp. 496–497; Hegmann, S., op. cit., pp. 379–380.

basic criterion for classifying a police officer as a secret agent. The use of NOEP agents does not require the fulfilment of statutory prerequisites for secret agents using the legend, so they may also be involved in matters not covered by the list in § 110a I of StPO, and their powers result from the general investigative powers of the police regulated in §§ 161–163 of StPO.[23] In view of the above mentioned limitations, provided for in StPO, in the use of secret police agents in the trial (VE – § 110a–110c) the procedural practice currently also observes the involvement of third parties as police informants (*"trusted persons" – V-Leute*) who, engage in special operations, for remuneration, thus avoiding legal regulations giving officers the status of secret agents.[24] With regard to the procedural consequences of police entrapment made contrary to the requirements of a fair trial (Article 6(1) of the ECHR) the case-law of German courts previously emphasised that the court adjudicating in a case should indicate the illegality of such evidence in the justification of the judgment, but at that time it was not a circumstance releasing the defendant from criminal liability (a negative premise for the trial) but a basis for mitigating that liability.[25] This line of jurisprudence of German courts, and in particular of the Federal Supreme Court (BGH), also resulted from the jurisprudence of the Federal Constitutional Court (BVerfG), which was to a large extent in conflict with the case-law of the ECtHR. The situation changed after the ECtHR judgment of 23.10.2014. *Furcht v Germany*[26] and the current line of jurisprudence of the German Federal Supreme Court, including the judgement of BGH of 10.06.2015[27] assumes that *"Illegal entrapment to commit a crime by members of law enforcement agencies or third parties controlled by them is in principle a premise for discontinuance of proceedings."* This judgement of BGH (against the background of the facts of controlled drug purchases by undercover police agents with the help of third parties) refers to the case-law of the ECtHR and assumes that a situation in which the investigators involved, acting in order to prove a crime, i.e. to obtain evidence against a specific person and initiate criminal proceedings are not limited to a largely passive criminal prosecution, but rather influence the person in such a way that he or she is inclined to commit a crime that he or she would not have committed without such influence.

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[23] Roxin, C., Schünemann, B., *Strafverfahrensrecht,* München, CH Beck, 2009, pp. 278–279.

[24] The German literature of the end of the 20th century raised a number of doubts concerning the compatibility of the application of this institution both in the light of the standard of the German Constitution (*Grundgesetz – GG*) and the jurisprudence of the Federal Constitutional Court and the standard of a fair trial as defined in Article 6 of the ECHR – see the monograph: Krauß, K., *V-Leute im Strafprozeß und Menschenschrechtskonwention*, Freiburg im Breisgau, MPICC, 1999, pp. 31–140.

[25] See e.g. Reindl-Krauskopf, S., 'Strafmilderung bei unzulässiger Tatprovokation', *Juristische Blätter*, 2009, No. 10, pp. 664–666.

[26] *Furcht v Germany*, No. 54648/09 (2014). See next part of this article.

[27] BGH 2 StR 97/14.

3. INADMISSIBILITY OF POLICE ENTRAPMENT IN ECTHR CASE-LAW

Until the end of the 20th century, the ECtHR did not generally address the specific problem of whether the testimony of police informers who provoked a suspect to commit a crime is subject to a ban on evidence. The decision of 9 June 1998 in the case of *Teixeira de Castro v Portugal*[28] in which the Court stated that the general principles of a fair trial, as set out in Article 6 of the Convention, apply to all types of proceedings, from the simplest to the most complex, including organised crime[29] can be regarded as a breakthrough here. In the circumstances of this case, the applicant, *F. Teixeira de Castro*, was persuaded by two undercover police officers to get three portions of heroin from a third party and then sell them. The court, considering that there was a violation of Article 6(1) of the Convention in this case, assumed that police officers did not act as "*agents provocateurs*", but provoked a crime that would not otherwise have happened.[30] It also indicated that the police authorities had no reason to believe that the suspect was involved in drug trafficking: there were no drugs in his home, he was contacted by a third party (and the third party only heard of him from another intermediary) with the police, he had no criminal record and under no circumstances did it appear that he was predisposed to commit the crime. The Court concluded from these circumstances that police officers did not confine themselves to following *Teixeira de Castro*'s criminal activities in a fundamentally passive manner, but exerted influence in order to persuade him to commit the crime. Moreover, the ECHR indicated that the action of police officers was not ordered or controlled by a judge[31]).

Following this ruling, German doctrine and case-law have also adopted the principle that the public interest cannot justify the use of means of evidence resulting from police entrapment. The German Supreme Federal Court explicitly recognised that bringing persons who are not suspects and initially not prone to a crime by police informers headed by the authorities of the State and then using this in a criminal trial leads to a violation of the principle of a fair trial as set out in Article 6(1) of the Convention. This principle is also constantly developed in the jurisprudence of the German Constitutional Court (BVerfG) as the highest order of the whole criminal procedural law analysed in the context of Article 1(1), Article 2(1), Article 20(3), Article 101(1), Article 103(1) of the German Constitution (GG) and Article 6(1) of the Convention.[32] As the German comments on this ruling emphasize, inciting someone, in a way for which the State is responsible, to commit a criminal act in order to subsequently prosecute and punish him or her for that very act is an unacceptable way of violating human dignity and freedom of action

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[28] *Teixeira de Castro v Portugal*, No. 25829/94 (1998).

[29] *Teixeira de Castro v Portugal*, op. cit., § 36.

[30] *Teixeira de Castro v Portugal*, op. cit., § 33.

[31] *Teixeira de Castro v Portugal*, op. cit., § 38.

[32] Cf. Kulesza, C., 'Czynności operacyjno-rozpoznawcze a zasada rzetelnego procesu w orzecznictwie Trybunału w Strasburgu i sądów polskich', *Przegląd Policyjny*, 2008, Vol. 90, No. 2, pp. 49–67, (here: pp. 52–56).

– it becomes the subject of crime-fighting tactic. In a material sense, there are no pending preparatory proceedings against him or her, but rather proceedings of a police state aimed at excluding the suspect from the circle of citizens.[33]

In the case-law of the ECtHR relating to the institution of police agents in the German trial, an important role was played by the judgement of the Grand Chamber of the ECtHR of 23 October 2014 in the case of *Furcht v Germany*[34] in which the Court formulated substantive criteria for assessing when the actions of police officers making controlled purchases were passive and when they took the form of incitement and entrapment to crime. It pointed out that police incitement to a crime occurs when police officers do not confine themselves to investigating criminal activities in an essentially passive manner, but exert influence on an individual to induce him or her to commit a crime that would not otherwise have been committed, so as to make it possible to establish whether a crime has been committed, i.e. to obtain evidence and initiate criminal proceedings. In the Court's view, the first criterion for determining whether an investigation was carried out 'essentially passively' is to examine the reasons for the use of classified operational activities and the behaviour of the authorities carrying out such activities, namely whether there were objective suspicions that the applicant was involved in criminal activities or was willing to commit a crime.[35] The ECtHR referred to its case-law according to witch the national authorities had no reasonable cause to suspect that the person was previously involved in drug trafficking when the person had no criminal record, no prosecution was initiated against that person and there were no indications that he was willing to engage in drug trafficking before contacting the police. It added that, depending on the circumstances of the specific case, the indication may be provided by prior criminal activity or intention to commit a criminal act: the applicant's knowledge of current drug prices and the possibility of obtaining the drugs in a short period of time, as well as the financial gain the applicant makes in such a transaction. The Court then examined whether the applicant was under pressure to commit the crime. In drug-related cases, it was found that abandonment of a passive attitude by law enforcement agencies should be associated with behaviours such as taking the initiative in dealing with the applicant, renewing the proposal despite an initial refusal, constant hurrying, increasing the price above average and invoking the applicant's sympathy and withdrawal symptoms. In applying the above criteria, the Court imposed on the authorities the burden of proving that there was no incitement to commit the crime, with the proviso that the applicant's claims were not entirely unreliable. In practice, the authorities may not comply with the burden of proof if no formal authorisation has been issued and no control of a classified operation has been carried out.[36] Against the background of the facts of the case, the Court noted that, at the time of the applicant's first contact with undercover officers in November 2007, there was no objective suspicion that he was involved

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[33] Herzog, F., 'Infiltrativ-provokatorische Ermittlungsoperationen als Verfahrenshindernis', *Strafverteidiger*, 2003, No. 7, pp. 410–412.

[34] *Furcht v Germany*, No. 54648/09 (2014).

[35] *Furcht v Germany*, § 49–52.

[36] *Furcht v Germany*, § 53.

in drug trafficking, he had no criminal record, there was no ongoing investigation against him and the police became interested in him as a good contact with another person (S). In examining whether the applicant was subject to covert pressure, the Court, on the basis of documentation gathered by the district court and the applicant's own explanations, found that officials took care not to propose specific illegal trade transactions or specific types or quantities of drugs before the applicant and S. took the first step. However, the Court noted that the applicant, after being contacted by undercover officer P. on 1 February 2008, explained to him that he was no longer interested in participating in drug trafficking, and yet the officer contacted the applicant again on 8 February 2008 and persuaded him to continue arranging drug sales by S. to undercover officers. With this behaviour against the applicant, the investigating authorities clearly abandoned their passive stance and made the applicant commit the crime.

In the light of all the circumstances of the case, the Court therefore concluded that a confidential measure in the form of an apparent transaction went beyond merely a passive investigation of pre-existing criminal activity and boiled down to police incitement within the meaning of the Court's case-law developed on the basis of Article 6(1) of the Convention. The evidence obtained through police incitement was then used in subsequent criminal proceedings against the applicant.[37] It is important in German practice for the ECtHR to recognise that leniency of a national court against a defendant who has been convicted on the basis of evidence obtained as a result of solicitation by secret agents does not mean that the evidence obtained as a result of such persuasion is not acceptable. In view of this ruling, which is limited to leniency for the defendant in such a situation, it should be regarded a violation of Article 6 of the ECHR and therefore the right to a fair trial.[38]

In its judgement in the case of *Furcht v Germany*, it applied the procedural test in principle without any reference to its substance. The broader considerations for this test are contained in one of the recent ECtHR judgments concerning Germany, namely the judgement in case *Akbay and Others v Germany* of 15 October 2020.[39] Referring to previous case-law,[40] the Court stressed that, following the substantive test, a procedural test should be carried out not only when the first test confirms that the applicant was the subject of the instigation, but also when the findings of the Court in the substantive test are ambiguous due to a lack of information in the file, their non-disclosure or contradictions in the interpretation of events by the parties. The Court applies this procedural test to determine whether the national courts took the necessary steps to disclose the facts of the alleged incitement at issue and whether, if the incitement is found (or if the public prosecutor's office has not refuted the allegation of incitement), appropriate conclusions were drawn in accordance with the Convention.[41] Also in this case, although the Court considered

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[37] *Furcht v Germany*, § 54–59.

[38] *Furcht v Germany*, § 68–71.

[39] *Akbay and Others v Germany*, No. 40495/15 and 2 others (2020).

[40] *Matanović v Croatia*, No. 2742/12,(2017), § 134; *Ramanauskas v Lithuania* (No. 2), No. 55146/14 (2018), § 62.

[41] *Akbay and Others v Germany*, § 120–124.

that the German courts had followed the correct procedure for hearing the complaint of entrapment, it considered, as in the *Furcht* case, the judgement which, when the charge was confirmed, was limited to leniency for the defendant was a violation of the right to a fair trial under Article 6 of the ECHR.[42]

It is worth adding that in both the *Furcht* and *Akbay* cases, the Court found it incompatible with the requirements of a fair trial for the court to allow the merits of proof of the defendant's confession of guilt as a result of unlawful entrapment.

In order to find a plane of comparison with the subjective test adopted in the US trial described above, it is necessary to go beyond the case-law of the ECtHR on German cases and to try the essential features of the substantive test of incitement adopted also in other ECtHR judgements.[43]

We should also note here the ECtHR case-law as regards private persons who are not police officers but co-operate with the police in the criminal trial. As for the complaints against the United Kingdom heard by the Court of Justice in Strasbourg, the ruling of the Grand Chamber of the ECtHR of 27 October 2004 in *Edwards and Lewis v the United Kingdom*[44] [45] deserves attention. In resolving this case, the ECtHR referred to the *Teixeira de Castro* ruling, but stressed that it cannot determine whether or not the applicants were the victims of police *entrapment*, as the relevant information had not been disclosed by the prosecution, as would be required by the principle of a fair trial, contained in Article 6(1) of the Convention. The Court was, thus, unable to strike a balance between the public interest requiring the secrecy of the proceedings and the requirements of an effective defence. Throughout the course of the trial in the various instances, the defence had been unable to address the covert evidence of the prosecution and lead the judge to conclude that applicants were accused of "*state created crime*". Therefore, the ECtHR considered that the procedure used to address the issue of disclosure of evidence and entrapment met the requirements of ensuring an adversarial process and equality of arms and included guarantees of respect for the interests of the defendant and concluded that there had been a violation of Article 6 § 1 of the Convention.[46]

I. The analysis of the current case-law makes it possible to identify, among other things, the following circumstances examined in the *substantive test*:
   a) Circumstances relating to the accused person and his or her predisposition to commit a crime. In particular, it must be established whether there were grounds for suspecting him of the crime for which he was provoked and, consequently, whether there is evidence that the crime would have been committed without operational police action. The Court emphasises that the state of a person's suspicion or predisposition to commit a criminal offence

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[42] *Akbay and Others v Germany*, § 140–142.

[43] Cf. Lach, A., *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Wolters Kluwer, Warszawa, 2018, pp. 185–195, and the ECtHR's judgments cited therein.

[44] *Edwards and Lewis v the United Kingdom*, No. 39647/98 and 40461/98 (2004).

[45] *Edwards and Lewis v the United Kingdom*, § 58.

[46] *Edwards and Lewis v the United Kingdom*, § 59.

must be assessed in relation to the moment when the secret agents engaged in operational activities. Domestic courts may prove an accused person's predisposition to commit a criminal offence, for example by relying on the accused person's criminal history and whether there is sufficient suspicion to order infiltration of a person in accordance with national law. For example, in *Ramaunskas* v *Lithuania*,[47] where the Court found a violation of the principle of a fair trial by considering corruption offences committed by the prosecutor as provoked by the police when there was no information that he had accepted bribes beforehand and that the police took action on their own initiative and obtained subsequent approval from their superiors. In contrast, there was no breach of the principle of a fair trial in the *Calabro*,[48] case, as the undercover officer's action boiled down to informing about his willingness to purchase large quantities of drugs, and then the applicant contacted the defendant himself. In the *Volkov and Adamskiy v Russia*[49] case, the Court also found the actions of police officers who called the applicants and asked them about the possibility of installing certain computer programs, and the applicants brought unlicensed programs for installation on their own initiative.

b) Circumstances relating to the infiltration activities of the officers themselves, including their compliance with the requirements of national law to initiate and conduct them, their activity in inducing directly the applicant or persons associated with him or her. The Court stresses that national law must provide for precise and appropriate conditions for the ordering of operational activities with adequate control (by recommending judicial review) (see e.g. *Veselow and Others v Russia*[50]).

II. With regard to the *procedural test*, the Court requires that domestic courts should effectively examine the allegation of entrapment by the applicant, maintaining an open and adversarial procedure and safeguarding the defendant's rights of defence. For example, it considered the control of the courts in relation to a number of illegal transactions involving counterfeit currency in *Grba v Croatia*,[51] ineffective, as it was limited to the domestic court's finding that there was no indication that the officials incited the defendant to commit the crime "in the sense that they offered him an advantage or provided him with gifts or the like". In this case, the ECtHR did not consider that the applicant was wrongly convicted of counterfeiting currency, but concluded that the procedure involving police entrapment was unreliable, as it led to more severe punishment of the applicant for committing repeated acts of currency counterfeiting.

The current case-law of the ECtHR emphasises the need to apply both tests (substantive and procedural) together, especially in situations where there is no formal procedure for conducting classified operations in a given national system.

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47 *Ramaunskas v Lithuania (Grand Chamber)*, No. 74420/01 (2008), § 62–74.
48 *Calabro v Italy and Germany*, No. 59895/00 (2002), § 2.
49 *Volkov and Adamskiy v Russia*, No. 7614/09, 30863/10, (2015), § 40–46.
50 *Veselow and Others v Russia*, No. 23200/10, 24009/07 and 556/10, (2012) § 126–128.
51 *Grba v Croatia*, No. 47074/12 (2017), § 116–126.

For example in *Mills v Ireland*,[52] the Court, applying the substantive test, found that the role of the police was "essentially passive" and that the behaviour of police officers providing the applicant with a 'mere opportunity' to buy drugs did not go beyond entrapment or incitement to commit the crime. The ECtHR rejected the complaint on the grounds that the proceedings before the court of first instance also met a standard of fairness, as it was adversarial, the applicant's defender had the opportunity to interview police witnesses and, as a result, all relevant information about the conduct of the controlled purchase operation was clarified before the court.

CONCLUSIONS

To sum up the considerations relating to the US criminal trial, it should be noted that judicial decisions allow for active forms of police entrapment, but based mostly on a subjective understanding of entrapment defence requires, in order for the actions of federal agents or the police to be based on pre-existing predispositions to commit a crime. These predispositions (which are different in the case-law of federal courts) must therefore have existed before the agents came into contact with the person being provoked, and the agents' actions merely reinforced it and ultimately led to the commission of the crime with which the person was later charged Thus, under the entrapment rule, entrapment is illegal if a police or federal officer, or a person cooperating with him, encourages or causes another person to take actions that bear the hallmarks of a crime in order to obtain evidence of a crime. However, the doctrine emphasises the difficulties faced by defendants who, even at the stage of the court hearing before the trial, have to prove that they were intensively provoked by the police or federal agents to commit a crime in case of entrapment defence. When significant doubts arise in this regard, it is incumbent on law enforcement authorities to demonstrate that the defendant was not provoked to commit a crime committed by state officials.

Thus, the US criminal justice system must be recognised as containing far-reaching guarantees for the defendant, which are not found in continental European systems. According to the entrapment doctrine, which is understood as a justification to the behaviour of the perpetrator provoked by a secret agent, if the perpetrator was brought to the scene of a crime by a secret agent in a way that violates the law, he or she should be acquitted even if the alleged (and proved to him or her by means of entrapment) crime was committed.[53] Moreover, we should not forget the fruit of the poisonous tree doctrine of the American trial, which prohibits the use not only of direct but also indirect illegal evidence.[54]

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[52] *Mills v Ireland*, No. 50468/16 (2017), § 23–25.

[53] Cf. Gontarski, W., *Granice legalności prowokacji policyjnej. Glosa do wyroku ETPC z dnia 5 lutego 2008 r.*, 74420/01, LEX/el. 2016.

[54] Cf. Thaman, S., 'Fruits of the Poisonous Tree in Comparative Law', *Southwestern Journal of International Law*, 2010, Vol. 16, No. 2, pp. 334–384, (here: pp. 334–337).

In turn, the analysis of the case-law of the ECtHR gives rise to the question whether the substantive incitement test adopted in recent rulings includes elements of both the subjective *entrapment defence* test developed by the US Supreme Court (and by the federal courts) and the objective test (related to the assessment of the intensity of the actions of the police and federal agents inciting the defendant to commit the crime with which he or she is subsequently accused). It seems that the Strasbourg standard in this regard appears to be more expansive and appears to place greater emphasis on the assessment of police actions, in particular their compliance with the statutory criteria for the admissibility of special operations under cover in those legal systems which provide for such premises. The ECtHR also regards as illegal police provocation of defendants through or with the help of third parties (in particular police informants, e.g. *V-Leute* in Germany),[55] which can in a sense be referred to the American doctrine of *derivative entrapment defence*. The Court also emphasises the role of control mechanisms for the management of undercover police operations, with a clear preference for preliminary judicial review. However, as for example, the *Akbay* or *Furcht* cases, show, judicial control is not always effective, which is mainly due to the judges' lack of knowledge of the operations requested by the police and their unfamiliarity with the specific nature of police work.

The fundamental difference between the US and European systems (apart of course, from the qualitative differences between common and civil law systems, e.g. in the field of evidence law) in this issue should be sought in the consequences of considering police entrapment as illegal evidence. The Strasbourg standard (which also applies to the German system) does not presuppose the automatic elimination of such evidence, but allows for the possibility of convalidating the negative consequences of such illegal evidence in court proceedings when the Court finds that "the trial as a whole was fair", in particular when the evidence from illegal entrapment did not constitute an important basis for the defendant's conviction. This conception of procedure seems to be manifest precisely in the procedural test, which is based both on an examination of the fairness of the court proceedings verifying the claimed use of unauthorised operational methods by the police against him and, on the other hand, on the adequacy of the effects of the court's finding that the allegations are justified. As stated ECtHR in *Akbay* case: "While the Court will generally leave it to the domestic authorities to decide what procedure must be followed when the courts are faced with a plea of incitement, it has indicated that the domestic courts deal with an entrapment complaint in a manner compatible with the right to a fair hearing where the complaint of incitement constitutes a substantive defence, places the court under a duty to either stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment or leads to similar consequences."[56] Thus, in the light of the Strasbourg standard, the prohibition on the use of evidence of illegal provocation (incitement to crime) is not absolute, because if such a breach of the defendant's right to a fair trial does not

[55] Cf. the previously cited Texeira and Akbay case.
[56] Akbay and Others, op. cit., § 122.

have a decisive influence on the outcome of the case, it can be compensated in court proceedings and then the applicant can "lose his status as a victim of a breach of Article 6(1) of the ECHR" as a result of a decision by a domestic court adequately compensating for that breach. If however, the inducement occurs in violation of the free will of the person being provoked in the form of a breach of Article 3 of the Convention – the trial is automatically considered unreliable, regardless of whether the evidence of the inducement has determined the conviction or the severity of the sentence.[57] It should be added that recent case-law of the ECtHR includes in the absolute prohibition of Article 3 of the Convention also evidence from the confessions of the accused obtained by torture by third parties, not connected with the law enforcement authorities.[58]

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[57] Gontarski, W., *Granice legalności prowokacji policyjnej,* op. cit.

[58] *Ćwik v Poland*, No. 31454/10 (2020), § 68.

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INADMISSIBILITY OF POLICE ENTRAPMENT EVIDENCE IN THE US AND GERMAN TRIALS IN THE LIGHT OF THE CASE-LAW OF THE US SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

Summary

The aim of this paper is to compare the American and European standards of the inadmissibility of evidence of unlawful police entrapment. In US criminal procedure, which permits active forms of entrapment, the US Supreme Court and most federal courts apply a subjective test for the entrapment defence, focusing on the predisposition of the person provoked to commit the crime and, less often, an objective test examining the legality of government agents' actions. The Strasbourg standard (including German cases) is based on two tests: a substantive one (examining both the predisposition of the person being provoked and the legality of the police actions) and a procedural one, which consists in verifying the reliability of the national courts' recognition of the charge of incitement to commit a crime by the police The basic difference between the analysed standards is to be found in the effects of illegal entrapment. In the US system, it is a justification to the perpetrator's responsibility for a crime committed as a result of entrapment, and the Strasbourg standard allows for sanctioning the negative effects of such illegal evidence to be convalidated in criminal trial when the Court considers that "the trial as a whole was fair".

Keywords: entrapment, fair trial, Germany, USA, European Court of Human Rights, US Supreme Court

NIEDOPUSZCZALNOŚĆ DOWODU Z PROWOKACJI POLICYJNEJ W PROCESIE AMERYKAŃSKIM I NIEMIECKIM W ŚWIETLE ORZECZNICTWA SĄDU NAJWYŻSZEGO USA I ETPCZ

Streszczenie

Celem artykułu jest dokonanie próby porównania standardu amerykańskiego i standardu europejskiego w zakresie niedopuszczalności dowodów z nielegalnej prowokacji policyjnej. Mimo jakościowych różnic pomiędzy systemem common law i systemem civil law (opisywanym tu na przykładzie Niemiec) w obu systemach uznano prowokację policyjną za efektywną metodę zwalczania przestępczości, jednakże przyjęto różne standardy jej stosowania. W procesie amerykańskim, która dopuszcza aktywne formy prowokacji zarzut Sąd Najwyższy USA i większość sądów federalnych przy ocenie zarzutu obrony stosuje subiektywny test obrony opartej o zarzut prowokacji, koncentrujący się na predyspozycjach prowokowanej

osoby do popełnienia przestępstwa. Z kolei wypracowany przez orzecznictwo ETPCz (w tym w sprawach niemieckich) standard oceny dopuszczalności dowodów z nielegalnej (przede wszystkim aktywnej) prowokacji opiera się na stosowaniu dwóch testów: materialnego (badającego zarówno predyspozycje prowokowanej osoby jak i legalność skierowanej wobec niej działań policji) jak i procesowego, polegającego na weryfikacji rzetelności rozpoznawania przez sądy krajowe zarzutu podżegania przez policję do przestępstwa. Podstawowej różnicy między analizowanymi standardami należy szukać w skutkach nielegalnej prowokacji. W systemie amerykańskim stanowi ona kontratyp odpowiedzialności sprawcy za przestępstwo popełnione wskutek prowokacji, zaś standard strasburski dopuszcza sanowanie negatywnych skutków takiego nielegalnego dowodu w postępowaniu sądowym wtedy gdy Trybunał uznaje, że „proces sądowy oceniany jako całość był rzetelny", zaś dowód z nielegalnej prowokacji nie był istotny dla skazania oskarżonego.

Słowa kluczowe: prowokacja, prawo do sądu, Niemcy, USA, Europejski Trybunał Praw Człowieka, Sąd Najwyższy USA

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ACCELERATED PROCEEDINGS IN CRIMINAL CASES VIEWED FROM COMPARATIVE LAW PERSPECTIVE

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INTRODUCTION

The topic of accelerated proceedings is undoubtedly an issue that is relatively often discussed in literature.[1] The interest of the doctrine in this special mode of criminal

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1 There are numerous threads discussed in the doctrine in connection with the legal nature of this mode that can be pointed out (see e.g. Eichstaedt, K., 'Postępowanie przyspieszone', *Prokuratura i Prawo,* 2007, No. 6, pp. 73–89; Nowicki, K., 'Postępowanie przyspieszone. Uwagi de lege lata i de lege ferenda', in: Bogunia, L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. XXIII, Wrocław, 2008, pp. 69–78; Wiliński, P., 'Postępowanie przyspieszone – tzw. sądy 24–godzinne', in: H. Kołecki (ed.), *Kryminalistyka i nauki penalne wobec przestępczości. Księga pamiątkowa dedykowana Prof. M. Owocowi*, Poznań, 2008, pp. 87–95) and its modifications resulting from the successive amendments (see e.g. Grzegorczyk, T., 'Nowy model postępowania przyspieszonego w sprawach karnych', *Prokuratura i Prawo,* 2010, No. 4, pp. 6–26; Grzeszczyk, W., 'Przebieg postępowania przyspieszonego – po nowelizacji k.p.k.', *Prokuratura i Prawo,* 2007, No. 4, pp. 34–44; Kasiński, J., 'Usprawnienie postępowania przyspieszonego w wyniku nowelizacji kodeksu postępowania karnego', in: Kasprzak, J., Młodziejowski, B. (eds.), *Wybrane problemy procesu karnego i kryminalistyki*, Olsztyn, 2010, pp. 165–175; Obuchowski, Sz., 'Postępowanie przyspieszone w świetle lipcowej nowelizacji Kodeksu postępowania karnego', *Palestra*, 2016, No. 11, pp. 64–79). There are also detailed issues discussed in connection with e.g. the position of the accused and the right to counsel (see e.g. Sowiński, P.K., 'Szybciej, ale czy lepiej? Ograniczenie prawa oskarżonego do obrony wynikające z "odmiejscowienia" niektórych czynności procesowych w postępowaniu przyspieszonym', in: Kopeć, M. (ed.), *Prawnokarna ochrona imprez sportowych w związku z Euro 2012*, Lublin, 2012, pp. 199–206; Zgryzek, K., 'Prawo do obrony w postępowaniu przyspieszonym – krok wstecz', in: Krajewski, K. (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. urodzin Profesora Andrzeja Gaberle*, Kraków, 2007, p. 335 et seq.), the rights of the aggrieved (see e.g. Gliniecki, W., 'Przyspieszanie i usprawnianie postępowania karnego a ochrona interesów pokrzywdzonego', *Prokuratura i Prawo,* 2007, No. 2, pp. 59–69; Kosowski, J., 'Pouczenie pokrzywdzonego w postępowaniu przyspieszonym', in: Gil, D. (ed.), *Gwarancje praw pokrzywdzonych w postępowaniach szczególnych*, Warszawa, 2012, p. 135 et seq.;

procedure is understandable at least due to the fact that the main reduction of procedural activities which takes place in its course provokes a discussion about guarantee related issues. Doubts can in particular concern whether *de lege lata* the mode of a proceeding proposed in the Chapter allows for maintaining a difficult to reach compromise between the contradictory, as a rule, values in the form of the principle of an expeditious proceeding and the right to counsel for the defence.

However, the doctrinal considerations rarely refer to the experience and legislations of other countries. It is certainly an interesting research perspective, especially if it takes into consideration that the trends to accelerate penal proceedings are evident not only in Poland. Therefore, the article aims to present the Polish accelerated mode from the comparative law perspective. First of all, the Polish regulations of the mater and then the solutions functioning in selected countries will be discussed. The content limit for the article does not allow for a complex discussion of the model of an accelerated proceeding so the main attention is drawn to the conditions for its application. The comparison of the conditions for admissibility of the accelerated mode in different countries makes it possible to best assess the criteria that decide on the possibility of reducing the standard mode, and this way improve and accelerate the process. However, the scope of the reduction, i.e. the issues in particular connected with the way of conducting a proceeding within the accelerated mode, is left outside the sphere of the discussion.

The article absolutely does not aspire to be a complete comparison. The conduction of comparative legal research in compliance with methodological requirements for

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Paluszkiewicz, H., 'Sytuacja pokrzywdzonego w postępowaniu przyspieszonym', in: Gil, D. (ed.), *Gwarancje praw pokrzywdzonych w postępowaniach szczególnych*, Warszawa, 2012, pp. 125–134; Woźniak, K.M., 'Pokrzywdzony występkiem chuligańskim a model postępowania przyspieszonego', in: Gil, D. (ed.), *Gwarancje praw pokrzywdzonych w postępowaniach szczególnych*, Warszawa, 2012, pp. 147–155), prospects of law enforcement bodies (see e.g. Jaros-Skwarczyńska, J., Skwarczyński, H., 'Postępowanie przyspieszone jako nowy instrument w pracy organów ścigania i sądów', *Edukacja Prawnicza*, 2007, No. 1, pp. 3–10; Jaros-Skwarczyńska, J., Skwarczyński, H., 'Postępowanie przyspieszone jako nowy instrument w pracy organów ścigania i sądów', *Monitor Prawniczy*, 2007, No. 2, pp. 63–74), standardu rzetelnego procesu (Kala, D., 'Postępowanie przyspieszone a standardy rzetelnego procesu', in: Kala, D. (ed.), *Praworządność i jej gwarancje*, Warszawa, 2009, pp. 83–98; Paprzycki, L.K., 'Rzetelność postępowania przyspieszonego', in: Gerecka-Żołyńska, A., Górecki, P., Paluszkiewicz, H., Wiliński, P. (eds.), *Skargowy model procesu karnego. Księga ofiarowana Prof. S. Stachowiakowi*, Warszawa, 2008, pp. 295–305), consociationalism (see e.g. Paluszkiewicz, H., 'Kilka uwag o konsensualizmie w postępowaniu przyspieszonym', in: Przyborowska-Klimczak, A. and Tarach, A. (eds.), *Iudicium et Scientia. Księga Jubileuszowa Prof. R. Kmiecika*, Warszawa, 2011, pp. 303–314), hooligan-like nature of an act (Darmorost--Sierocińska, E., 'Zwalczanie przestępczości o charakterze chuligańskim – powrót do przeszłości drogą ku przyszłości?', *Gazeta Sądowa,* 2006, No. 2, pp. 13–18; Wróbel, W., 'Tryb przyspieszony i występek chuligański w projekcie ustawodawczym', *Prokurator*, 2006, No. 3, pp. 12–23), or the practice of law application (see e.g. Cychosz, P., Zimmermann, S., 'Funkcjonowanie nowego trybu przyspieszonego. Sprawozdanie z badań', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2008, No. 1, pp. 45–80; Dziedzic, K., 'Postępowanie przyśpieszone na przykładzie Sądu Rejonowego w Kłodzku', *Przegląd Więziennictwa Polskiego*, 2008, No. 61, pp. 155–164; Kaucz, A., Myrna, B., 'Postępowanie przyspieszone i kilka uwag na tle jego stosowania', in: Bogunia, L. (ed.), *Problemy prawa karnego*, Vol. XXV, Wrocław, 2009, pp. 175–187; Momot, S., Ważny, A., 'Postępowanie przyspieszone w praktyce', *Prokuratura i Prawo*, 2009, No. 11–12, pp. 110–126; Raczak, Z., 'Funkcjonowanie sądów 24-godzinnych w praktyce', *Przegląd Sądowy*, 2009, No. 1, pp. 138–150).

research into foreign law would require a comprehensive, multifaceted analysis not limited to legislation and case law.[2] It would be necessary to take into account the biggest possible number of foreign legal systems[3] as well as the research into the application of the institutions analysed.[4] The article takes into consideration legal regulations of selected countries mainly based on the differences between the legal systems they represent, on the one hand, and availability of sources, on the other hand.

1. ACCELERATED PROCEEDING IN THE POLISH LAW

In the Polish legal system at present, an accelerated proceeding functions as the first stage proceeding because the provision on standard proceedings is applied to it provided that the provisions of Chapter 54a CPP do not stipulate otherwise. Thus, if a given matter has not been separately regulated in the provisions directly concerning accelerated proceedings, a court shall apply the provisions on standard proceedings.

The content of the provision of Article 517b § 1 CPP stipulates that the application of the accelerated mode is based on a discretionary decision. If specified categories of matters "may be" adjudicated on within this proceeding, it means it is optional in nature. It also concerns offences that are subject to private prosecution (Article 517b § 2 CPP).[5] The possibility of conducting an accelerated proceeding depends on a few conditions in conjunction. First of all, its application is admissible only in specified categories of cases, which determines its objective scope. These are cases that are subject to investigation and private prosecution provided they are hooliganism-related matters. Apart from that, admissibility of accelerated proceedings requires that a perpetrator is caught red-handed or directly after the commission of an offence, arrested and brought before a court, as well as a motion to apply an accelerated proceeding is lodged. On the other hand, the need to supplement an accelerated proceeding and the forecast of a penalty exceeding two years' imprisonment excludes the use of the accelerated mode.

Admissibility of accelerated proceedings depends first of all on the adopted legal classification of an act because it determines the scope of cases that are subject to investigation.[6] The content of Article 517b § 2 CPP additionally stipulates that an accelerated proceeding shall be conducted in the public prosecution mode and in case

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[2] Jakubowski, J., 'Z problematyki metodologicznej badań prawnoporównawczych', *Państwo i Prawo*, 1963, No. 7, p. 7.

[3] Tokarczyk, R.A., *Komparatystyka prawnicza*, Kraków–Lublin, 1997, p. 174.

[4] Rybicki, M., 'Badania prawnoporównawcze. Ich znaczenie dla rozwoju nauk prawnych i dla praktyki', in: Łopatka, A., *Metody badania prawa*, Wrocław–Warszawa–Kraków–Gdańsk, 1973, p. 37.

[5] The obligatory accelerated mode is stipulated in special provisions – see Article 64 fo the Act of 20 March 2009 concerning the security of mass events (consolidated text: Journal of Laws of 2019, item 2171).

[6] For a catalogue of cases conducted in the form of investigation see Article 325b CPP and Article 309 CPP.

of offences that are subject to private prosecution provided they are hooliganism-related.[7] The provision does not lay down a norm imposing an obligation to apply

[7] The term has already firmly entered criminal law regulations, however, its meaning constantly evolved and often raised interpretational doubts. The number of publications devoted to the issue of hooliganism-related nature of acts confirms how controversial it is; see in particular: Buchała, K., 'Glosa do uchwały SN z dnia 18 września 1975 r., VI KZP 2/75, *Państwo i Prawo,* 1976, issue 8–9, p. 255; Ćwiąkalski, Z., Tarnawski, M., 'Glosa do uchwały SN z dnia 18 września 1975 r., VI KZP 2/75', *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1976, issue 10, p. 438; Skupiński, J., 'Glosa do wyroku SN z dnia 17 lipca 1978 r., Rw 252/78', *Państwo i Prawo,* 1979, issue 7, p. 175; Morawski, J., *Przestępczość o charakterze chuligańskim młodocianych*, Warszawa, 1975; Morawski, J., 'Przyczynek do etiologii przestępczości chuligańskiej', *Problemy Alkoholizmu*, 1970, No. 3, p. 7 et seq.; Morawski, J., 'Chuligaństwo – anatomia pojęcia', *Gazeta Sądowa i Penitencjarna*, 1970, No. 16, p. 3 et seq.; Pepłowski, J., 'Chuligański charakter czynów według naszego ustawodawstwa i niektórych krajów socjalistycznych', *Zeszyty Naukowe Wyższej Szkoły Oficerskiej w Szczytnie*, 1977, No. 4, p. 794; Kubala, W., 'Działanie w rozumieniu powszechnym bez powodu lub z oczywiście błahego powodu', *Wojskowy Przegląd Prawniczy*, 1977, No. 1, p. 6 et seq.; Kubala, W., 'Znamię "publicznie" w ujęciu kodeksu karnego', *Nowe Prawo*, 1976, No. 3, p. 374 et seq.; Kubala, W., 'Glosa do wyroku SN z dnia 7 maja 1974 r., Rw 236/74', *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1975, issue 9, p. 284 et seq.; Prusak, F., Sarnowski, L., Skibicki, J., *Czynniki wyróżniające przestępstwa o charakterze chuligańskim*, Bydgoszcz, 1970; Osiadacz, Z., 'Przestępstwa o charakterze chuligańskim rozpoznawane w trybie przyspieszonym', *Zeszyty Problemowo-Analityczne*, 1971, No. 20, p. 67 et seq.; Szwacha, J., 'Chuligański charakter przestępstwa według nowego kodeksu karnego', *Nowe Prawo*, 1970, No. 1, p. 32 et seq.; Szwacha, J., 'Pojęcie działania "publicznie" i działania "w miejscu publicznym"', *Problemy Praworządności,* 1972, No. 9, p. 6 et seq.; Szwacha, J., 'Pobudki przestępstwa o charakterze chuligańskim', *Nowe Prawo*, 1966, No. 10, p. 1182; Szwacha, J., 'Sporne problemy na tle stosowania ustawy z dnia 22 maja 1958 r. o zaostrzeniu odpowiedzialności karnej za chuligaństwo', *Nowe Prawo*, 1965, No. 11, p. 1225 et seq.; Wierzbicki, W., 'Chuligaństwo w przepisach prawa karnego materialnego i procesowego', *Służba Milicji Obywatelskiej*, 1970, No. 3, p. 343; Wolter, W., 'Glosa do uchwały SN z dnia 10 sierpnia 1972 r., U 3/72', *Państwo i Prawo,* 1973, issue 2, p. 125 et seq.; Kabat, A., 'Glosa do uchwały SN z dnia 27 sierpnia 1972 r., VI KZP 57/71', *Nowe Prawo*, 1973, No. 6, p. 971 et seq.; Frankowski, S., 'Glosa do postanowienia SN z dnia 29 grudnia 1969 r., Rw 1415/69', *Państwo i Prawo,* 1972, issue 1, p. 166; Komorniczak, W., 'Czy istnieją "pobudki chuligańskie"?', *Gazeta Sądowa i Penitencjarna*, 1970, No. 24, p. 7; Bojarski, T., 'Glosa do uchwały SN z dnia 20 września 1973 r., VI KZP 26/73', *Państwo i Prawo,* 1974, issue 6, p. 174 et seq.; Kowalska, L., 'Zaostrzenie odpowiedzialności karnej za przestępstwa o charakterze chuligańskim w odniesieniu do nieletnich', *Nowe Prawo*, 1968, No. 11, p. 1649 et seq.; Kostrzewa, H., 'Rozważania na temat chuligaństwa', *Wojskowy Przegląd Prawny*, 1965, No. 2, p. 167 et seq.; Wizelberg, Z., 'Kryteria czynu chuligańskiego na tle orzecznictwa sądowego', *Nowe Prawo*, 1965, No. 7–8, p. 787 et seq.; Wizelberg, Z., 'W poszukiwaniu formuły prawnej chuligaństwa', *Nowe Prawo*, 1966, No. 2, p. 207 et seq.; Wizelberg, Z., 'Kluczowe zagadnienia interpretacyjne ustawy antychuligańskiej', *Palestra*, 1966, No. 2, p. 39; Szerer, M., 'Sąd Najwyższy o chuligaństwie', *Palestra,* 1965, No. 7–8, p. 84 et seq.; Frankowski, S., 'Przestępstwo o charakterze chuligańskim', *Państwo i Prawo*, 1965, issue 8–9, p. 314 et seq.; Kubec, Z., 'Chuligaństwo w świetle wytycznych Sądu Najwyższego z dnia 11 czerwca 1966 r.', *Problemy Alkoholizmu,* 1966, No. 11–12, p. 8 et seq.; Młynarczyk, Z., 'Z badań nad problematyką przestępczości o charakterze chuligańskim', *Problemy Kryminalistyki*, 1967, No. 66, p. 173 et seq.; Falandysz, L., 'Czynnik nietrzeźwości w przestępstwie o charakterze chuligańskim', *Problemy Alkoholizmu,* 1967, No. 8, p. 9 et seq.; Kempara, E., 'Kilka uwag o chuligańskim charakterze przestępstw przeciwko karności', *Wojskowy Przegląd Prawny*, 1968, No. 2, p. 158; Bereżnicki, M., 'Działanie z błahego powodu jako przesłanka warunkująca chuligański charakter czynu', *Palestra*, 1968, No. 6, p. 50; Góral, R., 'Czy chuligaństwo dorosłych jest fikcją prawną?', *Problemy Alkoholizmu*, 1968, No. 7–8, p. 5 et seq.; Rypiński, A., 'Chuligaństwo – przestępstwo kwalifikowane', *Gazeta Sądowa i Penitencjarna*, 1969, No. 13, p. 3 et seq.; Hanausek, T., 'Chuligaństwo jako potencjalny czynnik kryminogenny', *Problemy Kryminalistyki,* 1969, No. 77, p. 33 et seq.

the accelerated mode but only obliges to change the mode of prosecution into the public one in case of a decision to instigate an accelerated proceeding. At the same time, it is rightly noticed that the adoption of different interpretation would lead to a conclusion difficult to approve of, i.e. that an accelerated proceeding is obligatory in cases of lesser significance and optional in more serious cases.[8] In such situations, it is not necessary to prove the public interest in the application of public prosecution; it happens *ex lege* (Article 60 CPP). Like in case of a prosecutor's interference with private prosecution, in accordance with Article 60 CPP, the instigation of an accelerated proceeding in cases subject to the private prosecution mode does not depend on the will of the aggrieved. However, the recognition of a hooliganism-related act subject to private prosecution is not sufficient to apply the accelerated mode. In addition, the occurrence of other special conditions under Article 517b § 1 CPP is required.

The next condition for the application of the accelerated mode is the apprehension of a perpetrator red-handed or just after the commission of an offence. The *ratio legis* for such a solution consists in an implicit assumption that the circumstances of an act commission and the guilt of a perpetrator *in flagrante delicto* should not raise any doubts, and that is why it should be made possible to accelerate and deformalize a trial.[9] a citizen's apprehension is a coercive measure laid down in Article 243 CPP. The provision authorises citizens to catch a person red-handed or while chasing him/her directly after the commission of an offence provided that this person may hide or it will not be possible to identify him/her (Article 243 § 1 CPP). The apprehended person should be immediately turned over to the police (Article 243 § 2 CPP).

Therefore, a doubt is raised whether the provision of Article 517b § 1 CPP modifies the general rules under Article 243 CPP in the way that the apprehension within the accelerated mode is possible despite the lack of fear that a person can hide or it will not be possible to identify him/her, or whether this apprehension requires the fulfilment of all the conditions under Article 243 CPP. The second idea is more convincing. Firstly, unlike in case of arrest (Article 244 § 1 CPP), the legislator did not stipulate the possibility of apprehension only due to the occurrence of a condition for conducting an accelerated proceeding against a person. Thus, since the condition in the form of a need to conduct an accelerated proceeding is limited in statute only to arrest, it cannot be applied to apprehension. Apart from that, it would be difficult to expect a citizen apprehending a perpetrator to have the knowledge of potential

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[8] Hofmański, P., Sadzik, E., Zgryzek, K., *Kodeks postępowania karnego*, Vol. III, 2007, pp. 110–111; Fingas, M., 'Wokół problemu fakultatywności inicjowania trybu przyspieszonego', *Zeszyty Studenckie Wydziału Prawa i Administracji Uniwersytetu Gdańskiego*, 2008, p. 74.

[9] However, the thesis is not obvious, which A. Gaberle points out in: 'Zasada trafnej reakcji na przestępstwo a postępowanie uproszczone, przyspieszone i nakazowe', in: Waltoś, S., Doda, Z., Światłowski, A., Rybak, J., Wrona, Z. (eds.), *Problemy kodyfikacji prawa karnego. Księga ku czci Profesora Mariana Cieślaka*, Kraków, 1993, p. 542 et seq. In dynamic activities that often accompany apprehension, it is in particular difficult to avoid erroneous apprehension of another person than the actual perpetrator – see Jeż-Ludwichowska, M., Kala, D., 'Postępowanie przyspieszone – analiza rozwiązań ustawowych', in: Nowikowski, I. (ed.), *Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi*, Lublin, 2007, p. 223.

possibility of applying this special procedural mode. Apprehension, in accordance with Article 517b § 1 CPP, should meet all the requirements under Article 243 CPP. The opinion has supporters in the doctrine.[10]

It is commonly assumed in the doctrine that apprehension of a perpetrator of an offence red-handed occurs when it takes place the moment an act is being committed (also at the stage of an attempt) or the moment an act is being finished, when a perpetrator is still at the scene (e.g. is obliterating the traces of crime).[11] It does not matter whether it is an offence consisting in a perpetrator's action or omission. Apprehension is also possible "directly after an offence commission". It is a certain modification in relation to the conditions under Article 243 § 1 CPP, which stipulates apprehension red-handed or "during a chase started directly afterwards". In the former case, 'directly' means being close to, without indirect elements[12]; in the latter, it concerns a chase. The scopes of the concepts differ. In Article 517b § 2 CPP, emphasis is placed on the close time link between an act and apprehension, which is understandable due to the essence of the accelerated mode; Article 243 § 1 CPP concerns a direct start of a chase. This means that, *lege non distiguente*, apprehension under Article 517b § 2 CPP may take place as a result of a chase, however, only when a perpetrator is apprehended directly after the commission of an offence.[13] Apprehension directly after the commission of an offence may take place at the scene as well as elsewhere. What matters is a time link, not space.

For lawful apprehension, apart from catching a perpetrator of an offence red-handed or during a chase started directly afterwards, one of two other circumstances must occur: a fear that a person will hide or inability to identify a person. a perpetrator's attempt to run away and a severe penalty for a given offence may justify a fear that a perpetrator will hide. Inability to identify a perpetrator can result from a lack of documents confirming identity or their unreliability. Giving

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[10] Grzegorczyk, T., 'Wniosek o rozpoznanie sprawy w postępowaniu przyspieszonym jako surogat aktu oskarżenia', in: Gerecka-Żołyńska, A., Górecki, P., Paluszkiewicz, H., Wiliński, P. (eds.), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi S. Stachowiakowi*, Warszawa, 2008, p. 103. It is commonly assumed that a person who is involved in the apprehension referred to in Article 571b § 1 CPP is obliged to without delay turn over the apprehended perpetrator to the police, in accordance with Article 243 § 2 CPP. Thus, if the norm under Article 243 § 2 CPP is unanimously applied to apprehension in the mode under Article 517b § 1 CPP, this means that the application of the remaining requirements for apprehension that are not laid down directly in Article 517b § 1 CPP should not raise any doubts, either.

[11] Cieślak, W., 'Postępowanie przyspieszone', in: Prusak, F. (ed.), *System prawa karnego procesowego. T. XIV. Tryby szczególne*, Warszawa, 2015, p. 226; also see Bafia, J., Bednarzak, J., Fleming, M., Kalinowski, S., Kempisty, H., Siewierski, M., *Kodeks postępowania karnego. Komentarz*, Warszawa, 1971, p. 244; Stefański, R.A., *Środki zapobiegawcze w nowym Kodeksie postępowania karnego*, Warszawa, 1998, p. 241; Hofmański, P. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 1999, p. 875. Apprehension red-handed concerns not only an attempt (Article 13 CC) but also preparation (Article 16 CC). Due to rare cases of penalisation of preparation and special conditions for an accelerated proceeding, including a reservation that it concerns cases in which an investigation is conducted, cases of apprehension at the stage of preparation will be very rare in practice.

[12] See Dubisz, S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. I, Warszawa, 2003, p. 236.

[13] Cieślak, W., 'Postępowanie przyspieszone', in: Prusak, F. (ed.), *System prawa karnego…*, op. cit., pp. 228–229.

up apprehension of a person whose identity is unknown carries a risk of failure to detect a real offender.

Regardless of apprehension, Article 244 § 1 *in fine* CPP constitutes self-standing grounds for procedural arrest in the form of conditions for conducting an accelerated proceeding against a suspect. Therefore, arrest in connection with the accelerated mode does not require additional circumstances laid down in Article 244 § 1 CPP, i.e. a justified assumption that an offence was committed and a fear that a perpetrator will run away and hide or obliterate the traces of crime.

A procedural body, before arrest, must therefore comprehensively evaluate the circumstances of a case and first of all state whether conducting a proceeding in the accelerated mode is legally admissible and actually justified. Only then it can apply a coercive measure in the form of arrest. Since self-standing grounds for arrest consist in the occurrence of conditions for the accelerated mode, this circumstance must precede an arrest. Thus, it is inadmissible to make an arrest based on Article 244 § 1 *in fine* CPP, i.e. regardless of other conditions for deprivation of liberty laid down in the provision only in order to probably consider grounds for the application of the special mode in the course of it. Each time, however, an arrest is possible due to justified assumption that an offence was committed and a fear that a given person will hide or obliterate the traces of crime (Article 244 § 1 *ab initio* CPP), and then a decision on the accelerated mode may be taken. Within an arrest under Article 244 § 1 *in fine* CPP, there is a simultaneous recognition of the occurrence of conditions for deprivation of liberty and one of the requirements for instigating the accelerated mode (Article 517b § 1 CPP).

The provision of Article 245 § 2 CPP obliges to apply Article 517j § 1 CPP and the provisions issued based on Article 517j § 2CPP in relation to the arrested person, which means that the arrested person has the right to counsel or a lawyer on duty to provide assistance in connection with accelerated cases.[14]

Under the condition for admissibility of an accelerated proceeding, a person should be arrested and turned over to a court with a motion to hear a case in the accelerated mode within 48 hours. However, the legislator admits the possibility of abandoning arrest and turning over a perpetrator to a court, as well as releasing an arrested perpetrator and settling for obliging him/her in both cases to appear before a court in a fixed venue and time within 72 hours from the moment he/she was apprehended or turned over to the police (517b § 3 CPP). The *ratio legis* for this solution is dictated by the trial economics. It aims to minimise the costs of keeping an arrested person in custody and bringing them to a court in a situation when it is not necessary to conduct a case in the accelerated mode. Taking into consideration that, as a rule, the accused is not obliged to take part in a trial and that most often the circumstance of arrest or apprehension decide that a the accused admits the commission of an offence, giving up custody seems to be justified. What also

[14] Regulation of the Minister of Justice of 23 June 2015 concerning the way of providing the accused with the assistance of counsel in an accelerated proceeding lays down the rules for such service (Journal of Laws of 2015, item 920).

matters is the need to minimise coercive measures and to limit them to those that are procedurally indispensable.

The statute limits the possibility of giving up bringing a perpetrator to a court in case of the commission of a hooliganism-related act. It is admissible exceptionally if the circumstances imply that a perpetrator will appear before a court in a fixed venue and time and will not hamper a proceeding in another way. This limitation is based on the assumption that a hooliganism-related act may influence a perpetrator's procedural attitude. It is due to the fact that if an act is committed with flagrant disregard for the legal order, it is also difficult to exclude a perpetrator's obstructive conduct in the course of a trial.

In literature, it is rightly pointed out that, although the fear of hampering a proceeding as a negative condition for release from custody concerns only hooliganism-related offences, the objectives dictate that it should also be applied to other offences. Release of a perpetrator from custody is justified in any case when there is a justified assumption that a perpetrator, being at large, will appear before a court and will not hamper a proceeding in another unlawful way. However, if there is a fear that a perpetrator will not, regardless of whether it concerns a hooliganism-related act or not, a proceeding under Article 517b § 3 CPP becomes groundless.[15]

Obligatory bringing a perpetrator to a court after apprehension referred to in Article 517b § 1 CPP may also be abandoned provided that a perpetrator's participation in all court's activities in which he/she has the right to participate is ensured; in particular, it concerns giving explanations with the use of technical devices that make it possible to conduct those activities at a distance but with the simultaneous direct broadcast of vision and sound (Article 517b § 2a CPP).[16]

A specific condition for admissibility of the accelerated mode is a forecast of a penalty that can be imposed. The legislator did not express it explicitly. Article 517g § 3 CPP only indicates that if based on the circumstances revealed after a trial started, a court forecasts a possible penalty exceeding two years' imprisonment, it shall decide to apply a preventive measure and refer the case to a prosecutor in order to conduct a preparatory proceeding in accordance with general rules. The situation unambiguously excludes the possibility of a further accelerated proceeding. That is why the forecast of a penalty is sometimes treated as a negative condition for this mode.[17]

Although this provision concerns the stage after the initiation of a trial and circumstances revealed in the course of it, the literature rightly points out that it would be hard to approve of a situation in which a similar assessment was not carried out at the earlier stages of a proceeding, i.e. by a police officer, a prosecutor or finally a judge still before the initiation of a trial. The circumstances that justify a penalty exceeding the limit laid down in Article 517g § 3 CPP may also be revealed

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15 Grzegorczyk, T., 'Nowy model postępowania przyspieszonego…', op. cit., p. 12.

16 For more see Sowiński, P.K., 'Szybciej, ale czy lepiej…', op. cit., pp. 199–206; Światłowski, A., 'Odmiejscowienie, dwumiejscowość czy zdalność? Nowy fajerwerk w polskim procesie', in: Kopeć, M. (ed.), *Prawnokarna ochrona…*, op. cit., pp. 189–197.

17 Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2014, p. 914.

earlier and then they should already lead to immediate abandonment of a motion to hear a case in an accelerated proceeding.[18] On the other hand, in a situation when such a penalty is forecast after a motion is lodged to a court but before the initiation of a trial, it is admissible to refer a case to a session in order to issue a decision in accordance with the mode laid down in Article 339 § 3 CPP and refer a case to a prosecutor in order to conduct a preparatory proceeding in accordance with general rules.[19]

Article 517g § 3 CPP concerns a forecast of a possible penalty exceeding two years' imprisonment. Therefore, it concerns a forecast of a penalty that can be imposed on the particular accused in the legal and actual circumstances of a given case. The provision is not applicable to an act carrying a penalty exceeding two years' imprisonment,[20] but an act for the commission of which such a penalty can be imposed. Thus, since it concerns a potential possibility of imposing a particular penalty, a real penalty that may be imposed decides and not a penal threat. What counts is the type of penalty and how severe it is. It must be a penalty of deprivation

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[18] Cieślak, W., 'Postępowanie przyspieszone', in: Prusak, F. (ed.), *System prawa karnego…*, op. cit., Warszawa, 2015, p. 246.

[19] Thus also Eichstaedt, K., in: Świecki, D., *Komentarz do kodeksu postępowania karnego, Vol. II*, Warszawa, 2022, p. 580.

[20] The term is commonly recognised as a synonym of "statutory threat", i.e. a threat laid down in the provision determining an offence. For more on the differentiation between the terms: "penalty severity", "penalty risk" or "penalty threat" see the Supreme Court resolutions: of 19 March 1970, VI KZP 27/70, OSNKW 1970, No. 4–5, item 33; of 29 July 1970, VI KZP 27/70, OSNKW 1970, No. 10, item 116; of 29 July 1970, VI KZP 32/70, OSNKW 1970, No. 10, item 117; of 20 September 1973, VI KZP 28/73, OSNKW 1973, No. 12, item 152; of 18 September 1975, VI KZP 2/75, OSNKW 1975, No. 10–11, item 135; of 29 March 1976, VI KZP 46/75, OSNKW 1976, No. 4–5, item 53; of 21 May 1976, VII KZP 6/76, OSNKW 1976, No. 7–8, item 88; of 26 January 1978, VII KZP 53/77, OSNKW 1978, No. 2–3, item 18; joined Criminal and Military Chambers resolution of 22 December 1978, VII KZP 23/77, OSNKW 1979, No. 1–2, item 1; resolution of seven judges of the Supreme Court of 7 August 1982, VII KZP 19/82, OSNKW 1982, No. 10–11, item 68; the Supreme Court resolutions: of 20 May 1992, I KZP 16/92, OSNKW 1992, No. 9–10, item 65; of 16 March 1999, I KZP 4/99, OSNKW 1999, No. 5–6, item 27; of 15 April 1999, I KZP 7/99; of 13 May 1999, I KZP 16/99; the Supreme Court judgement of 22 September 1999, III KKN 195/99, OSNKW 1999, No. 11–12, item 73; the Supreme Court resolution of 25 October 2000, I KZP 30/00, OSNKW 2000, No. 11–12, item 97; the Supreme Court rulings: of 11 February 2004, III KK 304/03; of 26 May 2004, V KK 67/04; of 8 December 2004, V KK 344/04, PS 2005, No. 3, p. 104; Wolter, W., 'Glosa do uchwały 7 sędziów SN z dnia 29 marca 1976 r., sygn. VI KZP 46/75', *Nowe Prawo,* 1976, No. 9, p. 1338; Daszkiewicz, K., *Nadzwyczajne złagodzenie kary*, Warszawa, 1976, pp. 10–25; Kabat, A., 'Glosa do uchwały składu siedmiu sędziów SN z dnia 15 kwietnia 1986 r., sygn. VI KZP 55/85', *Nowe Prawo,* 1987, No. 1, pp. 116–118; Ćwiąkalski, Z., 'Glosa do uchwały składu siedmiu sędziów SN z dnia 15 kwietnia 1986 r., sygn. VI KZP 55/85', *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych,* 1988, No. 1, item 7; Janczukowicz, K., 'O pojęciu "zagrożenia karą" w świetle obowiązującego prawa karnego', *Nowe Prawo,* 1990, No. 1–3, p. 35; Rybak, J., 'Glosa do uchwały SN z dnia 20 maja 1992 r., sygn. I KZP 16/92', *Orzecznictwo Sądów Polskich*, 1993, No. 9, item 171; Światłowski, A.R., 'Omówienie uchwały SN z dnia 20 maja 1992 r., sygn. I KZP 16/92', *Edukacja Prawnicza*, 1994, No. 8, pp. 190–191; Hudzik, M., Kuczyńska, H., 'Glosa do postanowień SN z dnia 11 lutego 2004 r., sygn. III KK 304/03, z dnia 26 maja 2004 r., sygn. V KK 67/04, z dnia 8 grudnia 2004 r., sygn. V KK 344/04', *Przegląd Sądowy*, 2005, No. 3, p. 107. For different pinions see Nowikowski, I., 'Glosa do uchwały składu siedmiu sędziów SN z dnia 19 lutego 1976 r. – VI KZP 29/75', *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych,* 1979, No. 11, item 34; Buchała, K., Zoll, A., *Kodeks karny. Część ogólna. Komentarz*, Kraków, 1998, p. 71.

of liberty for more than two years; not a penalty of at least two years but a penalty of more than two years, i.e. a penalty of deprivation of liberty for the minimum of two years and one month.

The condition in the form of the necessity of supplementing evidence (Article 517g § 2 CPP) is similar in nature. It is due to the fact that if, based on the circumstances revealed after the initiation of a trial, a court states that there is a need to supplement an evidence examination proceeding but performing necessary activities during a court proceeding would cause considerable difficulties, a court shall refer a case to a prosecutor in order to conduct a preparatory proceeding in accordance with general rules and notifies the aggrieved of that. Thus, this circumstance is a condition not for admissibility but continuation of an accelerated proceeding. It is aimed at assessing whether a preparatory proceeding obtained the objectives laid down in 297 § 1 CPP, including first of all whether the circumstances of a case were explained (Article 297 § 1 (4) CPP) and whether sufficient evidence was collected, protected and recorded for a court (Article 297 § 1 (5) CPP). Shortages may consist not only in gaps in the evidence material collected at the stage of a preparatory proceeding but also in defective performance of some procedural activities.

2. ACCELERATED PROCEEDINGS IN FOREIGN LAW

The idea of accelerating and deformalizing a penal proceeding is not unknown to foreign legislations. For example, in Portuguese Code of Penal Procedure[21] adopted by means of Decree No. 78/87 of 17 February 1987,[22] one of the special proceedings is a summary proceeding (*processo sumário*) regulated in Book VII "On special proceedings", Title I "On summary proceedings". In accordance with Article 381(1) PCPP, a summary proceeding is applied to persons arrested in the act of committing an offence carrying a penalty of imprisonment not exceeding five years. The mode is applied in case a perpetrator is arrested by court or police authorities, or any other person for a period not exceeding two hours provided that the perpetrator is turned over to court or police authorities, which next write a short report of that fact. Pursuant to Article 382(2) PCPP, this proceeding is also applied to a person arrested in the act of committing an offence carrying a penalty of imprisonment not exceeding five years if the prosecution assumes in the indictment that in a given case it is not necessary to impose a penalty of imprisonment exceeding five years. In the judicature, it is unanimously assumed that the conduction of this proceeding in violation of the above-mentioned requirements results in its invalidity.[23]

The Portuguese procedure also introduces a definition of flagrante delicto/blazing offence. In accordance with Article 256 PCPP, it is an offence that is just

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[21] Hereinafter referred to as "PCPP".

[22] Decreto-Lei n.º 78/87, de 17 de Fevereiro, Código de processo penal, Diário da República n.º 40/1987, Série I de 1987–02–17.

[23] Acórdão do Tribunal da Relação de Évora de 30–06–2015, http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/064408f9847def6280257e7d0030fff5?OpenDocument [accessed on: 23.08.2019].

being committed or has just been committed, and a perpetrator is being chased by any person or has objects or signs clearly indicating that he/she has committed an offence or participated in it. In case of a persistent offence, the state of committing an offence maintains if there are circumstances clearly indicating that an offence is being committed and a perpetrator is taking part in it.[24]

In accordance with the content of Article 255(1) PCPP, in case of a blazing offence carrying a penalty of imprisonment, any court or police authorities shall arrest a perpetrator. Any person shall have this power if the authorities are not present and cannot be called on time. In case of a citizen's arrest, a person involved in apprehension without delay shall turn an offender over to the authorities, which write a short report on the event (Article 255(2) PCPP). In case of an offence the prosecution of which depends on notification, custody should be maintained provided that after the arrest the right to notify was exercised (Article 255(3) PCPP). In case of offences the prosecution of which depends on private accusation, a perpetrator is not arrested but his/her identity shall be determined (Article 255(4) PCPP).

On the other hand, in Spain, penal procedure is regulated in Royal Decree of 14 September 1882,[25] adopting Act on Penal Procedure,[26] one of special proceedings is a summary proceeding (*procedimiento abreviado*) regulated in Book IV "On special proceedings", Title II "On summary proceedings". In accordance with Article 757 SCPP, this proceeding is applicable to offences carrying a penalty of imprisonment not exceeding nine years or any other exclusive, joint or alternative penalty regardless of its severity or time of service.

Another type of special proceeding consists in a proceeding aimed at fast adjudication on given offences (*juicio rápido*) regulated in Book IV "On special proceedings", Title III "On proceedings aimed at fast adjudication on given cases". In accordance with the content of Article 795 SCPP, this proceeding is applicable to preparatory and court proceedings in case of offences carrying a penalty of imprisonment not exceeding five years or any other exclusive, joint or alternative penalty not exceeding ten years[27] provided that a penal proceeding was initiated based on a police officer's official report[28] and the court police arrested a person and turned him/her over to a court being on duty, or without arrest, called a person to appear before a court being on duty. The proceeding is intended for application

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[24] Conselho Consultivo da PGR, nº 54/1998, in DR, II Série de 28–04–1999.

[25] Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal (Gaceta de 17 de septiembre de 1882).

[26] Hereinafter referred to as "SCPP".

[27] In literature, it is assumed that it concerns an abstract threat of punishment, Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III. Proceso Penal*, Walencja, 2004, p. 585; see also Tosza, S., 'Postępowanie przyspieszone w hiszpańskiej procedurze karnej. Wybrane zagadnienia', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2007, No. 2, p. 243.

[28] A police officer's report is a public document equivalent to notification of an offence commission (Article 297 of the cited act) but also constitutes evidence if it contains objective data that can be verified: signing a report a police officer becomes a witness (for more see Sánchez Rodríguez, J.M., *Atestado policial: algo más que denuncia*, https://noticias.juridicas.com/conocimiento/articulos-doctrinales/4510-atestado-policial:-algo-mas-que-unadenuncia/ [accessed on: 22.08.2019]).

to petty offences and that is why the criteria for its adoption include, inter alia, exposure to punishment.[29]

Moreover, any of the following circumstances must occur: a perpetrator was caught red-handed; a case concerns one of the offences listed in the procedure statute, it can be assumed that a proceeding is not going to be complicated.

A blazing offence is recognised when a perpetrator is caught in the act of committing or just after having committed an act.[30] It does not only concern a perpetrator arrested in the moment of committing an offence, including the stage of attempting to commit it,[31] but also a perpetrator arrested or being chased just after its commission provided that a chase is continued and has not stopped due to the fact that a perpetrator is not within the reach of persons chasing him/her. a perpetrator of a blazing offence is also one who just after its commission has the property, tools or signs that make it possible to presume his/her participation in an offence.

Even when a perpetrator has not been caught in flagranti delicto, an accelerated proceeding may be carried out in cases concerning offences such as: body injury, coercion, threat or regular physical violence committed to the detriment of persons indicated in Article 173 (2) SCC[32]; theft; theft with the use of force, violence or threat; appropriation of a vehicle with the use of force, violence or threat; acts against safety in road traffic; damage to someone else's property (Article 263 SCC); acts against public health under Article 368 SCC[33]; acts concerning intellectual and industrial property listed in Article 270 SCC,[34] Article 273 SCC,[35] Article 274 SCC[36] and Article 275 SCC.[37] It is a closed catalogue. It is composed of offences frequently committed. It is also aimed at fast response especially to the phenomenon of domestic violence.[38]

In addition, an accelerated proceeding is admissible in cases in which it can be assumed that a preparatory proceeding will be uncomplicated and short. However,

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[29] Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III…*, op. cit., p. 584.

[30] This refers to the "directness in terms of time" – see Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III…*, op. cit., p. 586.

[31] Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III…*, op. cit., p. 586.

[32] Hereinafter referred to as "SCC". It concerns a present or former spouse or a person in a similar emotional relationship, even if they do not reside together, descendants, ascendants, siblings, step-siblings, one's own or a spouse's adopted children or relatives, or persons residing together, or minors or handicapped persons who require special protection who reside together with a perpetrator or are under his/her care, authority or guardianship or actual care of a spouse or a person residing together, or a protected person being in any other relationship within an integrated family unit, as well as persons who due to their special vulnerability are subject to care in public or private facilities.

[33] Growing, trafficking in, promoting, and facilitating the use of illegal drugs, intoxicating or psychotropic substances, or the possession of them.

[34] Plagiarism, distribution and economic exploitation of someone else's work to obtain profits.

[35] Production and import of patented goods without a patent holder's permission.

[36] Brand copying.

[37] Unlawful use of geographical indication.

[38] See Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III…*, op. cit., p. 587.

the mode is inadmissible in a situation when a preparatory proceeding is made secret and when there is a link between offences of which at least one does not qualify for hearing in this mode. Then, the provisions concerning a summary proceeding and, in case there are no such provisions in force, the provisions on standard proceedings can be applied.[39]

In the German penal procedure, an accelerated proceeding (*Beschleunigtes Verfahren*) is regulated in Chapter 2a of Book VI Code of Penal Procedure[40] (§ 417–420 GCPP). It is admissible if a case qualifies for immediate hearing due to uncomplicated actual state and unambiguity of the evidence collected (§ 417 GCPP). An additional requirement consists in a forecast of a penalty, which in case of imprisonment cannot exceed one year. However, liberty sanctions can be imposed. In a situation when it is predicted that the imprisonment sentence may account for at least six months, a court is obliged to appoint counsel ex officio if a perpetrator has not chosen one's own (§ 418 (4) GCPP). a trial is conducted immediately or in a short time with no need to issue a decision on a trial instigation. The period between the moment when a motion to hear a case in the accelerated mode is lodged and the appointment of a trial cannot exceed six weeks.

Due to the uncomplicated nature of cases heard in the accelerated mode, the German procedure statute stipulates many simplifications within a conducted proceeding in relation to a trial conducted in the standard mode. For example, it is admissible to abandon interrogation and reading reports of testimonies and written declarations of witnesses, expert-witnesses, co-accused persons, as well as official declarations (§ 420 GCPP). It is also not necessary to deliver an indictment; in such a case, the significant content of the indictment is included in the files the moment a trial starts (§ 418 (3) GCPP).

Paragraph 128b GCPP stipulates a self-standing requirement for the arrest of a perpetrator caught red-handed or in a chase by the prosecution or the police, provided that the application of the accelerated mode is probable. Within the procedure of judicial supervision of arrest (§ 128 (1) GCPP), a judge either orders to release an arrestee or, on a prosecutor's motion or ex officio, rules temporary detention, which in case of a person arrested in order to apply the accelerated mode cannot exceed one week from the act of arrest.

The French penal procedure stipulates the so-called *comparution immédiate*, which can be translated as 'immediate appearance'. In practice, the mode stipulates the possibility of bringing the accused before a court immediately, and it is laid down in the French Code of Penal Procedure[41] in Article 393–397-7. The procedure allows for fast sentencing and is applied in simple and obvious cases in which the determination of facts does not require a lot of labour input.[42] a proceeding of immediate bringing of a perpetrator before a court is instigated on a prosecutor's appropriate motion to hear a case in the accelerated mode. Provided that the accused gives consent for

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[39] Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A., Barona Vilar, S., *Derecho jurisdiccional III…*, op. cit., p. 583.

[40] Hereinafter referred to as "GCPP".

[41] Hereinafter referred to as "FCPP".

[42] Mathias, É., *Procédure pénale*, Bréal, 2007, p. 120.

its application, the mode means the hearing of a case within one working day from an offence commission, and in case a perpetrator refuses to give consent, a court's session is set within the period from two weeks up to four months depending on the type of a matter.[43]

The application of the mode of bringing a perpetrator before a court immediately requires the fulfilment of the following requirements: charges provided must be sufficient to bring a perpetrator before a court (Article 395 first sentence FCPP); a predicted penalty of imprisonment must account for at least two years, and in case of catching a perpetrator in a blazing offence (*délit flagrant*), more than six months (Article 395 second sentence FCPP); a case cannot concern minors, press offences, political offences or offences the prosecution of which is stipulated in special statute (Article 397-6 FCPP).[44]

In French literature, it is pointed out that the so-called mode of bringing a perpetrator before a court immediately is in fact more oppressive than a standard criminal and misdemeanour proceeding. The mode, although it is efficient, should be applied in extraordinary situations; however, it is commonly applied in urban areas.[45] Its critics point out that there is no space in it for the individualisation of punishment, the essential element of which consists in e.g. a perpetrator's criminal record, and because of that the accelerated procedure is often described as "*machine à emprisonner*", which means that it is perceived as a tool to quickly imprison the accused.[46] Attention is also drawn to the lack of full guarantees of the right to counsel because, taking into account a short time before a trial, even obligatory assistance of counsel for the defence does not guarantee full exercise of the rights of the accused in this area.[47]

In the Belgian penal procedure, the mode of bringing a perpetrator before a court immediately (*comparution immédiate*) was introduced by means of Act of 28 March 2000.[48] Like in France, the mode was aimed at adjudicating on a matter without delay and was applicable to simple cases with an uncomplicated actual and legal state. The requirement for the application of an accelerated proceeding was the threat of a penalty of imprisonment for a period from one year to ten years and the issue of a warrant for a perpetrator's arrest or his/her conditional release by an investigating judge. Apart from that, the circumstances of a case could not raise

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[43] Rogacka-Rzewnicka, M., *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warszawa, 2007, p. 169.

[44] Also see Berthel, L., 'Postępowanie przyspieszone we Francji', *Prawo Europejskie w Praktyce*, 2008, No. 2, p. 27.

[45] See Christin, A., *Comparutions immédiates. Enquête sur une pratique judiciaire*, Paris, 2008, pp. 59–74.

[46] Report presented to the French Senate: Zocchetto, F., *Juger vite, juger mieux? Les procédures rapides de traitement des affaires pénales, état des lieux*, available online: https://www.senat.fr/rap/r05–017/r05–017.html [accessed on: 3.09.2019].

[47] Hodgson, J., *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France*, Oxford, 2005, p. 130; also see Berthel, L., 'Postępowanie przyspieszone…', op. cit., pp. 29–30.

[48] The Belgian Monitor: http://www.ejustice.just.fgov.be [accessed on: 2.09.2018].

any doubts and evidence should be collected by a prosecutor or collected within a month from an act commission.[49]

As a result of the Belgian Constitutional Court judgement of 28 March 2002, many provisions of the new statute were repealed, in particular due to their discriminatory nature because of the different treatment of persons held in custody and those conditionally released. In addition, the Court stated that the new procedure of bringing a perpetrator before a court immediately does not provide the accused with time and possibilities necessary to prepare the defence guaranteed in Article 6 of the European Convention on Human Rights, which stipulates the right to a fair trial.[50] After some legislative changes, special penal chambers applying the procedure of bringing a perpetrator before a court immediately operate only in the region of Brussels and Ghent, but it is planned to introduce them in the whole country.[51]

Accelerated proceedings also exist in the penal procedure of Bulgaria, the Republic of Albania and Moldova. The requirements for the application of the mode include, inter alia, such circumstances as: arrest in flagrante delicto or in a chase started directly afterwards; recognition of obvious signs on a perpetrator's body or clothes indicating the commission of an act; self-denunciation and confessing to committing an act, or the identification of a perpetrator by the aggrieved or a witness.[52]

CONCLUSIONS

The above comparative presentation of the examples proves that the tendencies to accelerate proceedings in cases with an uncomplicated actual and legal state are evident. It is most often connected with the fact of catching a perpetrator in flagrante delicto or with circumstances undoubtedly indicating his/her perpetration. Narrowing the possibility of applying the accelerated mode to a given category of matters is also a rule. Also limitations concerning the type and severity of a penalty that can be imposed in an accelerated proceeding are quite often introduced. What is also typical is the need to provide the accused with access to counsel for the defence, which is in particular important in the context of reduction of a series of procedural guarantees resulting from the dynamics of an accelerated proceeding.

The presented examples indicate that the Polish procedure statute does not show any special specificity in comparison with the regulations in foreign jurisdictions. The requirements for admissibility of the Polish accelerated procedure, both from the comparative perspective and in the context of proposals *de lege ferenda*, are developed in an optimal way. They are composed of limitations concerning the

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[49] http://www.justice-en-ligne.be/article650.html [accessed on: 2.09.2019].

[50] Ibidem.

[51] https://www.7sur7.be/belgique/une-procedure-de-comparution-immediate-dans-tout-le-pays~aaabfb7e/ [accessed on: 2.09.2019].

[52] For more see Cieślak, W., 'Postępowanie przyspieszone', in: Prusak, F. (ed.), *System prawa karnego….*, op. cit., pp. 215–216.

subject matter of the process (determined catalogue of cases, forecast of a penalty as a negative condition), as well as some evidence-related circumstances (catching a perpetrator in flagrante delicto, referring a case for supplementing the evidence collection proceeding). The accelerated mode is first of all conditioned by well-established institutions that have existed in the Polish penal procedure for dozens of years in the form of apprehension and arrest. Most interpretational dilemmas and problems connected with the requirements for its application, occurring especially at the initial stage of being in force, have been explained in case law and literature.

However, the assessment whether the way in which the course of an accelerated proceeding was regulated provides the accused with an appropriate level of procedural guarantees composing the right to counsel for the defence constitutes a totally different thread. It is not a problem characteristic of only Polish legal regulations. Similar doubts are raised in the jurisprudence of other countries (France, Belgium, Spain). The deficit in the right to defence that results from the concentration of procedural activities in a short period is most often compensated by facilitating access to the assistance of counsel for the defence or the imposition of some obligations on courts.

At the same time, one can observe a tendency that, as it seems, may be also noticed in the context of Polish regulations. It consists in a typical evolution of the attitude to the idea of a separate mode assuming bringing a perpetrator before a court immediately: from a clearly sceptical, if not critical, attitude to this type of solutions at the beginning to the acceptance or even complete approval of them. The assessment of the accelerated procedure most often depends on which perspective is adopted: of the prosecution, defence or adjudication. This is what most often leads to different opinions usually exposing contradictory values (deformalizing a proceeding, accelerating it, the right to counsel for the defence and a fair trial). However, the speed of penal response is certainly a value that cannot be ignored, especially in the context of technical progress, which more and more often translates into the efficiency of court proceedings.

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ACCELERATED PROCEEDINGS IN CRIMINAL CASES VIEWED FROM COMPARATIVE LAW PERSPECTIVE

Summary

The paper covers the issue of the accelerated penal procedure. It discusses conditions for the application of this mode under Polish law and presents them against the background of regulations in force in other countries, including Germany, France, Spain, Portugal and Belgium. The assumption of the study was to assess Polish legal solutions and to demonstrate the basic similarities and differences between laws of the aforesaid countries.

Keywords: criminal proceedings, special proceedings, accelerated procedure, principle of expeditious proceeding, improvement of a criminal trial

POSTĘPOWANIE PRZYSPIESZONE W SPRAWACH KARNYCH NA TLE PRAWNOPORÓWNAWCZYM

Streszczenie

Artykuł poświęcony został problematyce postępowania przyspieszonego. Omówiono w nim przesłanki zastosowania tego trybu w prawie polskim i przedstawiono je na tle regulacji przyjętych w innych krajach, w tym m.in.: Niemczech, Francji, Hiszpanii, Portugalii i Belgii. Założeniami opracowania były: ocena polskich rozwiązań prawnych oraz wykazanie podstawowych różnic i podobieństw zachodzących pomiędzy poszczególnymi krajami.

Słowa kluczowe: postępowanie karne, szczególne postępowanie, postępowanie przyśpieszone, zasada szybkości postępowania, usprawnienie procesu karnego

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CYBORG ARTWORK*

ALEKSANDRA NOWAK-GRUCA**

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INTRODUCTION

Until now, a man has successively extended his reign over the external world. At present, we have and are developing skills in extending our physical and cognitive possibilities and the process is dynamically deepening. For example, co-founded by Elon Musk, Neuralink is developing neural lace technology that is to allow changing human thoughts into requests understandable for a computer. IT specialists and neurobiologists also expect that in the future the processing power of a computer will make it possible to simulate the activities of a human brain in a computer memory, which should result in the appearance of a brain analogous to the human one in this simulation. It is worth drawing attention to the fact that numerous projects showing modifiable bodies and brains have already emerged in transhumanistic concepts.[1] Artists of new media, such as Stelarc (Third Hand project), Tim Cannon (Cirkadia) or Neil Harbisson (Eyeborg), present pictures of complete integration of a man with a machine thanks to a modular composition of a human organism. They are motivated by an aesthetic vision in which everybody will be able to treat their body as artistic material.[2]

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1 Transhumanism is an idea advocating for using science and technology for the purpose of overcoming human biological limitations. It should result in the creation of a post-man, an 'enhanced' man in such fields as life span, cognitive capacity or emotive ability; see Szymański, K., 'Tranhsumanizm', *Kultura i Wartości*, 2015, No. 13, p. 135 et seq.

2 Gina, A., Nalepa, G.J., 'Człowiek z modułów – analiza adaptacyjności umysłu i ciała do wytworów techniki i technologii w kontekście teorii poznania rozszerzonego i ucieleśnionego', *Rocznik Kognitywistyczny*, 2015, No. 8, p. 6.

In the light of such a revolutionary technological progress, contemporary societies face great aesthetic and legal challenges. The advancing technicisation does not only force a reflection on the condition of a contemporary man but also new meditation on culture. The technological revolution (Rev. 4.0)[3] poses completely new challenges to law. Contemporary copyright law must address not only a problem of creativity of machines and artificial intelligence works. Cyborg artists and their works constitute successive challenges. Not only a question arises whether the works by Stelarc, Moon, Ribas, or Neil Harrbison match the features of a work within the meaning of copyright law. Technologically improved people in an artistic work make use of extended cognitive capabilities. This presents a problem in marking borders between what is man-made and what is machine-made and cannot be protected by copyright.

The article aims to present the most important legal issues concerning copyright classification in relation to the artworks by cyborg artists. The first part of the article presents, of necessity in a short form, the issue of artworks within the meaning of copyright in relation to the anthropocentric approach to authorship established in the doctrine and case law. The second chapter presents the concept of a cyborg and examples of artwork by cyborg artists. The third part presents concepts concerning possibilities of attributing authorship to works made by cyborgs and attempts to determine the status of technological physicality in copyright law. The considerations end with conclusions concerning the future of copyright law in the context of questions about the efficiency and effectiveness of this legal protection system.

1. CONCEPT OF ARTWORK AND ANTHROPOCENTRIC APPROACH TO AUTHORSHIP IN COPYRIGHT LAW: AN OUTLINE

In accordance with Act on Copyright and Related Rights,[4] a work means any manifestation of an individual artistic activity established in any form regardless of its value, purpose or way of expression (Article 1(1)). This synthetic definition is supplemented by a rather abundant list of particular categories of works. A work is subject to copyright the moment it is established to be one even if it is not finished and an author has the right to protection regardless of whether any formal requirements have been met (Article 1(3) and (4) of the Copyright Act). In addition, in the light of Article 2 Copyright Act, there are three categories of works distinguished in literature and case law: totally self-existent (not inspired by works by others), self-existent but inspired, and elaborations (case studies).[5]

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[3] Forth industrial revolution (*Industry 4.0*) from the point of view of J. Ryfkin is most often presented as a combination of IIoT (Industrial Internet of Things) and artificial intelligence of machines. See Schwab, K., *Czwarta rewolucja przemysłowa*, Warszawa, 2018, p. 17.

[4] Act of 14 February 1994, Journal of Laws of 2019, item 1231, as amended, hereinafter "Copyright Act".

[5] See the judgement of the Appellate Court in Łódź of 30 July 2012, I ACa 483/2012, OSA in Łódź, 2014, No. 2, item 9.

In the context of difficulties in determining the scope of the legal protection of authorship, the doctrine often points out the circumstances that are not important from the perspective of a given work protection. They include such features of a work as its size, completion,[6] intended use,[7] social/cultural significance/recognition,[8] the way of expression,[9] the process of creation,[10] and an author's effort, labour input and competence.[11] In literature, attention is drawn to the fact that copyright law does not require any special intensity of creative features (the so-called principle of artistic neutrality).[12]

The central problem of copyright law consists in setting the premises of legal protection of authorship.[13] We can observe considerable divergence of the assessment of what features allow classification of a product of human mind as a work. This disagreement is evident not only in the process of Polish law application. A stance appears in the CJEU judgements that copyright law protects intellectual property, an author's works, and the level of originality is unified.[14] In the doctrine and case law, what is absolutely arbitrarily and rather liberally, and even discretionally indicated as necessary features of a work are: individual mark,[15] artwork,[16] originality,[17] novelty,[18]

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[6] See Machała, W., *Utwór. Przedmiot prawa autorskiego*, Warszawa, 2012, p. 98.

[7] Cf. the judgement of the Supreme Court of 30 June 2005, IV CK 763/04, OSNC, 2006, No. 5, item 92, in which the Supreme Court recognises the protective capability of works specified as "non-fictional".

[8] Cf. the judgement of the Supreme Court of 25 January 2006, I CK 281/05, OSNC, 2006, No. 11, item 186. In its judgement, the Supreme Court recognises the features of a work in the objects: "Podręczny licznik kalorii" and "Podręczny licznik cholesterolu".

[9] Cf. the judgement of the Supreme Court of 3 October 2007, II CSK 207/07, *Palestra*, 2009, No. 9–10, p. 261 et seq., in which the Supreme Court granted legal protection of authorship of a fictitious character created for the needs of a radio programme.

[10] Cf. the judgement of the Appellate Court in Kraków, of 29.10.1997, I ACa 477/97, published in: Gawlik, B. (ed.), *Dobra osobiste. Zbiór orzeczeń Sądu Apelacyjnego w Krakowie*, Kraków, 1999, p. 282 et seq.

[11] Cf. Nowak-Gruca, A., *Przedmiot prawa autorskiego (utwór) w ujęciu kognitywnym*, Warszawa, 2018, pp. 238–242.

[12] Cf. the judgement of the Supreme Court of 5 March 1971, I CR 593/70, OSNC 1971, No. 12, item 212, in which the Supreme Court clearly states that a work should constitute an effect of an author's individual creation, not necessarily with strong intensity of creative features or big significance (value).

[13] Nowak-Gruca, A., 'Konieczne cechy utworu. Uwagi po 20 latach obowiązywania ustawy o prawie autorskim i prawach pokrewnych', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, Year LXXVII, 2015, issue 2, p. 95 et seq.

[14] See the judgement of CJEU of 16 July 2009 in the case C-5/08 *Infopac International A/S v Danske Dagblades Forening*, the judgement of CJEU of 22 December 2010 in the case C-393/09 *Svaz softwarové ochrany v Ministerstvo kultury*.

[15] See Grzybowski, S., in: Grzybowski, S., Kopff, A., Serda, J. (eds.), *Zagadnienia prawa autorskiego*, Warszawa, 1973, pp. 37–38; Błeszyński, J., *Prawo autorskie*, Warszawa, 1985, p. 40. The criterion is used again in the latest statements of the doctrine, see Machała, W., *Utwór…*, op. cit., p. 117.

[16] See Błeszyński, J., *Tłumaczenie i jego twórca w prawie autorskim*, Warszawa, 1973, p. 20.

[17] See a critical opinion about the use of the originality criterion, Sarbiński, R.M., *Utwór fotograficzny i jego twórca w prawie autorskim*, Kraków, 2004, p. 65.

[18] Nowak-Gruca, A., 'Konieczne cechy utworu…', op. cit., p. 95 et seq.

statistical one-time only occurrence,[19] cultural significance,[20] the scope of creation freedom (creative choices)[21] and others. What poses the biggest problems is the issue of determining a certain minimum 'border' level of works that allows recognition of a given intellectual product as a work within the meaning of copyright law.[22] The problem concerns not only the application of Polish law[23] but also the European[24] or common law[25] systems.

The difficulties in marking the borders of legal protection of authorship have been transferred onto courts, which results in the fact that most of the justifications concerning the recognition or refusal to recognise a work within the meaning of copyright law are based on purely intuitive criteria and not on whether a determined cognitive paradigm is matched.[26]

In addition, in case law and legal literature, there is general agreement that we can speak about a work only in case the result of human activity is subject to assessment.[27] The limitation of the right to legal protection of authorship only in relation to human activities is explained in the doctrine in various ways. J. Ginsburg clearly states that in the light of the Berne Convention, the legal protection of authorship may be applied only to a man.[28] The Court of Justice (CJEU) seems to unambiguously state that by expressing its stance that "originality" must reflect "an author's own intellectual work".[29] According to CJEU, we deal with the feature

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[19] See Flisak, D., 'Maxa Kummera teoria statystycznej jednorazowości – pozorne rozwiązanie problematycznej oceny indywidualności dzieła', in: Matlak, A., Stanisławska-Kloc, S. (eds.), *Spory o własność intelektualną. Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi*, Warszawa, 2013, p. 283 et seq.

[20] See Machała, W., *Utwór…*, op. cit., p. 117.

[21] Tischner, A., *Kumulatywna ochrona wzornictwa przemysłowego w prawie własności intelektualnej*, Warszawa, 2015, p. 199.

[22] See Sokołowska, D., '„Omnis definitio periculosa", czyli kilka uwag o zmianie paradygmatu utworu', in: Kępiński, M. (eds.), *Zarys prawa własności intelektualnej, t. 1: Granice prawa autorskiego*, Warszawa, 2010, p. 11.

[23] See e.g. judgement of the Court of Appeal in Kraków of 29 October 1997, I ACa 477/97, LEX No. 533708; judgement of the Supreme Court of 22 June 2010, IV CSK 359/09.

[24] See Rosati, E., 'Originality in a Work, or a Work of Originality: The effects of the infopaq decision', *European Intellectual Property Review,* 2011, issue 33, No. 12, p. 750.

[25] Kotzé, L.J., French, D., 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene', *Global Journal of Comparative Law,* 2018, No. 7(1), p. 5.

[26] See the judgement of the Supreme Court of 25 January 2006, I CK 281/05, OSNC 2006, No. 11, item 186; the judgement of the Supreme Court of 6 March 2014, V CSK 202/13, LEX No. 1486990; the judgement of the Supreme Court of 30 June 2005, IV CK 763/04, OSNC 2006, No. 5, item 92; *Orzecznictwo Sądów Polskich*, 2007, issue 6, item 67; *Biuletyn SN*, 2005, No. 9, item 14; the judgement of the Supreme Court of 13 January 2006, III CSK 40/05, LEX No. 176385; the judgement of the Supreme Court of 22 June 2010, IV CSK 359/09, OSNC 2011, No. 2, item 16; *Orzecznictwo Sądów Polskich*, 2011, issue 5, item 59, *Biuletyn SN*, 2010, No. 7, item 12.

[27] Cf. Szaciński, M., 'Wkład twórczy jako przesłanka dzieła chronionego prawem autorskim', *Państwo i Prawo,* 1993, No. 2, p. 50.

[28] Ginsburg, J.C., 'People Not Machines: Authorship and What It Means in the Berne Convention', *International Review of Intellectual Property and Competition Law,* 2018, Vol. 49, pp. 131–135.

[29] See Case C-5/08, *Danske Dagblades Forening* [2009] ECR 1–06569, at para. 35; Case C-393/09, *Bezpečnostní softwarová asociace-Svaz softwarové* [2010] ECR 2010 1–13971, para. 45;

of a work when an author makes free and creative choices and leaves his/her personal mark on it, which is interpreted as an obligatory human origin of a work. In literature, it is even pointed out that there is an anthropocentric requirement in copyright law.[30]

The approach limiting the protection of copyright to man-made works is well established in German, Spanish, French and Polish law. In Anglo-American systems the approach to the legal protection of authorship is more pragmatic and less emphasis is placed on the protection of an author and more on the creation of legal incentives supporting the creation of works that are valuable for society. As a result, objections to the, at least partial, protection of machine-made works are less evident in those legal systems.[31] Countries such as Great Britain, Ireland and New Zealand[32] provide computer-generated works with the protection similar to copyright, and these are products that do not have a human author.[33] The entity that undertook steps necessary to create a work becomes an owner of the copyright of the work.[34]

In accordance with Polish law, the stance on the application of the legal protection of authorship of only man-made works seems to be settled. Pursuant to Article 8(1) of the Copyright Act, an author owns copyright unless the statute stipulates otherwise. It is emphasised in the Polish doctrine that the provision lays down a general principle of copyright concerning the acquisition of the rights by an author, which is sometimes called an author's principle. "It is so because creative activity is typical only of a man. The above thesis is fully supported in the synthetic definition of a work. Thus, there is no need to introduce a provision clearly limiting an author's feature to natural persons."[35] W. Machała believes that the object of copyright must be an effect of a human activity and it should be based on Article 1(1) of the Copyright Act in the light of which a work results from a creative activity. The author emphasises that the whole legal system recognises only subjectivity of people and collectives organised by people (legal persons and organisational units without legal personality).[36]

The issue complicates in connection with the movement of the border between what is man-made and what cannot be recognised as man-made. Works made by AI or androids are recognised as 'non-man-made' although machines are as

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Case C-403/08 and C-429/08, *FA Premier League/Karen Murphy* [2011] ECR 2011, 1–09083, at para. 97; Case C-i 45/10, *Eva-Maria Painer/Standard Verlags* [2011] at para. 94; Case C-604/10, *Football Dataco/Yahoo* [2012] ECLI:EU:C:2012:1 15, at para. 38.

30 Kotzé, J.L., French, D., 'The Anthropocentric Ontology…', op. cit., p. 14.

31 de Cock Buning, M., 'Autonomous Intelligent Systems as Creative Agents under the EU framework for Intellectual Property', *European Journal of Risk Regulation,* 2016, No. 7(2), p. 315.

32 See Copyright, Designs and Patents Act 1988, c. 48, § 178 (U.K.); Copyright and Related Rights Act 2000, pt. II, ch. 2, § 21(f) (Act No. 28/2000) (Ir.); Copyright Act 1994, § 2 (N.Z.).

33 Maggiore, M., in: Bonadio, E., Lucchi, N. (eds.), *In Non-Conventional Copyright – Do New and Atypical Works Deserve Protection?* 2018, p. 391.

34 Bonadio, E., Mcdonagh, L., Arvidsson, C., 'Intellectual Property Aspects of Robotics', *European Journal of Risk Regulation,* 2018, No. 9(4), p. 660.

35 Sarbiński, R.M., in: Machała, W. (ed.), *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa, 2019, Article 8, Markiewicz, M., in: Markiewicz, R. (ed.), *Ustawy autorskie. Komentarze*. Tom I, Warszawa, 2021, Article 8.

36 Machała, W., *Utwór…*, op. cit., p. 125.

good as or even better than a man in the area of creative activities. Today, there is no agreement on how to resolve the problem of works generated by intelligent systems.[37] Moreover, the issue of attributing authorship is becoming even more controversial in case of the works by such artists who, like Neil Harbisson, describe themselves as cyborgs and demand that social and legal systems recognise them.

2. CYBORG ARTISTS AND THEIR ARTWORK

The term cyborg was first explained in 1960 by Manfred Clynes and Nathan Kline in their article 'Cyborgs and space', published in a journal called *Astronautics*. The authors proposed a concept of a cyborg that is a product of a man's active participation in his own evolution: in the process of a man's change towards maximisation of capabilities to explore the environment.[38]

What constitutes the concept of a cyborg is the idea of blurring the border between what is human and what is technical. In the cyborgs' culture, the border between a man and technique does not exist – cyborgs are human-technical hybrids and this union is what constitutes the essence of their existence. A cyborg as a man improved by technique is a successive form of a human being's evolution, a more complicated and highly complex one.[39]

Despite demonisation of the concept of 'cyborg', these are contemporary people who seem to be 'artificial people' in whose bodies organic functions are supported or performed by cybernetic, digital or virtual systems and circuits.[40] "A contemporary man's organism is undoubtedly cyborg-like. Firstly, the extension of memory (computers, mobile technologies), which still remains outside the human structure, can be considered. Nonetheless, many technologies, e.g. contact lenses or hearing aids, which improve a man's cognitive capacity, become an integral part of a human organism. Pacemakers, transplants, artificial organs and bionic prosthetic devices go even further because they do not only allow better functioning but also supporting life. As a result, technologies have considerably moved the boundaries formerly imposed by the rules of nature".[41]

Kevin Warwick, a scientist who let a series of experiments be carried out on his body in order to extend the limits of human body and senses, is recognised to be the first cyborg. For example, he used electronic implants that sent information to his brain with the use of echolocation. Thanks to that, like a bat, he was able to have a clear picture of rooms without the use of eyes. Thanks to a hundred of

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[37] Cf. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

[38] Clynes, M., Kline, N., 'Cyborgs and space', in: Gray, C.H., Mentor, S., Figueroa-Sarriera, H. (eds.), *The Cyborg Handbook*, Routledge, New York, 1995, p. 17 et seq.

[39] Klichowski, M., *Narodziny cyborgizacji. Nowa eugenika, transhumanizm i zmierzch edukacji*, Poznań, 2014, p. 12 and the literature referred to therein.

[40] Sandberg, A., Bostrom, N., 'Converging cognitive enhancements', *Annals of the New York Academy of Sciences*, 2006, 1093.1, p. 201 et seq.

[41] Gina, A., Nalepa, G.J., 'Człowiek z modułów…', op. cit., p. 4.

electrodes implanted into his nervous system of the left arm with the use of a neural interface, K. Warwick was able to control a wheelchair and an intelligent robot arm designed by Peter Kyberd. The implant was also able to activate artificial feelings by means of neural stimulation. Moreover, K. Warwick managed to communicate directly with the nervous system with no need to decode messages transferred in a language. He communicated with his wife, Irene Warwick, with the use of a direct neural communication system.[42]

It should not be a surprise that cyborgs' activities are clearly marked in science and art. In Wikipedia, one can find explanation that cyborg art, also known as cyborgism, is an art movement that started in the mid 2000s in Great Britain. It is based on the creation and addition of new senses to the body via cybernetic implants and the creation of artworks through new senses. Cyborg artworks are created by cyborg artists; artists whose senses have been voluntarily enhanced by cybernetic implants.[43]

The presentation of cyborg artists' works should start with information about Eduardo Kac, a pioneer of Bio Art (transgenic art),[44] who is first of all known for creating a genetically modified fluorescent rabbit called "Alba". Nevertheless, as early as in 1997, the artist implanted a RFID microchip in his body and used it in his work titled "Time Capsule".[45] However, one of the most famous cyborg artists is Neil Harbisson born in 1984. Suffering from a congenital defect of achromatopsia, i.e. total colour blindness, together with a group of scientists, he developed a device, which he called Eyeborg. Since 2004 N. Harbisson has had an antenna permanently implanted in his skull. It is connected to a camera placed over his head. It measures electromagnetic wave frequency and transmits it to a skull bone in the form of vibration received by the user as a sound signal. The implant is able to measure the spectrum of visible light as well as colours that are not visible to a human being: infrared and ultraviolet. Thus, it not only uses the phenomenon of sensor substitution but also extends the artist's cognitive processes by adding new senses. It is worth drawing attention to the fact that Neil Harbisson is strongly committed to the fight for cyborg rights. In numerous public lectures, he emphasises how difficult it was to find a surgeon who agreed to implant the device because physicians were rejected the bioethical commission's permission for the operation. He also fought a legal battle for the recognition of Eyeborg as part of his body and emphasised that the appliance allows the perception of colours. In 2010, together with Moon Ribas, he co-founded the Cyborg Foundation. Its aim is to help people become cyborgs, as well as do research and promote the availability of appliances developing senses. The Foundation is also involved in activities aimed at introducing cyborg rights.[46] On the other hand, the above-mentioned Moon Ribas is

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[42] See http://www.kevinwarwick.com/ [accessed on: 22.08.2021].

[43] Wikipedia, https://en.wikipedia.org/wiki/Cyborg_art#cite_note-1 [accessed on: 22.08.2021].

[44] Bio-art or transgenic art is a form of artistic activities that uses the techniques of genetic modification to transfer natural genetic material or synthetic genes to an organism in order to create a new, unique form of life, Rozynek, M., 'Bioart, czyli mariaż sztuki i nauki', *Tutoring Gedanensis*, 2018, No. 3(1), p. 29.

[45] https://www.ekac.org/timec.html [accessed on: 22.08.2021].

[46] https://www.cyborgfoundation.com/ [accessed on: 22.08.2021].

the first female cyborg well known for implanting seismic sensors in her feet, which allow her to feel earthquakes and to create dance pieces with the use of extended senses. A Catalan photographer, Manel De Aguas, who developed sensory fins that allow him to hear atmospheric pressure, humidity and temperature, joined the couple. The three artists initiated a social project and co-founded the Transpecies Society, aimed at raising awareness on challenges that transpecies face and promoting morphological freedom and the right to design and develop new senses and organs.

A. Łukasiewcz Alcaraz highlights the fact that both N. Harbisson and M. Ribas are aware of the consequences of the process of change they have undergone. The artists emphasise that "we did not always use to be people and we do not have to be ones". They stress that the process of evolution has not ended on people. N. Harbisson states that in the same way as we witness transgender phenomena at present, we will soon witness trans-species phenomena that will be possible thanks to genetic engineering. Such projects are already present in artistic experiments. The author points out that it is a radically anti-anthropocentric movement.[47] She emphasises that with the development of technology it is necessary to consider not only the substitution of cyborgs for human beings. It should be taken into consideration that different types of persons will be able to exist: from a man to a species classified somewhere between a man and an animal, various types of hybrids created as a result of genetic modification, to cyborgs, robots and artificial intelligence.[48]

3. ON PROBLEMS WITH COPYRIGHT: "MAN-MADE VS. NON-MAN-MADE WORKS"

Anthropocentric attitude of contemporary copyright law that grants the status of an author only to a natural person somewhat automatically raises a question about the human nature. Nevertheless, a discussion about who a man is, due to the frames of the article, cannot be even started. However, it is worth highlighting the opposition between 'human' and 'inhuman'. The indicated dichotomy is a form shaping our language and activities, which is always present. It is also especially topical in the light of problems with copyright and classification of works created by AI, androids and cyborgs.

Undoubtedly, many objects that are not man-made match the feature of originality, which in a different normative system would justify their recognition as works. However, rime on a window, a speleothem and a photograph taken by a monkey, which are non-man-made products, are not subject to protection of authorship. A series of disputes over the circle of persons entitled to authorship started in relation to *selfies* taken by Naruto, a macaque monkey. Nonetheless, the US District Court in California stated that the monkey called Naruto is not "an author" within the meaning of the American copyright law.[49] The representatives of the doctrine in

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[47] Łukasiewicz Alcaraz, A., *Cyborg Persons or Selves*, Szczecin, 2019, p. 73.

[48] Ibidem, p. 90.

[49] https://www.copyright.gov/title17/title17.pdf; *Naruto et al. v David Slater, et al.*, No. 3:2015cv04324 – Document 45 (N.D. Cal. 2016), https://law.justia [accessed on: 23.08.2021].

other countries, including Poland, took a similarly tough stance on "animal-made" works.[50]

At present, we witness a dynamic development of works generated by autonomous intelligent systems. For example, it is worth indicating that an autonomous robot named TAIDA won the 2016 Robot Art painting competition and the Grand Prize for the picture of Albert Einstein. The works by Ai-Da, the first humanoid robot-artist, who paints pictures and makes sculptures, are also very interesting. In June 2019, artworks by Ai-Da were featured in a gallery show called *Unsecured Features* at St. Johns College, Oxford.

As a result, various proposals for resolving the problem of the legal status of works created by artificial intelligence are put forward in the doctrine of copyright. Firstly, it is pointed out that copyright to those works might be granted to the programmers of AI systems. Secondly, it can be assumed that trainers and data providers are authors because their work is essential for the final functions of artificial intelligence systems. Thirdly, the feedback suppliers who help distinguish useful results from useless ones and correct information from incorrect one might be recognised as authors. Fourthly, the 'owners' of artificial intelligence systems might be given copyright. Fifthly, within the meaning of copyright law, a user who turns on an AI system may be recognised as an author. Sixthly, a buyer of a product of artificial intelligence may be subject to copyright. Seventhly, copyright may be granted to governmental entities. Eighthly, artworks created by AI may be recognised as works being in the public domain. There is also a proposal of the Work Made for Hire (WMFH) model in accordance with which an AI system is seen as a user's creative worker or independent contractor.[51] As concerns granting the authorship of a work, P. Księżak and S. Wojtczak propose to recognise the actual state: AI – an autonomous system – is a creator of artworks. It is clear for everyone that particular AI creates determined pictures or projects regardless of what the law stipulates. Thus, it is better, in conformity with facts, to indicate that particular AI is a creator of an artwork. Nevertheless, in the authors' opinion, it does not mean that it must be a holder of the financial rights to a work or that it has, apart from the right to authorship, other rights.[52] In my opinion, until the issue of AI authorship concerning personal and property rights are regulated, we can assume that we deal with a phenomenon of ghostwriting, which copyright law knows well. Ghostwriting is an activity consisting in creating a commissioned work, which is then disseminated under the name of the person who commissioned it and not the name of the real author. In this context, within the meaning of copyright, an author may be a user who turns on an AI system and initiates a creative activity and this way acts like a person who commissions a ghost writer to create a work. Therefore, we deal

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[50] See Juściński, P.P., 'Prawo autorskie w obliczu rozwoju sztucznej inteligencji', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Prawa Własności Intelektualnej,* 2019, No. 1(143), p. 39.

[51] See Shlomit, Y.R., 'Generating Rembrandt: Artificial Intelligence, Copyright, and accountability in the 3A Era – The Human-Like Authors are Already Here – A New Model', *Michgan State Law Review,* 2017, pp. 671–673; Palace, V.M., 'What If Artificial Intelligence Wrote This?', *Florida Law Review,* 2019, No. 217, p. 231.

[52] Księżak, P., Wojtczak, S., 'Prawo autorskie wobec sztucznej inteligencji (próba alternatywnego spojrzenia)', *Państwo i Prawo*, 2021, No. 2, p. 21.

with a machine-ghost, an electronic 'ghost author', creating works the creation of which a man only initiates.[53]

Another problem arises here: how to classify cyborg artists' works. First of all, it is necessary to draw attention to the fact that artworks in the area of bio art or techno-science art in many situations will be classified as the so-called borderline works in relation to which, after getting to know their features, it is not possible to state whether they match the feature of artwork within the meaning of copyright law. Some of them belong to the category of conceptual or performance art, which is refused the status of an artwork.[54] Another problem is whether in case of cyborgs we can speak of an author-person within the meaning of copyright law. This, on the other hand, requires determining whether we deal with a man or a machine.

K. Warwick defines a cyborg as "partly a man and partly a machine".[55] A cyborg that is a hybrid of nature and technique, however, is not an anthropoid robot (an anthropoid). A robot is totally technical, something "totally mechanical". A cyborg, on the other hand, is a man's technical extension; it always has something human, although this does not have to be something physical. A cyborg is not a man and does not lead a human life, but always has a (minimal at least) human element.[56]

Thus, the status of artworks created by cyborgs will depend on the decision whether they meet the criteria of a natural person within the meaning of civil law. The answer to the question is not obvious and requires deepened research, which cannot be done within the scope of this paper. Undoubtedly, artists have always used methods of changing or extending their conscience. In accordance with the approach established in the doctrine and case law, the mental state, capabilities, creative labour input or just the process of a work creation are not important for legal classification of authorship.[57] What is entitled to protection are objects that match the feature of individual artwork regardless of the features connected with the person of an author, however, with the reservation that it must be a man. At the moment, the technological possibilities of developing a man are not so advanced that we might speak about reaching the next level of evolution in the form of a technical-human hybrid, although work in this area is in progress and these are not science-fiction visions any more.[58] Nevertheless, at this stage of development, cyborg artists using their body as artistic material or extending their physical and cognitive capabilities may have the status of an author within the meaning of copyright law provided that their artworks match the statutory definition of a work.

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[53] For more see Nowak-Gruca, A., 'Could an Artificial Intelligence be a Ghostwriter?', *Journal of Intellectual Property Rights*, 2022, No. 1, pp. 25–37.

[54] Cf. the judgement of the Appellate Court in Kraków, of 29.10.1997, I ACa 477/97 published in: Gawlik, B. (ed.), *Dobra osobiste. Zbiór orzeczeń Sądu Apelacyjnego w Krakowie*, Kraków, 1999, p. 282 et seq.

[55] Warwick, K., 'Cyborg morals, cyborg values, cyborg ethics', *Ethics and Information Technology 5*, 2003, p. 131.

[56] Bendle, M.F., 'Teleportation, Cyborgs and the Posthuman Ideology', *Social Semiotics*, Vol. 12, No. 1, 2002, p. 57; Roden, D., 'Deconstruction and Excision in Philosophical Posthumanism', *Journal of Evolution & Technology*, Vol. 21, No. 1, 2010, pp. 29–32, after Klichowski, M., *Narodziny cyborgizacji…*, op. cit., p. 13.

[57] Nowak-Gruca, A., 'Could an Artificial Intelligence…', op. cit., pp. 33–34.

[58] Łukasiewicz Alcaraz, A., *Cyborg Persons…*, op. cit., p. 73 et seq.

Summing up, the status of cyborg artists' works in the light of copyright law is highly uncertain due to difficulties in classifying them firstly, as works created by an author within the meaning of copyright law, and secondly, as works matching the objective premises of legal protection of authorship. At the same time, however, technological changes will force such classification rather earlier than later.

CONCLUSIONS

Despite the rapid technological development and the existence of cyborgs, androids and artificial intelligence in our world, contemporary legal systems in many countries treat non-man-made works with big amount of suspicion. The problem with legal classification of authorship is also complicated in case of cyborg artwork. Using technological achievements, cyborg artists go beyond the limits of human physicality and extend their cognitive capabilities and the scope of interaction with the environment. Their creative manifesto poses challenges to anthropocentric copyright law, which is not necessarily able to protect dynamically developing artwork by entities whose continuity of links with a human being is disrupted (cyborgs) or even completely halted (autonomous AI systems). There are many proposals to resolve the problem of the legal status of works created by artificial intelligence and each of the possible approaches has defects and limitations. Due to the lack of statutory regulations, we can only assume that we deal with an electronic 'ghost author', a machine-ghost that creates works the creation of which a man can only initiate. Therefore, in accordance with the conception I proposed in relation to artificial intelligence artwork, a user who turns on an AI system, initiates its creative activity and this way acts like a person who commissioned a ghost writer to create a work may be recognised as an author within the meaning of copyright law. In this context, we deal with a new, technological form of the phenomenon of ghostwriting known in copyright law; however, due to the fact that the legal system does not recognise the subjectivity of AI (ghost author), the phenomenon-related problems with disposing of the work authorship disappear.

Artwork is cumulative in nature, thus most works are inspired by what has already been created. The proposal for a resolution of the European Parliament 2020/2015 (INI) emphasises that artwork, the so-called traditional art and AI artwork, despite the differences in the creative act alone, keeps having a common aim consisting in the extension of cultural heritage. Cyborg artists define themselves as hybrids of nature and technique, thus something between a human being and a machine. In the contemporary copyright law, the status of works generated by autonomous systems remains unclear. Even if we assume that due to a human element, cyborg artwork belongs to the category of man-made works, additional problems arise in connection with the determination whether techno-artworks related to the extension of one's own body (e.g. works by Stelarc) may be recognised as artworks within the meaning of copyright law. Due to the lack of clear criteria that allow distinguishing artworks from other objects and difficulties in determining premises of protection, bio-art or bioscience artworks will seldom match the statutory definition of an artwork. Therefore, there is a situation in which copyright law provides protection to maps,

calendars, railway timetables, specifications of essential terms of contract and other so-called "small coins", and contemporary artworks are refused protection. In accordance with the contemporary copyright law, the status of works by cyborg artists is highly uncertain due to the difficulties with their classification first of all as works created by an author within the meaning of copyright law; secondly, as works matching the premises of legal protection of authorship. In this context, it is necessary to ask a question about the future of copyright law, which is not able to precisely determine the object of protection and the attribution of authorship in case of artwork created by people-machines or machines alone.

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CYBORG ARTWORK

Summary

The copyright law enshrines the principle that copyright protection can be considered only in the case of works of human origin, which is mitigated in the Anglo-Saxon systems by introducing the category of computer-generated works. Nowadays we are dealing with a situation where, first of all, we are unable to precisely indicate the features of the subject of protection and copyright law grapples with an unresolved problem of distinguishing a work from other objects. Secondly, in the case of new phenomena such as the creation of AI, androids or cyborgs, there are difficulties with attributing the authorship of the work. This results in a too high level of uncertainty of legal effectiveness. The aim of the paper is to present the phenomenon of the work of cyborg artists in the context of the anthropocentric approach to

the authorship of the work, which is dominant in copyright law. The central problem here is the question of the copyright status of works that arise as a result of shifting the boundaries of human possibilities.

Keywords: copyright, cyborg, cyborg creativity, authorship, concept of a work

ARTYSTYCZNA TWÓRCZOŚĆ CYBORGÓW

Streszczenie

Na gruncie prawa autorskiego utrwalona jest zasada, że o ochronie prawnoautorskiej możemy mówić jedynie w wypadku dzieł pochodzących od człowieka, która jest łagodzona w systemach anglosaskich poprzez wprowadzenie kategorii dzieł generowanych komputerowo. Dziś mamy do czynienia z sytuacją, w której po pierwsze, nie potrafimy precyzyjnie wskazać cech przedmiotu ochrony, i prawo autorskie boryka się z nierozwiązanym problemem z odróżnianiem utworu od innych obiektów. Po drugie, w kwestii nowych zjawisk, takich jak twórczość AI, androidów czy cyborgów, pojawiają się trudności z przypisaniem autorstwa utworu. Rodzi to zbyt wysoki z punktu widzenia efektywności prawa poziom niepewności (co do przedmiotu i podmiotu prawa autorskiego). Celem artykułu jest przedstawienie zjawiska twórczości cyborgicznych artystów w kontekście dominującego w prawie autorskim antropocentrycznego podejścia do autorstwa utworu. Centralnym problemem staje się tu pytanie o autorskoprawny status dzieł, które powstają w wyniku przesunięcia granicy ludzkich możliwości, zarówno w obszarze cielesności, jak i zdolności kognitywnych.

Słowa kluczowe: prawo autorskie, cyborg, twórczość cyborgów, autorstwo, pojęcie utworu

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CIVIL LIABILITY OF ENTITIES OTHER THAN AIRCRAFT OPERATORS FOR AVIATION ACCIDENTS

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INTRODUCTION

Contemporary aviation is a system of mutually bound entities whose activities are aimed at ensuring conditions for safe exploitation of aircraft used on a constantly growing scale. The specificity of aviation, advancing specialisation and technique development are forcing distribution of various functions. And although the key function is still attributed to an aircraft operator, the safety of aviation operations also depends on other entities. In a nutshell, aviation safety also depends on:

1) an aircraft, including all appliances used during a flight, which should be designed and produced in the way ensuring the required level of reliability and safety, for which designing and manufacturing entities are responsible;
2) the maintenance of an aircraft in continuing exploitability, for which an aircraft operator is responsible via organisations that manage exploitability and provide services;
3) airport and ground infrastructure, for which airport managers and entities providing ground handling services are responsible;
4) organisation of airspace and air traffic (including ramp traffic at airports), for which the state and institutions providing air traffic services are responsible;
5) air traffic services provided by designated institutions;
6) the level of training of aviation personnel, especially cabin crew, mechanics and field operation service staff, which is conducted in organisations training this personnel;

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7) the system of state supervision over the aviation sector activities, in particular the system of aviation equipment certification, organisations involved in aviation and the system of licencing aviation personnel.

The system of norms regulating the functioning of the aviation sector is rather complicated. It is multi-layered. Its legal acts originate from various sources (international, European Union and national ones), with a different subjective and objective scope of application.[1] Anyway, the basic role of aviation law is to determine such requirements, rules or procedures that ensure the safety of aviation operations,[2] also in the area of developing mutual relations between the aviation sector entities. Administrative regulations, taking into account past experience or technical progress, impose a series of requirements and obligations on entities involved in aviation. It is the way to minimise aviation accidents.

However, if an aviation accident occurs, the issue of liability arises, which means facing the consequences resulting from an accident. With regard to civil liability within the meaning of compensation for loss caused by an aviation accident, it is what first of all an aircraft operator incurs, i.e. an air carrier towards passengers in accordance with special rules laid down in international and the EU law,[3] as well as an entity exploiting an aircraft towards the crew and third persons[4] in accordance with special rules laid down in the national law, i.e. Act: Aviation Law.[5] In both situations, we deal with obligatory civil liability insurance covering quite high minimum amounts.[6] At the same time, this liability is as a rule independent of a fault. Grounds for holding an aircraft operator liable are rather obvious as an aircraft is under their control and supervision. This is an operator who is responsible for the technical state of an aircraft, and designates the crew that takes decisions concerning the flight performance. However, as it was mentioned above, contemporary aviation involves a considerable number of entities whose task is to ensure safe flights. It is especially evident in commercial air transport of passengers the operations of which are based on the expanded infrastructure of air traffic the functioning of which involves various entities and institutions.

Unlike in the legal situation of aircraft operators (the system of liability of an air carrier, the system of liability of a person exploiting an aircraft), in case of other entities there are no special regulations concerning their civil liability, both at the national and international level. That is why while looking for grounds for civil liability of entities that are not aircraft operators it is each time necessary to refer to the provisions of civil law that regulate liability in tort.[7]

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1 Żylicz, M., *Prawo lotnicze*, Warszawa, 2011, p. 26.

2 Rembieliński, A., Olszewski, M., 'Niektóre zagadnienia odpowiedzialności cywilnej za wypadki lotnicze', *Nowe Prawo*, 1964, No. 7–8.

3 For more see Konert, A., *Odpowiedzialność cywilna przewoźnika lotniczego*, Warszawa, 2010.

4 For more see Konert, A., *Odpowiedzialność za szkodę na ziemi wyrządzoną ruchem statku powietrznego*, Warszawa, 2014.

5 See Articles 206 and 207 of the Aviation Law, Act of 3 July 2002, consolidated text, Journal of Laws of 2020, item 1970, as amended.

6 For more see Konert, A., *Ubezpieczenia lotnicze*, Warszawa, 2014.

7 Similarly Rembieliński, A., Olszewski, M., 'Niektóre zagadnienia odpowiedzialności cywilnej…', op. cit., p. 731.

Some of the above-mentioned entities are liable regardless of their fault. Firstly, the state supervision responsible for safety in civil aviation may be held liable for public authorities' activities that are unlawful (Article 417 et seq., Civil Code). Secondly, aircraft and aviation equipment manufacturers may be held liable for damage caused by a dangerous product (Article 449[1] et seq., Civil Code). Finally, if the activity of one of the above-mentioned entities is treated as a business activity within the meaning of Article 435 Civil Code, they can be held liable for risk. In other situations, liability of entities involved in aviation should be evaluated in the light of Article 415 Civil Code determining liability for damage caused by a culpable act.

From a practical point of view, suing an entity other than an aircraft operator is connected with extraordinary situations. It is due to the fact that an aviation accident is usually caused by many factors and circumstances. As a result, it is very difficult to prove that the only cause was action (omission) of only one entity involved in the event. That is why claims are filed to those entities whose liability is independent of a fault (an air carrier, an entity exploiting an aircraft). Then, it is not necessary to point out the cause of an aviation accident. The choice of an aircraft operator as an entity liable for damage is also advantageous because this liability is covered by obligatory insurance.[8] That is why the aggrieved may claim compensation directly from an insurance company of the person exploiting an aircraft (Article 822 § 4 Civil Code). What becomes important, however, is the issue of the so-called legal recourse. An aircraft user or an insurance company, having paid compensation for damage caused by an aviation accident, will start looking for liability of the entities whose action or omission contributed to an aviation accident. Of course, it is also possible that in some situations the liability of an aircraft operator and other entities will be joint and several one. For example, the general rule of joint and several liability for damage caused by a prohibited act (Article 441 § 1 Civil Code) is determined in Article 207 (7) AL in accordance with which persons culpable for damage are held liable jointly with a person exploiting an aircraft.[9]

Finally, the article analyses potential legal grounds for liability of the entities and institutions other than an aircraft operator that may be addressees of the obligation to redress the damage resulting from an aircraft movement. The considerations focus on the objective aspect, i.e. on the type of activities that such entities are involved in. This allows for identification of certain special features connected with the given entity's possible liability for damages. The article does not deal with the issue of civil liability of natural persons, i.e. personnel involved in aviation operations, such as pilots, mechanics or air traffic controllers.

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[8] Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L 138, 30.4.2004, as amended.

[9] The provision lays down joint and several liability of the persons who caused an accident together with other entities referred to in Article 207(1)–(5) AL. Thus, it also concerns liability of a registered aircraft operator (paragraph 5), all persons who have the right to operate (use) an aircraft (paragraph 3), persons subordinate to a person exploiting an aircraft (paragraph 4) and persons unlawfully using an aircraft (paragraph 6).

1. LIABILITY FOR AIRCRAFT AIRWORTHINESS

The first group of entities that can be held liable for damages resulting from an aviation accident includes organisations the operations of which are related to the failure of technical defect provided that the defect had had impact on the accident.

First of all, it is the **liability of the manufacturer of an aircraft** (its parts or equipment) in a situation when a given appliance may be recognised as a dangerous product within the meaning of the provisions of the EU[10] implemented to the national law (Article 449[1] et seq., Civil Code). An appliance understood as a whole (an aircraft, an engine and a propeller are defined as products that are subject to certification within the meaning of the EU regulations) but also a part of that whole (e.g. navigation systems). Evaluating 'dangerousness' of an appliance within this meaning that may substantiate its producer's liability, one should take into account the provisions regulating the process of designing and manufacturing aircraft and other aviation products.[11] Liability of a certified (authorised) manufacturer is on the foreground.[12] A question is also raised about the role of aviation authorities supervising the process of designing and manufacturing aviation equipment. These are the aviation authorities who grant every aircraft a certificate stating that it conforms to all the specifications laid down to ensure that aviation products meet fundamental requirements of aviation safety. In case of the EU, the aviation authority competence connected with certification of aviation products was given to the EU Aviation Safety Agency (EASA) pursuant to the provisions of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency.[13]

It should be emphasised that the issue of aviation equipment manufacturers' liability has become especially important in recent years. Two accidents of Boeing 737 MAX aircraft first of all revealed the weakness of certification processes.[14] From the perspective of civil liability, they resulted in the admission of liability by the manufacturer although, as the investigation indicated, one of the main causes of the two accidents was the defectiveness of one of the sensors of the MCAS system produced by a co-supplier.[15] It was later found that the main problem consisted in the MCAS system alone, especially the manufacturer's activities connected with

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[10] Council Directive of 25 July 1985 on the approximation of the laws and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, as amended. For more, see Diederiks-Vershoor, I., *An Introduction to Air Law, 2006*, pp. 184–193.

[11] Commission Regulation (EU) No. 748/2012 of 3 August 2012 laying down implementing rules for airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations. OJ L 224, 21.8.2012, as amended.

[12] McClean, D. (ed.), *Shawcross and Beaumont AIR LAW*, LexisNexis, Edition 152 (2016), Vol. IV, p. 231.3 et seq.

[13] OJ L 212, 22.8.2018, as amended.

[14] See Correia, V., 'Certification Issues Revealed by the 737 Max Crisis: A Comparative Approach from a European Perspective', *Air and Space Law*, 2020, Vol. 45, No. 3.

[15] For more, see Konert, A., 'Aviation Accidents Involving Boeing 737 MAX: Legal Consequences', *Ius Novum*, 2019, No. 3.

'hiding' the system in the new model of Boeing 737 from the operators and pilots, as well as aviation supervision authorities.[16]

Moreover, one of the most tragic aviation accidents in Europe that took place over Überlingen, a southern German town, in 2002, in which two planes collided, resulted in awarding damages not only from the institution providing navigation services but also the manufacturer of anti-collision system: TCAS (*Traffic Alert and Collision Avoidance System*).[17] The direct cause of the crash was the fact that the air traffic controller realised that the planes were on a collision course too late and the two crews reacted to the situation differently. On the one hand, the controller instructed one of the planes to descend and the other to climb immediately. At the same time, the TCAS instructed the pilots to do the same but in a different sequence. The crew of one aeroplane followed the instruction of the TCAS while the other followed the instructions of the controller. This resulted in a mid-air collision. The lack of unambiguous instructions from the TCAS was the cause of the recognition of the system as a dangerous product.

A manufacturer's liability under the regulations concerning liability for a dangerous product is taken into consideration regardless of the type of aircraft or the systems installed on board.

The potential manufacturer's liability can be exemplified by an accident of a small training aircraft (LX-2), which took place at Warsaw Babice Airport on 1 May 2012.[18] The circumstance conducive to the aviation accident that the airport indicated was "probably inappropriate work of the engine and/or the display of a warning and/or a caution of the FADEC system caused by fuel gasification resulting from high temperature in the surroundings and a 40-minute grounding at a sunny place before take-off". The final report suggests that the Flight Manual lacks detailed instructions concerning the use of the aircraft at high temperatures. However, such instructions can be found in the engine operation technical manual. According to the report, "the lack of relevant information in the Flight Manual might have lulled the pilot into a false sense of security as far as the use of an aircraft in high temperatures is concerned." That is why a safety recommendation was issued and addressed to the aeroplane manufacturer to introduce the procedure of the aircraft use in high temperatures into the Flight Manual. The lack of appropriate instructions in aircraft operation may result in its recognition as a dangerous product,[19] and therefore also a manufacturer's liability.

A different situation is related to inappropriate **technical exploitation** of an aircraft, which includes continuing airworthiness management (including periodical technical inspection) and service activities (repairs) ordered within this

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[16] Bradley Wendel, W., 'Technological Solutions to Human Error and How They Can Kill You: Understanding the Boeing 737 Max Products Liability Litigation', *Journal of Ari Law and Commerce*, 2019, Vol. 84, issue 3, p. 379.

[17] For more see Konert, A., 'Odpowiedzialność producenta systemów antykolizyjnych za szkody spowodowane przez wypadek lotniczy nad Uberlingen', *Ius Novum*, 2015, No. 3.

[18] Final Report of the State Commission on Aircraft Accidents Investigation No. 370/12.

[19] McClean, D. (ed.), *Shawcross and Beaumont AIR LAW*, LexisNexis, Edition 152 (2016), Vol. IV, p. 247 and American courts' judgements referred to therein.

management. If aircraft exploitation technical malpractice is found to be the cause of an aviation accident, then its owner, actual operator or an organisation managing continuing airworthiness to which the owner or operator transferred their duties may be held liable. The liability of organisations providing services commissioned by the above-mentioned entities to perform certain service tasks (inspection, renovation, repairs) may be a special case of liability. In order to determine who is liable and explain whether relevant requirements have been neglected, it is necessary to refer to the detailed provisions regulating continuing airworthiness.[20]

In case relevant requirements are not fulfilled, provided it results in an accident, as a rule Article 415 Civil Code (or Article 430 Civil Code) will constitute grounds for liability. If the tasks connected with continuing airworthiness management, including technical service of an aircraft, are transferred to an authorised organisation, an owner's or an operator's liability will be subject to evaluation in the light of Article 429 Civil Code.

2. LIABILITY FOR AIR NAVIGATION SERVICES

One of the state's roles in relation to air navigation is to establish and ensure the functioning of the system of air traffic management and to protect and handle this traffic.[21] In order to fulfil those functions the state establishes and enforces detailed regulations on air traffic, organises and manages its airspace, as well as ensures the functioning of air navigation services in this space. These are services provided for air traffic understood as the traffic of all aircraft during their flight and on the manoeuvring area of an aerodrome.[22] The air navigation services include aviation information services, the role of which is to provide all information and data necessary to plan and perform a flight in conformity with the binding air traffic regulations. A similar function is played by meteorological services, which provide meteorological information for the purpose of planning a flight and used during the flight. There are also communications, navigation and control services, which are assigned a task of maintaining the infrastructure and communications equipment, navigation information or one that allows localisation of an aircraft. Thirdly, there are air traffic services that are to directly support and control flights. These are services responsible for the provision of mid-air information, alarm services and air traffic control services. The latest service is particularly important because its role is to prevent mid-air collisions of aeroplanes, and aircraft collisions with barriers or other aircraft in the manoeuvring area, as well as to improve and maintain the organised flow of air traffic. This service is provided in particular sectors (parts) of airspace by air traffic control bodies. What is important, the regulations oblige an

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[20] Commission Regulation (EU) No. 1321/2014 of 26 November 2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks, OJ L 362, 17.12.2014, as amended.

[21] Żylicz, M., *Prawo lotnicze...*, op. cit., p. 231.

[22] Definitions of particular services are based on those provided in *Wielka Encyklopedia Prawa. Tom 19. Prawo komunikacyjne*, ed. inter alia by Żylicz, M., Warszawa, 2021.

aircraft commander to follow the air traffic control permissions and requests, and the only departure from this rule is admissible in a situation involving a threat to an aircraft safety.

Legal regulations concerning the functioning of air navigation services are rather complicated, which results from both a high level of technical specialisation necessary in their operations and the necessity of ensuring relatively uniform international and European rules. The European legislator implemented the so-called Single European Fly programme, which is aimed at standardising the rules of using airspace.[23] The European Union regulations are substituting for the former national provisions regulating the functioning of air navigation services. It can be said that a far-reaching process of unification of the provisions regulating the operating and functioning of airspace and air navigation services at the European level is taking place. It is worth reminding that just due to the necessity of adjusting Polish law to the EU provisions in accordance with Act of 8 December 2006, the Polish Air Navigation Services Agency [PANSA/PAŻP] was established[24] and given the status of a governmental legal person. PANSA aims to ensure safe, continuing, fluent and efficient air navigation in the Polish airspace by means of performing the functions of institutions providing air navigation services, airspace management and air traffic management. It should be pointed out that although the tasks assigned to the Agency are public ones, the legislator clearly determined that the State Treasury does not take responsibility for the Agency's liabilities (Article 7 of the Act on PENSA).

Looking for legal grounds for assuming that institutions providing air navigation services incur civil liability for an aviation accident, it is necessary to refer to the provisions of Civil Code because Act: Aviation Law does not regulate this issue. It seems that the liability of such entities should be excluded on the principle of risk, although, theoretically, it is possible to recognise them as "enterprises set in motion by natural powers" (Article 435 Civil Code) as the provision of air navigation services is not possible without the use of electricity and a series of technical appliances (radio stations, telecommunications links, radars, instrument display systems etc.). It should be taken into account, however, that the activity is a source of special hazard for third persons. Moreover, the functioning of institutions providing air traffic services is aimed at minimising risks occurring in the contemporary air traffic.[25] That is why liability of institutions providing air traffic services for potential damage should be based on the principle of fault (Article 415 or Article 430 Civil Code). As a result, an institution providing air traffic services is one of the entities that may be held jointly liable based on their fault, together with an entity exploiting an aircraft (Article 207 (7) AL). In order to hold an institution providing air traffic services liable together with an entity exploiting an aircraft for damage caused by

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[23] For more see e.g. Markiewicz, M.T., 'Zarządzanie ruchem lotniczym i służby żeglugi powietrznej w prawie Unii Europejskiej – wybrane zagadnienia', internetowy *Kwartalnik Antymonopolowy i Regulacyjny*, 2017, No. 2(6).

[24] Act of 8.12.2006 on the Polish Air navigation Services Agency (consolidated text, Journal of Laws of 2021, item 260).

[25] Thus also Chatzipanagiotis, M., 'Liability Aspects of Air Traffic Services Provision', *Air and Space Law*, 2007, No. 4–5, p. 334.

an aircraft movement, the aggrieved should prove the occurrence of the following circumstances: firstly, the existence of an obligation to provide a given service in the circumstances of a given accident. For example, air traffic control service is provided only for flights in the controlled airspace after a flight plan has been submitted and a permission to fly into this airspace has been given. In addition, having taken into account the provisions regulating the functioning of a given service, it is necessary to prove a culpable act or omission, as well as a relation between this act or omission and the damage. That is why determination whether institutions providing air traffic services (especially air traffic control services) infringed the provisions regulating their functioning is of key importance for the recognition of their liability.[26] At the same time, what requires special attention is the issue of liability for air traffic control service's acts or omission due to the aim of the service (prevention of collisions). In general one can say that each time it is necessary to establish whether a controller provided data and instructions necessary for a safe flight diligently.[27] However, this evaluation is difficult because it also requires assessment of the conduct of the aircraft crew, which is first of all obliged to maintain safety during the fight.[28] Undoubtedly, however, air traffic control service's liability will be greater in case of flights performed based on instrument indications when the aircraft crew takes decisions based on the data provided by certain instruments, as well as permissions given by an air traffic controller. Joint and several liability of institutions providing air traffic control services is most often assumed in case of mid-air aircraft collisions and crashes against the ground resulting from the provision of erroneous instructions or insufficient attention of air traffic control services.[29] By the way, it is worth emphasising that, in the context of progressive automation of air traffic services' activities, considering liability based on the principle of fault is not the right response to the challenges of the 21st century.[30] That is why there are proposals to introduce a different solution concerning compensation for damage in case of automated systems of air traffic management. It concerns in particular highly automated systems of unmanned aerial vehicles traffic management that are being developed.[31]

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[26] Commission Implementing Regulation (EU) 2017/373 of 1 March 2017 laying down common requirements for providers of air traffic management / air traffic navigation services and other air traffic management network functions and their oversight, and repealing regulation (EC) No. 482/2008, Implementing Regulation (EU) No. 1034/2011, (EU) No. 1035/2011 and (EU) 2016/1377, and amending Regulation (EU) No. 677/2011, OJ L 62, 8.3.2017.

[27] In accordance with Article 122 AL, the user of the Polish airspace is obliged to immediately follow the instructions of an institution providing air traffic services and of air traffic bodies.

[28] For more see Chatzipanagiotis, M., 'Liability Aspects of Air Traffic…', op. cit.

[29] See in particular American courts' judgements referred to in McClean, D. (ed.), *Shawcross and Beaumont AIR LAW*, LexisNexis, Edition 152 (2016), Vol. VI, p. 164.3 et seq.

[30] See Contissa, G., Sartor, G., 'Liabilities and automation in aviation', *Proceedings of the SESAR Innovation Days*, 2012.

[31] See Konert, A., Kotliński, M., 'U-Space – Civil Liability for damages caused by Unmanned Aircraft', *Transportation Research Procedia*, 2020, Vol. 51.

3. LIABILITY FOR AERODROME INFRASTRUCTURE AND OPERATIONS

Liability of an entity managing an aerodrome differs depending on the purpose for which the aggrieved uses the infrastructure of an airport. For the needs of the present article it is sufficient enough to limit the situation to one in which the damage caused by an aircraft movement is connected with the operations of the airport at the same time. Most often it will be an aviation accident that takes place in the course of an aircraft operation within the area of an aerodrome or in its nearest surroundings. In accordance with Article 80 AL, an aerodrome manager is responsible for safe exploitation of an aerodrome. That is why, in case of the infringement of the provisions concerning safe exploitation of an aerodrome, provided the infringement had impact on the occurrence of an aviation accident, an aerodrome manager's liability will be based on general rules, i.e. it will be treated as liability for causing culpable damage (Article 415 and Article 430 Civil Code). Obviously, detailed technical and exploitation-related requirements that an aerodrome manager must fulfil differ depending on the type of the aerodrome concerned. In a nutshell, public aerodromes involving passengers have to meet the strictest requirements.[32]

One should approve of the opinion expressed earlier that there is a lack of grounds for the application of Article 435 Civil Code as grounds for holding an aerodrome manager liable.[33] It is so because the situation is analogous to the liability of an institution providing air navigation services. The whole aviation-related infrastructure of an aerodrome on its own, including runways and their lighting or navigation systems, does not pose increased danger. It serves the provision of safety for aircraft operations.

4. LIABILITY FOR AVIATION AUTHORITIES' ACTIVITIES

It is also possible that the activities of aviation supervision, i.e. the aviation authorities, will be found to have caused an accident.

In case of national authorities (the President of the Civil Aviation Authority), legal grounds for liability must be looked for in the provisions regulating the liability of the State Treasury for activities that infringe law (Article 417^1 et seq., Civil Code) and should take into account the national and European provisions regulating the rules of aviation supervision functioning. However, the application of the rules of public authorities liability for unlawful action or omission in aviation raises a series

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[32] See Articles 54 and 59a of the Aviation Law and Commission Regulation (EU) No 139/2014 of 12 February 2014 laying down requirements and administrative procedures related to aerodromes pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 44, 14.2.2014, as amended.

[33] See Kaczyńska, S., 'Odpowiedzialność cywilna zarządzającego portem lotniczym z tytułu czynu niedozwolnego', in: Łuczak, K. (ed.), *Wybrane problemy prawne związane z funkcjonowaniem portu lotniczego*, Katowice, 2015, pp. 187–214.

of questions that require a deep analysis. Although the role of aviation authorities consists in the supervision over aircraft operators (and their entities), the obligation to comply with the provisions of the aviation law is the burden that first of all the operators must bear. That is why most activities of aviation authorities consist in "checking and confirming" whether a given operator meets the requirements of the aviation law (e.g. the issue of certificates and licences).

It should be taken into account that aviation authorities' activities sometimes have the features similar to commercial activities as most of them are, at least partially, charged for (aviation fees). Therefore, foreign courts more and more often apply general rules of liability for damage in their judgements on aviation authorities' liability.[34]

Thus, it seems that it is possible to deal with aviation authorities' liability in the following situations connected with aviation entities' activities. Firstly, it concerns a situation when it is proved that a certificate was issued although not all the requirements had been fulfilled. Secondly, it is a situation when the authorities supervising a certificate holder recognise irregularities and then, despite the operator fails to amend them, do not take further steps that regulations stipulate (limitation, suspension or withdrawal of the certificate).

It should be also remembered that some competences of national aviation authorities are transferred to the European Union Aviation Safety Agency (EASA). In order to assess the liability of the Agency, which sometimes acts as an aviation authority (issues certificates for foreign air carriers), it is necessary to start with Article 97(3) of the Regulation (EU) 2018/1139. In accordance with the provision, in the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Regulation also stipulates that the Court of Justice shall have jurisdiction in disputes over compensation for damage caused by EASA (Article 97(4)).

5. COMMON ISSUES

In the situations when aviation entities are liable based on the principle of fault a question arises when we can decide that it is possible to impute fault to a given entity or a member of its staff (Articles 415 and 430 Civil Code). It does not concern a theoretical consideration of the issue of fault in civil law but the explanation of a few practical issues.

Fault in relation to liability in tort is considered when an entity can be accused of unlawful conduct within the meaning of the infringement of the legal order understood very broadly. Moreover, the assessment of conduct alone must be negative and lead to a conclusion that damage was done intentionally or because of the lack of due diligence (negligence or recklessness). In the area of liability for

[34] See Korzeniowski, J., 'Case Law Digest – Liability of Aviation Regulators: Are the floodgates opening?', *Air and Space Law*, 2000, No. 2, pp. 87–89.

aviation accidents, in relation to the first aspect of liability on the principle of fault (the objective one), the concept of unlawfulness should be treated rather broadly. Most of the provisions of aviation law are norms that are specialist, technical in nature and were developed for the purpose of ensuring safety in air traffic. The provisions are rather complicated as they take into account the level of technical development and, in addition, originate from various sources. They are contained in legal acts of different rank, although the most extensive requirements connected with air navigation are laid down in (national and EU) implementing regulations. Moreover, some of the technical rules connected with ensuring aviation safety are laid down in a given user's internal documents approved of by aviation supervision bodies.[35] As maintaining the procedures laid down in a given document directly results from the provisions of law, the infringement of the requirements established by those documents should be treated as an exhaustive premise of unlawfulness. In order to impute liability on the principle of fault, it is obviously necessary to prove that the conduct that was not in compliance with the aviation provisions or procedures was the reason for an accident and damage caused.

Discussing the second aspect of liability on the principle of fault (the subjective one), it should be stated that the assessment of the conduct of a person exploiting an aircraft (the crew) in a given situation should be based on an objective model of conduct taking into account due diligence required in aviation activities. That is why a court, taking into account the opinion of an expert witness, should first of all adopt a hypothetical model of conduct of a person exploiting an aircraft (the crew) and take into consideration the purpose of an operation performed, objective circumstances having influence of the occurrence of an accident (weather, traffic etc.) as well as the level of training and experience of the crew. Only then the circumstances of a given accident may be compared to the established model.

CONCLUSIONS

The above-presented analysis of possible grounds for liability of entities other than aircraft operators for aviation accidents leads to the following conclusions. In the vast majority of cases, this liability will supplement the liability of an aircraft operator or will be liability resulting from regressive claims. Liability of an operator (including a carrier) is subject to a special legal regime, which is advantageous for the aggrieved. However, one cannot exclude a situation in which other entities will be addressees of compensation claims from the very beginning. It concerns in particular cases in which aircraft operators believe they are the aggrieved as a result of other entities' activities.

At the same time, an aircraft (its elements) manufacturer becomes the first entity to be held liable within the regime of liability for a dangerous product. On the other hand, in case of entities liable on the principle of fault, liability of entities managing

[35] E.g. an operational manual for an aircraft operator, a flight manual for an operator, a technical service programme, an aerodrome operational manual.

continuing airworthiness, service organisations, entities managing aerodromes or institutions providing air navigation services will always be connected with the necessity of proving a culpable action or omission which is in relation with the cause of the aviation accident. And this will require specialist knowledge, at least in order to establish those actions or omissions in the light of technical provisions thoroughly regulating a given activity, including also internal norms (instructions) required by aviation law. The use of a final report on the investigation into an aviation accident for this purpose would be absolutely insufficient.[36]

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[36] For more see Kasprzyk, P., 'Postępowanie w sprawie wypadku lotniczego a postępowanie cywilne', *Przegląd Sądowy*, 2009, No. 4.

CIVIL LIABILITY OF ENTITIES OTHER THAN AIRCRAFT USERS FOR AVIATION ACCIDENTS

Summary

Liability for damage caused as a result of an aviation accident means first of all liability of an air carrier for damage done to passengers and liability of an aircraft user for damage done to third persons. However, it is also possible to impute liability to other entities, such as an aircraft manufacturer, a service institution, en entity managing an aerodrome, an institution providing air traffic services, or even aviation supervision authorities. The article analyses potential grounds for those entities' liability. Liability of aviation personnel is not covered in the article.

Keywords: civil liability, aviation accidents

ODPOWIEDZIALNOŚĆ CYWILNA ZA WYPADKI LOTNICZE PODMIOTÓW INNYCH NIŻ UŻYTKOWNIK STATKU POWIETRZNEGO

Streszczenie

Odpowiedzialność za szkody wyrządzone wskutek wypadku lotniczego to przede wszystkim odpowiedzialność przewoźnika lotniczego za szkody wyrządzone pasażerom oraz odpowiedzialność użytkownika statku powietrznego za szkody wyrządzone osobom trzecim. Możliwe jest jednak również przypisanie odpowiedzialności innym podmiotom, takim jak producent statku powietrznego, organizacja obsługowa, zarządzający lotniskiem, instytucja zapewniająca służby ruchu lotniczego czy nawet nadzór lotniczy. Artykuł analizuje możliwe podstawy odpowiedzialności tych podmiotów. Poza jego zakresem pozostaje odpowiedzialność cywilna personelu lotniczego.

Słowa kluczowe: odpowiedzialność cywilna, wypadki lotnicze

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CONVERGENCE OF THE BASIC PRINCIPLES OF MEDIATION IN CRIMINAL, CIVIL, ADMINISTRATIVE AND JUDICIAL-ADMINISTRATIVE MATTERS

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Mediation takes place in all the three types of proceedings known in the Polish procedural law; however, only in relation to criminal and civil cases it can be treated as a court proceeding or as one serving the justice system. Mediation referred to in Chapter 5a Act of 14 June 1969: Code of Administrative Procedure (hereinafter: "CAP") takes place before (governmental or local) public administration organs.[1]

On the other hand, mediation serving the justice system is a judicial-administrative one, which is referred to in Article 115 Law on Proceedings before Administrative Courts[2] (hereinafter: "LPAC"). The normative source of all these types of mediation can be found in the provisions regulating a given type of a proceeding because no legal act on mediation has been passed and the legal status of a mediator has not been determined. However, I do not treat this fact as a legislator's oversight, because the institution, with some exceptions, has already established itself in the conscience of procedural organs and citizens. The prospects of mediation do not depend on another normative act regulating it but on the development of our society's legal culture, which is ... not very likely to take place.

Mediation[3] in relation to all these procedures has come into being in the last 25 years; however, only administrative law admits mediation in both arrangements:

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1 Act of 14 June 1960: Code of Administrative Procedure of 14 June 1960 (consolidated text, Journal of Laws 2021, item 735, as amended).

2 Act of 30 August 2002: Law on Proceedings before Administrative Courts (consolidated text, Journal of Laws of 2019, item 2325, as amended).

3 The text uses a term 'mediation' although the regulations discussed in it tend to use the phrase 'mediation proceeding' more eagerly. The acts do not know and apply a differentiation

a horizontal one (between parties: Article 96a § 4 (2) CAP) and a vertical one (between an organ of public administration and a party or this organ and parties: Article 96a § 4 (1) CAP)[4]; other types of mediation are possible only between parties to a proceeding. The oldest type of mediation is one in criminal matters: it occurred in the Polish legal system in 1997. Mediation in civil matters is younger as it was introduced, inter alia, to Article 10 *in fine* and Part II Act of 17 November 1964 Code of Civil Procedure[5] (hereinafter: "CPC") in 2005.[6] Mediation in administrative matters was introduced to CAP a few years ago, i.e. in 2017.[7] The core provisions concerning mediation in civil, administrative and judicial-administrative matters are contained in separate chapters devoted to proceedings, which is expressed in Chapter I Part II CCP, Chapter 5a Part II CAP and Chapter 8 Part III LPAC. Only mediation in criminal matters abandons this editorial practice because it was regulated in Article 23a Act of 6 June 1997 Code of Criminal Procedure (hereinafter: "CCP"),[8] which is not part of a separate chapter; however, this provision, although elaborated in 2003, seems to be succinct in comparison with competitive regulations. The provision was placed in the introductory regulations of Part I CCP as a result of its transfer from the repealed Article 320, which makes it possible to mediate in the course of jurisdictional proceedings and not only in the preparatory one as before 2003.[9] Although mediation is part of every procedural regulation, it is not treated as a separate mode of a given (administrative) court proceeding, which I. Pączek[10] emphasises in the doctrine of a criminal process, and A. Rutkowska[11] in the doctrine of civil litigation, and which is in conformity with the independence of mediation from the organs of the justice system in civil and/or criminal matters, which is recommended by the Committee of Ministers of the Council of Europe.[12]

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between 'criminal mediation' and 'civil mediation' as well as a 'criminal mediator' and a 'civil mediator', which constitutes a certain mental shortcut, which makes it easier to 'move' between those concepts.

[4] Kalisz, A., 'Mediacja administracyjna i sądowoadministracyjna', *Państwo i Prawo*, 2018, No. 3, p. 4.

[5] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (i.e. Journal of Laws of 2021, item 1805, as amended).

[6] Cf. Article 1(1) of the Act of 28 July 2005 amending Act: Code of Civil Procedure and some other acts (Journal of Laws of 2005, No. 172, item 1438).

[7] Cf. Article 1(20) of the Act of 7 April 2017 amending Act: Code of Administrative Procedure and some other acts (Journal of Laws, item 935).

[8] Act of 6 June 1997: Code of Criminal Procedure (consolidated text, Journal of Laws of 2021, item 534, as amended).

[9] Article 23a added by Article 1(6) of the Act of 10 January 2003 amending Act: Code of Criminal Procedure, Act: Regulations introducing Code of Criminal Procedure, Act on crown witnesses and Act on the protection of non-public information (Journal of Laws No. 17, item 155, as amended), which entered into force on 1 July 2003.

[10] Pączek, I., 'Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego', *Ius Novum*, 2016, No. 4, p. 102.

[11] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany*, LEX, 2021, Vol. 3 to Article 183^1.

[12] Which can be treated as a basic principle of mediation – cf. Kużelewski, D., 'Ewolucja polskich uregulowań dotyczących mediacji w sprawach karnych na tle standardów europejskich', *Białostockie Studia Prawnicze*, 2014, No. 15, p. 177.

Regardless of all the distinctions between mediation in criminal, civil, administrative and judicial-administrative matters, all these types share common principles of functioning. From the normative perspective, the catalogue of these principles includes amicability, voluntariness (optionality), commonness, loyalty to its participants, confidentiality and non-openness of its conduction, as well as a mediator's impartiality.[13] Apart from these statutory, to some extent fundamental, principles of mediation, one can observe ones that are deontological in nature. Although they are not commonly binding, mediators apply them and that is why they influence the shape of mediation proceedings. They are not discussed here in detail but they include the principle of neutrality in the object of a dispute (standard II), the principle of professionalism (standard VI), the principle of cooperation with other specialists (standard VII), the principle of protection of a weaker party (frankly speaking, breaking or finishing mediation because of circumstances referred to in standard VIII), the principle of mediation safety (standard IX), and finally the principle of informative reliability within the mediation services proposed (standard X).[14]

The above-mentioned amicability of a case settlement is one of the principles governing an administrative proceeding, which is reflected in public administration organs' obligation laid down in Article 13 § 2 CAP to undertake all actions justified at a given stage of a proceeding making it possible to mediate or reach an agreement. It seems that a similar rule can be drawn from Article 10 and Article 205[6] § 2 CPC, where it is stated that courts should strive for an amicable settlement of an argument at every stage of a proceeding, especially by encouraging parties to mediation. If we understand 'striving' as the the dictionary definition suggests, i.e. as aiming at something, a desire to do something or trying very hard to achieve a goal,[15] the directive to settle an argument amicably where it is admitted by law should not be treated as an insignificant permission but as strong obligation of a court to such activeness, which is reflected in the amendment to Article 10 CPC of 2016,[16] which changed the phrase "a court should strive for (...)" into a stronger one: "a court shall strive for (...)". This approach differs from that typical of a criminal proceeding, where an amicable way of settling a case is not distinguished by the legislator in any way,[17] however, admissible on the initiative or with the consent

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[13] In civil law jurisprudence, other types are formulated, i.e. principles of flexibility, fast proceeding, low costs of mediation, autonomy of parties to a dispute, respect to all participants' dignity, and even "satisfaction of both parties"; for more see Arkuszewska, A.M., Plis, J. (eds.), *Zarys metodyki pracy mediatora w sprawach cywilnych*, Warszawa, 2014, pp. 73–94. In the administrative law doctrine, there is a principle of acceptance (in relation to a mediator and assistance in resolving a conflict) and a mediator's professionalism; thus Suchanek, M., 'Mediacja jako metoda rozwiązywania sporów społecznych', *Studia Administracyjne*, 2018, No. 10, pp. 132–133.

[14] Standards of mediation and a mediator's conduct adopted by the Social Council for Alternative Methods of Solving Conflicts and Disputes at the Ministry of Justice on 26 June 2006.

[15] Słownik Języka Polskiego PWN available on https://sjp.pl/d%C4%85%C5%BCy%C4%87 [accessed on: 3.01.2022].

[16] Article 10 amended by Article 1(1) of the Act of 10 September 2015 (Journal of Laws of 2015, item 1595) that entered into force on 1 January 2016.

[17] T. Grzegorczyk is of a different opinion on the amendment that allowed for the application of mediation throughout the whole criminal proceeding. The author believes that

of the accused and the aggrieved.[18] None of the aims laid down in Article 2 CCP is close to settling the whole case amicably, and the mode is sometimes useless in cases that require bringing a perpetrator to criminal justice. However, this does not mean that the outcome of mediation is totally unimportant for final adjudication in a criminal case and this part of a sentence that contains penal consequences of an act. In accordance with Article 53 § 3 Act of 6 June 1997 Criminal Code (hereinafter: "CC"),[19] determining the so-called directives for judicial imposition of a penalty, when imposing a penalty, a court shall take into consideration positive results of mediation between the aggrieved and a perpetrator.[20] R. Koper points out a subsidiary nature of mediation in criminal matters,[21] the results of which may open a gate to conditional discontinuance of a criminal proceeding (Article 66 § 3 CC), extraordinary mitigation of punishment (Article 60 § 2 CC), as well as may be decisive for admissibility of entering into a prosecution agreement leading to sentencing without a trial (Article 335 CCP) or voluntary submission to penalty (Article 387 CCP).

All the procedures discussed herein, the judicial one as well as the administrative (judicial-administrative) one, assume voluntariness of participation in mediation (Article 23a § 1 CCP, Article 183 § 1[1] CPC, Article 96a § 2 CAP, Article 115 § 1 LPAC), thus, it depends mainly on the will of the parties involved, which corresponds to the adversarial system applied in criminal[22] and civil processes,

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giving mediation a "more general character" contributed to granting it a directive-like nature; cf. Grzegorczyk, T., *Kodeks postępowania karnego. Komentarz do art. 1–467, Vol. I*, Warszawa, 2014, p. 170; see also Kużelewski, D., 'Mediacja po nowelizacji kodeksu postępowania karnego – krok ku zwiększeniu roli konsensualizmu w polskim procesie karnym?', in: Sobolewski, Z., Artymiak, G., Kłak, C.P. (eds.), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 273. However, for a different stance, see Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks…*, op. cit., Vol. 6 to Article 23a.

[18] In the doctrine of a criminal process, mediation is expected to have an "extraordinarily important element of the system of protection of the victims of crime". Thus, equipping the aggrieved with the ability to communicate ("consensual resolution of criminal conflicts") is treated as a sign of his/her empowerment and the necessity of taking into account his/her interests in a trial to a greater extent. For more see Karaźniewicz, J., 'System gwarancji interesów ofiary przestępstwa we współczesnym polskim procesie karnym', in: Pływaczewski, E.W. (ed.), "Współczesne zagrożenia przestępczością i innymi zjawiskami patologicznymi a prawo karne i kryminologia", *Białostockie Studia Prawnicze*, 2009, No. 6, p. 66 et seq.

[19] Act of 6 June 1997: Criminal Code (consolidated text, Journal of Laws of 2021, item 2345, as amended.).

[20] And also "an amicable agreement between them entered into in a proceeding before a court or a prosecutor".

[21] Koper, R., 'Postępowanie mediacyjne a skazanie oskarżonego bez rozprawy', *Prokuratura i Prawo*, 1998, No. 11–12, p. 58.

[22] For a different stance see Kmiecik, R., who believes that mediation confirms giving up the adversarial confrontation of parties and using the so-called alternative method of solving disputes as a substitute for it. The author interprets mediation in criminal matters as a solution that is "contrary to many supreme procedural rules such as formality, the adversarial system, and finally speed and continuity of a trial"; for more see Kmiecik, R., 'Idea mediacji i probacji w Polsce i USA (z perspektywy procesowo-kryminologicznej)', in: Ćwiąkalski, Z., Artymiak, G., Kłak, C.P. (eds.), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 238.

and the autonomy of parties[23] emphasised in the studies of administrative law. The provisions of Article 23a (4) CCP, Article 183 § 1[1] CPC and Article 96a § 2 CAP express the above-mentioned feature of mediation literally.

Voluntariness of mediation means non-coercing its potential participants to participation in mediation, which matches the definition of the word 'voluntary' in a dictionary. Voluntariness of mediation first of all certifies subjectivity of the parties to it and secondly expresses the right belief that *bonum initium est dimidium facti*, and coercion is not the right method to build agreement between feuding parties to a proceeding. In the doctrine of criminal procedural law, it is rightly stated that voluntariness is a background of mediation,[24] and its rank is raised to that of a rule.[25] As a formality, however, it should be pointed out that the above-discussed feature of mediation within a criminal proceeding was not verbalised until 2015[26]; earlier one could think about such voluntariness only based on the fact that the referral of a matter to mediation took place after the defendant and the aggrieved gave their consent (Article 23a § 1 CCP). There are no exceptions to the principle of voluntariness within a criminal process.[27] The so-called obligatory mediation known in civil and judicial-administrative procedure does not negate the superiority of the principle of voluntariness, although it excludes a decision to refer a case to mediation from the application of the principle. The example of such a solution is family mediation regulated in Article 445[2] CPC ("in order to amicably solve litigious matters concerning the needs of a family, alimony/maintenance, methods of guardianship of children, contact with children and property related matters that are subject to a judicial judgement within adjudication on a divorce or separation"), as well as mediation under Article 115 § 2 LPAC. Both types of mediation are conducted ex officio based on a discrete and not consulted decision of a court,[28] which is not bound by limitations laid down in Article 183[8] § 2 CPC[29] or

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[23] Which contains an element of the adversarial system, parties' availability and free initiative. For more see Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M. (eds.), *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX, 2021, Vol. 6 to Article 96a.

[24] Grajewski, J., Steinborn, S., *Kodeks postępowania karnego, Komentarz do art. 1–424*, LEX, 2013, Vol. 2 to Article 23a.

[25] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 8 to Article 23a.

[26] Cf. Article 1(5) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws item 1247, as amended); for a similar stance see Kużelewski, D., 'Na marginesie prawa do sądu – mediacja w sprawach karnych w świetle prawa międzynarodowego i krajowego', in: Dynia, E., Kłak, C.P. (eds.), *Europejskie standardy ochrony praw człowieka a ustawodawstwo polskie*, Rzeszów, 2005, p. 331.

[27] Sławomir, S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX, 2016, Vol. 10 to Article 23a.

[28] Waszkiewicz, P., 'Zasady mediacji', in: Gmurzyńska, E., Morek, R. (eds.), *Mediacje. Teoria i praktyka*, Warszawa, 2018, p. 163 et seq.; Górska, A., Huryn, V., *Mediacje w rozwiązywaniu konfliktów rodzinnych*, Warszawa, 2007, p. 26.

[29] Dończyk, D., Koper, I., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom. II. Artykuły 367–505(39)*, LEX, 2021, Vol. 2 to Article 445[2]. However, the mediation under Article 436 § 1 CPC is not an obligatory one ("provided there are prospects for saving a marriage"), because the provisions on mediation are applicable to it by analogy, however with a reservation that the mediation may also aim at conciliation of the spouses (Article 436 § 2 CPC).

the lack of a party's motion to conduct it (Article 115 § 1 LPAC).[30] However, waving of mediation voluntariness in such a case is not especially burdensome because it does not go beyond the initiation of mediation and an obligation to appear before a mediator. Civil law experts[31] and administrative law experts[32] agreeably recognise voluntariness as a *sine qua non* of mediation, without which one cannot speak about mediation. However, it is not clear whether the latter also relate the statement to participation in mediation instigated ex officio under Article 115 § 2 LPAC.

Voluntariness of mediation in civil matters is clearly seen in relation to its special form, i.e. contractual mediation (Article 183^1 § 2 *in principio* CPC) as a contract just means parties' agreeable declaration. However, mediation based on a motion (Article 183^6 CPC) and one conducted based on a court's referral (Article 183^8 § 1 in conjunction with § 2 CPC) also have this characteristic feature.

Within the area we are interested in, the activeness of parties to a criminal proceeding, in accordance with Article 23a § 1 CCP, may take the form of an initiative concerning the referral of a matter to mediation, or consent for such referral, provided the other party takes a positive stance towards the initiative. Mediation can also take place as a result of an agreeable and unanimous motion of the aggrieved and the defendant. In a civil proceeding, such activeness takes the form of an agreement on mediation (Article 183^1 § 2 *in principio* CPC), a motion to a court to conduct mediation (Article 183^7 CPC), consent for mediation applied for by the other party or consent for referral of a matter to mediation by a court (*arg. a contrario ex* Article 183^8 § 2 CPC[33]).

The doctrine of criminal procedure does not exclude a situation in which a prosecutor or a court may take the subject-related initiative, which results in the necessity to obtain both parties' consent.[34] Also Article 96b § 1 CAP stipulates a similar 'official' initiative and treats it as equivalent to the motion-like form. After all, taking such an initiative *ex officio* does not mean that a matter is referred to mediation because the provision only stipulates the notification *ex officio* about the possibility of conducting mediation. And in such a case, giving consent for mediation is a requirement for further proceeding aimed at mediation. Taking the initiative to resolve an argument by means of mediation is also within a court's competence, which results directly from Article 183^8 § 1 CPC. In accordance with Article 183^8 § 5 CPC, before the first session of the bench, the chair assesses whether to refer the parties to mediation, and if it is necessary to hear them,

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[30] Woś, T., in: Knysiak-Sudyka, H., Romańska, M., Woś, T., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, LEX, 2016, Vol. 11 to Article 115; Dauter, B., in: Kabat, A., Niezgódka-Medek, M., Dauter, B., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, LEX, 2021, Vol. 6 to Article 115.

[31] Broński, W., Dąbrowski, M., 'Status prawny mediatora w sprawach cywilnych – stan obecny i propozycje zmian', *Roczniki Nauk Prawnych*, 2014, No. 4, p. 9.

[32] Łukasiewicz, J.M., 'Zasada dobrowolności', in: Arkuszewska, A.M., Plis, J. (eds.), *Zarys…*, op. cit., p. 75.

[33] However, see Article 202^1 CPC.

[34] Kurowski, M., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2022, Vol. 2 to Article 23a.

he/she calls them to appear at a non-public sitting. Only the civil and administrative procedures determine a clear deadline for parties for expressing their stance concerning the referral of a matter to mediation. In case of Article 183[8] § 2 CPC, the deadline for giving their consent is one week from the date of an announcement or delivery of a decision on the referral of a matter to mediation to a party. In case of Article 96b § 3 CAP, on the other hand, the time limit accounts for 14 days. The provisions of CCP do not stipulate similar time limits, which does not constitute a reason why the defendant and/or the aggrieved could give such consent *ad calendas graecas*. The receipt of this consent depends on the procedural organ that refers a matter to mediation or a mediator (Article 23a § 4 second sentence CCP), which results from the amendment of 2013 because earlier a mediator did not have this right. In case a mediator is obliged to receive consent for mediation, it is almost certain that a party will postpone giving it. Such a delay is also possible in the former situation, i.e. when an organ referring a matter to mediation receives parties' consent for it, which may be justified by the need to provide a party with the time necessary to consider such a solution or consult it with their counsel for the defence or proxy.

Nota bene, admissibility of the receipt of "consent for participation in a mediation proceeding" by a mediator (Article 23a § 4 CCP) raises doubts whether it is the same consent as the one referred to in Article 23a § 1 CCP, i.e. whether it is still consent for referring a matter to mediation ("for referring a matter to an authorised institution or person in order to conduct a mediation proceeding") or there is a difference between the two. Despite the terminological inconsistency between the content of § 1 and § 4 of Article 23a CCP, for functional reasons, S. Steinborn is for recognition of the identity of the two, which seems to be the right solution to the problem.[35] Referring a case to mediation in criminal matters (§ 1) shall always be based on the consent given by or on the initiative of one or both parties concerned, *eo ipso* both these types of activeness in general mean giving consent for participation in mediation because it is hard to assume that a party shows initiative and next does not want to use it. Diversification of the scope of consent under Article 23a § 1 and § 2 CCP would imply a two-stage system of obtaining consent from the defendant and/or the aggrieved and would lengthen the running of a case. After all, mediation is to help improve a criminal proceeding and not to complicate it. On the other hand, starting mediation on their own initiative, mediators, also those involved in criminal matters, ask parties about their stance on their onward participation in mediation.

Voluntariness is not only a requirement for referring a matter to mediation but also for continuing it and the way of its finalisation.[36] In each type of mediation

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[35] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 11 to Article 23a.

[36] Although the last aspect may be treated as a symptom of the autonomy of parties to a mediation, i.e. independence of decision making concerning the shape of mediation (its course) as well as its results. See Antolak-Szymanski, K., in: Piaskowska, O.M., Antolak-Szymanski, K., *Mediacja w postępowaniu cywilnym. Komentarz*, LEX, 2017, Vol. 3 to Article 183[1].

discussed herein, its participant[37] may withdraw consent until the end of a mediation proceeding[38]; however, only Article 23a § 4 *in fine* CCP expresses this literally. In other cases, i.e. mediation in civil[39] and administrative[40] matters, such a conclusion may be drawn from the provisions of Article 183[1] § 1 CPC and Article 96a § 2 CAP, which declare their voluntariness[41] not limited by any subjective or objective frames. Voluntariness means that a party does not have to explain the reasons why he/she does not give consent for participation in a mediation proceeding, withdraws from it, or does not accept the other party's proposals. A party does not have to put forward a counter-proposal in order to respond to a solution to an argument proposed in the course of mediation.

In every proceeding in question, consent is the expression of a party's subjective right to take discrete decisions concerning a dispute. Thus, consent given by counsel for the defence or a proxy cannot substitute for it. None of the above-mentioned procedural regulations lays down a form of consent for mediation, which means that it may be given orally or in writing. There are no obstacles to a withdrawal of oral consent by means of a decision in writing and vice versa. While consent for participation in mediation cannot be presupposed, a refusal to participate in it can be linked with persistent and unexplained absence from meetings scheduled by a mediator, as well as with a refusal to sign a mediation report, and in case of mediation in civil and administrative matters, with ineffective expiration of a term referred to in Article 183[8] § 2 CPC and Article 96b § 3 CAP respectively. The need of clear consent for participation in mediation may be concluded based on the fact that, unlike inter alia Article 98 § 3, Article 343 § 2 or Article 343a § 2 second sentence CCP, the provision of Article 23a § 1 CCP does not use the phrase 'lack of objection' but 'consent', thus some form of activeness perceived by others. Consent, meaning a form of active behaviour, is also a requirement for mediation in civil matters because it is carried out not when there is a 'lack of objection' but when both parties give their consent, on a party's motion or based on an agreement between parties (Article 183[7] CPC), as well as for mediation in administrative matters (Article 96c CAP).

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[37] In administrative law jurisprudence, however, an organ taking part in mediation is refused this right; cf. Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M. (eds.), *Komentarz…*, op. cit., Vol. 7 to Article 96a.

[38] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 10 to Article 23a.

[39] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 14 to Article 183[1]; Stefańska, E., in: Manowska, M. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–477[16]*, LEX, 2021, Vol. 9 to Article 183[1]; Żyznowski, T., in: Dolecki, H., Wiśniewski, T. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2013, Vol. 3 to Article 183[1].

[40] Morek, R., 'Dobrowolność mediacji i jej ograniczenia (prawo i praktyka)', *Studia Iuridica*, 2008, No. 49, p. 156.

[41] Voluntariness of entering an agreement in the course of a proceeding is also based on Article 117 § 2 LPAC, in which it is pointed out that "establishing the way of resolving a case" is an option that does not have to be implemented.

Parties can give their consent jointly or separately and at a different time,[42] which seems even more probable when the feud between parties is stronger and they avoid any contacts or even trace signs of cooperation. This 'different time' is limited in case of mediation types other than one in criminal matters pursuant to Article 183^8 § 2 CPC and Article 96b § 3 CAP.[43]

Optionality of mediation means that in criminal matters[44] as well as in civil and administrative cases it is a possible element of a proceeding and does not have to take place every time and be necessary. Even in civil cases in which a court used the possibility of referring them to mediation (Article 436 § 1, Article 445^2, Article 570^2 CPC), mediation remains a non-obligatory element of a proceeding. Although the parties whose case was referred by a court to mediation should appear before a mediator, they do not have to give their consent for participation in the mediation recommended by a court. Moreover, in situations under Article 436 § a, Article 445^2 and Article 570^2 CPC, a court just may but does not have to refer a case to mediation. A court's discretion over this referral is also based on the fact that only a decision under Article 436 § 1 CPC requires that particular circumstances occur, i.e. there are "prospects for saving a marriage".[45] Mediation under Article 115 § 2 LPAC is also an optional element of a judicial-administrative proceeding.

This lack of subjective and objective requirements for a decision on the referral of a matter to mediation (without parties' consent) evident in case of mediation in criminal,[46] civil and administrative matters offers an inducement for stating that mediation in those cases is characterised *sui generis* by commonness of application because none of the proceedings discussed uses a closed catalogue of cases in which mediation is admissible,[47] or any subjective exclusions on a priori grounds. It seems that this way the legislator signals certain universality of mediation as a consensual way of concluding a case (its part) and teats a potential exclusion from mediation as an extraordinary situation.[48] Article 96a § 1 CAP is not against

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[42] Grzegorczyk, T., *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz*, Warszawa, 2008, p. 138.

[43] However, in jurisprudence, the terms are recognised as instructive; cf. Kaczmarek, D., 'Mediacja w sprawach administracyjnych, sądowoadministracyjnych i cywilnych – zakres i zasady (analiza porównawcza)', *Studia Administracyjne*, 2017, No. 9, p. 127.

[44] Judgement of Appellate Court in Warsaw of 4 June 2014, II AKa 136/14, LEX No. 1483853; thus in the doctrine: Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, LEX, 2017, Vol. 7 to Article 23a; Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a.

[45] Which seems to correspond to the recommendations of the European Union institutions, which emphasise the necessity to leave the decision and evaluation of grounds for referring a criminal case to mediation to organs of the criminal justice system; cf. paragraph IV.9. of the Recommendation No R (99)19 of the Committee of Ministers (Council of Europe).

[46] Which does not mean that every criminal case can be subject to it. For more about such contraindications see Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a, as well as Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., LEX, 2017, Vol. 13 to Article 23a.

[47] A similar stance in the light of Article 23a – Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a.

[48] In the light of Article 183^1 CPC – Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 2 to Article 183^1.

commonness of mediation as it admits mediation in cases the "nature of which allows for that".[49] On the grounds of a civil proceeding, extraordinary exclusion from mediation is stipulated inter alia in Article 183^8 § 3 (inability to use mediation in proceedings by writ of payment or by writ of payment for a lesser value unless an effective plea is made) and Article 477^{12} CPC (inadmissibility of amicable agreement and submission of a case to an arbitration court for resolution in cases concerning social insurance). On the other hand, reference made to the so-called amicable agreement capability as a requirement for parties' referral to mediation in "other family and guardianship cases" under Article 570^2 CPC constitutes another type of limitation.

The content of the provisions of Article 23a § 1 *in fine*, Article 23a § 4, Article 300 § 1 (§ 2) CCP, as well as Article 103 § 4 in conjunction with § 3 (2), Article 183^8 § 4, Article 205^2 § 1 (1), Article 210 § 2^2 CPC and Article 13 § 2, Article 96b § 4 in conjunction with § 3 CAP makes it possible to formulate a thesis that the principle of loyalty[50] also brings the discussed mediation types closer. It is so because the principle includes a directive that obliges a proceeding organ to inform (to instruct or warn) the participants of the proceeding about the rights and duties they have and the consequences of failure to fulfil the latter. In case of mediation, information about duties and consequences of failure to fulfil them will be scarcer because of the institution is based on parties' voluntary participation and minimising of its consequences, which does not mean that they do not occur at all. The expression of such solitary but negative consequences of failure to fulfil duties resulting from participation in mediation is the possibility of "imposing (in a civil case) an obligation on a party to cover partial costs in the amount higher than the case result might suggest or even all the costs" if the party "in the course of a proceeding, does not appear at mediation sessions without an explanation for their absence regardless of their formerly given consent for mediation" (Article 103 § 3 (2) CPC). Among the proceedings analysed herein in which mediation does not occur, only the provisions of Law on Proceedings before Administrative Courts do not guarantee parties proper information. The above, however, seems to be an omission based on the conviction that, firstly, the proceeding in some sense constitutes the continuation of a feud in accordance with the provisions of CAP, where the informative obligation was implemented under Article 13 § 2, Article 96b § 4 in conjunction with § 3 CAP; and, secondly, a motion to carry out mediation is lodged by the complainant (organ) "before a trial is set" (Article 115 § 1 LPAC),

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[49] And what is recognised as the only substantive reason for mediation in administrative matters, but also a reason that is not excessively rigorous. In jurisprudence it is also emphasised that mediation may be conducted even if no special provision regulates it. Cf. Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M., *Komentarz…*, op. cit., Vol. 4 to Article 96a.

[50] The informative obligation is recognised in the doctrine of criminal proceedings as a component of the right to a fair trial/hearing, but it is sometimes also raised to the rank of the right to information, which is done inter alia by Grzegorczyk, T., *Kodeks…*, op. cit., Warszawa, 2008, p. 104, and Hofmański, P. (ed.), Sadzik, E., Zgryzek, K., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 1999, p. 111.

i.e. an entity that knows the rules of mediation and does not need instruction *post factum*.

The provisions of Article 23a § 1 *in fine*, Article 23a § 4 and Article 300 § 1 (§ 2) CCP constitute an almost classical example of the implementation of a directive of Article 16 § 1 CCP, which imposes a general informative obligation on organs carrying out proceedings; however, the circumstances of its implementation, as well as the scope of this obligation and the addressee of the information are laid down in special provisions. They include Article 23a § 1 *in fine* and Article 23a § 4, as well as Article 300 § 1 (§ 2) CCP. Pursuant to them, at different stages of a criminal process, the accused and the aggrieved are informed about the aims and rules of a mediation proceeding, including the content of Article 178a CCP (Article 23a § 1 and Article 23a § 4 CCP), about the possibility of withdrawing their consent "until the end of a mediation proceeding" (Article 23a § 4 CCP) and about the rights laid down in Article 23a § 1 CCP (Article 300 § 1 and § 2 CCP).[51] Although on civil law grounds the informative obligation also results from a series of special provisions, unlike the criminal procedure law, its civil law counterpart does not stipulate a general 'informative' directive. It is hard to recognise the norm under Article 5 CPC as such because in accordance with it a court may provide parties and participants of a proceeding with instructions concerning procedural activities; thus its form constitutes a court's right and not an obligation to take such steps,[52] and only "in case of a justified need" and only in relation to entities that are not represented by a solicitor, a legal advisor, a patent representative, or a solicitor of the General Counsel to the Republic of Poland [Prokuratoria Generalna Rzeczpospolitej Polskiej]. The last requirement reveals that the provision of Article 5 CPC serves other aims, i.e. ensuring a procedural balance between parties represented and not represented by legal practitioners. Despite the lack of a more general directive, the legislator quite often determines a court's informative obligation on civil procedure grounds, which in case of mediation adopts the form of the provisions of Article 103 § 4 in conjunction with § 3 (2) CPC (possibility of charging a party, regardless of the case result, for their conduct generating costs during a mediation proceeding), Article 183^8 § 4 CPC ("amicable methods of dispute resolution, in particular mediation"), Article 205^2 § 1(1) CPC ("possibility of resolving a dispute by means of an amicable agreement reached before a court or a mediator"), Article 210 § 2^2 CPC ("possibility of resolving a dispute amicably, in particular by means of mediation").

On the other hand, Article 9 CAP shows many parallels with the principle of loyalty within criminal procedure. It results from the obligation [imposed on public administration organs] to "inform parties properly and exhaustively about

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[51] Also see § 14 (2) Regulation of the Minister of Justice of 7 May 2015 concerning a mediation proceeding in criminal matters (Journal of Laws, item 716; hereinafter "RCM"), obliging a mediator, i.e. an entity deprived of the features of a procedural organ, to "explain to the accused and the aggrieved", during the so-called introductory meeting, "the aims and rules of a mediation proceeding, as well as instruct them that they have the right to withdraw their consent for participation in mediation until the end of it".

[52] Dolecki, H., Radkiewicz, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2021, Vol. 1 to Article 5.

actual and legal circumstances that may affect the determination of their rights and obligations that are subject to an administrative proceeding. The provision is quite commonly believed to reflect the rule that obliges to inform parties, or the rule that obliges to inform parties to and participants of a proceeding, implemented by a series of special provisions and matching the principle of the protection of trust in appropriate activities of administrative organs and courts.[53] These special provisions certainly include Article 13 § 3 CAP stipulating "provision of explanation concerning the possibilities and advantages of amicable resolution of a matter"[54] and Article 96b § 4 in conjunction with § 3 CAP, which requires "instruction on the rules of carrying out mediation and covering its costs".

As far as confidentiality of mediation is concerned, criminal, civil, administrative and judicial-administrative proceedings also show far-reaching similarity, which does not mean identical solutions. However, the reasons behind the legislator's decisions were identical: the aim was to introduce an additional incentive for parties,[55] assured that participation in mediation does not create a risk of worsening their procedural situation, to at least try to reach an agreement. The legislator may admit confidentiality of mediation because a mediator is not an organ of the justice system and does not play the judicial role. Thus, mediation is free from the 'burdens' connected with the implementation of the constitutional principle of public hearing before a court (Article 45(1) of the Constitution of the Republic of Poland[56]).

Two aspects of confidentiality of mediation may be analysed. Firstly, mediation alone is carried out in a way ensuring limited internal openness, i.e. parties have only access to information necessary to reach an agreement, which does not cover all semi-mediation statements, declarations or conduct of the opponent. Secondly, except its result, mediation is subject to complete external confidentiality, i.e. no entities other than parties (or "other persons" under Article 183^4 § 2 CPC, an organ under Article 96a § 4 (1) and "other persons" under Article 96j § 2 CAP) or their assistants or legal representatives have access to mediation. Confidentiality of mediation is referred to in Article 23a § 7 *in fine* CCP (a mediation proceeding shall be conducted in a confidential way). On the other hand, Article 183^4 § 1 CPC, Article 96j § 1 CAP and Article 116c § 1 LPAC stipulate it is not public, which is a synonymous term and has the same consequences.

The circle of people admitted to participation in mediation, thus indirectly to information about the course of it or at least its part is laid down in Article 23a

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[53] Wróbel, A., in: Jaśkowska, M., Wilbrandt-Gotowicz, M., Wróbel, A., *Komentarz…*, op. cit., Vol. 1 and 3 to Article 9; Knysiak-Sudyka, H., in: Cebera, A., Firlus, J.G., Golęba, A., Kiełkowski, T., Klonowski, K., Romańska, M., Knysiak-Sudyka, H., *Kodeks postępowania administracyjnego. Komentarz,* LEX, 2019, Vol. 1 to Article 9; Wegner, J., in: Chróścielewski, W., Kmieciak, Z. (eds.), *Kodeks postępowania administracyjnego. Komentarz*, LEX, 2019, Vol. 1 et seq. to Article 9.

[54] Przybysz, P.M., in: *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX, 2021, Vol. 1 to Article 9.

[55] In the doctrine of civil law, it is said that it is just this "basic rule" that was decisive for its popularity with the parties to a civil proceeding – cf. Ereciński, T., in: Grzegorczyk, P., Gudowski, J., Jędrzejewska, M., Weitz, K., Ereciński, T., *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze,* LEX, 2016, Vol. 2 to Article 183^4.

[56] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

§ 1 CCP and § 14 Regulation of the Minister of Justice concerning mediation in criminal matters (hereinafter: "RMC"). None of the provisions stipulates that, apart from a mediator, the defendant and the aggrieved,[57] as well as their potential legal assistants (Article 6 *in fine*, Article 86 § 1 CCP) or representatives (Article 51 CCP),[58] other persons selected by a mediator could take part in mediation. The existence of such a right cannot be concluded based on § 15 *in fine* RMC, because the term "another participant [of a mediation proceeding]" used in this provision, depending on the direction of action, means a procedural party other than the one who initiated the action, i.e. either the aggrieved or the defendant, but nobody else. In a civil proceeding, only parties have unlimited access to participation in mediation. To tell the truth, Article 183^4 § 2 CPC mentions "other persons" but it indicates them only in the context of the obligation to keep "the facts they got acquainted with in connection with the conduction of mediation"[59] secret, and not in relation to the right to participate in mediation. "Other persons" do not have such a guarantee as the civil law doctrine expresses a right opinion that they can take part in mediation "only if the parties give their consent for that and in consultation with a mediator",[60] i.e. their participation is also conditional and not guaranteed by law. There is no consensus about the subjective scope of "other persons". Thus, A. Rutkowska interprets them as parties' representatives,[61] and T. Żyznowski, apart from professional and non-professional proxies, also sees family members, expert witnesses and other third parties among them provided they took part in a mediation proceeding,[62] which seems to be closer to the literal content of Article 183^4 § 2 CPC. Thus, although the provision does not give "other persons" any guarantees of participation in mediation, by requiring that they keep mediation secret, it indirectly admits that they can participate in it if the parties involved give their prior consent.

It might seem that Code of Administrative Procedure is best at precisely indicating entities that have access to mediation, because Article 96a § 4 lists who can be its participants (an organ carrying out a proceeding and a party or parties – subparagraph (1), and parties to this proceeding – subparagraph (2)), but this impression quickly vanishes after reading Article 96j § 2 CAP. The provision, besides those "participants of mediation", also indicates "other persons taking part in mediation", which means obvious separation of the two groups. The "other persons" first of all include parties' proxies, interpreters and expert witnesses,[63] as

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[57] Also the so-called substitute party under Article 52 CCP.

[58] The participation of counsel for the defence, proxies and representatives seems to depend on the attitude of the other party, who can make participation in mediation dependent on their absence and effectively block their access to mediation this way.

[59] The thesis that this provision expresses the "rule of a lack of openness of a mediation proceeding" sounds awkward from the linguistic point of view – thus, Stefańska, E., in: Manowska, M. (ed.), *Kodeks…*, op. cit., LEX, 2021, Vol. 1 to Article 183^4.

[60] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 2 to Article 183^4.

[61] Ibidem.

[62] Żyznowski, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2021, Vol. 1 to Article 183^4; for a similar stance see Łukasiewicz, J.M., *Zasada…*, op. cit., p. 79.

[63] Majer, T., in: Karpiuk, M., Krzykowski, P., Skóra, A. (eds.), *Kodeks postępowania administracyjnego. Komentarz do art. 61–126. Tom II*, LEX, 2020, Vol. 2 to Article 96j.

well as a prosecutor, the Ombudsman, or a representative of a cooperating organ.[64] However, they all, i.e. the "participants" of mediation in administrative matters and those "other persons that take part [in it]", are obliged to keep all facts they got to know in connection with the conduction of mediation secret unless the participants of mediation decide otherwise (Article 96j § 2 CAP). The final part of Article 96j § 2 CAP undoubtedly weakens the confidentiality of mediation in the same way as Article 116c § 2 LPAC does by admitting that parties may express a different stance on the issue ("unless they decide otherwise"). Confidentiality of civil mediation is characterised by the same condition because Article 183[4] § 2 second sentence CPC stipulates a possibility of granting exemption from this "obligation" by parties. Any attempts to break the confidentiality obligation are purposeless, which results from ineffectiveness of reference "in the course of a proceeding before a court or an arbitration court to amicable resolution proposals, mutual concessions proposed or any other declarations made in the course of a mediation proceeding" (Article 183[4] § 3 CPC), and on administrative grounds, inadmissibility of using whatever "amicable resolution proposals, revealed facts or statements made in [its] course" "after the mediation" (Article 96j § 3 CAP).[65]

In all these cases, "deciding otherwise"[66] by participants of mediation in administrative and judicial-administrative matters (Article 96j § 2 *in fine* CAP, Article 116c § 2 LPAC), and "exemption from this obligation" (Article 183[4] § 2 second sentence CPC) are optional and fully dependent on the will of parties (participants of mediation), and not on an organ that conducts an administrative or civil proceeding. Only Article 183[4] § 2 second sentence CPC determines the addressee of this exemption, i.e. "a mediator and other persons taking part in a mediation proceeding", and at the same time omits the possibility of mutual or cross exemption from confidentiality by the parties themselves, which seems to be the legislator's oversight. It seems that maintaining confidentiality by parties while they gave consent for exempting other participants of mediation from it is not important; not to say that it does not make sense.

On the other hand, the criminal procedure provisions do not stipulate any exemptions from mediation confidentiality.[67] Confidentiality of mediation in

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[64] Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M., *Komentarz…*, op. cit., Vol. 2 to Article 96j.

[65] With the exception of "arrangements included in the report on the course of mediation [in administrative matters]".

[66] CAP does not use a term "exemption from confidentiality" – for more see Sowiński, P.K., 'Zakaz dowodowy przesłuchania mediatora w postępowaniu cywilnym, administracyjnym i karnym. Elementy wspólne i różnicujące (Uwagi na tle art. 183[4] § 2 k.p.c., art. 83 § 4 k.p.a. oraz art. 178a k.p.k.)', *Acta Iuridica Resoviensia*, 2021, No. 1(32), p. 202.

[67] However, see Article 178a CCP in the context of waiving *ex lege* confidentiality of "information about offences referred to in Article 240 § 1 CC". Such "incompleteness" of the principle of confidentiality of mediation in criminal matters is approved of in V.30 Recommendation No. (99)19 within the scope in which "the mediator should convey any information about any imminent crimes, which can come to light in the course of mediation, to the appropriate authorities or to the persons concerned", as well as III.17 *in fine* Recommendation No. CM/Rec (2018)8, which is even more liberal as it cedes the decision to parties and increases their level of empowerment ("unless parties give their consent for that").

criminal matters was statutorily protected relatively late, i.e. in 2013,[68] although there was an opportunity to do that a decade earlier, i.e. when Article 320[69] was repealed and mediation procedure was moved to introductory provisions. Since then, confidentiality has been systematically strengthened, which is expressed in the occurrence of a new provision in 2015,[70] i.e. Article 178a CCP, which excludes ("it is forbidden") interrogation of a mediator as a witness that could speak about facts that he/she got to know from the accused or the aggrieved during a mediation proceeding, which does not apply to ("with the exception of") information about offences referred to in Article 240 § 1 CC. Before the date, a mediator could only exercise the right to refuse testifying pursuant to Article 180 § 1 CCP, which, in the face of the defectiveness of this provision, provided conditional and uncertain protection. The provision of Article 178a CCP, although not without defects (it protects information from strictly determined personal sources, i.e. the accused and the aggrieved, but not other participants of mediation in criminal matters), constitutes an important and necessary incomplete absolute ban on evidence.[71] The incompleteness of this ban causes that the same circumstances that cannot be revealed by a negotiator's testimony may be provided as different evidence.[72] Following those solutions, the legislator changed the rules of documenting mediation in criminal matters, making a mediator exempt from the obligation to report "the course and results [of mediation]" (until 2003: Article 320 § 2 CCP; until 2015: Article 23a § 4 CCP), which might lead to unintended disclosure of stances and statements of the parties to mediation, by limiting the content of a report to "the results [of mediation]"[73] alone (now Article 23a § 6 first sentence CCP). Elimination of the risk was a step in the right direction. So why have not similar steps been made in mediation in civil and administrative matters, where the binding provisions of Article 183[12] § 1 CPC and Article 96m § 1 CAP unanimously require "a report on the course of mediation"? This lack may explain

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[68] Article 1(5) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws, item 1247, as amended).

[69] Article 1(126) of the Act of 10 January 2003 amending Act: Code of Criminal Procedure, Act: Regulations introducing Code of Criminal Procedure, Act on crown witnesses and Act on the protection of non-public information (Journal of Laws No. 17, item 155, as amended).

[70] Article 1(55) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws, item 1247, as amended).

[71] Gruszecka, D., in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 416; Gil, D., 'Problematyka mediacji w kontekście zmian w polskim procesie karnym', *Ius et Administratio*, 2014, No. 3, p. 9.

[72] Grzegorczyk, T., *Kodeks…*, op. cit., Warszawa, 2014, p. 612. It is argued in literature that Art. 178a CCP, beside a mediator, also covers other persons taking part in mediation in criminal matters – thus Kurowski, M., in: Świecki, D. (ed.), *Kodeks…*, op. cit., LEX, 2022, Vol. 4 to Article 178a; on the other hand, a different stance is presented inter alia by Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., Vol. 2 to Article 178a.

[73] In accordance with § 16 RCM, such a written report shall be developed without delay and presented to an organ that referred a matter to a mediation proceeding. The report alone should contain reference number of the case (paragraph 1), given name and surname of the mediator or name of the institution designated to conduct a mediation proceeding (paragraph 2), information about the outcomes of a mediation proceeding (paragraph 3) and a mediator's signature (paragraph 4).

the wording of the final part of the first sentence of Article 183^{12} § 1 CPC and Article 96m § 2 (4) CAP. They refer to "determination [...] of the mediation result" and the inclusion of "arrangements concerning the case resolution" respectively, which limits the reports under discussion to recording the results of mediation in civil or administrative matters, but never the conduct of participants of mediation.[74] Thus, despite this and not different terminology, the reports on mediation in civil and administrative matters, although *de iure* they remain reports on the course of mediation, they are in fact reports limited to mediation results.

The above-mentioned Article 178a CPC is denuded of this condition on which evidence bans are based under Article 259^1 CPC and Article 83 § 4 CAP. Both these provisions stipulate a possibility of exempting a mediator from the confidentiality obligation concerning "facts about which he/she got to know in connection with the conduction of mediation" (Article 259^1 CPC, Article 83 § 4 CAP), however, this exemption cannot be granted by an organ carrying out a proceeding but the parties to this proceeding (Article 259^1 CPC) or participants of mediation (Article 83 § 4 CAP). Until then, a mediator is legally unable to play the role of a witness ("cannot be a witness" – Article 259^1 CPC; "cannot be interrogated as a witness" – Article 83 § 4 CAP). However, both Article 259^1 CPC and Article 83 § 4 CAP broadly determine the area of immunised circumstances, including facts, about which a mediator got to know in connection with the conduction of mediation, and not only those that, as it can result from Article 178a CPC, were communicated to him/her by "the accused or the aggrieved" when he/she "conducted a mediation proceeding". As a result of the above-mentioned legislative arrangement, Article 178a CCP to some extent reminds the concept of confidentiality laid down in Article 101 (b) CCP of 1928, which treated the knowledge that counsel for the defence had in a similarly not equivalent way, protecting only the knowledge that originated from the accused and leaving without protection all information that originated from third parties even if it had been provided in the interest of the accused.[75] As it was already signalled above, one cannot draw a conclusion based on the statutory provisions discussed whether they protect confidentiality of mediation typical of the given procedure or also confidentiality of mediation conducted in accordance with the provisions of other Polish procedures. Personally, I am for the solution allowing broader protection of mediation confidentiality conducted based on mutuality, although it is not a collision-free solution and may raise a series of practical problems.[76]

Mediator's impartiality, in every type of proceedings discussed, is determined in the content of Article 23a § 7 CCP, Article 183^3 § 1 CPC, Article 96g

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[74] Finally, what especially ensures confidentiality of mediation in administrative matters is a ban on entering into the proceeding files any documents and other materials that are not in the proceeding files but are revealed in the course of mediation by its participants if the documents and materials do not constitute grounds for solving the matter in accordance with the arrangements laid down in the report on the course of mediation (Article 96n § 2 CAP).

[75] Peiper, L., *Komentarz do kodeksu postepowania karnego i przepisów wprowadzających ten kodeks*, Kraków, 1933, p. 171.

[76] For more see Sowiński, P.K., *Zakaz…*, op. cit., pp. 207–208.

§ 1 CAP and Article 116a LPACP. Maintaining impartiality and neutrality in the case, beside professionalism, seems to be a fundamental requirement for referring a case to a particular mediator (Article 183^9 § 1 CPC; Article 96a § 3 (2) in conjunction with Article 96d § 2 CAP), because it is hard to imagine that the parties might accept unequal treatment in the course of mediation. The best expression of the latter may be the right that a party to mediation in a criminal matter has to file a motion to recall a mediator (§ 11 (1)(4) and § 11 (2)(3) RMC).

A mediator in criminal matters is subject to a challenge ("a person cannot conduct [mediation]") in case of circumstances laid down in Article 40 and Article 41 § 1 CCP. Moreover, an active judge, a prosecutor, an assistant prosecutor, as well as a candidate for those professions, a lay judge, a court referendary, a judge's assistant, a prosecutor's assistant and an officer of a law enforcement agency cannot be a mediator. The occurrence of the circumstances laid down in Article 40 and Article 41 § 1 CCP constitutes grounds for recalling a mediator *ex officio* following the mode stipulated in § 11 (1) (3) or § 11 (2) (2) LPAC. Doing the job of a judge is the basis for a challenge to a mediator in civil matters ("cannot be"), which does not apply to retired judges (Article 183^2 § 2 CPC). On the other hand, the catalogue of challenges to a mediator in administrative matters can be found in Article 24 § 1 and § 2 CAP (*arg. ex* Article 96g § 1 *in fine* CAP), and additionally also Article 96f § 3 CAP.[77] In case of a mediator in judicial-administrative matters, the circumstances that imply a challenge are listed in Article 18 LPAC, thus the same as those applicable to a judge (Article 116a LPAC).

Conducting mediation, a mediator should refrain from developing relationships that can raise doubts about his/her impartiality,[78] and cannot support any of the parties to the proceeding or impose his/her opinions[79] or force parties to particular conduct.[80] A mediator cannot relate to any of the parties to a dispute,[81] and his/her neutrality, which is not directly required by statute but which seems to be connected with impartiality and result from Standard II, allows for building links based on trust in him/her.[82] The obligation to be impartial is included in the standards of a mediator's job. Thus, a mediator, first of all, knowing about inability to fulfil his/her obligations in the right way, should refuse to undertake mediation in any of the cases discussed. However, this duty is laid down only in Article 96g § 2 CAP, which obliges a mediator to refuse to conduct mediation in case of

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[77] An employee of a public administration body before which a proceeding is conducted cannot be a mediator.

[78] Dąbkiewicz, K., *Kodeks postępowania karnego. Komentarz do zmian 2015*, LEX, 2015, Vol. 7 to Article 23a.

[79] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks…*, op. cit., Vol. 28 to Article 23a.

[80] Dauter, B., in: Kabat, A., Niezgódka-Medek, M., Dauter, B., *Prawo…*, op. cit., Vol. 2 to Article 116a.

[81] Przybysz, P.M., *Kodeks…*, op. cit., Vol. 1 to Article 96g.

[82] Dańczak, P., 'Wymagania względem mediatora', in: Chróścielewski, W., Łaszczyca, G., Matan, A. (eds.), *System Prawa Administracyjnego Procesowego. Tom II. Część 1. Zakres przedmiotowy i podmiotowy postępowania administracyjnego ogólnego*, LEX, 2018, https://sip.lex.pl/#/monograph/369448067/386822/chroscielewski-wojciech-red-laszczyca-grzegorz-red-matan-andrzej-red-system-prawa...?keyword=zaufanie&cm=URELATIONS [accessed on: 16.01.2022].

doubts about his/her impartiality, as well as to immediately inform participants of mediation and an organ of public administration that is not a participant of mediation about that. In mediation in civil and administrative matters, a mediator is obliged to immediately inform parties about the circumstances that might raise doubts about his/her impartiality (Article 183[3] § 2 CPC; Article 96g § 1 CAP), however in case of the latter type of mediation, and also about the circumstances referred to in Article 24 §§ 1 and 2 CAP (Article 96g § 1 *in fine* CAP). A similar obligation is imposed on a mediator in judicial-administrative matters, however, Article 116a LPAC limits itself to indicating what this obligation consists in and when ("immediately") it should be fulfilled, but it does not indicate an addressee of the information about the circumstances that might raise doubts about [a mediator's] impartiality, i.e. circumstances referred to in Article 18.

The rules discussed in the article are treated in the doctrine as basic or even fundamental principles of mediation. Although they are laid down in the frames of so much different legal acts with so many differences in their construction, they are interpreted analogously within the respective normative acts and in the way that corresponds to the EU approach to them. Also from the perspective of the EU law, in order to meet the expectations that mediation will increase an individual's importance in a given proceeding and unburden the organs of the justice system, it must be based on particular principles. According to the Committee of Ministers of the Council of Europe, those principles include voluntariness,[83] commonness,[84] loyalty,[85] confidentiality of mediation[86] and a mediator's impartiality (neutrality).[87] Regardless of whether the Council treats any of those principles as a component

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[83] Paragraphs II.1 and V.31. of the Recommendation No. R (99)19 of the Committee of Ministers to Member States of the Council of Europe concerning mediation in penal matters of 15 September 1999, as well as paragraphs III.14, III.16 and IV.26 of the Recommendation No. CM/Rec (2018)8 of the Committee of Ministers to Member States of the Council of Europe concerning restorative justice in criminal matters of 3 October 2018, as well as paragraph IV of the Recommendation Rec (2002)10 of the Committee of Ministers to Member States of the Council of Europe on mediation in civil matters of 18 September 2002, paragraph II(a) of the Recommendation No. R (98)1 of the Committee of Ministers to Member States on family mediation, and explanatory memorandum of 21 January 1998.

[84] Paragraphs II.6 and III.18 of the Recommendation No CM/Rec (2018)8, paragraphs II.3 and II.4 of the Recommendation No. R (99)19, paragraph I(a) of the Recommendation No. R (98)1.

[85] Paragraphs IV.23 and IV.25 Recommendation CM/Rec (2018)8, paragraphs III.8 and III.10 Recommendation No. R (99)19, paragraph VI second sentence of the Recommendation Rec (2002)10, paragraph III (x) of the Recommendation No. R (98)1 (also therein, the admissible provision of legal information is distinguished from inadmissible legal advice).

[86] Paragraph II.2 as well as V.29 and V.30 Recommendation No. R (99)19, paragraph III.17 of the Recommendation No. CM/Rec (2018)8, paragraph IV third sentence of the Recommendation Rec (2002)10, paragraph III (v) and (vi) of the Recommendation No. R (98)1. See also recital 46 of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, which mentions the necessity of confidentiality that can be waived if the parties agree ("agreed otherwise") or due to "an overriding public interest".

[87] Paragraph V.26 of the Recommendation No. R (99)19 and paragraph VI.46 of the Recommendation CM/Rec (2018), paragraph IV second sentence of the Recommendation Rec (2002)10, paragraph III (i) and (ii) of the Recommendation No. R (98)1.

of mediation organisation, the course of mediation or one addressed to a person conducting mediation, it recognises them all as foundations of a coherent and modern vision of an alternative out-of-court or pre-judicial resolution of legal disputes.

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CONVERGENCE OF THE BASIC PRINCIPLES OF MEDIATION IN CRIMINAL, CIVIL, ADMINISTRATIVE AND JUDICIAL-ADMINISTRATIVE MATTERS

Summary

The article constitutes a comparative legal study of mediation based on for procedural regulations, i.e. Act of 6 June 1997: Code of Criminal Procedure, Act of 17 November 1964: Code of Civil Procedure, Act of 14 June 1960: Code of Administrative Procedure, and Act of 30 August 2002: Law on the Proceedings before Administrative Courts carried out with the use of a dogmatic method. The author analyses the solutions that, in his opinion, make it possible to propose a thesis on far-reaching convergence of the basic, and at the same time of normative provenance, principles of mediation. The principles include amicability, voluntariness (optionality), commonness, loyalty to parties, confidentiality and non-openness of mediation, as well as a mediator's impartiality. The above-mentioned convergence does not mean complete homogeneity of particular solutions or their non-defectiveness, which is exemplified by Article 2591 CPC and Article 83 § 4 CAP. It is also shown that the domestic solutions are in conformity with the solutions recommended by the Committee of Ministers of the Council of Europe.

Keywords: mediation, mediator, parties to a proceeding, principles, openness, confidentiality, commonness, voluntariness, criminal justice proceeding, civil proceeding, administrative proceeding

ZBIEŻNOŚĆ ZASAD LEŻĄCYCH U PODSTAW MEDIACJI W SPRAWACH KARNYCH, CYWILNYCH I ADMINISTRACYJNYCH ORAZ SĄDOWOADMINISTRACYJNYCH

Streszczenie

Tekst stanowi studium prawnoporównawcze instytucji mediacji występującej na gruncie czterech regulacji procesowych, tj. ustawy z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, a także ustawy z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi przeprowadzone w oparciu o metodę dogmatyczną. Analizie poddano te rozwiązania, które – zdaniem autora – pozwalają postawić tezę o daleko idącej zbieżności podstawowych, a zarazem mających normatywną proweniencję, zasad rządzących tymi mediacjami. Do zasad tych zalicza się w tekście polubowność, dobrowolność (fakultatywność), powszechność, lojalność wobec stron, zasadę poufności i niejawności prowadzenia mediacji, a także bezstronności mediatora. Wspomniana zbieżność nie oznacza całkowitej homogeniczności poszczególnych rozwiązań, ani też ich niewadliwości, co wykazuje się m.in. na przykładzie art. 2591 k.p.c. oraz art. 83 § 4 k.p.a. Wskazano na zgodność krajowych rozwiązań z rozwiązaniami rekomendowanymi przez Komitet Ministrów Rady Europy.

Słowa kluczowe: mediacja, mediator, strony procesowe, zasady, jawność, poufność, powszechność, dobrowolność, proces karny, proces cywilny, postępowanie administracyjne

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SECOND INSTANCE COURT'S BENCH COMPOSITION IN CIVIL PROCEEDINGS

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INTRODUCTION

The bench composition in civil proceedings is not only a technical issue, but has great systemic and procedural significance. Article 45(1) of the Constitution of the Republic of Poland lays down fundamental guarantees of a fair trial, which means that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. The organisational structure and jurisdiction as well as procedure of the courts shall be specified by statute (Article 176(2) of the Constitution).

Thus, the issue concerning which court will hear a case is especially important for parties to and participants in a proceeding because it concerns their most important procedural rights.[1] Designation of the composition of a court, compliance with granted territorial, subject matter related and functional jurisdiction, as well as the system of allocating cases and a bench composition are not only strictly formal matters but also directly affect the implementation of the right to a fair trial. A competent court within the meaning of Article 45(1) of the Constitution is the one that, in accordance with the provisions laid down in statutes, has the authority to hear a case based on the regulations concerning its subject matter related, territorial and functional jurisdiction, and in which a properly composed bench adjudicates

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1 Żyznowski, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego, Komentarz Vol. I, Artykuły 1–366*, Warszawa, 2021, p. 274; Jędrzejewska, M., Gudowski, J., in: Ereciński, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, Warszawa, 2012, p. 264; Jodłowski, J., in: Jodłowski, J., Resich, Z., Lapierre, J., Misiuk-Jodłowska, T., Weitz, K., *Postępowanie cywilne*, Warszawa, 2009, p. 163.

in conformity with its competence.[2] A properly composed court bench is also a fundamental guarantee of functional independence.[3]

In accordance with the constitutional principle of definiteness of the law in civil proceedings, a court composition, in the same way as its competence, is strictly determined in the provisions that result from the adopted model of dispute resolution, functional division of competence and conditions connected with ensuring efficiency of a proceeding. The issue concerning the actual court composition, i.e. whether it will be one-person or collective, has great procedural importance because the violation of those provisions may even result in invalidity of a proceeding.[4] On the other hand, however, these are regulations strictly connected with the economics of a proceeding. Thus, the issue concerning a court composition is not subject to a court's discretion but provisions usually regulate the composition of a court adjudicating on particular cases.

Already in the period before the COVID-19 pandemic, in civil proceedings before first instance courts, a one-person bench used to hear cases unless a special provision stipulated otherwise. On the other hand, in second instance courts, a collective bench was designated as a rule and a one-judge bench was an exception.

Act of 28 May 2021[5] amending Code of Civil Procedure introduced the rules determining a one-person bench composition not only in first instance but also second instance courts. Such a solution was adopted for the period of the pandemic for pragmatic reasons. However, the legislator left the regulation allowing a court president to designate a three-person bench unchanged (Article 47 § 4 CCP). Therefore, it seems interesting to consider to what extent this mechanism, which has been very rarely used in practice, will find its practical application and what the process of application of those provisions will finally look like in compliance with the guarantee of a fair trial and the principle of judicial independence. Some solutions arouse a lot of controversy and one can form an opinion that they interfere with judicial independence.

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[2] Sanetra, W., 'Sąd właściwy w rozumieniu Konstytucji RP', *Przegląd Sądowy*, 2011, No. 9, p. 13.

[3] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 181; Łazarska, A., *Niezawisłość sędziowska i jej gwarancje w procesie cywilnym*, Warszawa, 2018, p. 198 et seq.; Artymiak, G., 'Pojęcie, zakres, definicja zasady kolegialności w znaczeniu opisowym', in: Wiliński, P. (ed.), *Zasady procesu karnego. System Prawa Karnego Procesowego*, Vol. III, part 2, Warszawa, 2014, p. 1364; Defecińska, D., 'Skład sądu w cywilnym postępowaniu rozpoznawczym', *Przegląd Sądowy*, 1993, No. 6, p. 63 et seq.

[4] A court composition that is in conflict with the provisions results in invalidity of a proceeding; thus, for example, the Supreme Court resolution of 18.12.1968, III CZP119/68, OSNPG 1969, No. 4, item 23. Zembrzuski, T., *Nieważność postępowania w procesie cywilnym*, Warszawa, 2017, p. 232 et seq.

[5] Act of 28 May 2021 amending Act: Code of Civil Procedure and some other acts, Journal of Laws of 2021, item 1104 – hereinafter referred to as "the amendment".

1. FIRST AND SECOND INSTANCE COURT COMPOSITION BEFORE AND AFTER THE AMENDMENT

In general, a court composition can be determined to be one-person or collective depending on the type and mode of a case and the instance in which this case is heard, as well as the procedural model adopted in order to resolve a given type of disputes.[6] A one-person bench, as the term suggests, means that a judge adjudicates solo. When statute stipulates that more judges shall be involved in the performance of a given procedural activity, we deal with a team (collective) action, which is the opposite of a one-person bench composition.[7]

Before the amendment, as a rule, one-person benches heard cases in first instance courts, and three judges composed benches in second instance courts (Article 47 § 1 CCP). However, there were exceptions in first instance proceedings, inter alia, in cases concerning employment law or family matters laid down in Article 47 § 2 CCP. In such cases heard in first instance courts, a bench was composed of one chair-judge and two lay judges. The rule that one judge without lay judges adjudicates is constituted in a non-trial proceeding – Article 509 CP.

It should be emphasised, however, that a one-person bench composition of first instance courts was introduced on 30 June 1996; earlier, a collective composition was obligatory and lay judges took part in first instance proceedings. The rules were not absolutely binding because Article XII of the Regulations Implementing Code of Civil Procedure (repealed) gave a district court president wide powers to issue orders to refer cases for hearing by one-person benches and limited that possibility only in relation to cases concerning employment and family relations matters.[8] However, those changes reflected the belief that a collective court composition does not ensure more efficient proceedings or more insightful assessment.[9]

On the other hand, in second instance courts, as a rule, three judges heard cases, and a one-judge bench adjudicated only in closed sessions. However, it was not applicable to sentencing (Article 367 § 3 CCP). In other words, as a rule, three professional judges used to hear an appeal. Exceptionally, one judge could adjudicate on accident related cases (not requiring the issue of a sentence). Another exception concerned a simplified mode of hearing an appeal (Article 505(10) § 1 CCP).

Nobody claimed that hearing summary cases before second instance one-person benches resulted in lowering the "standard of legal protection". It is so because the whole system of judicial protection should be based on the presumption of professional knowledge and experience of appellate court judges.

The amendment to Act of 2 March 2020 on special solutions for preventing, counteracting and combating COVID-19, other contagious diseases and crisis

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[6] May, J., 'Skład sądu w postępowaniu cywilnym', in: Lubiński, K. (ed.), *Studia z prawa publicznego*, Toruń, 2001, p. 109.

[7] Waligórski, M., *Polskie prawo procesowe cywilne*, Warszawa, 1947, pp. 236–237; Wengerek, E., 'Zasada kolegialności w postępowaniu cywilnym', *Państwo i Prawo*, 1959, No. 3, p. 480 et seq.

[8] Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., p. 264.

[9] Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 275.

situations caused by them[10] has been introduced by Article 4 of the Act of 28 May 2021. The regulations were provided for the period of epidemic risk and the state of the COVID-19 pandemic and within the period of one year from the moment the latter is revoked. As a result of the amendment to Article 15zzs[1] (1) (4) Act of 2 March 2020, in accordance with which both first and second instance courts' one-person benches hear cases, a court president may order a three-judge bench to hear a case if he recognises that as advisable due to special complexity of a case or its precedent-like nature.

Thus, within the changes, the legislator departs from the rule of a collective bench composition, which due to the above-mentioned regulations is especially important for second instance courts, because a collective bench was exceptionally applicable in first instance courts and in cases in which lay judges used to compose a bench. The reasons for the changes were purely pragmatic and included the pandemic related risks and a desire to increase the efficiency of proceedings in civil cases. It aimed at improving adjudication in appellate courts, which were most exposed to risk to life and health due to the COVID-19 pandemic.[11]

In advance of further considerations, it should be pointed out that the COVID related solutions met with criticism that they lead to a decrease in legal protection standards both in cases in which a first instance court's collective bench adjudicated and in appellate proceedings, and they should disappear from the legal space after the pandemic.[12] Therefore, it should be emphasised that before the COVID Act an appellate court as a one-person bench also heard some cases.

Thus, it is admissible that an appellate court adjudicates as a one-person bench. It is hard to agree with a general opinion that the introduction of a one-person bench composition immediately decreased the standard of legal protection. The problem does not consist in the fact whether one judge adjudicates in a second instance court but in which cases should be heard before collective benches due to their subject matter and the level of complexity. Therefore, the rule itself should not be criticised; but what can be criticised is the way in which the legislator stipulated subject matters of cases in which collective adjudication is possible.

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[10] Journal of Laws, item 1842, as amended.

[11] Justification for the governmental Bill amending Code of Civil Procedure and some other acts, Sejm IXth term, print No. 899. Nevertheless, in the doctrine, it is also pointed out that the aim of the changes was not only the fight against the pandemic, but it was only an excuse. "Because it is not important whether one or three judges adjudicate on a case." may be interpreted only as a declared aim of changes and not the real one. It results from the fact that this way of fighting against the pandemic was introduced at the time when the Polish legislator gave up legal regulations introducing COVID-19 restrictions and, at the same time, there were opinions of the advocates general and judgements of the European Court of Human Rights (ECHR) and the CJEU concerning the interpretation of the term 'court established by statute'; thus Markiewicz, K., 'Wpływ regulacji "covidowych" na zasadę niezmienności (stabilności) oraz kolegialność składów sądów odwoławczych', *Polski Proces Cywilny*, 2022, No. 1, p. 38 et seq.

[12] Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania', *Polski Proces Cywilny*, 2022, No. 1, p. 74, Markiewicz, K., 'Wpływ regulacji…', op. cit., p. 47.

It also seems that while searching for axiological justification of the amendment,[13] it is also necessary to take into consideration the value of an efficient proceeding. A judgement issued by a collective bench but after several years, even if it is perfect from the juridical point of view, may have a symbolic value then. Thus, during the pandemic, the two values of a fair trial, i.e. efficiency of a proceeding and an appropriate value of court judgements must be ensured and matched.

However, the legislator introduces definitely further reaching changes concerning the composition of benches with lay judges[14] that are in conflict with Article 182 Constitution because they practically eliminate their participation, which rightly raises objections and axiological and constitutional doubts. Regardless of the epidemiological conditions, it is worth considering the time span of the changes introduced, their purposefulness and the need to maintain them not only at the time of the epidemic risk or the COVID-19 pandemic but also for a year after the latter is revoked.

2. ONE-PERSON VS. COLLECTIVE BENCH COMPOSITION

The procedure of adjudicating on matters in an appellate court by a collective bench undoubtedly has a long tradition. E. Waśkowski wrote about the principle of collectiveness as early as in 1930 and pointed out that a judge who knows that the whole collective bench supports him and shares responsibility with him feels more independent and acts more freely than when he judges solo.[15] Apart from that, it cannot be ignored that, therefore, collective hearing of cases constitutes an important guarantee of judicial independence[16] because while exerting pressure on one judge may be easy, influencing the whole bench may prove to be much more difficult.

There is no doubt that a collective bench composition serves to increase the quality of judgements, intensifies the supervisory function of second instance courts because a judgement results from a detailed discussion on the matter by judges, which is conducive to its comprehensive analysis from different points of view, sometimes comparison of different possible ways of interpreting regulations and, as a result, serves to issue a just judgement. There are reasons for treating a collective judgement as a guarantee of a just one.[17] Collective adjudication should ensure more diligent and comprehensive consideration of matters.[18]

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[13] Cieślak, S., 'Założenia aksjologiczne postępowania cywilnego – propozycja sformułowania kryteriów aksjologicznej oceny regulacji procesowej', in: Cieślak, S. (ed.), "Założenia aksjologiczne nowelizacji KPC z 4 lipca 2019 r.", *Jurysprudencja*, 2021, No. 14, p. 14 et seq.

[14] Piotrowski, R. (ed.), *Udział obywateli w sprawowaniu wymiaru sprawiedliwości*, Warszawa, 2021; Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania', *Polski Proces Cywilny*, 2022, No. 1, p. 67.

[15] Waśkowski, E., 'Zasady procesu cywilnego', *Rocznik Prawniczy Wileński*, 1930, p. 329.

[16] Łazarska, A., *Niezawisłość sędziowska…*, op. cit., p. 543.

[17] Rosenberg, L., Schwab, K.H., Gottwald, P., *Zivilprozessrecht*, München, 2010, p. 596.

[18] Waśkowski, E., *Podręcznik procesu cywilnego*, Wilno, 1932, p. 106.

A collective bench composition is believed to be one of the guarantees of judicial independence and impartiality.[19] Bench collectiveness serves to adopt a pluralistic approach to adjudication. In the course of discussion, reasons for and against a particular resolution are considered, which allows highlighting various points of view and organise a discussion. What is of major importance is not a discussion alone and voting on the judgement but the presentation of stances during a discussion and the analysis of the judgement. A pluralistic attitude to judgements, on the other hand, contributes to case law stabilisation and considerably increases the possibility of issuing a proper judgement. Despite those unquestionable advantages of the collective system, probably for pragmatic reasons, hearing civil cases before first instance courts, as a rule, takes place before one-person benches.[20]

Still, E. Waśkowski also lists disadvantages of the collective system. A one-person bench hears a matter faster while a collective bench needs more time so that judges can get acquainted with the case material and discuss the matter together. Apart from that, according to Waśkowski, in practice it happens that one judge respects another one and it is the chair-judge who proposes a judgement and other judges approve of his stance.[21] Nevertheless, Waśkowski assesses the comparison of advantages and disadvantages of the rule of collective and one-person adjudication and decides the collective system is better because it ensures more in-depth, diligent and just judgement. On the other hand, the one-person system may be applied to petty and uncomplicated cases, which require summary proceedings and fast closing of a case; they can be more successfully judged by single judges, who are more available to parties and know them better.[22]

Such opinions created a collective model in appellate courts for successive dozens of years. That is because the legislator decided to introduce collective benches composed of professional judges to second instance courts. Nevertheless, within this area, the statute has also evolved. In a summary proceeding, due to the trial economics, one-person benches were introduced (Article 505(10) § 1 CCP). Moreover, as a result of the amendment of 4 July 2019,[23] it was stipulated that a three-person bench should hear a case. On the other hand, a one-person bench should hear a case at a closed session, however, with the exception of the issue of a sentence (Article 367 § 3 CCP). This evolution shows the gradual departure from collective benches in favour of one-person benches in relation to petty, uncomplicated matters for pragmatic reasons and because of the trial economics.

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[19] Łazarska, A., *Niezawisłość sędziowska…*, op. cit., p. 546; Wengerek, E., 'Zasada kolegialności…', op. cit., p. 480 et seq.; Artymiak, G., 'Pojęcie, zakres, definicja zasady kolegialności', op. cit., p. 1364 et seq.

[20] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postepowania cywilnego, Vol. I Komentarz*, Warszawa, 2019, p. 160.

[21] Waśkowski, E., *Podręcznik procesu cywilnego*, Wilno, 1932, p. 106.

[22] Ibidem, pp. 106–109; Olaś, A., 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy', *Polski Proces Cywilny*, 2020, No. 3, p. 497 et seq.

[23] Act of 4 July 2019 amending Act: Code of Civil Procedure and some other acts, Journal of Laws of 2019, item 1469.

By the way, similar tendencies can be observed in other systems. For example, a possibility of referring a case to a one-person bench was introduced in the German model (*einen entscheidenden Einzel-Richter*). However, the statute stipulates when such reference is possible (§§ 526 and 527 Zivilprozessordnung).[24]

Thus, undoubtedly, successive changes to a bench composition were necessary. Doubts were raised only in relation to whether collective benches in second instance courts should have been maintained as a rule or not, and to the need of a more detailed and flexible regulation of the situation when a court can refer a case to a one-person bench. However, taking into account second instance courts' workload, chair-judges would have to take those decisions. Thus, in practice, it would be a chair-judge who would suggest adjudicating on a matter collectively or solo. Therefore, probably for pragmatic reasons and in order to ease the burden in courts, different solutions were adopted.

It seems, however, that even in case of introducing one-person adjudication as a rule, there should be mechanisms ensuring the possibility of composing a collective bench depending on the type and nature of matters. Thus, it is essential to introduce such regulations that may fully protect parties' rights in case a matter requires the composition of a collective bench.

3. COLLECTIVE BENCH COMPOSITION VS. RANDOM ALLOCATION OF CASES

The issue of a court composition is strictly connected with the systemic regulations on the allocation of cases to judges. Collective adjudication in second instance courts considerably complicated the introduction of random allocation of cases to judges. Since 12 August 2017 when Article 47a § 1 was introduced to Act: Law on the system of common courts, in accordance with it, cases have been randomly allocated to judges within the scope of particular categories unless a case is subject to allocation to a judge who is on standby duty.[25] The so-called random case allocation system (RCAS) determines, inter alia, the methods of picking cases at random, the rules of designating multi-person benches, division of cases into categories in which they are randomly allocated, and decreasing the number of cases allocated to a judge because of his extra functions, or justified leave of absence, as well as other rules concerning substitutions or being on duty. The Minister of Justice has gained great power to determine those rules, although the division of cases in courts is a core area that is subject to judicial independence.[26] The system was introduced in order to ensure transparency and objectiveness, and to avoid manipulation of designation a bench composition and this way to ensure the guarantee of the right to a statutory judge. Therefore, the members of the adjudicating bench shall be selected with the use of

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[24] Rosenberg, L., Schwab, K.H., Gottwald, P., *Zivilprozessrecht*…, op. cit., p. 596.

[25] Act of 27.07.2001: Law on the system of common courts (Journal of Laws of 2020, item 2072, as amended), hereinafter referred to as LSCC.

[26] Łazarska, A., *System losowego przydziału spraw w praktyce*, LEX, 2019, online version.

the IT system designed for random allocation of cases and tasks (Article 47 Act: Law on the system of common courts).[27]

However, the system of random allocation of cases has not been adjusted to multi-person appellate departments and collective benches. It is so because appellate courts have not adopted a division into the so-called permanent benches. A bench composition, both a chair-judge and other complementing judges individually one by one, is selected at random.[28] Thus, if there are several adjudicating judges in a department, it means that they are selected at random in all possible bench composition configurations. Therefore, there may be five cases scheduled for hearing on the same day and several different judges involved in the sessions, which obviously, beside logistic difficulties and disorganisation of work time, poses a threat to health in the pandemic period.

As a result of numerous requirements for the system of designating benches in second instance courts, there were also practical difficulties in ensuring the uniformity of a bench composition at sessions. Especially the lack of a possibility of establishing the so-called permanent benches during the pandemic became a minor inconvenience to courts and judges. The necessity of designating substitutions for judges in case of their illness or leave of absence becomes a real organisational challenge, especially as the allocation system designates judges for the future while cases are heard within a few weeks or months when the allocated judges may be absent from work, e.g. because of illness or annual leave. Allocation of judges at random is applicable to every case without exception, which caused many organisational problems in case of multi-person appellate departments.

4. ORDERING A THREE-JUDGE BENCH TO HEAR A CASE

It was indicated above that, as a result of the amendment, a one-judge bench would hear second instance cases. However, it was also decided to introduce an exception to the rule. A court president of order a three-judge bench to hear a case. In accordance with the amended Article 15zzs[1] (1) (4) of the statute in the period of the epidemic threat announced in connection with the COVID-19 pandemic and for a year after the state of pandemic is revoked, in cases heard based on the provisions of Act of 17 November 1964: Code of Civil Procedure, a one-judge bench hears cases in first and second instance courts; a court president may order a three-judge bench to hear a case provided he recognises that to be advisable due to special complexity of a case or its precedent-like nature.

The provision was modelled on the regulation of Article 47 § 4 CCP, which stipulates that the president of a first instance court may order a three-judge bench to hear a case provided he recognises that to be advisable due to special complexity of

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[27] Ibidem; Pytlewska, M., 'System Losowego Przydziału Spraw jako gwarancja bezstronnego prawa do sądu w kontekście Unii Europejskiej', *Prawo w Działaniu*, 2019, No. 40, p. 265 et seq.; Rygiel, P., 'Losowy przydział spraw cywilnych w sądzie drugiej instancji', *Przegląd Sądowy*, 2019, No. 2, p. 40.

[28] Łazarska, A., *System losowego…*, op. cit.

a case or its precedent-like nature. The application of the provision to a proceeding before a first instance court was in fact exceptional or even extraordinary in nature.[29] It is indicated in the judicature that the provision is systemic as it decides about a court composition, however, it has procedural consequences as it decides about the proper court composition, which is connected with the possible recognition of a proceeding as invalid.[30]

In addition, the provision indicates two indefinite conditions, i.e. special complexity of a case and its precedent-like nature. Each of them is independent and may constitute grounds for designating a bench. It is pointed out in the doctrine that a case is complex when it is e.g. multifaceted, when accumulated claims are made, there is joint participation or it is necessary to apply foreign law.[31] The provision does not limit the intricacies to legal issues but there may also be actual problems or necessity of conducting a complex evidence proceeding or multi-volume files, i.e. procedural material. The second condition is a precedent-like nature. It consists in the need to solve some complex issues concerning interpretation of law or establishing an adjudication policy. A case does not have to be complicated but due to the occurrence of new and important problems, it requires especially in-depth and mature consideration based on very good knowledge of law.[32] For example, in loan related cases, a court's judgement may affect thousands of other cases. Thus, the influence of a given case on social and economic life or the social-legal significance of a given case will be very important. Moreover, from the perspective of a given department, a provision may have fundamental importance for ensuring uniformity of adjudication. It often happens that individual judges issue different judgements based on the same actual state. The issue of a collective judgement might serve to eliminate those discrepancies. Within this meaning, adjudicating on a given case may be of precedent-like importance.

5. NATURE OF A COURT PRESIDENT'S ORDER TO DESIGNATE A BENCH

The nature of a court president's order to designate a bench may raise doubts. This order is not classified in the doctrine. The placement of the competence norm in Code of Civil Procedure may indicate the procedural nature of this order. On the other hand, the judicature points out that e.g. such an order in the procedural mode may be overruled due to the change of circumstances (Article 359 § 1 CCP

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[29] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego, Vol. I Komentarz*, Warszawa, 2019, p. 160.

[30] Uwagi na tle art. XII PWKPC uchwała SN z 21.07.1966 r., III CZP 62/66, OSNCP 1966, No. 12, item 212.

[31] Harla, A., 'Charakter precedensowy sprawy cywilnej w rozumieniu k.p.c. – uwagi de lege lata i de lege ferenda', *Przegląd Sądowy*, 2001, No. 4, p. 23; Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., pp. 264–265.

[32] Jędrzejewska, M., Gudowski, J., *Kodeks postępowania…*, op. cit., pp. 264–265.

in conjunction with Article 362 CCP).[33] It seems, however, due to the nature and placement in Code of Civil Procedure, that it has a procedural-systemic character.

There are no doubts that an order referred to in the above-mentioned provision does not fit in the frameworks of administrative supervision at all. A court president is an organ of a court appointed to manage a court and represent it (Article 22 LSCC). A court president also performs activities within the scope of internal administrative supervision. In accordance with Article 8 LSCC, the Minister of Justice exercises administrative supervision over courts. Administrative activity of courts consists in the provision of proper technical, organisational and financial conditions for the functioning of courts and performing tasks referred to in Article 1 §§ 2 and 3; ensuring proper course of internal office working, which is directly connected with the performance of a court's tasks referred to in Article 1 §§ 2 and 3 LSCC. In accordance with Article 9a § 1 LSCC, presidents of courts shall exercise internal administrative supervision over courts' activities.[34]

According to the judgement of the Constitutional Tribunal of 25 May 2016,[35] a judge being subject to administrative supervision of the Minister of Justice or the president of a given court cannot be deprived of the guarantees of independent adjudication. "The constitutional principle of independence should be understood as independence from any organs, both court and non-court bodies. Administrative supervision cannot ignore the specificity of judicial power and its constituting special feature – independence. That is why, assessing the supervision model, one cannot interpret the principle of checks and balances resulting from Article 10 Constitution of the Republic of Poland only as mutual limitation of powers, but should admit the superiority of the principle of separation, i.e. isolation of judicial power from other powers".[36] In jurisprudence, supervision is unambiguously assessed as being in conflict with the principle of definiteness and proportionality. R. Piotrowski believes that the legislator excessively interferes with the principle of judicial independence by introducing the higher authority supervision of the Minister of Justice, and this way poses a risk to judicial independence in the way that is disproportional to the intended objective.[37]

It would be difficult to classify an order to designate a bench as a supervisory one because it does not concern administrative activities. Its aim and legal grounds are different.

A court president cannot designate a particular judge (Judge X or Judge Y) to adjudicate on a given matter, either. Systemic provisions regulate the issue of division of duties between judges, namely those concerning random designation

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[33] Thus the Supreme Court resolution of 18.12.2014, III SZP 3/14, OSNP 2015, No. 9, item 129.

[34] Piotrowski, R., 'Sędziowie a władza wykonawcza', *Studia Iuridica*, 2008, year XLVIII, p. 202; idem, 'Status ustrojowy sędziego a zakres i charakter zarządzeń nadzorczych', in: Piotrowski, R. (ed.), *Pozycja ustrojowa sędziego*, Warszawa, 2015, p. 177.

[35] The Constitutional Tribunal judgement of 26 May 2016, Kp5/15, OTK.

[36] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 161.

[37] Piotrowski, R., 'Sędziowie a władza wykonawcza', op. cit., p. 202; Piotrowski, R., 'Status…', op. cit., p. 177.

of judges to adjudicating benches. Thus, the order of a court president may only concern abstract designation of a three-judge bench.

The major doubt is raised in connection with the question whether the president of a court should assess a case on its merits; whether he is authorised and competent to do this. In the judicature, it is pointed out that a decision on designating a three-judge bench is an autonomous decision of the president of a court although the president does not have discretion over that and must base it on strictly determined circumstances.[38] In the doctrine, the blanket nature of this order is excluded. This order cannot be of general character and should always be issued in connection with a particular case.[39] This interpretation of the provision would mean that a court president should each time analyse every case lodged to a court and assess whether a three-judge bench is necessary.

However, it is obvious that the president of a court does not analyse all cases lodged to a court and particular judges or even departments. What is more, such analyses might be recognised as the infringement of the principle of judicial independence. Thus, how does the president of a court acquire information about cases lodged to a court and whether he should designate a three-judge bench? Is he able to assess special complexity of a case without specialist knowledge? This is what shows the uselessness of the regulation.

It is obvious that it is not a court president but a chair-judge randomly selected to adjudicate on a given case is able to assess whether it is necessary to designate a three-judge bench. Thus, this judge should propose a motion to designate such a bench justifying it by stating that the above-mentioned circumstances may occur. A question arises whether the head of a department may do this when, the moment a case is registered or formal deficiencies are supplemented, he recognises that it is complex or precedent-like in nature. It can also happen that a statement of claim will result in a plaintiff's motion to designate a collective bench with arguments provided. In the judicature, it is also pointed out that the president of a court cannot delegate the competence to order a case hearing by a bench composed of three professional judges to another entity, e.g. a head of department.[40]

In the same way as the president of a court, a head of department is not able to assess the nature of a case based on its cursory examination. Especially as it may require an analysis of complex matters from different areas and fields of law that often need specialisation. In other words, the evaluation of the circumstances of special complexity and precedence-like nature of a case, due to the need to its analysis, should be reserved for a chair-judge.

Judicial management of a proceeding is an argument for this approach. Appropriate understanding of the principle of judicial management of a proceeding requires that a chair-judge conduct all activities in a case from the moment it is filed to a competent court. First of all, he should examine a case provisionally and issue adequate orders if necessary. A chair-judge should endorse a statement of claim and

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38 The Supreme Court ruling of 6.12.2017, III PK 34/17, Legalis.

39 Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 277.

40 The Supreme Court judgement of 27 May 1971, II CR 122/71, Legalis.

assign the date of trial. A head of department is just a court administrative organ and his powers are laid down in a court rules and regulations.[41]

For pragmatic reasons, the provision will be very difficult to apply in practice and probably also for these reasons, Article 47 § 4 CCP was not often applied. Also, it cannot be ignored that it can be in conflict with the principle of judicial independence. How can a situation when a chair-judge recognises a case to be a precedent be reconciled with the one when a court president does not share the opinion?

It would also be difficult to accept the interpretation that a court president might not approve of a motion proposed by a judge. Although the provision stipulates that a court president "may" order that a case should be heard by a three-judge bench, when a chair-judge's assessment indicates the occurrence of statutory circumstances, the activity of designating a bench composition should have an exclusively technical character. The possibility of revoking such an order by a court president raises even more doubts. For these reasons, it should be postulated that the provision is changed, which will be discussed below. The more so as the latest amendments to Law on the system of common courts[42] considerably strengthened the competence of the Minister of Justice, who gained total discretion to appoint and dismiss basic presidents and vice-presidents of all courts. The Minister's of Justice powers to supervise court presidents and judges holding some functions were also strengthened, which means that, at present, Article 47 § 4 CCP and its procedural significance should be interpreted in a completely changed systemic context.

6. PRESIDENT'S ABILITY TO REVOKE HIS OWN ORDER

As it was indicated above, a court president shall take a decision concerning designation of a bench in the form of an order. In the judicature, it is pointed out that it is an order that due to the change of circumstances may be revoked in a procedural mode (Article 359 § 1 CCP in conjunction with Article 362 CCP).[43] In its resolution of 18 December 2014, the Supreme Court pointed out pragmatic reasons why, in the course of a proceeding, it may turn out that, due to the change of circumstances, a case may stop being complex, e.g. as a result of the withdrawal of a lawsuit, the subject or object elated changes, the change of the legal state, and a resolution adopted by the Supreme Court or the Court of Justice of the European Union. In such a situation, a court president has powers to revoke an order issued in accordance with Article 47 § 4 CCP, which will result in a 'return' to hearing a case by a bench determined by statute.

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[41] Koniuszewski, S., 'Przewodniczący wydziału a przewodniczący rozprawy', *Głos Sądownictwa*, 1937, No. 7–8, p. 471.

[42] Act of 12.07.2017 amending Act: Law on the system of common courts and some other acts (Journal of Laws, item 1452).

[43] Thus the Supreme Court resolution of 18.12.2014, III SZP 3/14, OSNP 2015, No. 9, item 129.

This opinion may obviously be recognised as controversial. Approval of such interpretation would give a court president a possibility of interference with the sphere of judicial independence and discrete evaluation whether a case continues to be complex and precedent-like. Respect for judicial independence and the guarantee of the right to a statutory judge (Article 45 (1) of the Constitution), which ensure protection of an individual against an arbitrary change of a court composition, object to such interpretation. Moreover, Law on the system of common courts lays down a principle of invariability of a bench composition (Article 47b LSCC). In accordance with the provision, the change of a bench composition may take place only if the formerly composed bench cannot hear a case or there is a long-term obstacle in the way of the formerly composed bench hearing a case. Thus, since the designation of a bench by a court president pursuant to Article 47 § 4 CCP has the nature of a systemic norm, it means that the order cannot be revoked in the procedural mode (Article 359 § 1 CCP), because this way the provisions would serve avoiding systemic regulations, in addition, ones that are very important as they concern a bench composition.

Moreover, as the Supreme Court states in its resolution of 5 December 2019 concerning the case III UZP 10/19, the legislator introduced the principle of invariability of a bench in order to ensure efficiency of proceedings, emphasising that once a randomly selected bench (thus, the legislator referred the principle to the already selected bench before it starts any activities in a case still at the stage of drafting the provisions) should not be changed until the end of a proceeding. However, exceptions to the principle are laid down in statute and are due to organisational reasons and the efficiency of a proceeding.[44] In its judgement, the Supreme Court emphasises the axiological and systemic significance of the principle of invariability of a bench.

Therefore, there are no grounds for extensive interpretation of Article 47 § 4 CCP, especially as respect for judicial independence objects it. Judges are also not obliged to inform a court president about the course of activities or the change of circumstances of a case (within the meaning of Article 359 § 1 CCP). That is why the provision should be interpreted in a narrowing way, especially as a president's order is not subject to justification or appeal.

7. RANDOMLY CHOSEN BENCHES – TEMPORARY STATE

A basic problem occurs in a situation when collective benches have already been randomly selected in appellate courts. As it was mentioned above, RCAS randomly selects cases for judges 'for the future' and many more cases than judges can complete within a month's time. This results in designation of benches and chair-judges to cases that can be heard even next year. Therefore, a question arises whether the regulation is not in conflict with the principle of invariability of benches, because it introduces changes with immediate effect also to cases in which benches had

[44] The Supreme Court resolution of 5.12.2019, III UZP 10/19.

already been designated and those collective benches had heard cases allocated to them. In accordance with Article 6(2) of the Act of 28 May 2021, cases that a court had started hearing in a composition different from a one-person bench before the act entered into force should continue to be heard by the same judge who was selected to be a chair-judge until its conclusion in a given instance court.

Interpreting those provisions, one cannot ignore the principle of invariability of court benches. The principle is also a guarantee of judicial independence. On the other hand, Article 47b LSCC stipulates that a change of a bench may only take place if the former bench cannot hear a case or there is a long-term obstacle for the former bench in the way of hearing a case. The provision of Article 47a shall be applied by analogy. The exception to the rule is laid down in Article 6(2) of the Act of 28 May 2021, which allows continuation of a case before a one-person bench, i.e. a chair-judge designated to a given case. Thus, a question is raised whether such a change is admissible and whether those proceedings should not be continued before collective benches.

In the light of this, an opinion[45] was expressed that the amendment interferes with the principle of continuity and invariability of a court bench adjudicating on a matter. This way, it results in a conflict because the change of a bench may take place only in case of a permanent or long-term obstacle in the way of the former bench hearing a case (Article 47b § 1 LSCC) or an obstacle that is urgent in nature (Article 47b § 2 LSCC) when the necessity of undertaking activities in a case results from other provisions or efficiency of a proceeding is a reason. The obstacles should really exist and should not be created by the legislator in order to achieve other political-procedural objectives.[46]

Undoubtedly, the act departs from the principle of bench invariability and interferes with judicial independence to some extent. The pandemic was recognised as a permanent obstacle and used as justification. However, the pandemic did not result in complete closure of courts but only caused difficulties in organising court work; thus, it is not a permanent obstacle but rather a temporary one. Therefore, the maintenance of the principle of invariability of benches in cases in which they had already been selected and established should support respect for the principle of judicial independence. It is so because the problem of those cases is temporary;

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45 Recommendation of the Polish Judges Association Iustitia: iustitia.pl/dzialalnosc/opinie-i-raporty/4195-rekomendacje-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-stosowania-przepisow-ustawy-z-dnia-28-maja-2021-r-o-zmianie-ustawy-kodeks-postepowania cywilnego [accessed on: 7.06.2022].

46 Recommendations of the Polish Judges Association Iustitia: iustitia.pl/dzialalnosc/opinie-i-raporty/4195-rekomendacje-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-stosowania-przepisow-ustawy-z-dnia-28-maja-2021-r-o-zmianie-ustawy-kodeks-postepowania cywilnego. For these reasons, the Association recommends: further hearing of a case in accordance with the former rules due to unconstitutionality of the above-mentioned regulations; it recognises the hearing of such cases by a former bench after a prior issue of an order by a court president as admissible due to the fact that the introduction of COVID related changes alone should be treated as special complexity or precedent-like nature of a case for the reasons discussed above; and in case of refusal to accept such a motion, it recommends filing a legal question to the Supreme Court or a prejudicial question to the CJEU and refraining from further hearing of a case until the above legal issues are resolved.

it concerns a certain number of 'old' cases with formerly designated benches. Thus, the principle of invariability of benches should be superior in nature due to its guarantee related significance. It is also not possible to reject the stance that the departure from the principle of collective hearing introduced by the COVID-19 Act is perspective as well as retrospective in nature. The disturbance to the principle of invariability of the composition of adjudicating benches raises serious objections due to the change of rules of proceeding in the course of hearing a case. A party has the right to expect that the shape and rules of a proceeding from the beginning to its conclusion will not be basically changed.[47] Especially, when a court continues the hearing after its adjournment or has already conducted a part of evidence examination procedure. The reasons for respect for the right to a statutory court should be in this case superior without harm to the guarantee of a fair trial.

Due to those constitutional reasons, it is hard to approve of the Supreme Court resolution of 26 May 2022[48] in accordance with which, provided that a court president has ordered an appeal hearing by a three-judge bench based on Article 15zzs[1] (1)(4) of the Act on special solutions to problems connected with preventing, counteracting and combating COVID-19, other contagious diseases and crisis situations resulting from them, the case should be heard by the former chair-judge and other judges should be designated randomly in accordance with Article 47a of the Law on the system of common courts. The principle of randomly chosen benches should not annihilate the principle of unchangeable bench composition, which is of fundamental importance to respect for judicial independence. The provisions concerning the system of randomly designating benches should not be instrumentally used to oust judges from adjudication or manipulate a bench composition. Once selected and established composition of a court bench should not be changed, especially as the efficiency related reasons are also against that.

However, I do not share the opinion that the introduction of the changes will weaken supervision over proper designation of benches due to allegations of defectiveness of judges designation and that it constitutes a decrease in the standard of legal protection due to depriving collective benches of supervision over the proper process of appointing one judge of a bench who was designated to the office of a judge in the course of defective proceedings conducted by the 'neo-KRS' [new National Council of the Judiciary].[49] In fact, the procedure does not exclude parties' ability to raise objections to a bench composition or even file a motion to

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[47] Zembrzuski, T., 'Przeciwdziałanie i zwalczanie epidemii…', op. cit., p. 69.

[48] The Supreme Court resolution of 26 May 2022, III CZP 82/21, www.sn.pl.

[49] According to K. Markiewicz, "It should be pointed out that this step is, additionally, dangerous because adjudication by such persons in appellate courts as the last instance – and their main problem concerns, due to the principle of collectiveness, the composition of appellate court benches – may result in the recognition of judgements issued by them as non-existent. Situations in which persons who have become judges as a result of defective selection will come to a self-reflective conclusion that responsibility for the stability of a judgement and the guarantees for the right to a court should result in their refraining from adjudication will constitute exceptions. I do not know such cases in case law. On the other hand, I know cases in which judges appointed in an appropriate way refused to exercise justice together with defectively appointed judges, which in general resulted in the instigation of disciplinary proceedings against them. Therefore, it is necessary to remember that the former practice of disciplinary representatives that consisted in

exclude a judge in case of justified doubts concerning his/her impartiality or judicial independence. Thus, it is not important whether a one-judge bench or a collective bench adjudicates on a matter.[50]

At present, however, there is another issue concerning the actuality of supervision over the processes of appointing judges due to the threat of disciplinary proceedings freezing the activities of judges and professional proxies in case they attempt to apply pro-EU interpretation of, inter alia, Article 42a LSCC, which stipulates that, within the activity of courts or court bodies, it is inadmissible to question the empowerment of courts and tribunals, constitutional state bodies and organs of supervision and protection of law, and determining or assessing by a common court or any other authority whether the appointment of a judge is lawful or whether an appointed judge is authorised to perform activities within the scope of justice enforcement. The practice in the months to come will show whether courts will in fact check such appointment processes ex officio or because of the parties' allegations.[51]

8. WEAKNESSES OF THE NEW REGULATIONS

As it was mentioned above, the issue of a one-person or collective bench of a second instance court may be controversial. In the period of the pandemic, however, it is necessary to consider the functioning of appellate departments comprehensively

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the instigation of disciplinary proceedings for the issue of a judgement will be much easier in case of hearing by a one-person bench." Markiewicz, K., 'Wpływ regulacji…', op. cit., p. 11.

[50] At present, also "activities challenging the existence of a judge's employment relationship, validity of a judge's appointment or constitutional empowerment of an organ of the Republic of Poland", i.e. examination whether somebody is a judge carry the most severe disciplinary penalties: a judge's relegation to another post or dismissal from office (Article 109 § 1a in conjunction with Article 107 § 1 (2)–(4) LSCC). There are many cases concerning judges against whom a disciplinary proceeding was instigated because they undertook steps aimed at the supervision of appointing processes, https://www.hfhr.pl/etpc-skarga-sedzia-juszczyszyn/ [accessed on: 7.06.2022].

Act of 20.12.2019 amending Act: Law on the system of common courts, Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).

[51] The Constitutional Tribunal judgement of 15.07.2021, C-791/19, the European Commission versus the Republic of Poland, ECLI:EU:C:2021:596; and the Court of Justice ruling of 14.07.2021, C-204/21, in the case the European *Commission versus the Republic of Poland*, LEX No. 3196955. It is worth pointing out that within the President's Bill, there is a plan to introduce changes to Article 42a para. 1 and 2 Act: Law on the system of common courts. In accordance with the Bill, §§ 3–19 are to be added to the provision. Thus, based on the motion of parties, it will be admissible to examine the fulfilment of the requirements for independence and impartiality of judges and to take into account circumstances in which they were appointed, conduct after the appointment on a motion filed by an authorised person provided that in the circumstances of a particular case it may result in the infringement of the standard of judicial independence or impartiality, which may have impact on the case result. A motion can be lodged in relation to a judge designated to hear a case in a first instance court or an appellate court and should be filed within three days from the moment a party is notified about an adjudicating bench composition. After the deadline, the right to lodge a motion shall expire. Bill amending Act on the Supreme Court and some other acts proposed by the President of the Republic of Poland, print no 2011, https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2011.

and take into account problems that judges of appellate courts face as a result of the introduction of the random case allocation system.

As a rule, one should approve of the solution that, *ex lege*, one judge should hear cases in a second instance court (without creating complicated exceptions). It should also be seen in positive light that the legislator did not introduce a catalogue of cases excluded from this regulation because what usually happens when such catalogues are developed, there is a risk of omitting or insufficiently determining cases subject to hearing by another bench. Secondly, as case law concerning Article 47 CCP shows, establishing exceptions to the rule in general always leads to interpretation related disputes.

In addition, what really decides whether a case is complex and should be heard by a collective bench are actual circumstances. Thus, even if a rule is laid down that one-person benches shall hear summary cases, it does not mean that they never include really complex cases. Thus, it is hard to draft abstract regulations that would constitute grounds for a statutory catalogue of cases for which a collective bench should be designated.

The regulation concerning designation of a bench composition should be based not on strict formal rules but on trust in judges. However, in case of this regulation, there is a lack of such trust. A chair judge is not the one who decides about a bench composition; it is a court president. And a court president does not have procedural competence in a case but is in general an organ of administrative supervision. Thus, a president should not undertake activities that are within the scope of holding office by a judge. Thus, the regulation would probably not raise serious doubts if a president's competence were strictly technical and were limited only to endorsement based on a judge's binding motion.

Unfortunately, there are no such regulations and the present interpretation of Article 47 § 4 CCP, as it was pointed out in case law, leads to a conclusion that a president's competence means his own discrete decision, which is hard to approve of. Such a regulation for both pragmatic and systemic reasons is out of touch with reality of the functioning of courts. *De lege ferenda*, a provision stipulating that a court president orders hearing a case by a collective bench based on a chair-judge's binding motion should be introduced. And ultimately the model should be changed.

9. PROPOSALS *DE LEGE FERENDA*

Looking for systemic solutions, also after the pandemic, completely different models should be introduced. It is worth noticing that the German model applies a different rule. This is a collective bench that can refer a case for hearing to one judge when a one-person first instance bench has already heard the case and when the case does not have any legal or actual difficulties, and it is not really significant (§ 526 ZPO). As a result, it is not an organ of administrative supervision that decides about a bench composition but a collective bench, which having analysed a case takes a decision to refer it for hearing to a single judge.

Such a regulation would allow maintaining the rule of collectiveness in second instance courts and would be in conformity with the principle of judicial independence. The fact that a collective bench would refer a case to a one-person bench would also be an advantage. This way, in-depth and thorough assessment of a case would be ensured. The assessment would be based on the lack of problematic legal or actual issues and lack of real significance of a case, thus statutory conditions and not a court's arbitrary decision.

There is one more shortcoming of the present regulation concerning a president's order to designate a collective bench. It was indicated above that the regulation under Article 47 § 4 CCP was rarely applied. It resulted from the fact that the competence to apply it was granted to a court president as well as a narrow scope of conditions for designating a collective bench. The provision requires that a case should not only be complex but it should be especially complex. However, most cases in courts are complex, which does not always mean that there is the so-called classified complexity. On the other hand, precedents are absolute exceptions. Thus, one can forecast that the introduction of such rigorous conditions for designating collective benches will lead in practice to their non-application in second instance courts.

10. CONSEQUENCES OF THE INFRINGEMENT OF THE PROVISIONS ON A BENCH COMPOSITION

Due to the fact that the provisions concerning allocation of cases, a court jurisdiction, as well as a bench composition have a guarantee related importance, the legislator laid down very strict consequences of the infringement of the provisions concerning the composition of a bench. The infringement of the provisions concerning an adjudicating bench results in invalidity of a proceeding, which takes place in every situation when the composition of an adjudicating bench is in conflict with the law.[52] If a case is heard by a first instance court composed of one judge and two lay judges and the condition for adjudication consists in the recognition that the parties were involved in a civil law contract, it leads to the annulment of this proceeding.[53]

It is pointed out in the doctrine that the significance of an adjudicating bench composition in the whole proceeding aims at avoiding arbitrariness. It allows examination of all civil cases by such court benches that are stipulated in legal regulations for a given type of cases.[54]

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[52] See the Supreme Court resolution of 18.12.1968, III CZP 119/68, OSNPG 1969, No. 4, item 23 and the Supreme Court ruling of 9.6.2009, II PZP 5/09, Legalis.

[53] The Supreme Court judgement of 25.11.2004, I PK 42/04, OSNAPiUS 2005, No. 14, item 209.

[54] Żyznowski, T., *Kodeks postępowania…*, op. cit., p. 274; Zembrzuski, T., *Nieważność postępowania w procesie cywilnym*, Warszawa, 2017, p. 232 et seq.

It is argued in case law that there are no better or worse benches; there are only benches that are in conformity or in conflict with legal provisions.[55] Undoubtedly, such strict interpretation of the provisions also has guarantee related importance because it does not allow sanctioning whatever manipulation of a bench composition. The moment one-person benches are introduced, the process of adjudicating for sure will be considerably simplified and there will be no need to resolve complicated disputes concerning a court composition. Nevertheless, a court president's order concerning a bench designation becomes especially important. That is why, undoubtedly, the issue concerning a possibility of revoking an order by a court president should be confronted with the principle of judicial independence. This, however, may lead to a conclusion that a court president cannot interfere with the proceeding in progress, and thus, he should not change the order concerning a bench composition. Such interpretation should be disapproved of because judges, in accordance with Article 178(1) of the Constitution, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

CONCLUSIONS

A court bench composition in a civil proceeding has fundamental procedural and systemic importance. The right to hearing before a competent and independent court is a guarantee of a fair trial. Collective adjudication has been a long tradition in second instance courts up till now.

The amendment to Code of Civil Procedure by means of Act of 28 May 2021 changes the rules by determining a court composition as a one-person bench not only in first instance but also second instance courts. The new solutions provoke a lot of controversy and one can formulate a thesis that in many aspects they interfere with judicial independence. Changing the rule of collective into one-person benches, the legislator did not ensure sufficient guarantees of continuation of the so-called old cases before already established collective benches, which violates the principle of invariability of court benches. Secondly, giving a court president the power to decide on the composition of a bench, the legislator did not ensure respect for judicial independence. The decision of a court president whether there is a need to designate a bench due to an especially complex or precedent-like nature of a case is disapproved of. It is not within a court president's competence to assess a nature of a case, on which a judge adjudicates. On the other hand, classified conditions for designating a collective bench cause that the discussed regulation will be very rarely applied and can interfere with a sensitive matter of judicial independence.

It is also not possible to approve of the opinion about admissibility of revoking an order by a court president because such a regulation requires confrontation with the principle of judicial independence. Thus, it is obvious that a court president cannot interfere with a case that is in progress and change orders concerning

[55] Justification for the Supreme Court judgement of 28.03.1957, I CR 605/56, NP. 1958, no 5, p. 115; the Supreme Court resolution of 18.12.1968, III CZP 119/68, OSNPG 1969, No. 4, item 23.

a bench composition. The more so as the provisions concerning a bench composition have great procedural importance and their infringement may result in invalidity of a proceeding. First and foremost, such a solution hits the constitutional guarantees of the right to a statutory court (Article 45(1) of the Constitution).

De lege ferenda, it is necessary to call for an amendment to Article 15zzs[1] (1) of the Act of 2 March 2020 so that a collective bench will adjudicate in an appellate proceeding. A collective composition of a bench may refer a case to a one-person bench when a one-person bench has already heard that case in a first instance court and when there are no legal or actual difficulties in that case, and when it is not of considerable importance. A statute should determine the conditions and thus, it would be possible if a case were not legally and actually complex and did not have great significance. This way, an important value of a collective bench in a second instance court would be restored.

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SECOND INSTANCE COURT'S BENCH COMPOSITION IN CIVIL PROCEEDINGS

Summary

The aim of the article is to discuss the effects of the amendment to Code of Civil Procedure introduced by Act of 28 May 2021 within the scope of a change of a court bench composition in appeal proceedings. The new solutions are controversial and in some aspects interfere with the principle of judicial independence. By reversing the principle of a collective composition in favour of a one-person composition, there were insufficient guarantees for the continuation of the so-called unchanged bench composition for old cases, which may violate the principle of invariability of a bench composition. Secondly, entrusting a decision on a court composition to a court president that is an administrative body did not provide sufficient guarantees for respect for judicial independence. A court president's decision on whether it is necessary to designate a bench due to the complexity or precedent-like nature of a case also raises objections. It is not within a court president's competence to assess a nature of a case on which a judge adjudicates. On the other hand, classified conditions for establishing collective benches cause that the discussed regulation will be very rarely applied.

Keywords: bench composition, one-person composition, collective composition, judicial independence, order of a court president, invalidity of a bench composition, invalidity of a proceeding

SKŁAD SĄDU DRUGIEJ INSTANCJI W POSTĘPOWANIU CYWILNYM

Streszczenie

Celem artykułu jest omówienie skutków nowelizacji Kodeksu postępowania cywilnego, wprowadzonych Ustawą z dnia 28 maja 2021 r. w zakresie zmiany składu sądu w postępowaniu apelacyjnym. Nowe rozwiązania budzą liczne kontrowersje i w wielu aspektach ingerują

w niezawisłość sędziowską. Po pierwsze, odwracając zasadę składów kolegialnych na rzecz jednoosobowych, nie zapewniono wystarczających gwarancji kontynuacji tak zwanych starych spraw w niezmienionym składzie, co może naruszać zasadę niezmienności składów. Po drugie, powierzając wyłącznie czynnikowi administracyjnemu prezesowi sądu decydowanie o składzie sądu, nie zapewniono wystarczających gwarancji poszanowania niezawisłości sędziowskiej. Sprzeciw budzi decydowanie przez prezesa sądu o tym, czy zachodzi potrzeba wyznaczenia składu z uwagi na szczególną zawiłość lub precedensowy charakter sprawy. Nie jest rzeczą prezesa ocenianie charakteru sprawy, którą rozstrzyga sędzia. Kwalifikowane przesłanki zaś do ustanowienia składu kolegialnego sprawią, że przedmiotowa regulacja będzie niezwykle rzadko stosowana.

Słowa kluczowe: skład sądu, skład jednoosobowy, skład kolegialny, niezawisłość sędziowska, zarządzenie prezesa, niezmienność składu, nieważność postępowania

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SUABILITY OF A RECTOR'S DECISIONS TO SUSPEND A STUDENT'S RIGHTS

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INTRODUCTION

The right to appeal, which originates from Article 78 of the Constitution of the Republic of Poland and remains in conjunction with Article 176 of the Constitution of the Republic of Poland, shows a considerable link with suability interpreted as admissibility of a demand for a review of a decision by an authorised entity. Depending on the model of instance supervision adopted, in case a judgement appealed against is found inappropriate, it shall be repealed, amended or substituted by a new one. The right constitutes a procedural opportunity, which a party or another authorised entity can but does not have to use, which is also applicable to appeals against a rector's decision to suspend a student's rights.

A university rector is an organ of public administration, however, not in a systemic[1] but functional sense (a governing organ), i.e. plays the function of an organ of public administration within the meaning of Article 5 § 2(3) Code of Administrative Procedure [CAP] in situations in which it is by virtue of law designated to adjudicate on individual matters by means of an administrative decision.[2] The opinion is in conformity with the autonomy of the institutions of higher education and the judgements of the Constitutional Tribunal, which emphasise that "It is thus not possible, in the light of the Constitution, to give the organs of a public university, in cases concerning the essence of functioning of this school, the nature of organs of public authorities, including organs of state

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1 Supreme Administrative Court's judgement of 10 September 2013, I OSK 1377/13, Legalis No. 1924820; Kopacz, M., 'Pozycja procesowa rektora uczelni publicznej w indywidualnych sprawach studenckich', *Zeszyty Naukowe Sądów Administarcyjnych*, 2011, issue 1, p. 30.

2 See Klat-Wertelecka, L., 'Organy szkoły wyższej w postępowaniu administracyjnym', in: Blicharz, J., Chrisidu-Budnik, A., Sus, A. (ed.), *Zarządzanie szkołą wyższą*, Wrocław, 2014, p. 124.

administration. (...) The Constitution stipulates that state universities pursue public goals referred to in Article 70 Constitution. (...) The analogy to administrative-legal relationships cannot lead to giving a rector or any other university organ a status of an organ of state administration".[3]

A rector's tasks have been laid down in a non-enumerative way in the provision of Article 23 Law on Higher Education and Science [LHES]. In accordance with the content of this provision, a rector's tasks include matters concerning a university with the exception of the matters that are regulated otherwise by statute or belong to other university organs' competence. As a result, it should be assumed that a rector is a monocratic organ of a university that is the right one to adjudicate on individual matters within the scope of public administration laid down by statute by means of administrative decisions within his/her competence,[4] which includes a decision to suspend a student's rights. This is due to the fact that students constitute the biggest group of university users who can be subject to a rector's administrative powers, including the right to suspend a student's rights. A rector has the right to exercise this power before an explanatory proceeding in a disciplinary one against a student as well as in connection with a disciplinary proceeding in progress. A rector's right to use this measure is laid down in Law on Higher Education and Science of 20 July 2018,[5] Part VII, Chapter Two: Article 312(5) and Article 316(4) LHES.

The starting point for the analysis of the issues discussed in this article includes first of all the consideration of the types and consequences of the suspension of a student's rights as well as the legal form of this suspension; and only then, secondarily, there are findings, the issue of instance supervision and one conducted by administrative courts in relation to a rector's decision. The catalogue of appellate measures that a student has the right to use against a rector's decision to suspend his/her rights is mainly determined by its legal form. However, it must be *in principio* emphasised that the legislator does not *expressis verbis* indicate that it is an administrative decision, which considerably influences a student's procedural position and rights.

1. SUSPENSION OF A STUDENT'S RIGHTS BY A RECTOR

Universities, as organisational units designated to pursue public goals and enter into administrative-legal relationships, are treated as administrative entities whose most numerous users are students and where management is assigned to a one-man organ: a rector, *ut supra*. The legal relationship between a student and a university is an administrative-legal one, i.e. a corporate one. It starts the moment a student, after making an oath and matriculation, joins the academic community. A person admitted to studies is granted student rights the moment he/she makes an oath

[3] Constitutional Tribunal's judgement of 8 November 2000, SK 18/99, OTK ZU 2000, No. 7, item 258.

[4] Voivodeship Administrative Court's judgement of 4 December 2020, III SA/Łd 430/20, Legalis No. 2509041.

[5] Consolidated text, Journal of Laws of 2021, item 478, as amended.

(Article 83 LHES). It is a legal relationship, which is temporary in nature, i.e. lasts until graduation or the occurrence of circumstances that result in its termination for other reasons, e.g. a student's withdrawal from studies or death. The relationship may also be modified in its course as a result of the suspension of a student's rights.

It should be pointed out that the doctrine indicates that the management of a university is based on the rules of a public law corporation,[6] which, within executive authority, result in the right to issue individual administrative acts also in relation to students. The recognition of universities as public law corporations considerably influences the empowerment of this group within the academic environment because it results in the abandonment of their treatment as company users whose position is 'rather passive' but as members of public law corporations exercising certain rights.[7]

The essence of company authority consists in "the scope of a company organs' authorisation to unilaterally develop legal relationships with the users of a company (in this case with students)".[8] As a result, this means that "the moment a given person becomes one of the users of a company, he/she becomes subject to the rights and duties of the users of a given company. Those rights and duties result from both the provisions of commonly binding regulations (statutes and normative executive acts) and company statutes as well as rules and regulations".[9] Within the scope of his/her company authority, which is necessary to achieve company goals, a rector adjudicates not only on admitting a user to company services but also on depriving a user of the possibility to use them in case he/she infringes or does not comply with the rules of commonly binding law as well as company regulations, or on limiting them temporarily by means of suspending a student's rights.

Thus, the content of a corporate relationship consists in a company's and its users' mutual rights and duties. A student's rights are laid down in Part II Chapter 3 LHES and are diverse in nature. They include those concerning directly studying (e.g. transfer and recognition of ECTS points, change of the field of studies, repetition of some classes because of insufficient leaning outcomes), the right to a leave of absence, the right to scholarship and other student benefits (e.g. a rector's grant, a scientific or sports scholarship funded by a natural or legal person that is not a state or local government institution, a student loan, the right to accommodation in a university hostel or board in a university canteen, the right to 50% discount on municipal public transport). It is also worth pointing out the classification of student

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[6] Przybysz, P., 'Sytuacja prawna jednostki w zakładzie oświatowym', in: Ura, E. (ed.), *Jednostka wobec działań administracji publicznej*, Rzeszów, 2001, p. 367. There are also opinions in the doctrine that universities are public law corporations – see e.g. Ochendowski, E., 'Pozycja prawna studenta uniwersytetu – użytkownik zakładu publicznego czy członek korporacji publicznej', in: Filipek, J. (ed.), *Jednostka w demokratycznym państwie prawa,* Wyższa Szkoła Administracji, Bielsko-Biała, 2003, pp. 457–462; Dolnicki, B., 'Pozycja prawna studenta i doktoranta', in: Szadok-Bratuń, A. (ed.), *Nowe prawo o szkolnictwie wyższym* a *podmiotowość studenta*, Wrocław, 2007, pp. 91–93; Szadok-Bratuń, A., 'Trójwymiarowość przestrzeni podmiotowości prawnej studenta', in: Szadok-Bratuń, A. (ed.), *Nowe prawo*..., op. cit., pp. 194, 197.

[7] Dolnicki, B., 'Pozycja prawna studenta i doktoranta…', op. cit., p. 93.

[8] Decision of Voivodeship Administrative Court in Kielce of 17 October 2017, II SA/Ke 600/17, Legalis No. 1684321.

[9] Ibidem.

rights proposed by J. Borkowski,[10] who distinguishes the rights in the course of studies, the rights during a leave of absence, the rights after a leave and the rights after graduation. Taking into account a normative act that is the source of student rights, one can also point out those student rights that result from the commonly binding law and company regulations, inter alia, rules and regulations.

The suspension of a student's rights may constitute a disciplinary penalty imposed after a disciplinary proceeding conducted by a disciplinary commission in the mode and following the rules laid down in Law on Higher Education and Science and analogous application of Code of Criminal Procedure.[11] It can also be a type of coercive measure imposed by a rector's decision preceding an explanatory proceeding or in connection with a disciplinary proceeding conducted. A rector's decision on the suspension of a student concerns the sphere of student rights and duties and causes that the company relationship, as a result of the decision issued, "has been considerably changed".[12] Moreover, this causes an affliction preventing a student from learning at university and, as a result, completing studies on time. Although there is no clear statutory regulation, *de lege ferenda* it is suggested that the suspension of a student's rights should first of all be temporary, interim in nature and it seems it should not exceed the period of a disciplinary penalty, i.e. one year (Article 308 LHES). A longer suspension period might discourage a student from continuing studies. Secondly, suspension should concern particular student rights. It should not be the suspension *in genere*.

1.1. SUSPENSION OF A STUDENT'S RIGHTS BEFORE AN EXPLANATORY PROCEEDING

The suspension of a student's rights by a rector may be applied in case of a justified suspicion that a student committed a crime.[13] A rector may at the same time order the instigation of an explanatory proceeding and suspend a student (Article 312(5) LHES). Thus, there is a close link between a (justified) suspicion of a crime commission and the suspension of a student and the instigation of an explanatory proceeding and possibly a disciplinary proceeding to follow. *Ratio legis* of the use of this measure by a rector may result from the need "to ensure the sense of safety

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[10] Borkowski, J., *Organizacja zarządzania szkołą*, Wrocław–Warszawa–Kraków–Gdańsk, 1978, p. 269.

[11] Code of Criminal Procedure of 6 June 1997, consolidated text, Journal of Laws of 2021, item 534, as amended.

[12] Supreme Administrative Court's judgement of 17 November 2015, I OSK 1383/15, Legalis No. 1396007.

[13] However, it is not only an act referred to in Article 287(1) (1)–(5) LHES. For the issue of a rector's duty to report an offence of plagiarism committed by a student see Kajfasz, J., 'Rektor jako osoba zobowiązana do zawiadomienia o podejrzeniu popełnienia plagiatu (rozważania na gruncie odpowiedzialności dyscyplinarnej studentów)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2018, issue 2, pp. 121–131. For relation between an offence and a disciplinary tort committed by a student see e.g. Sroka, T., 'Przestępstwo jako przewinienie dyscyplinarne w perspektywie celów postępowania dyscyplinarnego wobec studentów', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2011, issue 1, pp. 137–147.

at university and to protect its good reputation".[14] The placement of this regulation in the chapter dealing with students' liability indicates that the suspension of a student's rights by a rector is an element of proceedings concerning a student's disciplinary liability although such a decision is not issued within a disciplinary proceeding or a preceding explanatory proceeding. As a result, it should be assumed that Code of Criminal Procedure is not applicable in such cases. Thus, the use of this instrument by a rector is treated as a preventive measure and not a surrogate for a disciplinary penalty.

In practice, interpretational difficulties occur in relation to the expression 'at the same time' used by the legislator as the moment of issuing the decision in question by a rector. The application of the linguistic interpretation may lead to a conclusion that the suspension of a student's rights and the order to instigate an explanatory proceeding coexist. However, court judgements[15] emphasise that the term indicates the earliest moment of the suspension of a student's rights in this mode, i.e. in other words, it may take place without a preceding order to instigate an explanatory proceeding. As a result, it means that the application of this measure is also possible in the course of an explanatory and a disciplinary proceeding.[16]

The legislator does not strictly determine the period of a student's rights suspension in this case. According to Article 312(5) LHES *in fine*, the maximum suspension period shall last until a disciplinary commission issues a judgement. A rector's use of this right may be justified especially when it is probable that a disciplinary commission will impose the most severe penalty of striking a student off.

Moreover, unlike in case of a disciplinary penalty laid down in Article 308(4) LHES, the legislator does not indicate particular rights subject to suspension but all the rights in general. It should be emphasised, however, that a suspended student is not deprived of the status of a student[17] but cannot exercise his/her rights resulting from his/her administrative-legal relationship with a university. In particular, a suspended student may continue to benefit from the discount on public transport (including some airline fees for students who have ESN – Erasmus Student Network – cards), discounts on tickets to cultural institutions, cinemas, water parks, sports events, discounts in bookshops, restaurants and even some banks offering student accounts and special credit cards provided a student still has a valid student ID.

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[14] Judgement of Voivodeship Administrative Court in Lublin, of 19 December 2019, III SA/Lu 498/19, Legalis nr 2288914.

[15] Judgement of Voivodeship Administrative Court in Lublin, of 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603; also see Giętkowski, R., 'Zawieszenie studenta w prawach', *Administracja: teoria, dydaktyka, praktyka*, 2015, No. 2, pp. 9–11.

[16] Wojciechowski, P., in: Woźnicki, J. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, p. 877.

[17] Giętkowski, R., 'Zawieszenie studenta...', op. cit., p. 13.

1.2. SUSPENSION OF A STUDENT'S RIGHTS IN THE COURSE OF A DISCIPLINARY PROCEEDING

A rector can also exercise the right to suspend a student's rights in case of his/her persistent unjustified failure to appear before a disciplinary representative for student affairs in the course of an explanatory proceeding or before a disciplinary commission despite the receipt of a proper notification (Article 316(4) LHES). The essence of this measure is that it ensures a student's participation in an explanatory proceeding or a sitting of the commission. Thus, the legislator regulated a preventive measure in the course of a disciplinary proceeding against a student. The possibility of suspending a student's rights under Article 316(4) LHES may be treated as a coercive measure to make a student appear in case of his/her permanent, persistent absence. At the same time, it should be emphasised that a rector's decision issued based on the provision discussed may be addressed to any student, also a student playing the role of a witness and not only the one against whom an explanatory or disciplinary proceeding is conducted.

The regulation authorising a rector to suspend a student's rights in the course of a proceeding, like in case of suspension before an explanatory proceeding, does not determine the maximum period of suspension or the scope of rights suspended.

2. LEGAL FORM OF THE SUSPENSION OF A STUDENT'S RIGHTS

The provisions of the Act: Law on Higher Education and Science regulating admissibility of a rector's decision to suspend a student do not stipulate its legal form. In such cases, it is assumed that as the legislator authorised an administrative organ to adjudicate on an individual's matter without clearly indicating a legal form of that organ's action, one should follow the so-called presumption of a case resolution in the form of an administrative decision. The adoption of this presumption depends on whether the act is issued in the circumstances giving authority to issue a decision based on substantive legal grounds and whether it includes an authoritative adjudication on an individual's matter.[18] What is more, it is emphasised in case law that "In present systemic conditions of functioning of public administration, the presumption of a case resolution in the form of an administrative decision is a consequence of 'the right to an administrative proceeding', which results from the constitutional principle of a democratic state ruled by law (Article 2 Constitution)".[19]

The adoption of the presumption of the form of an administrative decision in case of a rector's adjudication on the case of the suspension of a student requires that not only it should be established whether the legislator did not envisage the form of

[18] Resolution of seven judges of the Supreme Administrative Court of 16 December 2013, II GPS 2/13, ONSA and WSA 2014 No. 6, item 88, p. 17, and judgement of Voivodeship Administrative Court in Gdańsk, of 3 February 2021, I SA/Gd 824/20, Legalis No. 2553509, Supreme administrative Court's decision of 26 May 2021, III OSK 143/21, Legalis No. 2626200.

[19] Judgement of Voivodeship Administrative Court in Warsaw of 11 February 2021, I SA/Kr 1283/20, Legalis No. 2557628.

an organ's action, *ut supra*, but also it should be considered whether the adjudication is authoritative and unilateral in nature concerning an individual administrative matter. The judicature uniformly[20] indicates that the suspension of a student belongs to the category of individual students' affairs to which administrative procedure shall be applied and which require the issue of an administrative decision in order to be resolved. The conclusion is especially significant because it enables a student to exercise the right to procedural protection and ensures relevant procedural guarantees of the protection of a student's own legal interest.[21] Moreover, it is essential for the issues of the supervision of a rector's decision within the instance (because pursuant to Article 23(4) LHES, a rector's administrative decision can be subject to application for reconsideration) as well as the review by an administrative court. In case of the latter, it is also important that the decision issued in accordance with Article 315(5) Act on Higher Education and Science as well as Article 316(4) LHES, is discretionary, *ut infra*. However, a rector's action within the scope of administrative adjudication does not mean complete freedom because "The scope of adjudication is always determined by competence norms, provisions concerning administrative procedure and the regulations of substantive law. Issuing a decision that is discretionary in nature, an organ is always bound by a provision and an aim of a particular regulation".[22]

A rector's decision should contain the following minimum of elements necessary to its qualification as an administrative decision: the indication of an administrative organ that issues an act (a rector), the indication of an addressee of an act (a student), the adjudication on the essence of the case (an authoritative determination of a particular administrative-legal relationship) and a rector's signature. Pursuant to Article 107 CAP, a rector's decision to suspend a student's rights must meet the requirements set in it, i.e. apart from the above-mentioned ones, the indication of the date of issue, reference to legal grounds (substantive grounds of the decisions include Article 312(5) AHES and Article 316(4) LHES), and actual and legal justification. What should be emphasised here are additional requirements for discretional decisions in the field of justification because their content should include a comprehensive analysis of evidence and exhaustive reasoning behind the organ's stand. Moreover, they should result in comprehensiveness and completeness of consideration and evaluation of all circumstances important for the case.[23] A rector's decision should also contain information whether and in what mode it can be appealed against and about the right to renounce application for reconsideration of the case and the consequences of it,[24] a rector's signature with the indication of his/her full

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[20] Judgement of Voivodeship Administrative Court in Lublin, 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603.

[21] Supreme Administrative Court's judgement of 17 November 2015, I OSK 1383/15, Legalis No. 1396007.

[22] Supreme Administrative Court's judgement of 25 March 2009, I OSK 1535/08, Legalis No. 221026.

[23] Supreme Administrative Court's judgement of 17 March 2010, II GSK 491/09, Legalis, No. 229991, and Supreme Administrative Court's judgement of 20 July 2011, I OSK 2006/10, Legalis, No. 360778.

[24] A student may declare he/she renounces the right to use this measure pursuant to Article 127a CAP in the course of running of the time limit to lodge a motion to reconsider a case.

given name and surname, information about admissibility of a complaint to an administrative court and the fee amount for lodging a complaint, as well as about the possibility of applying for exemption from costs or for financial support. Taking into account the nature of the decision and circumstances of its issue, a rector may order its immediate enforceability (Article 108 CAP). In particular, it may concern a decision issued pursuant to Article 316(4) LHES because it constitutes a specific type of a measure ensuring an efficient course of a disciplinary proceeding

3. INSTANCE AND INSTANCE SUPERVISION IN THE CONTEXT OF A RECTOR'S DECISION TO SUSPEND A STUDENT

Suspending a student, a rector issues a non-final first instance decision. However, the issue of the instance system is not treated in a uniform way in the doctrine of law.[25] It is sometimes interpreted as a legal, hierarchical relationship between organs or courts of different levels, as well as a hierarchical dependence between some internal units of organs or courts that conduct proceedings.[26] But, as a rule, the instance system is procedural in nature because it is a mechanism with the use of which the state guarantees proper and just judgements; and an instance (in the light of Article 78 Constitution) has a conventional character. The doctrine of law defines the concept of the instance system by emphasising the meaning of various features that are connected with it. According to M. Żbikowska, "the principle of the instance system *in generale* is not characterised by supremacy of one procedural organ over another one but is marked by clear independence of organs and 'better preparation' of an authorised organ to hear appellate measures against procedural decisions issued by an organ of first instance",[27] with the exception of a horizontal instance. Andrzej Wróbel[28] expresses an opinion that the instance system of proceedings and suability of judgements are not identical concepts. M. Michalska-Marciniak gives the same opinion and points out that it is necessary to distinguish between the two terms because, regardless of the indissoluble relation between them, an instance unlike the instance system is an autonomous concept.[29] The instance system of a proceeding assumes the existence of an instance course (dynamics), i.e. the movement of a case

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[25] For more on the issue of instance and the instance system see e.g. Ziółkowska, A., *Postępowanie międzyinstancyjne w postępowaniu sądowoadministracyjnym,* Katowice, 2019, pp. 15–47.

[26] See Zieliński, A., 'Konstytucyjny standard instancyjności postępowania sądowego', *Państwo i Prawo,* issue 11, p. 3.

[27] Żbikowska, M., 'Właściwość funkcjonalna Sądu Najwyższego do rozpoznania zażaleń w postępowaniu około kasacyjnym', *Prokuratura i Prawo*, 2016, No. 6, p. 127.

[28] Wróbel, A., 'Niektóre aspekty realizacji zasady dwuinstancyjności w administracyjnych postępowaniach w sprawach z zakresu własności przemysłowej', in: Wikło, E. (ed.), *Księga pamiątkowa z okazji 85-lecia ochrony własności przemysłowej w Polsce*, Warszawa, 2003, p. 256.

[29] See Michalska-Marciniak, M., *Zasada instancyjności w postępowaniu cywilnym*, Warszawa, 2012, p. 66 and literature referred to therein. For different views see Osajda, K., 'Zasada sprawiedliwości społecznej w orzecznictwie Trybunału Konstytucyjnego', in: Ereciński, T., Weitz, K. (eds.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania i Cywilnego*, 1st issue, Warszawa, 2010, p. 446 et seq.

on the initiative of an authorised entity from one instance to the other (next one) in order to review a judgement and protect a party's interest.[30] There is an indissoluble dependence between the instance system and the course of an instance: the instance system could not be implemented without the course of an instance.

The guarantee of the review of first instance judgements results from Article 78 and Article 176(1) Constitution of the Republic of Poland. The former provision gives a party the right to appeal against them, and the latter introduces the rule of a two-instance proceeding. There are close links between the above-mentioned provisions. The provision of Article 176(1) Constitution indicates the minimum number of instances, on the other hand, Article 78, "using the term 'right to appeal', mandates taking the substantive meaning of this right into consideration in the provisions on court procedure".[31] Adopting this point of view, one should agree that: "the introduction of a properly shaped instance system constitutes a guarantee of the exercise of the right to a fair trial".[32] The provision of Article 78 and the provision of Article 176(1) Constitution do not shape a constitutional right to appeal against second instance judgements.[33] The Constitutional Tribunal repeatedly emphasised in its judgements that "The constitution-maker did not precisely determine the shape of instance supervision and gave the legislator much freedom; however, it is not unlimited and does not allow for introducing arbitrary solutions that can restrict the procedural rights of the parties to a proceeding".[34] Considering the shape and number of instances, the legislator should take into account that the multi-instance system of a proceeding, apart from undoubted benefits including the increased chance that the judgement will be in conformity with law, the elimination of mistakes made in the lower instance and higher degree of proficiency of the adjudicating bench, also has a disadvantage, which is extended time of a proceeding. One of the ways of eliminating this consequence is the introduction of legal regulations making the instance system more flexible.[35]

The intensity of instance supervision and the scope of powers of the second instance organ are determined by the instance model adopted by the legislator. Taking into consideration the above statement, two types of the instance system can be distinguished: the vertical and horizontal ones; at the same time it should be emphasised that the vertical organisation of organs guarantees more independence and proficiency.[36] Devolutivity, which origins from constitutional law, where it means an upward movement of competence (competence devolution), is a determinant of the vertical instance system. However, devolutivity as a category of procedural

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[30] See Zimmermann, J., *Administracyjny tok instancji*, Kraków, 1986, pp. 12 and 15.

[31] Zieliński, A., 'Konstytucyjny standard instancyjności postępowania sądowego', *Państwo i Prawo*, 2005, issue 11, p. 8.

[32] Ibidem, p. 9.

[33] Grzegorczyk, P., in: Gudowski, J. (ed.), *System Prawa Procesowego Cywilnego, Środki zaskarżenia*, Vol. III, Part. 1, Warszawa, 2013, p. 45.

[34] See judgement of 28 July 2004, P 2/04, OTK ZU No. 7/A/2004, item 72, and Constitutional Tribunal's judgement of 8 April 2014, SK 22/11, OTK-A 2014/4, item 37.

[35] Cf. Zieliński, A., 'Konstytucyjny standard...', op. cit., p. 4.

[36] See e.g. Stahl, M., 'Uwagi o toku instancji organów odwoławczych w postępowaniu administracyjnym', *Zeszyty Naukowe Uniwersytetu Łódzkiego*, 1974, Seria I, Łódź, issue 106, pp. 63–64.

law means the movement of a case between instances in the course of an instance and constitutes a feature of appellate measures. On the other hand, the horizontal instance course (the so-called 'flattened' or 'limited'[37] instance course) allows for verification of a judgement by another organ of the same level, or the same organ that issued a judgement. The course should be treated as an exception and its admission constitutes a specific type of two-instance system surrogate. It should be signalled that the use of the term 'horizontal instance' in relation to appellate measures in a situation in which they do not have a legal consequence in the form of movement of a case to a higher instance organ misleads and is semantically inappropriate, results in a semantic noise because it allows for having an erroneous opinion that lodging an appeal will make another court (organ) that is at a higher level of court (organ) structures hear the case. Thus, as it is rightly emphasised in the doctrine of law,[38] if an organ or a court bench that is at the parallel or equivalent level as the supervised one or the same organ is authorised to supervise, one cannot speak about the instance system because in such a situation there is no competence devolution necessary to review a judgement. A horizontal appeal would be a more appropriate term, which is validating in case of a rector's decisions.

3.1. INSTANCE SUPERVISION IN THE COURSE OF A PROCEEDING OF SUSPENDING A STUDENT BY A RECTOR

A rector's decisions on suspending a student's rights pursuant to Article 312(5) AHES as well as Article 316(4) LHES are first instance decisions, which can be appealed against by means of a standard non-devolutive appellate measure (which is stipulated in the content of Article 16 § 1 first sentence CAP), which is a remonstrance. In case law it is indicated that "lodging a motion to reconsider a case does not initiate instance supervision of the decision appealed against but only its self-review by the organ that issued it. Thus, it is a review that due to its nature cannot give a party all the procedural guarantees that are given by instance supervision".[39] What is more, in case of an appellate measure in the form of a motion to reconsider a case, a rector "acts as a 'substantive' organ, i.e. one that is obliged to deal with and resolve the essence of the case taking into account all general rules of administrative procedure and detailed regulations that constitute

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[37] See the Supreme Court resolution of 13 February 1996, III AZP 23/95, OSP 1996, No. 12, item 219. It is worth drawing attention to Z. Kmieciak's opinion. According to him, in an administrative proceeding, in some categories of cases heard by local government units, there are no obstacles to give up devolutive appeals and admit a motion to re-examine a case, which starts a horizontal instance course – Kmieciak, Z., 'Samorządowe kolegia odwoławcze a formuła instancyjności postępowania administracyjnego (na tle prawnoporównawczym)', *Samorząd Terytorialny*, 2015, No. 6, p. 64.

[38] See Świecki, D., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa, 2017, p. 44; Michalska-Marciniak, M., *Zasada instancyjności*..., op. cit., pp. 93–94.

[39] Supreme Administrative Court's judgement of 12 June 2018, I OSK 1803/15, Legalis No. 1798538.

their extension",[40] including those guaranteeing statutory rights of a party and maintaining the autonomy of a higher education institution.[41]

The motion to reconsider a case should be lodged within 14 days from the date of the receipt of a decision. An appellant does not have to formulate particular objections to a rector's adjudication or select any elements of its content. It is enough to indicate in the content of the motion that a student is not satisfied with the decision issued. In an administrative proceeding based on CAP, *gravamen* is not required as a condition for the effective lodging of an appellate measure or making a particular plea. In case of formal deficiencies, a rector should issue a decision on inadmissibility of a remonstrance, "which ensures the protection of a party's rights in a proceeding in a better way than when an application is left not dealt with".[42]

In a proceeding initiated by a motion to reconsider a case, the provisions concerning appeals against decisions are applicable respectively (Article 127 § 3 CAP). Such a legal construction means that the provisions concerning: an indirect mode of lodging an appellate measure (Article 129 § 1 CAP), the first instance organ's rights to self-supervision (Article 132 CPA), substantive-technical activities consisting in the obligation to transfer an appellate measure together with the case files (Article 133 CAP), the mode of conducting an additional supplementing explanatory proceeding (Article 136 *in fine* CAP), or the higher instance organ's right to rule a cassation[43] and issue a cassation decision pursuant to Article 138 § 2 CAP or a cassation decision cancelling the decision appealed against and obliging the first instance organ to issue a particular decision (Article 138 § 4 CAP) are not applicable

A motion to reconsider a case is suspensive in nature because until the deadline for lodging it, and in case it is lodged on time, until a new decision is issued, the implementation of the decision appealed against is suspended.[44]

Ratio legis of providing a student with an imperfect appellate measure against a rector's decision to suspend a student in the form of a motion to reconsider a case consists in a university's autonomy,[45] which is expressed in its independence from

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[40] Supreme Administrative Court's judgement of 15 May 2019, II GSK 1909/17, Legalis No. 1976124.

[41] Judgement of Voivodeship Administrative Court in Szczecin of 13 September 2018, II SA/Sz 523/18, Legalis No. 1828280.

[42] Judgement of Voivodeship Administrative Court in Warsaw of 9 December 2015, VII SA/Wa 707/15, Legalis No. 1383100.

[43] Cf. Supreme Administrative Court's judgement of 3 October 2011, II GSK 1062/10, Legalis No. 389319, Supreme Administrative Court's judgement of 7 October 2015, I OSK 1223/15, Legalis No. 1387242. For different views see judgement of Voivodeship Administrative Court in Warsaw of 30 May 2011, VI SA/Wa 766/11, Legalis No. 391407. For different views see Chróścielewski, W., in: Chróścielewski, W., Tarno, J.P., Dańczak, P., *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warszawa, 2021, p. 226.

[44] Judgement of Voivodeship Administrative Court in Warsaw of 7 July 2011, VI SA/Wa 822/11, Legalis No. 387200.

[45] For the issue of university autonomy and its limits see e.g. Rybkowski, R., 'Autonomia a rozliczalność – polskie wyzwania', *Nauka i Szkolnictwo Wyższe*, 2015, No. 1 (45), pp. 95–112; Syryt, A., 'Kształtowanie systemu szkolnictwa wyższego w Polsce w drodze aktów wykonawczych i wewnętrznych – zakres dopuszczalnej regulacji', *Krytyka Prawa*, 2018, Vol. 10, No. 2, pp. 323–324. Also see Dańczak, P., *Decyzja administracyjna w indywidualnych sprawach studentów i doktorantów,* Warszawa, 2015, pp. 27–29.

state authorities, especially the limitation of the powers of a minister for higher education and science also within the scope of instance supervision of a rector's individual decisions concerning students (Article 9(2) LHES in conjunction with Article 70(5) of the Constitution).

4. REVIEW OF A RECTOR'S DECISION TO SUSPEND A STUDENT BY AN ADMINISTRATIVE COURT

The regulation of Act of 7 April 2017[46] introduced to the provision of Article 52 Act: Law on Proceedings before Administrative Courts [LPAC]) allows a party to choose an appellate measure (Article 52 § 3 LPAC). Thus, in the case discussed, the legislator gave a student the choice of an appellate measure: a motion to reconsider a case or a complaint about a non-final administrative decision lodged to a court. It is a party who decides whether they demand protection in the course of an administrative proceeding or an administrative court's proceeding. However, lodging a motion to reconsider a case and a complaint to an administrative court at the same time results in the recognition of the latter as inadmissible.[47] The moment that opens the running of the time limit for lodging a motion and a complaint is the date of the delivery of a rector's non-final decision to a student.[48] There are opinions in case law that admissibility of lodging a complaint to a court instead of lodging a motion to reconsider a case means that the legislator assumed that both legal measures protect legal interests of entitled entities in a similar way,[49] but the choice is given to a party to a proceeding.

The above-mentioned regulation that allows a student to choose an appellate measure does not change the fact that a rector's adjudication issued as a result of hearing a motion to reconsider a case may constitute the subject matter of a complaint to an administrative court (Article 3 § 2 LPAC). Undoubtedly, a rector's final decision on suspending a student can be subject to an administrative court's review. Nevertheless, what is of key importance for the scope of an administrative court's supervision of those decisions is their discretionary character. However, in relation to decisions of this type, a court's supervision consists in the examination whether the proceeding conducted by a rector was appropriate and if the adjudication was formally proper, as well as in establishing whether the organ's assessment was not arbitrary and was within the limits laid down by legal norms, and whether

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[46] Act amending Code of Administrative Procedure and some other acts, Journal of Laws of 2017, item 935.

[47] Cf. Supreme Administrative Court's decision of 13 November 2019, I OSK 2727/19, Legalis No. 2251293. By the way, it is worth mentioning that in the proceeding discussed, because of one party to the proceeding (a student), a situation in which it would be possible to apply the regulation of Article 54 a LHES concerning the collision of a motion to reconsider a case and a complaint to an administrative court is excluded.

[48] Cf. Woś, T., in: Woś, T. (ed.) Knysiak-Sudyka, H., Romanowska, M., *Postępowanie sądowoadministracyjne*, Warszawa, 2017, p. 296.

[49] Judgement of Voivodeship Administrative Court in Rzeszów of 9 May 2018, II SA/Rz 213/18, Legalis No. 2258028.

a rector justified the adjudication on a student's case providing sufficient individual reasons. Moreover, the scope of a court's supervision of lawfulness of a rector's discretionary decision includes an assessment "whether the organ taking a decision collected evidence properly, whether the conclusions drawn are justified by the collected evidence and whether the assessment is within the statutory limits".[50] This is because an administrative court examines the conformity with law and not the purposefulness of a decision and the adjudication it contains.

A student's complaint should be lodged within 30 days from the receipt of the adjudication on the case. Failure to meet the deadline for lodging a complaint results in its rejection pursuant to Article 58 § 1 subparagraph 2 LPAC. A voivodeship administrative court having venue competence to hear a complaint about a rector's decision is one where a university is based.

A complaint shall be lodged in a paper or electronic form to a competent administrative court via a rector. It should meet the requirements for pleadings laid down in Article 46 LPAC. Moreover, it should indicate the adjudication appealed against, a rector and the violation of law or legal interest, i.e. indicate reasons for lodging a complaint to an administrative court. The content of a complaint may also include a party's additional motions and requests. Unlike a cassation complaint, lodging a complaint to an administrative court does not require compulsory barrister's assistance. A complainant is obliged to pay a fee for a complaint[51] unless he/she also applies for financial support (Article 243 LPAC et seq.). A rector forwards a complaint to a court together with all documents and case files, as well as a response to a complaint in a paper or electronic form within 30 days from its receipt. A rector may also, within the scope of his/her competence, allow a complaint fully within 30 days from its receipt within the so-called process of self-supervision (Article 54 § 3 LPAC). After a complaint has been lodged to a voivodeship administrative court, its formal legal appropriateness is examined and in case of any deficiencies a remedial proceeding is initiated (Article 49 LPAC). In case the formal defects are not amended until a set deadline, a court shall reject a complaint by issuing a decision pursuant to Article 58 § 1 subparagraph 3 LPAC.

If an administrative court allows a complaint, it issues a judgement referred to in Article 145 LPAC. In case a court allows a complaint about a rector's decision, it does not have legal effects until the judgement becomes final, i.e. until the end of a 30-day period from the date of delivery of a judgement with justification for lodging a cassation complaint to the Supreme Administrative Court to a party to the proceeding, unless the court decides otherwise. On the other hand, if a court rejects a complaint as a whole or partly, it dismisses the whole complaint or a part of it (Article 151 LPAC). Administrative courts' judgements may be subject to cassation complaints to the Supreme Administrative Court.

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[50] Judgement of Voivodeship Administrative Court in Lublin, of 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603.

[51] The amount is PLN 200 (§ 2 sub-paragraph 6 Regulation of the Council of Ministers concerning the amounts and the rules of charging fees in proceedings before administrative courts of 16 December 2003, consolidated text, Journal of Laws of 2021, item 535, as amended).

CONCLUSIONS

Within the scope of the present analysis, Act: Law on Higher Education and Science has loopholes that are of fundamental importance from a student's point of view. The first of them consists in non-determination *expressis verbis* of the form of a rector's decision to suspend a student, which results in the need to presume an administrative decision. In addition, it is hard to find a regulation concerning the maximum period of a student's suspension resulting from such a rector's decision in AHES. At the same time, the act succinctly stipulates that a rector's administrative decisions can be subject to a motion to reconsider a case. As a result, the legislator shaped a horizontal model of appeal against those decisions, which to a large extent is a consequence of a legal nature of a rector as a monocratic organ managing an autonomous university. AHES abandons a regulation concerning the procedure in case of a motion to reconsider a case, which means the application of the provisions of Code of Administrative Procedure by analogy, and CAP on the other hand refers to the application of the analogous provisions on appeal against a decision (Article 127 § 3 CAP). The adopted construction of cascade reference may constitute the source of problems for a student at least within the scope of methods of dealing with the appellate measure lodged and the procedural rights he/she has at this stage of a proceeding. The difficulties are raised by the right to lodge a complaint before the administrative course is exhausted, which is laid down in Law on the Proceedings before Administrative Courts. As a result of the regulations adopted, a student that is a party to a proceeding and an addressee of a decision on student suspension has been provided with legal instruments allowing him/her to use the administrative mode of appeal in the form of an imperfect appellate measure, i.e. a motion to reconsider a case or an administrative court mode laid down in Article 52 § 3 LPAC. The above-mentioned modes cannot be applied simultaneously. Nevertheless, lodging the appellate measures indicated is based on the principle of disposition of rights. A student decides not only which measure to lodge but also whether to use them at all. In case of the choice of the mode of administrative review of a rector's decision, a student has the right to appeal to an administrative court against a decision issued as a result of a motion to reconsider a case pursuant to general rules.

Finally, it should be emphasised that the right to lodge an appellate measure cannot be identified with instance procedure. Suability is a concept broader than the instance system. The right to appeal "is a kind of a party's activity with the use of which he/she exercises his/her rights (a measure of protection of their rights and freedoms) to verify a judgement or decision".[52] The right to appeal does not always mean that an organ of a higher level will perform instance supervision of a decision, which is typical of the vertical instance system based on competence devolution. A motion to reconsider a case, as a non-devolutive appellate measure, matches the issue of the horizontal instance system in the administrative procedure. A student who uses it must consider its impact

[52] Michalska, M., 'Prawo do zaskarżenia orzeczenia w postępowaniu cywilnym (uwagi na tle art. 78 i 176 ust. 1 Konstytucji RP)', in: Pogonowski, P., Cioch, P., Gapska, E., Nowińska, J. (eds.), *Współczesne przemiany postępowania cywilnego*, Warszawa, 2010, p. 181.

on the period of *lis pendens* and be aware of decisions a rector can make in this appeal mode, including upholding a former decision. On the other hand, lodging a complaint to an administrative court before a complete use of an administrative course seems to create better procedural guarantees for a student (a case is heard by an independent and impartial court) and, from the point of view of time, constitutes a solution that can lead to faster final adjudication on the case. However, skilful and efficient use of an appellate measure by a student suspended by a rector requires his/her own legal knowledge or means a necessity to use a professional procedural representative, which is undoubtedly connected with costs and may be an obstacle to the use of procedural rights. That is why, on the one hand, it is essential not to avoid calling a rector's judgements decisions and providing a student with reliable and full information about all appellate measures and, on the other hand, ensure the activities of student organisations and a student ombudsman and his/her counterparts at other universities who implement preventive activities aimed at increasing students' awareness in the field of their rights and obligations, as well as support students not only in disciplinary proceedings but also in the field of protection of student rights.

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SUABILITY OF A RECTOR'S DECISIONS TO SUSPEND A STUDENT'S RIGHTS

Summary

The present study concerns the issue of suability of a rector's decision on the suspension of a student's rights. The author tries to define the appellate measures that a student has the right to use and the consequences of lodging them. The critical issue consists in the necessity to delimit a student's suspension as a disciplinary penalty imposed as a result of a disciplinary proceeding conducted by the disciplinary commission in the mode and on terms specified in the Act on Higher Education and Science and appropriate application of the Code of Criminal Procedure and suspension as a result of an administrative decision issued by a university rector before the initiation of an explanatory proceeding or in the course of a disciplinary proceeding. The starting point was to define the legal nature of the relationship between a student and a university as an administrative institution managed by a rector. The considerations lead to the necessity to adopt a presumption that a rector's decision in a case in question is a form of an administrative decision. Only the adoption of this optics leads to the reconstruction of appellate measures that enable a student – in case of those that are not final – to use non-devolutive appellate measures in the form of a motion to reconsider a case, which is classified as a horizontal instance, or a complaint to an administrative court in accordance with Article 52 § 3 Act on Proceedings before Administrative Courts. The legislator left the choice of the legal remedy to a student. A student still has the right to lodge a complaint about a final decision to an administrative court.

Keywords: suspension of a student's rights, presumption of an administrative decision, horizontal instance, motion to reconsider a case, complaint to an administrative court

ZASKARŻALNOŚĆ ROZSTRZYGNIĘĆ REKTORA O ZAWIESZENIU STUDENTA W PRAWACH

Streszczenie

Artykuł odnosi się do problematyki zaskarżalności rozstrzygnięć rektora o zwieszeniu studenta w prawach. Autorka podejmuje próbę określenia środków zaskarżenia z których student ma prawo skorzystać i skutków ich wniesienia. Kwestią kluczową jest konieczność delimitacji zawieszenia studenta w prawach jako kary dyscyplinarnej orzeczonej na skutek przeprowadzenia postępowania dyscyplinarnego przez komisję dyscyplinarną w trybie i na zasadach określonych w ustawie Prawo o szkolnictwie wyższym i nauce przy odpowiednim stosowaniu Kodeksu postępowania karnego, od zawieszenia jako skutek decyzji administracyjnej wydanej przez rektora uczelni przed wszczęciem postępowania wyjaśniającego lub w toku postępowania dyscyplinarnego. Za punkt wyjścia uznano potrzebę określenia charakteru prawnego stosunku łączącego studenta z uczelnią jako zakładem administracyjnym zarządzanym przez rektora. Rozważania prowadzą do konieczności przyjęcia domniemania rozstrzygnięć rektora w przedmiotowej sprawie w formie decyzji administracyjnej. Dopiero przyjęcie tej optyki prowadzi do rekonstrukcji środków zaskarżenia, które umożliwiają studentowi – w odniesieniu do tych nieostateczych – wykorzystać niedewoltywny środek ich zaskarżenia w postaci wniosku o ponowne rozpatrzenie sprawy, wpisujący się w problematykę instancyjności poziomej albo skargę do sądu administracyjnego w trybie art. 52 § 3 ustawy Prawo o postępowaniu przed sądami administracyjnymi. Wybór środka zaskarżenia ustawodawca pozostawił stronie. Aktualne pozostaje przy tym prawo studenta do wniesienia skargi do sądu administracyjnego od decyzji posiadających przymiot ostateczności.

Słowa kluczowe: zawieszenie studenta w prawach, domniemanie decyzji administracyjnej, instancyjność pozioma, wniosek o ponowne rozpatrzenie sprawy, skarga do sądu administracyjnego

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THE ISSUE OF LEGALISING AN ADVERTISING MEDIUM LOCATED BY A PUBLIC ROAD AT A DISTANCE SHORTER THAN THE ONE REQUIRED BY ACT ON PUBLIC ROADS

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INTRODUCTION

Advertising media are more and more often used to provide information about goods or services. Most often, they are in the form of advertising devices or hoardings. The development of advertising resulted in changes in the methods of exposing advertisements. Entrepreneurs often take decisions to use large-format digital signage.[1] Each type of advertising media is intended for or serves exposing advertisements. There are various types of media offered on the market. As far as the way of placement is concerned, they can be permanently anchored to the ground or be temporary in nature. The choice of a medium type, the location, and the method of anchoring have impact on the determination if there is an obligation to register it or obtain a construction permit.

The article is aimed at presenting the significance of the appropriate classification of construction works connected with anchoring an advertising medium. In the construction law practice, this is the type and method of construction works that decide on their classification in the light of statutory definitions laid down in Article 3 of the Act of 7 July 1994: Construction Law.[2]

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1 It is the so-called "animated advertising", see Kall, J., *Reklama*, Warszawa, 1999, p. 17.

2 Consolidated text, Journal of Laws of 2021, item 2351; of 2022, item 88, hereinafter: "CL".

Inappropriate classification of construction works by an investor often leads to the instigation of a legalisation proceeding. Thus, taking into account the type of a facility and the method of works, it is necessary to consider how to properly classify advertising media. It is especially important because CL does not provide a definition of the concept. It is also worth considering possibilities of legalising the construction or building works other than construction in a situation when an investor has not obtained a road administrator's permit for the placement of a medium by this road at a distance shorter than the one laid down in Act of 21 March 1985 on public roads.[3]

1. ADVERTISING MEDIUM IN THE LIGHT OF CONSTRUCTION LAW

There is no definition of an advertising medium in CL. An advertising medium may be an advertising device as well as a hoarding. However, there is a definition of an advertising device in Article 1a(1)(3a) Act of 12 January 1991 on local taxes and charges[4] and in Article 2(16b) Act of 27 March 2003 on planning and spatial development.[5]

An advertising device should be understood as a physical object designed for the purpose of or used for exposing advertisements, together with its construction and anchoring elements, with the exception of small everyday objects used in accordance with their intended purpose. The definition of an advertising device unambiguously states that it cannot be a physical object designed for the purpose of or used for exposing advertisements, together with its construction and anchoring elements, that is a hoarding.[6] It should be emphasised here that both definitions of a hoarding and an advertising device state that these are physical objects designed for the purpose of and used for exposing advertisements, together with their construction and anchoring elements. Thus, as a hoarding is an object with "a flat surface",[7] it is first of all necessary to determine whether a given physical thing designed for the purpose of and used for exposing advertisements is a hoarding, and only then one can consider its classification as an advertising devise.[8]

It is emphasised in case law that the difference between an advertising medium and a hoarding, as well as that the determination of those concepts requires taking

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[3] Act of 21 March 1985 on public roads, consolidated text, Journal of Laws of 2021, items 1376, 1595, of 2022: item 32, hereinafter: "APR".

[4] Journal of Laws of 2021, item 2192: The act determines the rules of charging an advertising fee, which depends on whether it is a hoarding or an advertising device. For more on the issue see Wantoch-Rekowski, J., 'O opłacie reklamowej', in: Miemiec, W. (ed.), *Księga Jubileuszowa Profesor Krystyny Sawickiej. Gromadzenie i wydatkowanie środków publicznych. Zagadnienia finansowoprawne*, Wrocław, 2017, p. 290.

[5] Journal of Laws of 2022, item 503.

[6] Article 7 (16c) of the Act on planning and spatial development.

[7] See Article 16b of the Act on planning and spatial development, which contains a definition of a hoarding. It means a physical object designed for the purpose of and used for exposing advertisements, together with its construction elements and anchoring, with a flat surface for exposing advertisements, in particular a banner, advertisements stuck onto building windows, placed on scaffolding, a fence or the equipment used on the construction site, with the exception of small everyday objects used in accordance with their intended purpose.

[8] Judgement of the Supreme Administrative Court of 12 December 2018, II FSK 1897/18.

into consideration the actual state of the matter.[9] Courts point out that the difference between an advertising device and a hoarding consists in the fact that a hoarding is an object with a flat surface.[10] On the other hand, such concepts as: an advertisement, a hoarding, an advertising device, and a signboard, due to their location, should be interpreted based on the planning and spatial development regulations.[11]

Taking into account the above, in the light of Construction Law, one can speak about two types of advertising devices. Firstly, these are advertising devices classified as constructions, i.e. architectural facilities that are permanently anchored to the ground within the meaning of Article 3(3) CL.[12] Secondly, these are installed advertising devices and hoardings. It is worth emphasising that advertising media may be subject to special provisions, inter alia those concerning the protection of monuments or determining the minimum distance from a public road. Thus, apart from the obligations laid down in CL, an investor must, provided it is required by law, be given consent or reach agreements stipulated in separate regulations (which is thoroughly discussed below).

2. CONSTRUCTION VERSUS INSTALLATION OF ADVERTISING DEVICES

Installation of advertising devices within the meaning of Article 29(3)(3)(c) CL concerns only the construction works that are not connected with the erection of an architectural facility in a given place, i.e. construction within the meaning of Article 3(6) CL. Pursuant to Article 29(3)(3)(c) CL, installing hoardings and advertising devices, except electric advertising signs and illuminated advertisements situated outside a built-up area within the meaning of the road traffic regulations, requires registration in an organ of architectural and construction administration.

It should be determined when construction works are classified as the construction of an advertising medium or works consisting in the installation of hoardings or advertising devices. In the light of the provisions of CL, an advertising medium may be classified as a construction or construction works consisting in the installation of advertising devices. The determination of the category of an architectural facility in the light of CL will be of key importance from the point of view of the obligation to obtain a construction permit or to register construction works.

Having considered the above-mentioned issues, an advertising medium may be classified differently depending on the actual state. Detached advertising media permanently anchored to the ground are classified as constructions. It is emphasised

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[9] Judgement of the Voivodeship Administrative Court in Szczecin of 7 February 2008, II SA/Sz 1026/07.

[10] Thus, as a result, it should be treated as a hoarding (not an advertising device), see judgement of the Supreme Administrative Court of 12 December 2018, II FSK 1897/18.

[11] See Plucińska-Filipowicz, A., Wierzbowski, M. (eds.), *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Warszawa, 2022, commentary on Article 7.

[12] See a hoarding on a foundation; judgement of the Voivodeship Administrative Court in Gliwice, I SA/Gl 1361/16, LEX No. 2290742.

in case law that it is not the way or method of anchoring an object to the ground or the technology of making a foundation that decides whether the anchoring is permanent. This is the size of a given facility, security and the method of setting a given advertising device that makes it possible to classify a facility as a construction and not a construction device.[13]

What is of key importance from the point of view of the category of an architectural facility is determination whether an advertising facility is permanently anchored to the ground. Construction works consisting in the installation of hoardings and advertising devices, except electric advertising signs and illuminated advertisements outside the built-up areas, do not require a construction permit but they require registration.[14] Thus, the installation of hoardings and advertising devices (with the exception of the illuminated ones) does not require a construction permit, but does require its registration. The term "installation" should be understood as such construction works that consist in anchoring, connecting an element to an already existing architectural facility. The term should be referred to the relation between an installed element or device and an existing facility, e.g. installation of devices on facilities.

An advertising medium that is not a construction is subject to the registration procedure. The registration of construction or other construction works shall be done in an organ of architectural and construction administration. The registration should determine the type, scope, place and method of carrying out construction works as well as the term of starting them.[15] It is necessary to attach: (1) a declaration that the real property concerned is in the investor's disposal for construction purposes; (2) sketches or designs depending on the needs; and (3) permits, agreements and opinions that are required based on the provisions of other legal acts. The registration should take place before the term of carrying out the planned construction works consisting in the installation of hoardings and advertising devices.

It is worth considering whether an organ can impose an obligation to obtain a construction permit in a situation when it is notified about the installation of an advertising device the size of which and the method of installation may pose a threat to security or put restrictions on the neighbouring areas.[16] The grounds for the imposition of such an obligation are laid down in Article 30(7) CL. In accordance with the provision concerning the installation of hoardings and advertising devices, an organ of architectural and construction administration can (provided that there are circumstances indicated in Article 30(7) CL) impose an obligation to obtain a construction permit.

Determination of the above is of key importance for determining whether an investor's activities are appropriate. It is due to the fact that in both cases: the procedure concerning the issue of a construction permit and the registration of works, an investor is obliged to be given a permission for departure from regulations concerning the minimum distance from the edge of a road.

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13 Judgement of the Supreme Administrative Court of 13 September 2016, II OSK 3037/14.
14 Article 29(3)(3c) CL.
15 Article 30(1b) and (2) CL.
16 Niewiadomski, Z., *Prawo budowlane, Komentarz*, Warszawa, 2016, pp. 322–323.

3. INSTALLATION OF ADVERTISING MEDIA IN A ROAD AREA AND BY PUBLIC ROADS

Investors vey often take decisions to install advertising media within a road area and by public roads. The installation of such media is subject to the regulations of CL concerning the classification of an architectural facility and determination of the mode of procedure (registration of construction works, a construction permit). As far as the choice of placement is concerned, not only the regulations of CL but also the provisions of Act of 21 March 1985 on public roads are applicable.[17]

It is necessary to point out the difference between the placement of an advertisement in a road area and by a public road. The requirement concerning the placement of advertisements in a road area and by a public road is laid down in Act on public roads. Due to their functions, public roads are divided into the following categories: national, voivodeship, county and commune ones. Article 4(1) APR lays down a definition of a road area. It is a separated land marked with border lines together with the space above and under its surface where a road, architectural facilities and technical devices connected with the traffic maintenance, protection and service as well as devices for the needs of road administration are located. The concept of a road area is broader than a road. However, in order to recognise the land as a part of a road area it is not enough to state that it is next to a road. It must be established that there are architectural facilities or technical devices connected with the traffic maintenance, protection and service or the needs of road administration.[18] Occupation of a road area requires a road administrator's localisation decision and consent. A road administrator who issues a localisation decision must always take into consideration the actual state of the place where a particular advertisement is to be located.[19]

The right to place advertisements by roads has been limited due to road traffic safety. The placement of advertisements by a road requires an analysis of regulations concerning:

1) the minimum distance between an advertisement and the outer edge of a roadway;
2) obtaining a construction permit or notifying an organ of architectural-building;
3) obtaining a road administrator's consent for occupation of a road area for the purpose of placing an advertising device.

The provisions of APR determine the minimum distance between an advertising medium and the edge of a road, as well as the conditions for obtaining any departures from the rule. Construction or construction works consisting in the installation of hoardings and advertising devices (with the exception of electric advertising signs and illuminated advertisements located outside a built-up area within the meaning of the road traffic regulations) require: (1) obtaining a construction permit for erecting

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[17] Consolidated text, Journal of Laws of 2021, item 1376.

[18] Judgement of the Voivodeship Administrative Court in Gdańsk, of 8 May 2014, III SA/Gd 226/14.

[19] Judgement of the Voivodeship Administrative Court in Szczecin of 5 October 2011, II SA/Sz 516/11.

a facility in the form of a detached advertising medium permanently anchored to the ground; or (2) registration of the installation of hoardings. A construction permit is not required in case of construction works consisting in the installation of hoardings and advertising devices with the exception of ones located on facilities entered into the registry of monuments within the meaning of the provisions on the protection and taking care of monuments, and with the exception of electric advertising signs and illuminated advertisements located outside a built-up area within the meaning of the road traffic regulations.

All things considered, it should be emphasised that the requirement for the lawful (in the light of the provisions of Construction Law) installation of advertising media by a public road is an agreement reached with a given road administrator. The rules of placement of architectural facilities and advertisements that do not constitute architectural facilities by roads in a built-up area are laid down in APR. Media must be located at a determined distance from the outer edge of a road. On the other hand, in particularly justified situations, an investor may obtain a road administrator's consent for placing an architectural facility by a road at a distance shorter than the one determined in Article 43 APR. In accordance with Article 42a and Article 43 APR, there is a general ban on placing advertisements in a road area outside built-up areas, with the exception of car parks. If the actual distance between an advertising medium and the outer edge of a road does not meet the requirement laid down in Article 43 APR, an investor may be given a road administrator's consent for placing an architectural facility by a road at a distance shorter than the one laid down in Article 43 APR. An investor is obliged to obtain a road administrator's permit before the start of construction or construction works. A road administrator's consent must be given before an investor obtains a construction permit or registers building works, or does construction works. It shall be attached to an application for a construction permit and registration of construction or construction works consisting in the installation of hoardings or advertising devices (with the exception of electric advertising signs and illuminated advertisements located outside a built-up area).

It is worth emphasising that the above-mentioned road administrator's consent shall be given in extraordinary situations. It is due to the fact that placing advertising media in a road area is admissible only in particularly justified situations after obtaining a road administrator's permit. Advertising media are facilities that are not connected with road management or traffic needs. In the permit issued, a road administrator determines the type of advertisement and the way in which it may be placed in a road area, as well as the place in a road area. The omission of the agreement-related procedure by investors has specific consequences. In the practical application of the provisions of CL, organs of construction supervision relatively frequently classify the installation of hoardings and advertising devices as an unauthorised construction just because an investor fails to follow the procedure of obtaining a road administrator's consent for placing a facility at a distance shorter than the one required by the provisions of Act on public roads.

4. LEGALISATION OF AN ADVERTISING DEVICE

As it was mentioned above, the construction and installation of an advertising medium at the distance that is shorter than the one laid down in Act on public roads requires a road administrator's consent given based on Article 43(2) of the statute. In practice, however, it happens that investors omit this stage in the proceeding of obtaining a permit and decide to legalise the already existing advertising devices. A question is raised, however, whether it is possible to obtain an administrator's consent in the course of a legalisation proceeding. In accordance with Article 43(2) APR, an administrator's consent for the placement of an advertising device at the distance shorter than the one stipulated in regulations[20] should be given before an investor is granted a building permit or registers construction or construction works. The consent should be attached to the application for a construction permit or registration of construction or construction works.

In the light of the content of Article 43(2), a question arises whether an investor or owner may submit an administrator's consent also in the course of a localisation proceeding. The linguistic interpretation of the above-mentioned provision does not raise any doubts concerning the moment of obtaining a road administrator's consent.

4.1. LEGALISATION PROCEDURE

Article 48 CL regulates the issue of an unauthorised construction consisting in building or having built an architectural facility or its part without the required construction permit, which generally results in the issuing of a demolition order.[21] Article 48 CL stipulates a possibility of legalisation of an unauthorised construction but only in case the construction conforms to the binding rules of planning and spatial development and does not infringe the technical construction regulations (an ordinary unauthorised construction). A legalisation proceeding is instigated at an investor's request. An organ shall issue a decision on construction stoppage in case of an architectural facility or its part that is under construction or has already been built:

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[20] Construction facilities by roads and advertisements that are not construction facilities and are placed by roads outside built-up areas should be situated at the following minimum distance from the outer edge of a road:

No.	Type of road	Within a built-up area	Outside a built-up area
1.	Motorway	30 metres	50 m
2.	Expressway	20 m	40 m
3.	Public highway:		
	a) National	10 m	25 m
	b) Voivodeship/county	8 m	20 m
	c) Commune	6 m	15 m

[21] For more on an unauthorised construction see Cherka, M., Grecki, W., *Samowola budowlana w polskim prawie budowlanym*, Warszawa, 2013, p. 32 et seq.

(1) without the required construction permit; or
(2) without registration or in spite of the fact that objections to this registration have been raised.[22]

Having recognised an unauthorised construction, an organ shall issue a decision on construction stoppage, even if construction works have been completed. An organ shall inform an investor about the possibility of legalisation, i.e. that an investor can apply for legalisation of an architectural facility or its part and the necessity of paying a legalisation fee in order to get a decision legalising an architectural facility or its part, as well as about the rules of calculating a legalisation fee.[23] Then an investor, an owner or an administrator of a construction may, within 30 days from the receipt of a decision, file an application for legalisation to an organ of construction supervision.[24] In case an investor (owner or administrator) files an application for legalisation, an organ of construction supervision shall start a legalisation proceeding. Having carried out a legalisation proceeding, provided that some irregularities have been found, an organ shall issue a decision obliging to eliminate them under pain of a demolition order. If an investor fails to file documents requested by an organ of construction supervision, the next step of a legalisation proceeding cannot start and an organ shall issue a decision on obligatory demolition. The fulfilment of obligations imposed is an obligatory element of the process of legalising an unauthorised construction. An organ cannot issue a decision approving of a construction project and a decision allowing for construction resumption if the construction has been completed and the required documents have not been submitted.[25] The above-mentioned decisions end a legalisation process, i.e. legalise an unauthorised construction.[26]

In the light of the above, the practice of enforcing the regulations concerning legalisation of an unauthorised construction consisting in the construction or carrying out construction works consisting in the installation of advertising media raises doubts concerning legal admissibility of placing advertising media within a road area, and admissibility of legalisation in case an investor fails to obtain a road administrator's consent for that although the minimum distance from a public road edge is not maintained.

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[22] Article 48(1) CL.

[23] Article 48(5) and (3) CL.

[24] Article 48a(1) CL.

[25] Judgement of the Voivodeship Administrative Court of 10 March 2021, VII SA/Wa 1770/20, judgement of the Supreme Administrative Court of 28 April 2020, II OSK 1808/19.

[26] Judgement of the Supreme Administrative Court of 14 October 2020, II OSK 1565/20; A demolition order is also issued when an application is withdrawn, which may practically happen in the course of the whole legalisation proceeding. See Article 49e(2) in conjunction with Article 48a(2) CL.

4.2. LEGALISATION OF ADVERTISING MEDIA PLACED BY A PUBLIC ROAD IN CASE THE ADMISSIBLE DISTANCE FROM A PUBLIC ROAD EDGE IS NOT MAINTAINED

The above considerations show that an investor is obliged to obtain a road administrator's consent for placing an advertising medium at the distance shorter than the one admitted by the provisions of Act on public roads. A road administrator may give consent for the placement although the minimum distance from a public road edge is not maintained. However, it is of key importance to establish whether it is possible to obtain a road administrator's consent for departure from the regulations concerning the minimum distance from a road edge in the course of a legalisation proceeding. In accordance with Article 43 APR, an application for a permission to place an architectural facility at the distance shorter than the one laid down in the provision should be filed before construction or installation of an advertising medium (registration respectively).

Therefore, it should be considered whether there is a possibility of conducting a legalisation proceeding concerning works consisting in construction or installation of an advertising medium in case an investor has not been given prior consent for placing an architectural facility at the distance shorter than the one laid down in Article 43 APR. It should be reminded that in accordance with the regulations, the consent should be given before construction or installation of hoardings. Article 43(2) APR determines the mode of procedure applicable in order to reach the compliance with law as a result of obtaining a road administrator's consent for placing a facility at the distance shorter than the one laid down in paragraph 1 of the provision. In accordance with Article 43(2) APR, in particularly justified cases, the placement of an architectural facility by a road at the distance shorter than the one determined in paragraph 1 therein may take place only based on a road administrator's consent given before an investor is granted a construction permit or registers construction or construction works.

Thus, in the light of the content of the provision discussed, can an investor file an application and obtain an administrator's consent after a construction has been completed? Administrative courts' judgements emphasise that it is absolutely necessary to adopt a systemic interpretation because in accordance with the literal interpretation of Article 43 APR, such 'subsequent' consent is not possible. Consent may also be given for a completed construction project for the purpose of a legalisation proceeding. However, it is the systemic interpretation that is in favour of admitting a possibility of obtaining such consent also in other situations. In fact, a legalisation and remedial proceeding examines whether the same requirements have been met as in case of a proceeding concerning a construction permit or in a registration proceeding. The only difference consists in the fact that the already existing facility is subject to examination in a legalisation and remedial proceeding.[27]

As it was established above, an investor may provide, and thus obtain a road administrator's ex post consent for placing an architectural facility at the distance

[27] Judgement of the Supreme Administrative Court of 9 September 2018, II OSK 2489/16.

shorter than the one laid down Article 43(1) APR. Article 39(1) of the statute bans the activities within a road area that might cause destruction or damage to a road and its devices or weaken its stability as well as pose threat to road traffic safety. In accordance with Article 43(1) APR, architectural facilities placed by a road outside a built-up area should be placed at a determined distance from an outer edge of a road. However, in accordance with Article 43(2), in particularly justified situations, the placement of an architectural facility by a road referred to in paragraph 1, at the distance that is shorter than the one laid down therein, may take place only based on a road administrator's consent given before an investor is granted a construction permit or registers construction of construction works.

It is worth considering what premises may have influence on whether a positive decision is issued. It seems that the key element of the evaluation is road traffic safety.[28] However, it is not a clear concept and is not defined in Act on public roads. A decision issued based on Article 43(2) APR is discretionary. A statutory premise of giving consent for the placement of a given facility at the distance from a road edge shorter than the one laid down in the statute is the occurrence of "particularly justified situations". In such a case, proving that such a situation exists may be a condition for issuing a permit for placing a facility in a certain place although the distance from a road edge is shorter. The "particularly justified situations" include a lack of a threat to road traffic safety. Thus, a road administrator will take the criterion of "a lack of a threat to road traffic safety" into consideration. A party may in particular prove that an advertising device does not have influence on road traffic safety due to the location, the lack of lighting, or the size of the facility. On the other hand, refusal to issue a decision must be based on appropriate evidence that an advertising device, due to its construction or other parameters, would be burdensome for the maintenance of road traffic safety.[29]

CONCLUSIONS

The above considerations make it possible to formulate a few detailed comments.

1. With regard to construction and installation of advertising media by public roads, there is a relative ban on their placement there. Having obtained a road administrator's permission, before those works, an investor may place a hoarding within a road area that is outside a built-up area (with the exception of car parks) regardless of the lack of the minimum distance between advertisements and the outer edge of a roadway.
2. Depending on the category of an architectural facility (an advertising medium as a construction or installation), its location in a particular place must be preceded by obtaining a construction permit or registration. Thus, the determination of

[28] Brylak, J., *Ochrona prawna bezpieczeństwa w ruchu drogowym*, Warszawa, 2018, p. 39.

[29] Judgement of the Voivodeship Administrative Court in Szczecin of 14 September 2011, II SA/Sz 517/11.

the category of an architectural facility is of key importance from the point of view of the choice of the procedure under CL.

3. An unauthorised construction or installation of advertising media without registration is subject to legalisation procedure. An investor, provided the legalisation requirements are met (Article 48 CL), may legalise the construction of an advertising medium or construction works consisting in installation.
4. An investor who has not obtained a road administrator's consent (before construction works) for placing an architectural facility by a road at the distance shorter than the one laid down in APR may provide the 'subsequent' consent for the purpose of a legalisation proceeding.

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THE ISSUE OF LEGALIZING AN ADVERTISING MEDIUM LOCATED BY A PUBLIC ROAD AT A DISTANCE SHORTER THAN THE ONE REQUIRED BY ACT ON PUBLIC ROADS

Summary

The article discusses the issues related to the legalisation of an advertising medium located by a public road at the distance that is shorter than the one required by the Act on public roads. Both the type of the medium and its location affect the obligation to notify an organ or obtain a building permit. A special issue in this regard is the possibility of obtaining a road administrator's consent for the placement of an advertising device in spite of the fact that the minimum distance of advertisements from the outer edge of a road was not taken into consideration in the course of the legalisation proceeding. Despite the lack of legal regulations of this matter, possible solutions are indicated.

Keywords: advertising, public road, legalisation, construction permit, road administrator

PROBLEMATYKA LEGALIZACJI NOŚNIKA REKLAMOWEGO USYTUOWANEGO PRZY DRODZE PUBLICZNEJ W ODLEGŁOŚCI MNIEJSZEJ NIŻ WYMAGANA W USTAWIE O DROGACH PUBLICZNYCH

Streszczenie

W artykule omówiono problemy związane z legalizacją nośnika reklamowego usytuowanego przy drodze publicznej w odległości mniejszej niż wymagana w ustawie o drogach publicznych. Zarówno rodzaj nośnika, jak i miejsce jego usytuowania wpływają na obowiązek zgłoszenia lub uzyskania pozwolenia na budowę. Szczególną kwestią w tym aspekcie poruszoną jest możliwość uzyskania zezwolenia od zarządcy drogi, na umieszczenie urządzenia reklamowego pomimo braku uwzględnienie minimalnych odległości reklam od zewnętrznej krawędzi jezdni w trakcie prowadzenia postępowania legalizacyjnego. Pomimo braku regulacji prawnej w tym zakresie, wskazano możliwe rozwiązania.

Słowa kluczowe: reklama, droga publiczna, legalizacja, pozwolenia na budowę, zarządca drogi

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EUROPEAN PRICING SYSTEM FOR WATER SERVICES AS AN INSTRUMENT FOR SHAPING THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER PAYS PRINCIPLE

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INTRODUCTION

The entry into force of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy[1] (hereinafter: "the WFD") is referred to in the literature as a Copernican revolution in water policy,[2] and the WFD itself is referred to as the "next-generation directive",[3] as it has created a common framework to coordinate and partially replace existing legislation. At the same time, we cannot lose sight of the fact that the provisions of the WFD, in particular paragraphs 19 and 20 of the preamble, indicate that it primarily regulates water quality management and that quantitative water management is of a subsidiary nature.[4] Action at European Union (hereinafter: "EU") level is aimed at transforming water policy into a comprehensive

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1 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, pp. 1–73.

2 Morgera, E., 'Water Management and Protection in the EU', in: *Environmental protection in multi-layered systems*, Leiden, 2012, pp. 265–287.

3 Liefferink, D., Wiering, M., Uitenboogaart, Y., 'The EU Water Framework Directive: a multi-dimensional analysis of implementation and domestic impact', *Land Use Policy*, 2011, No. 28(4), pp. 712–722.

4 Aubin, D., Varone, F., 'The Evolution of European Water Policy', in: *The evolution of national water regimes in Europe*, Kluwer, 2004, pp. 49–86; Aubin, D., Varone, F., *European Water Policy, A path towards an integrated resource management*, Louvain-la-Neuve, 2002, pp. 1–27.

policy and thus integrating water management as a cross-cutting element into other policy areas closely related to water resources, such as human consumption, energy, agriculture, fisheries, tourism, environment. Such a development of legal relations in water management should only enhance the effective implementation of the precautionary principle and the polluter pays principle, which should continue to be applied as a starting point in the field of water policy.[5]

A key instrument of the WFD is river basin management: the Member States must define river basins on their territory, assign them to river basin districts and establish river basin management plans for those river basin districts. The WFD river basin management objective is to achieve good status for all surface and groundwater bodies in the EU.[6]

The WFD ensures full economic and environmental integration of water quality and quantity management within the EU. Its main objective is to achieve by 2015 (with the possibility to extend this deadline until 2027 – Article 4(4) of the WFD) a good status of more than 111 000 surface waters (e.g., rivers, lakes, coastal waters) and more than 13 000 groundwater bodies within the EU.[7] The intent of the WFD is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which: a) prevent further deterioration, protect and improve the status of aquatic ecosystems and, in relation to their water needs, terrestrial ecosystems and wetlands directly dependent on aquatic ecosystems; b) promote sustainable use of water based on the long-term protection of available aquatic resources; c) pursue enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing out of discharges, emissions and losses of priority hazardous substances; d) ensure a gradual reduction of pollution of groundwater and prevent further pollution,

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[5] Opinion of the European Committee of the Regions: *Effective water management: approach in favour of innovative solutions*, 121st plenary session, 8–9.02.2017, ENVE-VI/-14, COR-2016–03691–00–00-AC-TRA (EN) 11/12.

[6] Albrecht, J., 'The Europeanization of water law by the Water Framework Directive: A second chance for water planning in Germany', *Land Use Policy*, 2013, No. 30/1, pp. 381–391; Blöch, H., 'European Water Policy and the Water Framework Directive: an overview', *Journal for European Environmental & Planning Law*, 2004, No. 31, pp. 170–178; Chase, P., *The EU Water Framework Directive. An Introduction*, IWA publishing, London, 2001; Correlje, A., François, D., Verbeke, T., 'Integrating water management and principles of policy: towards an EU framework', *Journal of Cleaner Production*, 2007, No. 15, pp. 1499–1506; Moss, B., 'The Water Framework Directive: total environment or political compromise', *Science of the Total Environment*, 2008, No. 400, pp. 32–41.

[7] Liefferink, D., Wiering, M., Uitenboogaart, Y., 'The EU Water Framework Directive…', op. cit., pp. 712–722; Albrecht, J., 'The Europeanization of water law…', op. cit., pp. 381–391; Blöch, H., 'European Water Policy…', op. cit., pp. 170–178; Lawrence, D., Kaminskaite-Salters, G., Mueller, H., 'A Challenging Road: implementing the Water Framework Directive in UK', *Journal for European Environmental & Planning Law*, 2004, No. 1(3), pp. 179–193; Hering, D., Borja, A., Carstensen, J., Carvalho, L., Elliot, M., Feld, C., Heiskanen, A.S., Johnson, R.K., Moe, J., Pond, D., Solheim, A.L., van Bund, W., 'The European Water Framework Derective at the age of 10: critical review of the achievements with recommendations for the future', *Science of Total Environment*, 2010, No. 408, pp. 4007–4019; Sobota, M., Jawecki, B., Feng, L., 'Charges for water services: legal and systemic concepts in the European Union (the example of Poland) and China', *Journal of Water Law*, 2021, No. 27(1), pp. 13–19.

and e) contribute to the reduction of the effects of floods and droughts (Article 1 of the WFD).

The research method used in this study is primarily based on the use of primary data, i.e., legislation that is developed both at Member States' and EU level, as well as secondary data, i.e., the one obtained from the interpretation of the legislation carried out in the framework of the case-law of the Court of Justice of the European Union (hereinafter: "CJEU") and the literature, in particular the European water legislation. Only after a sufficient amount of data has been collected, proper aggregation, comparison and summarisation is possible. Thus, the research method adopted involves the collection and initial selection of legislation, rulings, views of legal academics and commentators (the comparative method) and then the analysis of their content and development of research conclusions (the analytical method).

1. IMPLEMENTATION OF THE WFD

In accordance with Article 288 of the Treaty on the Functioning of the European Union[8] (hereinafter: "the TFEU"), a Directive is a source of law which is binding on each Member State to which it is addressed, in relation to the result to be achieved, but leaves national authorities the choice of form and means, and therefore the provisions of a Directive are implemented in the form determined by each Member State.[9] However, the rich case-law of the CJEU governs the principles of implementation, pointing out, inter alia, the need to implement a directive fully and effectively, in particular, to ensure that its provisions are exercised with respect to rights and obligations imposed, importantly, on both private and public entities.[10]

In the 1970s and 1980s an average of one in three directives was not transposed within the time specified.[11] The control of transposition into national law is based on the principle of primacy, which consists of the direct effect of directives, a conforming (pro-EU) interpretation of national law and the Member State's liability for damages.

As a general rule, the direct effect of directives is related to the relationship between the State and the individual (vertical nature). The direct effect of directives is not an alternative to the obligation to implement EU law, but it does allow, in

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[8] Treaty on the Functioning of the European Union (consolidated version) of 26.10.2012, OJ C 326, 26.10.2012, pp. 47–390.

[9] Kurcz, B., *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków, 2004, pp. 46; Maśnicki, J., 'Bezpośredni skutek dyrektyw relacjach triangularnych', *Europejski Przegląd Sądowy*, 2017, No. 3, pp. 4–12.

[10] Łętowska, E., 'Implementacyjne grzechy przeciw effet utile', *Europejski Przegląd Sądowy*, 2014, No. 1, p. 58; Prechal, S., *Directives in EC Law*, Oxford, 2005, p. 6; Klamert, M., 'Judicial implementation of directives and anticipatory indirect effect: connecting the dots', *Common Market Law Review*, 2006, No. 5(43), p. 1252; Becker, F., 'Application of community law by member states public authorities: Between autonomy and effectiveness', *Common Market Law Review*, 2005, No. 44 (4), pp. 875–1205.

[11] Haverland, M., Romeijn, M., 'Do Member States Make European Policies Work? Analysing the EU Transposition Deficit', *Public Administration*, 2007, No. 85(3), pp. 757–778.

some cases, to minimise the consequences of non-transposition.[12] However, the CJEU recognizes that the principle of direct effect applies in certain cases in order to protect the rights of individuals (horizontal nature), which may occur when provisions of a directive are unconditional and sufficiently clear and precise, moreover, if the Member State concerned has not transposed provisions of a directive within the deadline.[13]

The case-law of the CJEU also indicates how the principle of conforming interpretation of national law should be applied, i.e., both in the absence of incorporation of the provisions of a directive into national law and in the event of incorrect implementation of a directive. In such a case, entities applying the law (courts, public administrations) should take action which, however, complies as far as possible with provisions of a directive and its objectives, which in practice means prohibiting any action contrary to the rules of the specific directive.[14]

In addition, the case-law of the CJEU has established the principle of a Member State's liability for damages in the event of failure to implement provisions of a directive into national law. Compensation will be payable to private parties where a provision of a directive is intended to confer specific powers on them, and a Member State has failed to implement the provision within the time limit set by a directive, or has implemented it incorrectly, and there is a causal link between these circumstances (a Member State need not to be at fault), and the law of the country where infringements occur is applicable to pursue claims.[15]

The WFD is a framework issued on the basis of Article 192 of the TFEU. The common principles and general framework for action established by the Directive are to be developed subsequently by the Member States, which are to issue a set of special provisions within the time limit laid down in the Directive.[16] However, this

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[12] Becker, F., Campbell, A., 'The Direct Effect of European Directives – Towards the Final Act?', *Columbia Journal of European Law*, 2007, No. 13, p. 405; Skouris, V., 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives', *European Business Law Review*, 2006, No. 17(2), p. 250; Judgement of the Court of Justice of 05.04.1979, in case C-148/78, *Ratti*, ECLI:EU:C:1979:110; Judgement of the Court of Justice of 26.02.1986, in case C-152/84 *Marshall* ECLI: ECLI:EU:C:1986:84.

[13] Weatherill, S., 'Breach of Directives and breach of contract', *European Law Review*, 2001, No. 26(2), p. 184; Colgan, D., 'Triangular Situations: The Coup de Gràce for the Denial of Horizontal Direct Effect of Community Directives', *European Public Law*, 2002, No. 8(4), p. 546; Lackhoff, K., Nyssens, N., 'Direct Effect of Directives in Triangular Situations', *European Law Review*, 1998, No. 23, p. 409; Judgement of the Court of Justice of 04.12.1974 *Yvonne van Duyn v Home Office*, ECLI: ECLI:EU:C:1974:133; Judgement of the Court of Justice of 18.12.1997, in case C-129/96, *Inter-Environnement Wallonie ASBL v Régionwallonne*, para. 43, EU:C:1997:628; Judgement ECJ of 19.01.1982, *Ursula Becker v Finanzamt Münster-Innenstadt*, case C-8/81, EU:C:1982:7, para. 25; Opinion of the Advocate General Eleanor Sharpston of 12.10.2017, case C-664/15, *Protect Natur-Arten- und Landschaftschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760; Judgement ECJ of 01.07.2015, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, case C461/13, EU:C:2015:433.

[14] Judgement of the Court of Justice of 10.04.1984, in case C-14/83 *Von Colson*, ECLI:EU:C:1984:153.

[15] Judgement of the Court of Justice of 19.11.1991, in case C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

[16] Uitenboogaart, Y., van Kempen, J.H.J., Wiering, M., van Rijswick, H.F.M.W., *Dealing with Complexity and Policy Discretion, the Implementation of the Water Framework Directive in Five Member*

directive does not aim at a complete harmonisation of the Member States' regulations in the field of waters. The CJEU has repeatedly pointed out in its rulings that the WFD is a framework directive that establishes common principles and a general framework for the protection of waters and is intended to ensure coordination, integration and, in the long term, the development of general principles and structures for the sustainable use of water in the EU.[17]

2. WATER SERVICES UNDER THE EUROPEAN WATER LEGISLATION

The WFD is comprehensive and detailed, which, however, results in a complex act containing numerous exceptions to the principles laid down, as well as references to other legal acts.[18] According to the WFD: "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such" (recital 1 in the preamble to the WFD). The WFD also highlights that there are different conditions and needs in the various EU Member States, which require different specific solutions. This diversity should be taken into account when planning and implementing measures to ensure protection and sustainable use of water within the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to actions under the responsibility of individual Member States through the development of action programmes adapted to regional and local conditions (recital 19 in the preamble to the WFD).

The above concerns have certain legal consequences also with regard to water-pricing policies.[19]

States, SDU Publishers, The Hague, 2009; Moss, T., 'The governance of land use in river basins: prospects for overcoming problems of institutional interplay with the EU Water Framework Directive', *Land Use Policy*, 2004, No. 21(1), pp. 85–94; Knill, C., Lenschow, A., *Implementing EU Environmental Policy: New Directions and Old Problems*, Manchester, 2000; Mosert, E., 'Law and Politics in River Basin Management: The Implementation of the Water Framework Directive in The Netherlands', *Water*, 2020, No. 12(12), p. 3367.

[17] Judgement ECJ of 30.11.2006, *Commission v Luxemburg*, case C32/05, ECLI:EU:C:2006:749, para. 41; Judgement ECJ of 09.11.1999, *Commission of the European Communities v Italy* (also called "San Rocco"), case C-365/97, ECLI:EU:C:1999:544, para. 67 and 68; Judgement ECJ of 18.06.2002, *Commission of the European Communities v France*, case C-60/01, EU:C:2002:383, para. 27; Judgement ECJ of 11.09.2014, *European Commission v Germany*, case C-525/12, ECLI:EU:C:2014:2202. para. 50.

[18] Josefsson, H., Baaner, L., 'The Water Framework Directive: A Directive for the Twenty-First Century?', *Journal of Environmental Law*, 2011, No. 23(3), p. 463; Irvine, K., 'Classifying ecological status under the European Water Framework Directive: the need for monitoring to account for natural variability', *Aquatic Conservation: Marine and Freshwater Ecosystems*, 2004, No. 14(2), p. 107; Szöllös, A., 'The enforcement of the European Union environmental law in the mirror of the judical practice of the Court of Justice of the European Union', *Journal of Agricultural and Environmental Law*, 2020, No. 28, pp. 402–418; Thieffry, P., 'Le nouveau cadre de la politique communautaire de l'eau', *Europe*, 2001, No. 2, p. 4.

[19] Howarth, W., 'Cost recovery for water services and the polluter pays principle', *ERA Forum 10*, 2009; Rotko, J., 'Zasada zwrotu kosztów usług wodnych i jej znaczenie prawne', *Studia Prawnicze*, 2016, No. 2(206), pp. 123–136; Unnerstall, H., 'The principle of full cost recovery in the EU Water Framework Directive – genesis and content', *Journal of Environmental Law*, 2007, No. 19(1), pp. 29–42.

According to Article 2(38) of the WFD, 'water services' mean all services which provide for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste-water collection and treatment facilities which is subsequently discharge into surface water. Therefore, the WFD defines water services in view of the two main activities necessary for the use of water, in the first phase, the supply of water and in the second phase, the treatment of waste-water. The term 'service' should be understood as referring to the activities offered by the supplier to all types of recipients, whether households, public bodies, agricultural or industrial operators.[20]

The above dictates that we first consider the scope of the word used in the WFD: 'service' because the definitions formed in Article 2 of the WFD are intended to serve the effective implementation of the objectives of the WFD in the individual Member States. Helpful in this respect are the rules of interpretation developed in the case-law of the CJEU, which emphasise that the interpretation of concepts and definitions contained in directives should be based on a common denominator for all Member States, which is the ordinary meaning of the concepts used. The above assertion of the CJEU was derived from the principle of legal certainty, which assumes that the EU regulation should allow the interested parties to know the exact scope of the obligations it imposes on them. Furthermore, the CJEU has also emphasised that where there are clear, transparent and unambiguous terms in a legal act, which are further shaped by the scheme of a legal act, such terms cannot be interpreted in a way that leads to an extension of the Member States' obligations under those terms.[21] On the other hand, if doubts arise as to the interpretation of the meaning of a provision of EU law, both its wording, context and the purpose pursued by the regulation in question should be taken into account.[22] Moreover, as the case law of the CJEU indicates, the very genesis of the inclusion of a given provision in a legal act may also contain elements relevant to its interpretation.[23]

In view of the above rules of interpretation formulated by the case law of the CJEU, it is reasonable to first provide a literal interpretation of the term 'service' as used by the WFD. It should be noted that in different language versions of Article 2(38) of the WFD, the meaning of this word is different. In the French version of the WFD, the term 'services' includes the activities ('couvrent') listed in paragraphs 38(a) and 38(b) of the WFD, which does not refer directly to the provision of services to the recipient, while the wording in Spanish 'en beneficio de',

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[20] Opinion of Advocate General Niil Jääskinena of 22.05.2014, case C-525/12, *European Commission v Federal Republic of Germany*, ECLI: ECLI:EU:C:2014:449, para. 50.

[21] Judgement ECJ of 15.07.2010, *European Commission v United Kingdom od Great Britain and Northern Ireland*, case C-582/08, ECLI:EU:C:2010:429, para. 135.

[22] Judgement ECJ of 29.10.2009, *NCC Construction Danmark A/S v Skatteministeriet*, case C-174/08, EU:C:2009:669, para. 23; Judgement ECJ of 09.04.2013, *European Commission v Ireland*, case C85/11, EU:C:2013:217, para. 35; Judgement ECJ of 03.10.2013, *Criminal process against Daniel Lundberg*, case C317/12, EU:C:2013:631, para. 19; Judgement ECJ of 14.11.2013, *SFIR and others*, cases C187/12 – C189/12, EU:C:2013:737, para. 24; Judgement ECJ of 12.02.2015, *Theodor Hendrik Bouman v Rijksdienst voor Pensioenen*, case C114/13, EU:C:2015:81, para. 31.

[23] Judgement ECJ of 27.11.2012 *Thomas Pringle v Governement of Ireland*, case C-370/12, EU:C:2012:756, para. 135.

in German 'zur Verfügung stellen', in English 'provide', in Italian 'che forniscono', in Lithuanian 'teikiamos', in Polish 'umożliwiają', in Finnish 'tarjoavat' and in Swedish 'tillhandahåller', indicates that the emphasis is on the fact of offering or providing to the recipient the activities listed in Art. 2(38)(a) and (b) of the WFD, which dictates that the legislative intention was to establish a clear requirement for a bilateral relationship in which a party provides a service to the other party. This understanding of the concept of 'services' is also confirmed by the link between Article 2(38) of the WFD and Article 57 of the TFEU, where it is indicated that 'services' is a bilateral legal relationship. Therefore, it is not present, i.e., in the case of the use of water for navigation or flood protection measures, while on the other hand, it is found in the case of water supply or sewage treatment activities.[24]

On the basis of the above literal interpretation, it is possible to assume that the scope of water services covers only activities strictly connected with water supply and sewage disposal (the so-called narrow definition of water services) or, within the so-called broad definition of water services, to assume that they may also cover 'related' services, e.g. impoundment for the purposes of navigation, hydroelectric power generation, navigation and flood protection, abstraction for the purposes of irrigation and for industrial purposes. It is up to the Member States of the European Union to take a sovereign decision in this respect and thus to decide to which extent Article 2(38) of the WFD should be transposed into their national legal order.[25] However, the compliance of the actions of Member States' authorities with the systemic assumptions set out in the WFD, i.e., the principle of cost recovery and the polluter pays principle, remains an important aspect.

3. THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER-PAYS PRINCIPLE

Article 9(1) of the WFD emphasises that the Member States shall take account of the principle of recovery of the costs for water services, including environmental and material costs, having regard to the economic analysis carried out in accordance with Annex III, and in particular in accordance with the polluter-pays principle, and that it is therefore for the Member States to take measures to ensure that water charging policies encourage users to use resources efficiently and in this way to contribute to the achievement of the environmental objectives of the WFD.[26] The legislator

[24] Opinion of Advocate General Niil Jääskinena of 22.05.2014, case C-525/12 *European Commission v Federal Republic of Germany*, ECLI: ECLI:EU:C:2014:449, para. 50.

[25] Unnerstall, H., 'Kostendeckung für Wasserdientsleistungen nach Art. 9 EG–Wasserrahmenrichtlinie', *Zeitschrift für Umweltrecht (ZUR)*, 2009, No. 5; WATECO (CIS Working Group 2.6 on Water and Economics), Economics and Environment – The Implementation Challenge of the Water Frame Directive, Guidance Documnent and Annexes (2002), Annex IV.40.

[26] Gawel, E., 'ECJ on Cost Recovery for Water Services under Article 9 of the Water Framework Directive: Camera Locuta Causa non Finita', *Journal for European Environmental & Planning Law*, 2015, No. 12, pp. 71–79; Lindhout, P.E., 'A wider notion of the scope of water services in eu water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, 2012, No. 8(3), pp. 86–101.

used the phrase 'shall take into account', and thus part of legal academics and commentators highlight that this is not a provision establishing a typical obligation, but it has an initiating and announcing function, as it is only a general introduction to the provisions defining the specific functions of that principle.

The scope of Article 2(38)(a) and (b) of the WFD in conjunction with Article 9(1) of the WFD, i.e., whether all water services should be charged for or whether it is up to the Member State to choose, is an issue that was already controversial at the time of drafting the WFD. On the one hand, on the basis of historical interpretation, it should be pointed out that the European Commission, as early as the drafting of the WFD, highlighted that the act should aim to establish a Community framework for the protection of waters according to a common approach, pursuing common objectives, on the basis of common principles and actions. And so, the Commission defended a full cost recovery approach, in the sense that all costs of all water services should be fully recovered, taking into account all users in each economic sector.[27] On the other hand, we cannot disregard the fact that the position of the Council of the European Union emphasised that a Member State decides on the basis of its economic analysis, which measures are to be covered by the principle of cost recovery.[28]

The above dualism arose because the provisions of the WFD do not contain a legal definition of the term 'services' and it is therefore impossible to state clearly whether the EU legislator intended to include in the principle of cost recovery all water services connected with each of the activities listed in Article 2(38)(a) and (b) of the WFD or whether it left the Member States a certain discretion in that regard on the basis of Article 9(1) of the WFD (cost recovery in accordance with the polluter pays principle, taking into account environmental and material costs). At the same time, it is worth noting the interesting view presented in literature by Erik Gaweł, who argues that a strict interpretation of taking into account environmental and resource (material) costs is not justified under Article 9 of the WFD. Moreover, such an interpretation – in this author's opinion – may even be counter-productive to the legislator's intention in terms of the practical application of water protection.[29] Erik Gaweł presents nine arguments against focusing on calculating environmental and material costs referred to in Article 9 of the WFD when determining the context for the application of the cost recovery policy, i.e.:

1. Environmental and resource costs cannot be calculated.
2. There is more to taking account of environmental and resource costs than identifying formal cost recovery levels.
3. Calculation problems give rise to dubious derivative concepts.

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[27] Proposal for a Council Directive, COM(97) 49 final, p. 21.

[28] Common Position (EC) No 41/1999 of 22 October 1999, adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council establishing a framework for Community action in the field of water policy (OJ C 343, 30.11.1999, p. 1).

[29] Gawel, E., 'Article 9 Water Frame Directive: Do We Realy Need to Calculate Environmental and Resource Costs?', *UFZ Discussion Papers Departament of Economics*, May 2014, No. 13, Helmholtz Zentrum für Umweltforschung UFZ.

4. There is no legal obligation to provide a calculation solution.
5. Environmental economics does not necessarily support calculation approaches.
6. Calculation approaches are costly and time consuming.
7. Calculation approaches distract from the real challenges.
8. Calculation approaches are not required from a conceptual point of view.
9. Calculation approaches weaken the political legitimation of cost recovery policy.

This author, above all, from an economic point of view, highlights that the phrase 'taking account of' used in Article 9 of the WFD means the same as 'calculating' and, as a consequence, may lead to the fact that in practice it will not be possible to take this quantifier into account due to its ambiguity on the ground of economic theories of environmental policy. Gawel points out that taking only material and environmental costs into account when implementing the principle of cost recovery in accordance with the polluter pays principle can never provide a satisfactory result because, in any specific situation, which a Member State will have to consider when establishing national law, factors which – from the point of view of environmental protection – are not measurable must also be taken into account. An important argument raised by Gaweł is that under Article 9(1) of the WFD, the Member States are not legally obliged to provide an estimated solution to settle environmental and resource costs, as Article 9 of the WFD provides the Member States with discretion in the choice of methods and instruments when implementing the Directive. However, this does not change the fact that the Member States are obliged to report, document and justify their actions (Article 9(2); (4), sentence 2, of the WFD), and details of what an economic analysis for the implementation of the cost recovery principle should contain are set out in Annex III of the WFD.

On the other hand, another view is that minimum requirements for such a principle should be set under a correctly applied principle of administrative discretion. Thus, the principle under Article 9(1) of the WFD will be violated when the action taken totally disregards the demand expressed therein in an unjustified manner or pursues it by indisputably inappropriate means.[30]

CONCLUSIONS

Practice to date has shown that the interpretation of the provisions of the WFD concerning the polluter-pays principle, i.e. whether the Member States are entitled to exclude certain services from the scope of Article 2(38) of the WFD, e.g. because of differences between the Member States in access to water and in the capacity of the population to be supplied with water, or due to the geographical and climatic conditions of different regions, or finally because of different economic approaches to water management, has remained a contentious issue.

[30] Lindhout, P.E., van Rijswick, H.F.M.W., 'Effectiveness of the Principle of Recovery of the Costs of Water Services Jeopardized by the European Court of Justice – Annotations on the Judgment in C-525/12', *Journal for European Environmental & Planning Law*, 2015, No. 12, pp. 80–94.

The WFD highlights that there are diverse conditions and needs in the EU that require different specific solutions. This diversity should be taken into account when planning and implementing measures to ensure protection and sustainable use of water within the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to actions under the responsibility of the individual Member States through the development of action programs adapted to regional and local conditions (recital 13 in the preamble to the WFD).

In view of the above circumstances, it remains reasonable to accept the thesis that the WFD sets out a new methodology for water management, covering not only the level of planning, but also the level of achieving binding environmental objectives. It is expressed in the adoption of concrete measures to guarantee good water status and avoid deterioration of water status (contrary to the thesis that the WFD is only a large-scale planning instrument for water management).[31]

In this context, Article 9 of the WFD stipulates that the Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, in the light of an economic analysis carried out under Annex III to the Directive and in particular according to the polluter-pays principle. It is up to the Member States to ensure that water pricing policy encourages users to use water resources efficiently and that it contributes to achieving the environmental objectives set out in the WFD. The position of the CJEU in its judgment of 07 December 2016 Vodoopskrba i odvodnja d.o.o. v Željce Klafurić, Case C-686/15 is worth mentioning. The judgment defines the scope of Member States' discretion on how to determine the charges for the supply of water to consumers (whether to pay for actual consumption according to a water meter reading or whether other charges or fees can also be charged). The CJEU pointed out that the choice of measures to achieve the stated objective of ensuring that pricing policies encourage users to use water resources efficiently was therefore left to the Member States. In this perspective, it is undisputable that pricing water services on the basis of the volume of water consumed is one of the measures that can encourage users to use water resources in an efficient manner.[32]

The discussion on creating the foundations for an effective cost recovery policy has been going on among lawyers and economists dealing with the subject of environmental protection for over one hundred years, and when translated into the WFD implementation practice it may determine that there is no basis for solving this problem both at present and in the future.[33] The phrase used in Article 9(1) of the WFD: "Member States *shall take account* of the principle of recovery of the costs of water services, including environmental and material costs…", is vague and interpreted by the Member States through the prism of their current environmental policy at a national level, and may be tailored to current political or fiscal objectives.

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[31] Opinion of the Advocate General Niil Jääskinen of 23.10.2014, case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, ECLI:EU:C:2014:2324.

[32] Judgement of ECJ of 07.12.2016, *Vodoopskrba i odvodnja d.o.o. v Željce Klafurić*, case C-686/15, ECLI:EU:C:2016:927.

[33] Gawel, E., 'Article 9 Water Frame Directive: Do We Realy Need To Calculate…', op. cit.

In this view, it is a mistake for the EU legislator to avoid clear definitions in the EU legislation on the subject.

As highlighted above, the WFD is a framework directive, which on the one hand means that the Member States have discretion in choosing an appropriate cost recovery policy and the polluter pays principle, but not a discretion without a legal framework. The author supports the arguments presented in the Opinion of Advocate General Niilo Jääskinen of 22nd May 2014 regarding Case C-525/12 European Commission v Federal Republic of Germany, in which the European Commission claims that the CJEU should declare that the Federal Republic of Germany has failed to fulfil its obligations under the WFD, in particular under Article 2(38) and Article 9 thereof, by excluding certain services (for example, impoundment for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for the purposes of irrigation and for industrial purposes, as well as personal consumption) from the concept of 'water services'.[34] Following the Advocate General's opinion, it is for the Member States to take measures primarily from the point of view of efficiency as compared with their national system of water management, and in that regard to take account of specific regional, social, environmental and economic conditions, enjoying a broad discretion. The framework for action by the individual Member States should not be standardised in view of the fact that, in all Member States, water resources are largely in the public domain, which would allow the State to impose prices for water uses such as personal consumption or production of hydroelectricity. On the other hand, in all Member States, the environmental targets adopted under environmental policy justify encouraging sparing use of freshwater in the context of water supply. In other words, the obligation to recover the costs of water services cannot be a central, identical instrument for all Member States and thus a means of resolving water management problems. Instead, it is a specific instrument to be applied to water supply and waste-water collection and treatment in the individual Member States, taking into account local conditions. The latter cannot be a top-down, superior regulation because it would promote a purely quantitative approach, which would not be justified in the Member States with significant water resources. Under current law, there is a need to emphasise the protection of water quality and to ensure the sustainable management of the annual hydrological cycle in order to avoid large water level fluctuations in the water masses constituting the integrated hydrological system.

Thus, it must be assumed that the provisions of the WFD require the Member States to take the necessary measures to achieve the objectives formulated in general and not in numerical terms, leaving the Member States some discretion as to the nature of the measures to be taken. However, the WFD does not aim at a complete harmonisation of Member States' water regulations and therefore assumes a complementary nature of charging.[35] Complementarity in this respect lies in the recognition of charges for water services as one of the elements of a Member State's system of water protection.

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[34] Opinion of Advocate General Niil Jääskinena of 22.05.2014, case C-525/12, *European Commission v Federal Republic of Germany*, ECLI: ECLI:EU:C:2014:449, para. 50.

[35] Judgement ECJ of 30.11.2006, *Commission v Luxemburg*, case C32/05, ECLI:EU:C:2006:749, para. 41; Judgement ECJ of 18.06.2002, *Commission of the European Communities v France*, case

It also implies that while the principle of cost recovery and the polluter-pays principle must be implemented through a pricing system for water services, charges are not necessarily the only way in which these principles are implemented in Member States' domestic legal systems. In other words, the implementation of the principle of cost recovery through charges for water services is rather a specific instrument to be used primarily for water supply and waste-water collection and treatment. According to the WFD, this instrument serves to stimulate greater economy and prudence in water management, and the limits of interpretation in this respect at a Member State level consequently determine which activities a Member State shall exclude from water services and thus the principles of cost recovery, which involves the non-charging of such activities. These measures are taken on the basis of an analysis of regional, environmental, geographical, social and economic conditions by the Member States.

The above statements seem to be confirmed by the WFD, recital 13 in the preamble to the WFD states as follows: "*There are diverse conditions and needs in the Community which require different specific solutions. This diversity should be taken into account when planning and execution of measures to ensure protection and sustainable use of water in the framework of the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to action within the responsibility of Member States through the drawing up of programmes of measures adjusted to regional and local conditions.*"

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EUROPEAN PRICING SYSTEM FOR WATER SERVICES AS AN INSTRUMENT FOR SHAPING THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER PAYS PRINCIPLE

Summary

The entry into force of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy has introduced a new pricing system for water services. The Directive identifies the polluter-pays principle and the principle of cost recovery as a basis for action to be taken by the Member States when setting up pricing systems for water services. The provisions of Article 2(38) and Article 9 of the Directive raised questions of interpretation. The research issue of this study is to determine the discretionary scope of the Member States of the European Union for the protection of waters under a pricing system for water services, and to interpret the concept of "services" used in the Directive in the context of the cost recovery principle and the polluter-pays principle. The author, on the basis of the adopted research method, i.e., interpretation of law, views of legal academics and commentators, case-law of the Court of Justice of the European Union, states that the Directive provides for a mechanism whereby each EU Member State determines the individual uses of water in a pricing system for water services on the basis of a country-specific definition of "water services". The pricing system for water services is only one of the legal instruments for setting the principle of cost recovery and the polluter-pays principle in the Member States' water management system, and its scope is based on geographical, economic and natural criteria.

Keywords: Water Framework Directive, water services, polluter pays principle, principle of cost recovery

EUROPEJSKI SYSTEM OPŁAT ZA USŁUGI WODNE JAKO INSTRUMENT KSZTAŁTOWANIA ZASADY ZWROTU KOSZTÓW I ZASADY „ZANIECZYSZCZAJĄCY PŁACI"

Streszczenie

Wejście w życie Dyrektywy 2000/60/WE Parlamentu Europejskiego i Rady z dnia 23 października 2000 r. ustanawiającej ramy wspólnotowego działania w dziedzinie polityki wodnej wprowadziło nowy system opłat za usługi wodne. Wskazane tam zostały zasady: „zanieczyszczający płaci" oraz zasada zwrotu kosztów jako podstawy działań podejmowanych przez państwa członkowskie w ramach tworzonych systemów opłat za usługi wodne. Wątpliwości interpretacyjne budziły uregulowania zawarte w art. 2 pkt 38 oraz art. 9 dyrektywy. Problemami badawczymi niniejszego opracowania pozostają: określenie, jak szeroki jest margines swobodnych działań państw członkowskich Unii Europejskiej w celu ochrony wód w ramach systemu opłat za usługi wodne, a także dokonanie wykładni użytego w dyrektywie pojęcia „usługi" w kontekście zasady zwrotu kosztów oraz zasady „zanieczyszczający płaci". Autor, na podstawie przyjętej metody badawczej, czyli wykładni prawa, poglądów doktryny, orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, formułuje tezę, że dyrektywa przewiduje mechanizm, według którego to każde państwo członkowskie Unii Europejskiej określa indywidualne sposoby korzystania z wód w systemie opłat za usługi wodne na bazie przyjętej w danym państwie definicji „usług wodnych". System opłat za usługi wodne stanowi jedynie jeden z instrumentów prawnych kształtowania zasady zwrotu kosztów i zasady „zanieczyszczający płaci" w systemie gospodarowania wodami w państwach członkowskich, zaś zakres jego kształtowania odbywa się na podstawie kryteriów geograficznych, ekonomicznych, przyrodniczych.

Słowa kluczowe: ramowa dyrektywa wodna, usługi wodne, zasada „zanieczyszczający płaci", zasada zwrotu kosztów

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UNITED ARAB EMIRATES "ICEBERG PROJECT" – WOULD AN AMBITIOUS CONCEPT COMPLY WITH INTERNATIONAL LAW?

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1. PRESSURE OF CLIMATE CHANGE

Every single state in the world that plans to continue its existence in current and following century should not underestimate the threat posed by the global warming. Rising average temperatures caused by CO_2 and other greenhouse gases' emissions[1] in the last decades have alarmed climatologists all over the world.[2] According to official reports prepared under auspices of Intergovernmental Panel on Climate Change (hereinafter: "IPCC"), the world is on the course of achieving an increase of global average temperature by 1.5°C above pre-industrial levels at the mid-century if no real action is taken by global community to limit the emissions.[3] Although it

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1 Although in public debate it is quite common to assign greenhouse effects solely to emissions of carbon dioxide, there are multiple other gases whose production contributes to global warming, including water vapor, methane, etc. See Cassia, R., Nocioni, M., Correa-Aragunde, N., Lamattina, L., 'Climate Change and the Impact of Greenhouse Gasses: CO_2 and NO, Friends and Foes of Plant Oxidative Stress', *Frontiers in plant science*, 2018, No. 9, pp. 2–3.

2 Currently more than 97% of climate scientists agree that global warming has an anthropogenic origin. See Cook, J., Nuccitelli, D., Green, S.A., Richards, M., Winkler, B., Painting, R., Way, R., Jacobs, P., Skuce, A., 'Quantifying the consensus on anthropogenic global warming in the scientific literature', *Environmental Research Letters*, 2013, No. 8, pp. 1–2.

3 *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Masson-Delmotte, V., Zhai, P., Pörtner, H.-O., Roberts, D., Skea, J., Shukla, P.R., Pirani, A., Moufouma-Okia, W., Péan, C., Pidcock, R., Connors, S., Robin Matthews, J.B., Chen, Y., Zhou, X., Gomis, M.I., Lonnoy, E., Maycock, T., Tignor, M., Waterfield, T. (eds.), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [accessed on: 26.02.2021].

is difficult to enumerate all potential problems previously unknown to humanity if the scenario predicted by IPCC is realized, on the foreground pointed out would be: continuous oceans acidification negatively affecting marine life, extreme droughts, flooding of coastal cities, as well as food and water shortages.[4] Thus, in popular culture it is common to refer ongoing climate changes to "climate catastrophe".[5]

The mentioned consequence of water shortages is especially threatening for arid or semi-arid regions of the world, including California, North Africa and Middle East.[6] Several countries have already undertaken strategies that would assure some emergency water supplies for their citizens if the worst-case scenarios related to global warming are at stake. One of the boldest ideas came out in the United Arab Emirates. One of its nationals plans to tow into coast of UAE a giant iceberg of Antarctic origin that would provide a great source of fresh water for its inhabitants for many years. The whole operation would be organized under name "Iceberg Project" and run in early 2020s. However, the project itself might sound highly ambitious, but it is linked to serious risk and moreover, it may rise certain concerns of legal nature. This article has an aims to present the Emirati concept in the light of international law, make an academic comment thereon and consequentially explain whether the country is entitled, under international law, to tow an iceberg to its coast. The article shall not serve as a basis for explanation neither of environmental impact of the operation, nor its economic aspects.

2. "ICEBERG PROJECT" – AN OVERVIEW

The idea of towing icebergs is not somewhat new. Some small ones were already transported from southern Chile to Valparaiso mid-1800s.[7] But a concept of towing an iceberg from Antarctic came up in 1977 in Saudi Arabia under the directorship of Prince Mohammad al Faisal and help of French scientists. The prince established a special company called "Iceberg Transport International" that was preparing an operation of moving an iceberg to the shores of kingdom for a purpose of supplying its citizens with fresh water.[8] However, the plan was never materialized.

In 2017 in a country neighbouring Saudi Arabia – United Arab Emirates initiated a project that would make an original idea of Prince Faisal true. Abdulla Alsheni

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[4] Detailed breakdown of most potential negative social and economic consequences is presented by IPCC in its reports. See: *Global Warming...*, op. cit.

[5] See Kolbert, E., 'Why We Won't Avoid a Climate Catastrophe', *National Geographic*, 25.03.2020, https://www.nationalgeographic.com/magazine/2020/04/why-we-wont-avoid-a-climate-catastrophe-feature/?awc=19533_1600188260_709608ad992840ddb64a96eac0f399f7 [accessed on: 26.02.2021].

[6] Mehran, A., AghaKouchak, A., Nakhjiri, N., Nakhjiri, N., Stewardson, M.J., Peel, M.C., Phillips, T.J., Wada, Y., Ravalico, J.K., 'Compounding Impacts of Human-Induced Water Stress and Climate Change on Water Availability', *Scientific Reports*, 2017, No. 7, p. 1.

[7] Iceberg Project, National Adviser Bureau Limited, http://www.icebergs.world/ourstory.html [accessed on: 26.02.2021].

[8] Lundquist, T., 'The Iceberg Cometh: International Law Relating to Antarctic Iceberg Exploitation', *Natural Resources Journal*, 1977, No. 17(1), p. 11.

– an Emirati businessman and an owner of National Adviser Bureau Limited publicly announced his "Iceberg Project" aiming at towing an immense iceberg from the Heard Island in the South Pole to the coast of Fujairah, at the eastern part of the country. The project was already presented to UAE Ministry of Climate Change and Environment and Ministry of Infrastructure and Development and is scheduled to have its trial run launched in early 2022, and a final hauling in late 2023. The ultimate cost of the project is estimated at 100–150 million U.S. Dollars.[9] If the plan is successful, an iceberg might provide 20 billion gallons of fresh water; enough for consumption by million people for five years.[10] It is worth noticing that the official website of "Iceberg Project" also features information: *From Legal point of view; According to the freedom of the high seas […], icebergs can be considered a water resource and subject to acquisition for private use anywhere in the world*.[11] Such expression suggests that the whole concept totally complies with international law (in particular law of the seas). But the idea of hauling icebergs by itself seems to be much more complicated from a legal point of view that it might stem from the project's website. Subsequent part of the article shall be devoted to the detailed analysis of Mr Alsheni's concept in the light of international legal measures.

As the government of the UAE has not declared any formal involvement in the plan, it shall be interpreted as being a purely private venture.[12]

3. DETERMINING THE STATUS OF ICEBERG

Although international law norms clearly distinguish water areas from landmass and thereby regulate the question of states' jurisdiction, no particular provision gives an unambiguous answer how ice (covering large surface of polar regions) should be treated. One of key problems in identifying its legal status is a fact that it is by its nature non-permanent.[13] It remains a solid structure only in cold temperature, but when the temperature rises above 0°C, it melts and transforms into water. Moreover, the polar ice itself appears in two different forms: ice-caps or glaciers covering land areas and ice floating on the water in form of e.g. icebergs. In the former case it is appropriate to apply norms that are normally applicable also to a base terrain for ice-caps (e.g. Antarctic Treaty for ice covering landmass of Antarctic). But in the latter situation such an interpretation seems unjustified. Ice formations floating on the seas have different density, as well as physical properties

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[9] Sanderson, D., 'Plan to Tow Iceberg to UAE 'Not Science Fiction', Claims Businessman', *The National UAE*, 11.07.2019, https://www.thenational.ae/uae/environment/plan-to-tow-iceberg-to-uae-not-science-fiction-claims-businessman-1.885243 [accessed on: 26.02.2021].

[10] Baldwin, D., 'Trial Run for UAE Iceberg Project in 2019', *Gulf News*, 01.07.2018, https://gulfnews.com/uae/environment/trial-run-for-uae-iceberg-project-in-2019–1.2244996 [accessed on: 26.02.2021]. Note that scheduled in the article is outdated, as the original timetable for launching the project was 2019 for pilot run and 2020 for final hauling.

[11] Iceberg Project, National Adviser Bureau Limited (http://www.icebergs.world/index.html).

[12] Sanderson, D., 'Plan to Tow Iceberg…', op. cit.

[13] See Machowski, J., 'The Status of Polar Ice under International Law', *Polish Polar Research*, 1992, No. 13(2), p. 157.

than pure water and therefore a direct application of legal norms relating to sea into the icebergs is unreasonable.[14]

What complicates the problem even more, no international treaty refers *expressis verbis* to status of icebergs, not to mention even question of their appropriation and towing.[15] But such a legal vacuum in that matter is not without reason: as it was mentioned in previous chapter, iceberg harvesting, although not being a totally new concept, never occurred on a bigger scale; neither states themselves nor private operators dared to haul larger pieces of ice floating on waters. Therefore, international community might have been simply showing a *désinteresement* in the matter of determining a status of iceberg.[16]

However, lack of expressed provisions does not automatically mean that it is impossible to assess whether certain actions undertaken in regards to icebergs are lawful or not. Many doubts arising in that matter might be dispelled by international conventions. Treaties of particular importance here are: Antarctic Treaty System (hereinafter: "ATS") and United Nations Convention on Law of the Seas (hereinafter: "UNCLOS").

4. APPLICATION OF UNCLOS

UNCLOS is the main international treaty regulating the regime of maritime zones, adopted and signed in 1982 in Montego Bay, replacing four Geneva Conventions of 1958. Currently, there are 168 parties to the treaty.[17]

Although no single provision of the UNCLOS deals directly with icebergs (not to mention its harvesting), the treaty sets out the rules applying to particular maritime zones depending on their distance from the territory of coastal state: territorial sea, contiguous zone, exclusive economic zone (EEZ) and high seas. As for the territorial sea, its breadth is established by every state up to a limit not exceeding 12 nautical miles measured from baselines.[18] Generally, in the area covered by territorial seas, as well as in the airspace above it and its subsoil and bed, a coastal state may exercise all sovereignty rights.[19] In turn, in the contiguous zone, that may extend up to 24 nautical miles from the baseline, competences of the coastal state are more limited and are described in Article 33(1) of UNCLOS. As for the EEZ, extending

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[14] Ibidem, pp. 157–158.

[15] Geon, B., 'A Right to Ice?: The Application of International and National Water Laws to the Acquisition of Iceberg Rights', *Michigan Journal of International Law*, 1997, No. 19(1), p. 282.

[16] A norm concerning status of iceberg, its potential appropriation etc. would have been crystallized in an international custom, rather than conventions if in a given period of time certain number of subjects would have repeatedly act in a certain way (in that case – tow icebergs) and equally accept such practice (*opinio iuris*). See Shaw, M.N., *International Law*, Cambridge, 2014, pp. 51–53.

[17] See Chronological lists of ratifications of, accessions and successions to the UNCLOS and the related Agreements (https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm; accessed: 26.02.2021).

[18] See United Nations Convention on Law of the Sea, United Nations Treaty Series, Vol. 1833, No. 31363.

[19] United Nations Convention on Law of the Sea.

up to 200 nautical miles from the baseline, UNCLOS in Article 56 empowers the coastal states with set of rights including conservation and management of natural resources, but at the same time provides all other states with certain rights and duties in Article 58. Finally, the area covering high seas is free from sovereignty, thereby granting all states freedoms of navigation, fishing, laying submarine cables and pipelines and overflight.[20] Certainly, it does not mean that states cannot exercise their jurisdiction over vessels sailing under their flag. In general a state has a right to exercise civil, criminal and administrative jurisdiction over their ships.

What stems from the above wording is a permission to undertake acts of harvesting ice (including icebergs) provided that it is located on high seas. That partially refers to what was mentioned on the "Iceberg Project" website (see previous chapter). Any vessels that sail in order to proceed with towing an iceberg should in advance make sure that it does not float on waters that belong to territorial sea, contiguous zone, or exclusive economic zone of a coastal state. Otherwise, such appropriation of an iceberg might be pertained as a breach of UNCLOS, empowering coastal states with significant rights exercised even in EEZ.

However, one should bear in mind that execution of rights granted by UNCLOS to states on high seas should have certain limitations. More precisely speaking, ice harvesting might be proceeded with provided that it does not unreasonably interfere with other activities related to freedom in high seas.[21] On the foreground one would mention protection of environment and conservation of living resources (Articles 116–120), duty to render assistance (Article 98), or the duty to avoid collisions with other vessels (Article 97). But if the process of harvesting runs with observance of reasonable use rules, it should not be pertained as violating provisions of UNCLOS.[22]

5. THE ANTARCTIC TREATY

The whole continent of Antarctica is under many circumstances absolutely unique. Not only it has the highest average altitude (ca. 2200 meters) in comparison to other continents, but is also covered mostly with ice. In fact, the Antarctic ice-cap spans through a surface of 14 million km^2.[23] That equally makes it a largest source of fresh water on Earth, accumulating around 70% of its global volume.[24] What is more, Antarctica has a considerable impact on climate; its ice caps play role in cooling the

[20] United Nations Convention on Law of the Sea.

[21] Lewis, C., 'Iceberg Harvesting: Suggesting a Federal Regulatory Regime for a New Freshwater Source', *Boston College Environmental Affairs Law Review*, 2015, No. 42(2), p. 457.

[22] Ibidem, p. 458.

[23] Snow or ice-free lands of Antarctica cover barely 0.34% of its surface; see Convey, P., 'Terrestrial biodiversity in Antarctica – Recent advances and future challenges', *Polar Science*, 2010, No. 4, p. 139.

[24] Marciniak, K.J., 'System Układu Antarktycznego: uwagi z perspektywy prawa międzynarodowego', in: *Układ Antarktyczny. Wybór dokumentów z wprowadzeniem*, Ministry of Foreign Affairs of the Republic of Poland (ed.), Warsaw, 2017, p. 17.

atmosphere, whereas the ocean around absorbs heat of the sun thereby reducing the global temperature.[25]

All those specific traits of Antarctica make it an important research area from the perspective of the whole mankind. That was one of key factors for drafting the Antarctic Treaty (hereinafter also called "the Treaty") in 1959 on 1st December. That year, twelve states of the world held a Conference on Antarctica in Washington whose main aim was to regulate the status of the continent as a place forever reserved only for peaceful activities and international cooperation in scientific investigation.[26] Those aims are expressed in the Preamble of the Treaty itself. The Treaty is relatively short in contents; it comprises fourteen articles (marked by Roman numbers) plus mentioned Preamble. It entered into force on June 23rd, 1961 and currently has 54 parties.[27] For analysis conducted in the hereby article relevant are only its provisions of Articles I–VI.

First of all, according to Article I, exploitation of Antarctica should be performed without usage of military (prohibited is then establishing military bases, or fortification as well as weapon testing). Exemption relates to engagement of military forces in research activities. Wording of Article V goes even further, banning any nuclear trials on the continent. In turn, Article II guarantees all parties freedom of scientific investigation. Potential towing of an Antarctic iceberg would not breach any of those provisions, as such an operation has a peaceful purpose: acquiring a genuine source of fresh water. Certainly, if a ship designed to haul an iceberg is chartered, it should not be a military or an armed unit.

Nevertheless, the nature of the Treaty, making Antarctic in reality *res communis* – a terrain excluded from any state sovereignty,[28] complicates the issue of iceberg towing. Its Article IV deals with interests of: states that previously made claims regarding their sovereignty on certain parts of Antarctica; states that would make such claims in the future; and states that would never do so.[29] It stipulates that, *[n]o acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force*.[30] From that wording one would read that no state might effectively exercise its powers related to sovereignty on the lands of Antarctica. Additionally, as its lands are out of any state's possession, the continent has no territorial sea (see previous

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[25] See Norwegian Polar Institute, *Global Climate Change*, https://www.npolar.no/en/themes/global-climate-change/#The_climate_in_Antarctica_has_impact_worldwide [accessed on: 26.02.2021].

[26] The conference lasted from October 15th until 1st December, 1959 and gathered representatives of following states: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, Soviet Union, the United Kingdom, and the United States.

[27] See the full list of parties and their status (consultative and non-consultative): https://www.ats.aq/devAS/Parties?lang=e [accessed on: 26.02.2021].

[28] Shaw, M.N., 'International Law...', op. cit., pp. 385–389.

[29] Before Washington Conference, several states made claims on exercising their sovereignty over certain part of Antarctica; those were: United Kingdom, New Zealand, France, Australia, Norway, Chile, Argentina. See Marciniak, K.J., 'System Układu Antarktycznego...', op. cit., p. 18.

[30] The Antarctic Treaty, United Nations Treaty Series, Vol. 402, No. 5778 (1961), Art. IV(2).

chapter).[31] Ultimately, if then any object, like an iceberg, floats on the Antarctic waters, it is treated as being part of its area and Article VI explains how far it is extended. It stipulates that, *[...] Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing […] shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area*.[32] Taking all above mentioned into consideration one may claim that an iceberg that freely floats on seas around Antarctica is not a property of any state, which effectively makes it *res nullius*, as it is located on high seas (see more: previous chapter).[33] Therefore, its potential acquisition and subsequent towing would rather not violate any state territorial rights.

6. THE ENVIRONMENTAL PROTOCOL

Several decades after adoption of the Treaty, in 1991 in Madrid drafted was a Protocol on the Environmental Protection to the Antarctic Treaty (hereinafter referred to as "Environmental Protocol" or simply "Protocol"). Seven years later, on January 14th, 1998 it entered into force thereby creating a regime establishing a wide protection of flora and fauna of Antarctica and its associated ecosystems.[34] The text of Protocol is equally important for considerations on legal harvesting of icebergs.

What is worth mentioning at the very beginning, the Protocol in fact declared Antarctica to be a first continent that together with its maritime space constitutes "natural reserve" (Article 2).[35] However, the core provision is its Article 3, stipulating that, *[t]he protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area*.[36] Further, the same Article in paragraph 2 denotes that:

– activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems;
– activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: adverse effects on climate or weather patterns, as well as air or water quality; significant changes in the environments; changes in populations of

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[31] Lundquist, T., *The Iceberg Cometh*..., op. cit., p. 28.

[32] The Antarctic Treaty, United Nations Treaty Series, Vol. 402, No. 5778 (1961), Art. VI.

[33] Similar approach is taken by C. Lewis who analyzed three separate views to treating an iceberg: as *res nullius* (an object belonging to no-one), a private property under national-sovereignty claim, or as common property, so called *res communis*. Lewis, C., 'Iceberg Harvesting:...', op. cit., pp. 452–453.

[34] Rothwell, D., 'Polar Environmental Protection and International Law: the 1991 Antarctic Protocol', *European Journal of International Law*, 2000, No. 11(3), pp. 591–592.

[35] Ibidem, p. 594.

[36] Protocol on Environmental Protection to the Antarctic Treaty, United Nations Treaty Series, Vol. 2941, No. A-5778 (2013), Art. 3(1).

species of fauna and flora and further jeopardy of the endangered species; degradation of, or substantial risk to, areas of significance;
– those activities shall be planned and conducted on the basis of information sufficient to allow prior assessments of impacts on the environment and dependent and associated ecosystems and on the value of the continent for the conduct of scientific research;
– priority shall be given to activities of scientific research and those destined to preserve the value of Antarctica as an area for the conduct of such research, including research essential to understanding the global environment.[37]

The aforementioned provision clearly expresses that any activity (either conducted by a governmental or non-governmental entity, such as Mr Alsheni's company) should be as least intrusive to Antarctic environment as possible. In short, if anyone decides to tow piece of ice that no longer forms a part of Antarctica's glacial structure, such as an iceberg, should pay attention to fauna and flora of the continent and save a towing unit from potentially adversary incidents (like fuel leak, destruction of other ice formations, etc.).[38]

Another provision of the Protocol that should attract attention here is its Article 7 that reads as follows: *[a]ny activity relating to mineral resources, other than scientific research, shall be prohibited*.[39] For some that statement might seem as limiting the possibility of harvesting ice, if it is treated under the Protocol as "a mineral resource". However, helpful in that matter would be Final Act of the eleventh ATS Consultative Meeting which states that, *the harvesting of ice [is] not considered to be an Antarctic mineral resource activity; it was therefore agreed that if the harvesting of ice were to become possible in the future, it was understood that the provisions of the Protocol, other than Article 7, would apply*.[40] Thus, one can understand from this provision, that activity of harvesting icebergs that is not harmful to environment of Antarctica would not be unduly restricted by the Protocol.[41] Especially as no provision of the Protocol *expressis verbis* prohibits acts of exploiting ice for humanitarian purposes, including supplying water for population of arid regions.

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[37] Ibidem Article 3(2).

[38] Such an interpretation is based on wording of Article 3 paragraph 2(b)(iii) that imposes an obligation of conducting activities in a way they would not adversely affect its glacial environments. Certainly, an action destined to physically "brake off" a part of ice from the Antarctic glaciers and subsequently tow it would breach the rule stemming from the provisions. But if appropriated is an iceberg that spontaneously broke off from the ice, then such move seems to be legitimate under the Protocol's provisions.

[39] Protocol on Environmental Protection to the Antarctic Treaty, United Nations Treaty Series, Vol. 2941, No. A-5778 (2013), Article 7.

[40] See Final Act of the eleventh Antarctic Treaty Special Consultative Meeting. Different opinion was expressed *inter alia* by M. Patterson; see Patterson, M., 'Icebergs and international Law', *ILA Reporter*, November 2019, http://ilareporter.org.au/2019/11/icebergs-and-international-law-matthew-paterson/ [accessed on: 26.02.2021].

[41] Similarly: Rothwell, D., 'Polar Environmental Protection...', op. cit., p. 597.

7. CASE OF UNITED ARAB EMIRATES

Assessment of role of both UNCLOS and ATS in the "Iceberg Project" cannot be done without pointing at another important issue. It is not yet resolved under what flag a ship assigned by Mr Alshemi to tow an iceberg will operate. Nevertheless, it is quite probable that the vessel shall fly the flag of its "home country" – United Arab Emirates. Vital is to note here, that this state is neither a party to any instrument of ATS, nor to the UNCLOS.[42] Would this mean that none of norms expressed in aforementioned treaties is applicable to operation planned by Mr Alshemi?

When answering that question, it is indispensable to mention one of crucial principles of international law, namely *pacta tertiis nec nocent nec prosunt* ("treaties neither create rights nor impose obligations on third parties"). According thereto, United Arab Emirates as a state not being party to any of mentioned treaties has no obligation to observe their norms. Nevertheless, specific nature of both UNCLOS and ATS makes the case a little more complex.

The status of Antarctic Treaty (or Antarctic Treaty System as a whole) is an issue that raised many controversies. In particular strong is belief among several authors that the Treaty creates "an objective regime" – a set of rules applicable *erga omnes*.[43] Indeed an intent of applicability of ATS also to third parties stems from wording of its certain provisions. Already the Preamble stipulates, that *Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord*, which clearly signals that the purpose of signatories was to establish the Antarctic continent a zone free from military intervention of any State.[44] Analogically, Article X of the Treaty states that, *[e]ach of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to [its principles and purposes]*.[45] Doubtlessly, that provision establishes a duty for the whole international community not to engage on the Antarctic terrain in any acts that may be contrary to Treaty's principles. Such statement is strongly related to the nature of the continent itself – Antarctica, being one-of-a-kind piece of land on Earth, having such a great importance for the scientific research, global climate and consequentially the whole mankind, "deserves" a treaty system protecting it from unduly activity of any state in the world. Therefore provision of Article X is somehow "addressed" to international community *en bloc*. Finally, it is worth to note that so far, after nearly sixty years of the Treaty's adoption, no single state has ever undertaken any activity that would be perceived as contradictory to ATS' principles.[46] Taking into

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[42] United Arab Emirates have never acceded into ATS. See https://www.ats.aq/devAS/Parties?lang=e [accessed on: 26.02.2021]. As for the UNCLOS, UAE was one of its signatories, but have not yet ratified/accepted the Treaty. See https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [accessed on: 26.02.2021].

[43] Marciniak, K.J., 'System Układu Antarktycznego...', op. cit., p. 47; Fitzmaurice, M., 'Third Parties and the Law of Treaties', *Max Planck Yearbook of United Nations Law*, 2002, No. 6(1), p. 123.

[44] The Antarctic Treaty, United Nations Treaty Series, Vol. 402, No. 5778, 1961, Preamble.

[45] Ibidem, Article X.

[46] Marciniak, K.J., 'System Układu Antarktycznego...', op. cit., p. 47. Separately one would look at the question of customary law in regards to Antarctic Treaty.

account all aforementioned arguments, one may conclude that although United Arab Emirates is not a party to ATS, a vessel flying their flag assigned to tow an iceberg from Antarctic area should observe the rules of the Treaty if the whole operation is to be regarded as totally lawful in the view of international law.

Differently should be approached a situation with UNCLOS. The Convention itself is widely accepted by states of the world, but still several entities having maritime interests refrain from ratifying the document, including landlocked and coastal countries, like Iran, Turkey, Venezuela or the United Arab Emirates, that signed, but never entered into the agreement.

However, it does not mean that the country denies norms stemming therefrom. Currently, maritime claims of the UAE match those determined by UNCLOS – they recognize as territorial sea the water area extending to 12 nautical miles from the baseline; as contiguous zone the area extending to 24 nautical miles from the baseline and finally, as EEZ the area up to 200 nautical miles measured from the baseline.[47] What is more, multiple provisions of UNCLOS relating to breadth of territorial waters, sovereignty of states thereon, extent of exclusive economic zones etc. tend to be perceived as customary international law, thereby binding states regardless if they are parties to relevant conventions or not. That statement is strongly confirmed by relevant judgments of International Court of Justice (or "ICJ"). Already in case *Nicaragua v United States*, the Court referred to sovereignty in internal waters and territorial sea as forming part of customary international law.[48] Similar attitude towards the breadth of territorial waters and its delimitation the Court expressed in case *Nicaragua v Colombia*.[49] In turn, the concept of EEZ as being part of international custom was evoked by Court in judgment *Canada/United States of America*.[50] Interestingly enough, ICJ has not yet issued any judgment reaffirming that freedom of high seas on which stipulates Part VII of UNCLOS would be considered as customary international law. On the other hand, the Court addressed the question in relation to High Seas Convention of 1958, being of one UNCLOS "predecessors". The Convention in its Article 2 refers to freedom of the seas belonging to states that is currently reflected in UNCLOS Articles 86–115; the Court also recognized it as customary international law in *Continental Shelf* case.[51] Vital is to note here, that rules enumerated above are just few of many others related to law of the seas that are considered by ICJ as custom. Others concern *inter alia* immunity of warships, navigation on straits, the continental shelf, etc.[52]

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[47] Central Intelligence Agency, *The World Factbook: Maritime claims*, https://www.cia.gov/library/publications/the-world-factbook/fields/283.html [accessed on: 26.02.2021].

[48] Judgment of ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*), Merits, ICJ Reports 1986, para. 212.

[49] Judgment of ICJ, Territorial and Maritime Dispute (*Nicaragua v Colombia*), Merits, ICJ Reports 2012, para. 177.

[50] Judgment of ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area (*Canada/United States of America*), ICJ Reports 1984, para.94.

[51] Judgment of ICJ, North Sea Continental Shelf (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), ICJ Reports 1969, para. 65.

[52] An accurate and up-to-date analysis in that subject was prepared by J. Ashley Roach. See Ashley Roach, J., 'Today's Customary International Law of the Sea', *Ocean Development & International Law*, 2014, No. 45(3).

United Arab Emirates, as a probable state whose flag shall be flown by a vessel used for the purpose of "Iceberg Project" would be then obliged to comply with norms forming part of law of the seas. That simply means that if Mr Alshemi finalizes his ambitious concept, an iceberg selected for towing should be located on high seas, outside of other coastal states' sovereignty.

CONCLUSIONS

It is indisputable that "Iceberg Project" under direction of Mr Abdulla Alsheni would be an ambitious and major logistical achievement if indeed realized in upcoming years. It would be fair to say also that it would somehow reduce negative impact of climate change for arid region of Arabian Peninsula, if the water harvested from an iceberg really is supplied for those that may suffer from water shortages. From both ecological and economic point of view it is better decision to provide water for people than risk melting of iceberg ultimately contributing to rising sea levels.

As for the legal aspects of the operation, above analysis clearly indicated that there exist no obstacle on juridical level to harvest an iceberg. However, the situation is not as simple as it is featured on the project's website suggesting that rules of high seas allow anyone to appropriate any object floating thereon. Provisions of UNCLOS and ATS require from potential appropriator of iceberg that they observe rules of environmental protection, norms related to navigation on other states' waters etc. And although the United Arab Emirates, that would be probably a state whose flag shall fly a vessel used in the project, is not a party to any of those treaties, it does mean that they would ignore their provisions. As for the ATS, its nature entails establishing "objective regime" requiring that all states of the world comply with its provisions, so that the goals of the Treaty (and Protocols thereto) are fulfilled. In case of UNCLOS, in the opinion of ICJ its multiple provisions relevant for the case have already became customary international law, binding upon states not being parties to the Convention. Hence the conviction that United Arab Emirates (or generally every state) would need to follow obligations stemming both from ATS and UNCLOS to make sure that operation within Project Iceberg is lawful.

It is vital to note at the final point that quite probably a need for more precise regulation of harvesting icebergs would arise regardless whether Mr Alshemi's concept is realized. International community, facing the growing threat of climate catastrophe would seek additional sources of fresh water necessary for their citizens if devastating droughts happen more frequently. In such conditions, icebergs would become attractive and desired stream of supplies and therefore additional provisions adopted on international level would be necessary in order to ensure just system of appropriating ice for all states of the world.

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UNITED ARAB EMIRATES "ICEBERG PROJECT" – WOULD AN AMBITIOUS CONCEPT COMPLY WITH INTERNATIONAL LAW?

Summary

In the ongoing climate crisis, more and more states of the world undertake initiatives that would reduce negative impact of dangerous growth of global average temperature, including droughts, drowning of coastal cities and water shortage. Recently, an ambitious idea to provide huge supplies of water for the population of the United Arab Emirates was initiated by one of Emirati businessmen – Mr Abdulla Alsheni, who plans to tow a huge Antarctic iceberg to the coast of Emirates. The plan itself is a logistic challenge, but at the same time may raise certain concerns on its compliance with international law. Hereby article has as an aim response to a question whether an act of towing an Antarctic iceberg would breach international law provisions, particularly those related to Antarctic Treaty System and law of the seas.

Keywords: iceberg, law of the seas, Antarctic Treaty System, climate change, international law

„ICEBERG PROJECT" ZE ZJEDNOCZONYCH EMIRATÓW ARABSKICH – CZY INICJATYWA TA JEST ZGODNA Z PRAWEM MIĘDZYNARODOWYM?

Streszczenie

Trwający kryzys klimatyczny wymusza na państwach świata podjęcie działań zmierzających do zminimalizowania negatywnych skutków wzrostu globalnej średniej temperatury, włączając w to wyniszczające susze, podtopienia miast leżących u morskich wybrzeży, a także deficyty wody pitnej. Ostatnio, pewna ambitna inicjatywa dotycząca zapewnienia ogromnych ilości zdatnej do picia wody dla całej populacji państwa, w tym wypadku Zjednoczonych Emiratów Arabskich, wypłynęła od lokalnego biznesmena – Abdullaha Alsheniego, który zaplanował, aby przyholować ogromną górę lodową z Antarktydy aż do wybrzeży Emiratów. Sam plan stanowi oczywiście ogromne wyzwanie logistyczne, ale jednocześnie może rodzić pewne wątpliwości co do jego zgodności z prawem międzynarodowym. Artykuł niniejszy ma na celu odpowiedzieć na pytanie czy działanie polegające na holowaniu góry lodowej może w istocie stanowić naruszenie przepisów prawa międzynarodowego, w tym szczególnie Układu Antarktycznego oraz prawa morza.

Słowa kluczowe: góra lodowa, prawo morza, Układ Antarktyczny, zmiany klimatu, prawo międzynarodowe

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TERMINOLOGY USED TO DENOTE REAL PROPERTY IN THE SOURCES OF CLASSICAL ROMAN LAW

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INTRODUCTION

In Roman law, only land was considered real property. Land itself was seen as a limited surface of the earth with everything attached to it, both by their own nature and artificially, e.g. buildings based on foundations, trees grown in soil, plants. Movable property located on the surface of land and attached to it permanently, pursuant to the *superficies solo cedit* rule, belonged to land and the land's owner.[1]

In the sources of Roman law of the classical period, one can find a great number of passages in which land was described by means of a variety of terms. They included: *praedium*, *fundus*, *locus*, *possessio*, *villa*, *ager*, *solum*. Those concepts were not uniform and the meanings of words used to describe them sometimes coincided or overlapped.

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[1] More on real property in Roman law see, e.g., Biondo, B., 'Cosa mobile ed immobile', *Novissimo Digesto Italiano*, Vol. 1, pp. 1023 et seq.; Bonfante, P., *Corso di diritto Romano, Part I, Proprietá*, Milano, 1966, pp. 217 et seq.; Di Marzo, S., *Res immobiles*, BIDR, 1947, Vol. 49–50, pp. 236 et seq.; Kaser, M., *Das Römische Privatrecht*, Vol. 2, München, 1959, p. 323; idem, *Die Typen der römischen Bodenrechte in der späteren Republik*, ZSS, 1942, Vol. 62, pp. 1 et seq.; Kübler, B., *Res mobiles und immobiles*, in: *Studi in onore di P. Bonfante*, 1930, Vol. 2, pp. 347 et seq.; Świrgoń-Skok, R., *Nieruchomość i zasady akcesji według prawa rzymskiego*, Rzeszów, 2007, pp. 10–196; idem, 'Akcesja do nieruchomości w prawie rzymskim', in: Dębiński, A., Wójcik, M. (ed.), *Współczesna romanistyka prawnicza w Polsce*, Lublin, 2004, pp. 289–299; idem, 'Grundstücke Grundstücksverbindungen nach römischen Recht – ein Überblick', *Orbis Iuris Romani*, 2008, Vol. 12, pp. 45–62.

In the doctrine of Roman law it is widely accepted that the term *res immobiles*[2] standing for real property appeared as late as in post-classical law.[3] It is pointed out that texts covered by the Justinian codification do not date back to the classical period but are Justinian interpolations.[4]

In this paper, a number of source texts of Roman law relating to land will be scrutinized and the purpose will be to present the scope of terms used to denote land. Terminology in this respect was rather flexible and the scope of terms applied in relation to land was being established by Roman jurists while deciding

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[2] Such views have been expressed, among others, by Bonfante, P., *Corso di diritto Romano...*, op. cit., pp. 219 et seq.; Di Marzo, S., op. cit., p. 236; Kaser, M., *Das Römische Privatrecht, Vol. 1,* München, 1971, p. 323; Kübler, B., op. cit., p. 347; Rasi, P., 'Distinzione fra cose mobili ed immobilia nel diritto ostclasico e nella glosa', in: *Atti del Congresso di Verona*, Milano, 1953, Vol. 4, pp. 415 et seq. L'Albertario, *Appunti sul peculio castrense,* BIDR, 1931, Vol. 29, p. 29, suggests that the phrase '*res immobiles*' should be substituted with '*praedium*'. Bonfante, P., 'Facoltà e decadenza del procuratore romano', in: *Studi giuridici dedicati e offerti a F. Schupfer*, Roma, 1975, Vol. 1, pp. 3 et seq. M. San Nicolo ('La clausola di difetto o eccedenza di misura nella vendita immobiliare secondo il diritto Babilonese', in: *Studi in onore di P. Bonfante*, Milano, 1930, Vol. 2, p. 42) maintains that the Roman division of things into *res mobiles* and *res immobiles* may be traced back to Neo-Babylonian law under which things were divided into movables, i.e. slaves and animals, and immovables.

[3] Justinian's Institutes (I.2,6pr) provide for a one-year time limit for the usucaption of a movable and a two-year time limit for the usucaption of an immovable (*si mobilis erat, anno ubique, si immobilis biennio tantum in Italico solo usucapiat...*), while in D.2,8,15pr Macer mentions a special category of possessors (*possessores immobillium rerum*) who were relieved from the obligation to provide the *satisdatio*. It is quite likely that in the original text instead of *immobillium* either *res soli* or *fundus* were used. The same situation occurs in D.3,3,63: "*neque mobile vel immobiles neque servos speciali domini mandatu (…) alienare potest*". Here, again, the phrase *alienare potest* was probably used in the opposite meaning than it originally had had in the works of Modestinus. Moreover, in a text by Marcellus (D.19,2,48) it seems suspicious that the word *rem* was followed by *non immobilem*. Also, in D.41,3,23pr (Javolenus), the phrase *temporis immobilium rerum* is in contrast to a previous phrase *temporis de mobilibus statuto* and it is likely that it was interpolated because it is appropriate for the style and language of Justinian's compilers. Also, as far as the Justinian code is concerned, the phrase *res immobiles* does not come from the period of classical law. It is, instead, a Justinian interpolation. In C.3,34,2 the phrase *servitutem exemplo rerum immobilium tempore quaesisti* does not date back to the classical period. Similarly, the phrase *etiamsi si res immobiles in his erunt*, coming from the C.12,36,1,2 constitution, as well as the phrase *res mobiles vel se moventes* appearing in C.3,36,4, are results of interpolations made by Justinian's compilers. The post-classical origin of the phrase *res immobiles* may also be evidenced by the constitutions contained in the Codex Theodosianus. The C.Th.8,12,1,2 passage reads as follows: "*donandum rem, si est mobilis, ex voluntate traditam donatoris vel, si immobilis, abscessu donantis novo domino paterfactam*", while in Fr.Vat.249,7 the same issue is covered in a slightly different way: "*non enim aliter vacua iure dantis res erit, quam ea vel eius voluntate, si est mobilis, tradatur, vel abscessu sui, si domus aut fundus aut quid eiusdem generis erit, sedem novo domino patefecerit*". In the first piece of text, the term used to describe real property is *immobilis,* while in the second it is *domus aut fundus aut quid eiusdem generis erit.* Besides, in another constitution of Constantine (C.Th.12,1,6 of 319 AD), which was later included in the Justinian code (C.5,5,3,1), it was clearly written: *"bonis eius mobilibus et urbanis mancipiis confiscandis, praediis vero rusticis mancipiis civitati ... mancipandis"*. As is seen, Constantine used the term *prediis*, not *immobilis*.

[4] More on interpolations in the quoted texts see *Index interpolationum Quae in Justyniani Digestis*, Levy, E., Rabel, E. (eds.), Weimar, 1929, which proves that all texts, i.e. D.2,8,15pr; D.3,3,36; D.19,2,48; D.33,6,3,1; D.41,3,23pr; C.3,34,2; C.3,36,4; C.12,36,1,2 were in fact interpolated; cf. Di Marzo, S., op. cit., pp. 236 et seq.; Rasi, P., op. cit., p. 216. It seems reasonable to approve the view of P. Bonfante (op. cit., p. 219) according to whom the division of things into *res mobiles* and *res immobiles* is appropriate for post-classical Roman law.

individual cases. Although the preserved sources of Roman law indicate that there were attempts by jurisprudence to define individual terms used to denote land, Roman lawyers did not fully introduce a complete division of land into individual categories. These are the issues that this study will be devoted to.[5]

1. LEGAL TERMS TO DENOTE LAND

Fundamental importance for the presentation of terms used in the sources of classical Roman law to denote land has the passage authored by Javolenus, from the Fourth Book of his *epistulae*:

> *D.50,16,115 Iavolenus libro quarto epistularum: Quaestio est, fundus a possessione vel agro vel praedio quid distet. "Fundus" est omne, quidquid solo tenetur. "Ager" est, si species fundi ad usum hominis comparatur. "Possessio" ab agro iuris proprietate distat: quidquid enim adprehendimus, cuius proprietas ad nos non pertinet aut nec potest pertinere, hoc possessionem appellamus: possessio ergo usus, ager proprietas loci est. "Praedium" utriusque supra scriptae generale nomen est: nam et ager et possessio huius appellationis species sunt.*

In the quoted text, Javolenus distinguishes four basic terms used to denote land, i.e. *fundus*, *ager*, *possessio* and *praedium*. *Fundus* was understood to mean all that was attached to the ground (*quidquid solo tenetur*). The word *ager* was in turn a specific name for such land that could be subject to separate ownership (*species fundi ad usum hominis comparatur*). The term *possessio* meant the property that was actually used. Moreover, Javolenus clearly distinguished *ager* from *possessio*. As he pointed out, ownership rights applied to land specified as *ager*, while land identified as *possessio* might be in actual possession (*"possessio" ab agro iuris proprietate distat*). The name *praedium*, on the other hand, was the basic general expression (*generale nomen est*) used in Roman law to denote land in general, as opposed to *ager* and *possessio* which were individual names.[6] In addition, the following terms were also used in the

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[5] The article is a modified English version of the text by Świrgoń-Skok, R., 'Prawne określenia gruntu jako nieruchomości w prawie rzymskim', *Czasopismo Prawno-Historyczne*, 2006, Vol. 58, pp. 151–163.

[6] As for the Roman terminology for land and agrarian structure see, among others, Zack, A., *Forschungen über die rechtlichen Grundlagen der römischen Außenbeziehungen während der Republik bis zum Beginn des Prinzipats. II. Teil: Fragen an Varro de lingua Latina 5,33: die augurale Ordnung des Raumes,* (file:///C:/Users/rskok/Downloads/ZackForschungenII.pdf); Jurewicz, A.R., '"Domniemanie" własności w reskrypcie Dioklecjana i Maksymiana', *Studia Prawnoustrojowe*, 2006, No. 6, pp. 253–258; Kamińska, R., 'Czy w prawie rzymskim istniała instytucja wywłaszczenia?', *Miscellanea Historico-Iuridica*, 2018, Vol. 17(2), pp. 71–86; Sacchi, O., 'Ager est, non terra, (Varro, l.l. 7.2.18). La "proprietà quiritaria" tra natura e diritto con qualche riflessione in prospettiva attuale', *Diritto & Storia*, 2015, No. 16 (https://www.dirittoestoria.it/17/memorie/romaterzaroma/Sacchi-Proprieta-quiritaria-natura-diritto-qual%20che-riflessione-prospettiva-attuale-[2015].htm); Buck, R.J., *Agriculture and Agricultural Practice in Roman Law,* Wiesbaden, 1983, pp. 9 et seq.; Bojarski, W., 'Prawne formy zapobiegania kryzysowi w rolnictwie w okresie późnego cesarstwa', *Meander*, 1975, Vol. 30, pp. 76 et seq.; idem, 'Przymus zagospodarowania nieużytków (epibole) w cesarstwie rzymskim według konstytucji z III–V wieku', *Acta Universitatis Nicolai Copernici*, 1971, No. 42, pp. 45 et seq.; Capogrossi Colognesi, L., '"Ager publicus" e "ager privatus" dall' eta arcaica al compromesso patrizio – plebeio', in: *Estudios en Homenaje al*

sources of Roman law for land: *solum*[7] and *res soli*.[8] Sometimes, to denote a square, space, part of land separated from the whole, the name *locus*[9] was also used.

Thus, the primary name for land in classical Roman law was *praedium*. According to Javolenus, it was a phrase generally used to denote land; it also stood for a landed estate (*uwiusque supra scriptae generale nomen est: nam et ager et possessio huius appellationis species sunt*). The term *praedium* was contrasted with *ager* and *possessio*, which were used separately to denote a field (*ager*) or a property (*possessio*).

The word *praedium* probably derives from *praes*, *praedis*, *praestendo*, which stood for land possessed by a superior in the family.[10] The Romans divided the *praedia* into *rustica*, *urbana* and *suburbana*:

> *D.50,16,198 Ulpianus libro secundo de omnibus tribunalibus: "Urbana praedia" omnia accipimus, non solum ea quae sunt in oppidis, sed et si forte stabula sunt vel alia meritoria in villis et in vicis, vel si praetoria voluptati tantum deservientia: quia urbanum praedium non locus facit, sed materia. Proinde hortos quoque, si qui sunt in aedificiis constituti, dicendum est urbanorum appellatione contineri. Plane si plurimum horti in reditu sunt, vinearii forte vel etiam holitorii, magis haec non sunt urbana.*

Ulpian understood the *praedia urbana* as land that was used for urban purpose. This category included not only land that was located in the city, but also that which was situated under stables (*stabulae*), inns (*meritoriae*), country houses (*villis*) and streets (*vicis*). In addition, *praedia urbana* included gardens that were located next to buildings. The jurist furtherly emphasizes that not all gardens (*horti*) may be classified as urban lands, because they do not include gardens that bring agricultural benefits, such as vineyards (*vinearii*) and gardens located on the shore (*holitoria*). Moreover, whether or not land belonged to the *praedium urbanum* category depended on the economic purpose of land and not on its location (*quia urbanum praedium non locus facit, sed materia*). The reason was that sometimes there was an enclave of rural land in an urban area. Hence, it can be assumed that all other land that Ulpian did not mention in the above-cited passage as *praedia urbana* was included either to *praedia rustica*, i.e. land used for agriculture, or to *praedia suburbana*, i.e. plots of land for a villa and park which yielded agricultural benefits and still were located within the city limits.

Prof. J. Iglesias, Madrid, 1988, Vol. 2, pp. 639 et seq.; idem, *Alcuni problemi di storia romana arcarica "ager publicus", "gentes" e "clienti"*, BIDR, 1980, Vol. 83, pp. 29 et seq.; idem, '"Ager publicus" e "gentilibus" nella riflesione storigrafica moderna', in: *Studi in onore di C. Sanfilippo*, Vol. 3, Milano, 1983, pp. 73 et seq.; Lauria, M., *Cato de agri cultura,* SDHI, 1978, Vol. 44, pp. 9 et seq.; Watson, A., *Agriculture and Law in Rome of the XII Tables, Les communantes rurales, Vol. 2, Antiquité,* Paris, 1983.

[7] See D.6,1,49pr Celsus; Gai. 2,7; D.41,1,30,1 Pomponius; D.10,3,4,1 Ulpian; D.43,8,2,21 Ulpian.

[8] See D.7,1,7,1 Ulpian.

[9] D.50,16,60 Ulpian.

[10] The word *praedium* probably derives from *praes*, *praedis*, *praestendo*, and was created by combining *prae* + *vas*, the archaic form *praevides*, i.e. surety, guarantor or surety's property. See Forcellini, A., *Totus Latinitatis Lexicon,* Prati, 1868, Vol. 4, pp. 785 et seq.; *Thesaurus Linquae Latine,* Lipsiae, Vol. 10,2, part 4, pp. 577 et seq.; cf. Buck, R., op. cit., pp. 10 et seq.; Gradenwitz, O., *Praedes und praedia,* ZSS, 1921, Vol. 42, pp. 565 et seq.; Sicardi, G.P., 'Saltus, praedium e colonia nella tavola veleiate', in: *Studi in onore di A. Biscardi*, Milano, 1982, Vol. 3, pp. 297 et seq.

The second frequently used term to denote land was *fundus*,[11] by which the Romans understood land property, having the character of a compact economic unit, which was also referred to by Javolenus in D.50,16,115: ... *"fundus" est omne, quidquid solo tenetur* (all that was related to the ground). Florentinus, on the other hand, in an excerpt from Book Eight of his Institutions, described *fundus* as follows:

> *D.50,16,211 Florentinus libro octavo institutionum: "Fundi" appellatione omne aedificium et omnis ager continetur. Sed in usu urbana aedificia "aedes", rustica "villae" dicuntur. Locus vero sine aedificio in urbe "area", rure autem "ager" appellantur. Idemque ager cum aedificio "fundus" dicitur.*

According to the jurist, the *fundus* was a land estate comprising all the buildings and land situated within the borders of such an estate (*omne aedificium et omnis ager continetur*). If the estate was located in a city, then the buildings (*urbana aedificia*) were called houses (*aedes*), while the buildings located in the countryside were villas (*villae*)[12] or farm houses (*rusticae villae*).[13] There were also tenement houses or *insulae*[14] in the city, inhabited by poorer people. The *fundus* category also included construction sites located in the city, called *area*,[15] and rural, single plots of land called *ager*. Finally, Florentinus adds that land with a building located on it is called *fundus* (*ager cum aedificio "fundus" dicitur*).

This is, in turn, how Gaius described *aedes*:

> *D.47,9,9 Gaius ad quarto libro duodecim tabularum: … appellatione autem aedium omnes species aedificii continentur.*

Thus, according to Gaius, the word *aedes* was used to describe all individual buildings. Moreover, in a narrower sense, the *aedes* meant a house situated in a city, as opposed to the *villa* which stood for a house located in the countryside as well as land on which the house was situated. The *aedes* was synonymous with the *domus*,

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[11] More on the *fundus – i* (basis, land, country property, plot of land) see Forcellini, A., op. cit., Vol. 3, p. 167; Heumann, H., Seckel, E., *Handlexikon zu den Quellen des römischen Rechts*, Graz, 1958, p. 225; *Thesaurus Linquae Latine*, Vol. 6, pp. 1573 et seq.; Giumelli, A.S., *Si fundus quem mihi locaveris. Conflitti e sopravvenienze nella locazione-conduzione.* Tesi di Dottorato (https://core.ac.uk/download/pdf/187926305.pdf).

[12] As to the *villa-ae* (country house, outbuildings, farmhouse, country property), which is synonymous with the *aedeficium* (building, house but without a plot of land, in contrast to *aedes*) and the *domus* (house, flat) see among others the following source texts on the basis of which it can be assumed that the words *villa* and *aedeficium* were used by Roman lawyers interchangeably and treated as synonyms: D.7,4,8 Ulpian; D.9,2,27,7 and 9 and 11 Ulpian; D.18,1,52 Paulus; D.19,2,30,4 Alfenus; D.19,2,60,4 Labeo; D.29,5,2 Callistratus; D.48,6,1 and 3 Marcian; I.2,1,1; I.2,3,1. Cf. also Heumann, H., Seckel, E., op. cit., p. 625. See also Witzschel, B., *Villa,* Paulus Realenyklopädie der classischen Altertumswissenschaft von G. Wissova, Stuttgart, Vol. 6, pp. 2599 et seq.

[13] As to farmhouse land cf. D.33,7,8pr Ulpian; D.33,7,18,4 Paulus.

[14] The *insula, – ae* was a tenement house, a separate city building or an outbuilding which was rented to poorer inhabitants of Rome (D.17,2,52,10 Ulpian; D.20,2,1 Papinian). See Forcellini, A., op. cit., Vol. 3, p. 553; Heumann, H., Seckel, E., op. cit., p. 276.

[15] As regards the *area – ae* (undeveloped square, courtyard, city plot) see e.g. two texts authored by Paulus D.8,2,20,2: "*area est pars aedificii*"; and D.46,3,98,8: "*est pars insulae area est*", according to which city lots were parts of buildings (*edificium; insulae*) located in the city. See also Sicardi, G.P., op. cit., pp. 289 et seq.

i.e. a house, household, flat, especially a private house as opposed to the *insulae* (tenement houses).[16]

It should be noted, however, that not every part of land separated from the whole was referred to by Roman lawyers as the *fundus*; sometimes, to denote a field or a plot of land they used the term *locus*.[17] The definition of *locus* can be found in D 50,16,60 from Book 69 of Ulpian's commentary to the edict:

> *D.50,16,60 Ulpianus libro sexagensimo nono ad edictum: "Locus" est non fundus, sed portio aliqua fundi: "fundus" autem integrum aliquid est. Et plerumque sine villa "locum" accipimus: ceterum adeo opinio nostro et constitutio locum a fundo separat, ut et modicus locus possit fundus dici, si fundi animo eum habuimus. Non etiam magnitudo locum a fundo separat, sed nostra affectio: et quaelibet portio fundi poterit fundus dici, si iam hoc constituerimus. Nec non et fundus locus constitui potest: nam si eum alii adiunxerimus fundo, locus fundi efficietur. Loci appellationem non solum ad rustica, verum ad urbana quoque praedia pertinere Labeo scribit. Sed fundus quidem suos habet fines, locus vero latere potest, quatenus determinetur et definiatur.*

In the quoted passage, Ulpian presented the differences between such terms as *locus* and *fundus*. Thus, the name *locus* implied a field or plot of land, separated from the whole of real property (*portio aliqua fundi*) where "the whole" was *fundus* (*"fundus" autem integrum aliquid est*). The lawyer furtherly adds that the term *locus* was most often used to denote land on which there was no country house (*sine villa*). Moreover, the using of different terms *locus* and *fundus* to denote land was subjective, because the size of the plot was not important here, but it depended on the will of the land's possessor (*nostra affectio*). For example, a small field (*modicus locus*) could be called *fundus*, and a large plot, if it was part of land, could be called *locus* (*magnitudo … locum*). Always, however, the land referred to as *fundus* had its borders, while the boundaries of the *locus* could remain hidden until they were demarcated. Moreover, Ulpian, referring to a statement by another Roman lawyer, Labeon, contends that land referred to as *locus* constitutes urban land, not rural. It should be noted that Ulpian, making a reference to rural land, instead of using the expression *praedia rustica* (which stood for rural land), used the word *solum*, meaning soil, land or real property. This may indicate that Roman lawyers sometimes used these terms interchangeably.

In turn, the name *ager*[18] was used by Roman lawyers to denote a single, undeveloped plot of land located in the countryside, which was part of the *fundus*. The following source texts refer to them:

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[16] Murga, J.L., *Sobre una nuova calificatión del aedificium por obra de la legislacion urbanistica imperial*, IURA, 1975, Vol. 26, pp. 41 et seq.

[17] *Locus – I* (place, part of land separated from the whole, square, space, field, plot, part of land as opposed to *fundus*), see Heumann, H., Seckel, E., op. cit., pp. 320 et seq.

[18] *Ager, – agri* (land, ground), see Forcellini, A., op. cit., Vol. 1, pp. 166 et seq.; Heumann, H., Seckel, E., op. cit., p. 24; see also Branca, G., *Ager,* Novissimo Digesto Italiano, Vol. 1, pp. 410 et seq.; Buck, R., op. cit., pp. 15 et seq.; Capogrossi Colognesi, L., *Ager publicus,* pp. 639 et seq.; idem, *Alcuni problem,* pp. 29 et seq.; idem, *Ager publicus e gentilibus,* pp. 73 et seq.; Crook, J.A., *Law and Life of Rome,* London, 1970, pp. 140 et seq.; De Ruggiero, E., *Ager,* Dizionario Epigrafico di antichità romane, De Ruggiero, E. (ed.), Roma, 1964, Vol. 1, pp. 355 et seq.; Kaser, M., *Die Typen,* pp. 3 et seq.; Kubitschek, W., *Ager,* Paulus Realenyklopädie der classischen Altertumswissenschaft von G. Wissova, Stuttgart, Vol. 1, p. 780.

D.50,16,115 Iavolenus libro quarto epistularum: "Ager" est, si species fundi ad usum hominis comparatur. "Possessio" ab agro iuris proprietate distat...

D.50,16,211 Florentinus libro octavo institutionum: ...Locus vero sine aedificio in urbe "area", rure autem "ager" appellatnur.

D.50,16,27pr Ulpianus libro septimo decimo ad edictum: "Ager" est locus, qui sine villa est.

In the first passage, Javolenus defined the *ager* as sort of a cultivated land, e.g. a farming field. Moreover, unlike the *possessio*, land referred to as the *ager* was always subject to separate ownership. In D.50,16,211 from Book Eight of the Institutions of Florentinus, *ager* was in turn presented as an undeveloped square located in the countryside. The same undeveloped squares, but located in the city, were called *area*. On the other hand, Ulpian, in D.50,16,27pr, described the *ager* as a square without a country mansion. The term *ager* was sometimes used to denote the entire territory of a commune, state or tribe, e.g. *ager Campanus*.[19]

Finally, in order to describe land Roman lawyers used the term *solum*,[20] meaning soil (*terra*), land (*ager*) or field (*campus*). The following text by Celsus is worth citation:

D.6,1,49 pr Celsus libro octavo decimo digestorum: Solum partem esse aedium existimo nec alioquin subiacere uti mare navibus.

In the above passage, to denote land the word *solum* was used, and a building (*aedium*) was part of it. The name *solum* also appears in the source texts referring to the *superficies solo cedit* principle:

Gai.2,73: Praeterea id, quod in solo nostro ab aliquo aedificatum est, quamuis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit.

Also, Gaius, when considering the problem of ownership of a building erected on someone else's land, to denote land, used the word *solum*, stating that ownership of the building belonged to the landowner, regardless of on whose behalf it had been constructed.[21] Sometimes, land was referred to as *res soli*. This phrase was used, among others, by Ulpian in D.7,1,7,1:

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[19] Cf. Branca, G., *Ager,* p. 410.

[20] *Solum, – i* (land, ground, real property, field) see Forcellini, A., op. cit., Vol. 4, p. 558.

[21] The word *solum* also appears, among others, in texts authored by Gaius relating to the *superficies solo cedit* principle (D.41,1,7,10: *omne quod inaedificatur solo cedit*; D.41,1,9pr: *plantae quae terra coalescunt solo cedent ... frumenta ... quae sata sunt solo cedere intelleguntur*; D.41,1,9,1: *solo cedere ... ea quae aedificantur aut seruntur*), Ulpian (D.43,17,3,7: *semper ... superficiem solo cedere*), Paulus (D.44,7,44,1: *superficies ... natura solo cohaeret*) and Epit.Gai. 2,1,4 (*superficies solo cedat*), as well as the constitutions of Emperors Diokletian and Maximian (C.8,10,5: *aedificia, quae alieno loco imponuntur, solo cedant*). The *superficies solo cedit* principle was discussed, e.g., by Kuryłowicz, M., *Zasada superficies solo cedit. Obrót nieruchomościami w praktyce notarialnej,* Kraków, 1997, pp. 79 et seq.; Meincke, J.P., *Superficies solo cedit*, ZSS, 1971, Vol. 88, pp. 180 et seq.; Sokala, A., *Zasada superficies solo cedit w prawie rzymskim*, AUNC, 1987, Vol. 25, No. 172, pp. 145 et seq.; Żak, E., 'Współczesne przemiany zasady superficies solo cedit', in: *Polska lat 90-tych, Przemiany państwa i prawa*, Lublin, 1997, pp. 319 et seq.

D.7,1,7,1 Ulpianus libro septimo decimo ad Sabinum: Rei soli, ut puta aedium, usu fructu legato quicumque reditus est, ad usufructuarium pertinet quaeque obventiones sunt ex aedificiis, ex areis et ceteris, quaecumque aedium sunt.

In the quoted text, the term *res soli* was used to denote real property, i.e. land understood as a limited part of the earth's surface with everything that was attached to it in a natural or artificial way. Ulpian mentions *aedium* (a house located in a city) as an example. According to the jurist, the right of usufruct (*ususfructus*), having *aedes* as an object, comprised both the profits of the building itself (*aedificium*) and those that were brought by the city plot (*area*), as both the building and plot were in fact one real property.[22]

The above terms are not the only ones to be found in the sources of the law of the classical period to denote real property. The then lawyers also used phrases such as: *res quae solo continentur*[23] (things related to land) or *tenentur*[24] (to be in a relationship), or *res solo cohaerentes*[25] (things attached to land). The phrases *res quae solo continentur* and *res quae solo tenentur* were used to denote land, among others, by Gaius in his Institutions:

Gai.2,53: Et In tantum haec usucapio concessa est, ut et res, quae solo continentur, anno usucapiantur.

Gai.2,54: ... Et quamvis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur annua usucapio remansit.

The above-quoted passages concern issues related to usucaption of individual things belonging to the inheritance. Gaius, referring to real property, i.e. land with everything that was naturally or artificially attached to it, used the phrase *res quae solo continentur* (things related to land – Ga. 2:53) and *res quae solo tenentur* (things attached to land – Gaia 2:54).

On the other hand, the expression *res solo cohaerentes*, meaning an immovable thing, was used, *inter alia*, by Paulus:

D.44,7,44,1 Paulus libro septugensimo quarto ad edictum: Sic et in tradendo si quis dixerit se solum sine superficie tradere, nihil proficit, quo minus et superficies transeat, quae natura solo cohaeret.

Thus, the ownership of land may not be transferred if the ownership of everything that is on its surface, being permanently attached to land, is not

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[22] Forcellini, A., defines *res soli* as everything situated on earth (*terra*), i.e. buildings (*aedes*), land (*ager*), plants (*plantae*) and all other immovables attached to land (*quo solo coniunguntur*), op. cit., Vol. 4, pp. 557 et seq.; see also Sondel, J., op. cit., p. 839, according to whom the phrase *res soli* stands for land, real property.

[23] The phrase *res quae solo continentur* in relation to land was used by Ulpian in D.6,1,1,1 and D.33,7,12,11.

[24] The phrase *res quae solo tenentur* appears among others in Gai.2,204; D.50,16,115 Javolenus.

[25] As for *res solo cohaerentes* meaning real property see, e.g., D.43,16,1,4 and 8 Ulpian; D.43,24,9,10 Veneleius; D.43,24,22,1 Veneleius; D.47,2,62,8 Africanus.

transferred simultaneously. Here, to denote land, Paulus used the term *quae solo cohaeret* (things attached to land).

Based on the preserved source material it can be concluded that the most commonly used term to designate land was *fundus*, followed by *praedium*.[26] It seems, therefore, that these were common phrases used to designate land as real estate, but the subject ranges of the two terms did not fully cross. By contrast, the terms *ager* and *possessio* were used individually to designate a field or estate. In addition, based on the economic purpose land was to serve, Roman lawyers divided the term *praedium* into three types: *urbanum*, *rusticum*, *suburbanum*. Moreover, taking into account buildings located on land, the term *fundus* can be divided into: land with buildings, i.e. *aedes-urbana aedificium* and *rustica vilae*, as well as land without buildings, i.e. *area* and *ager*. Based on the preserved sources of Roman law, one can distinguish the still existing division of buildings between the *aedes* (buildings in the city, in the narrower sense), *domus* (private house), *villa* (country house) and *insula* (tenement house). Another classification of land that can be derived from the preserved sources of Roman law is the division between the *fundus* and *locus*. The latter formed part of the *fundus* (the *locus* was in fact the *fundus* without the *villa*). The *locus*, in turn, was understood as the *praedia urbana* and *praedia rustica*. Finally, one can demonstrate various terms used to denote Roman estates, i.e. land with all the buildings and plants that were on its surface. Those terms were: *praedium*, *fundus*, *posessio*, *villa* and *villae rusticae*.

The above land categories with their different names also served different economic purposes. Moreover, they showed how real estate was defined in Roman law, i.e. whether in Roman law real estate was treated as a composite thing and buildings and plants as components of land, or whether Roman jurists treated surface and land in terms of a natural and obvious relationship, without reference to the notion of a composite thing and component part.

As all the source passages cited above indicate, only land was considered real estate in Roman law. Land was understood as a certain limited part of the earth's surface with everything connected with it in a natural or artificial way, e.g. buildings on foundations, trees growing in the ground, plants. All movable property located on the surface of the land and permanently attached to it, based on consistent application of the superficies solo cedit rule in Roman law, belonged to the land and its owner. As a result of being detached from the land, objects located on the surface of the land become independent movable things, i.e. things that can change their position without damaging their essence, and it is irrelevant whether they are moved by an external force or whether they move themselves. Before detachment, the above objects were merely dependent parts of an immovable thing. Roman law treated surface and land in terms of a natural and obvious relationship; it did not know building or premises property. It is true that Roman jurists considered questions of the permissibility of separating individual parts of buildings, but these were considerations on the plane of possession, use or easement of urban.[27]

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[26] *Vocabularium Iurisprudentiae Romanae,* Vol. 1–5, Berlin, 1903–1985.

[27] Cf. the following passages D.39,2,47 Nerva; D.43,17,3,7 Ulpian; see also Kaser, M., Das Römische, Vol. 1, p. 430; idem, Das Römische, Vol. 2, p. 308; Meincke, J.P., op. cit., p. 141.

SUMMARY

Briefly summarizing, terms that were used in classical Roman law to designate land were: *praedium*, *fundus*, *locus*, *possessio*, *villa*, *ager*, *solum*. The analysis of the source texts shows that the meaning of the terms discussed in this paper sometimes coincided or overlapped. Therefore, in order to refer to land Roman lawyers sometimes used the terms in question interchangeably.

Thus, the term *praedium* implied land with all the buildings and plants that were on its surface. Similarly, the term *fundus* was used to describe a landed estate, i.e. land and buildings. Thus, the words *praedium* and *fundus* were sometimes used by Roman lawyers interchangeably, most often to represent land with everything that was on its surface.[28] In the source texts, the words used to denote a landed estate were *possessio* and *villa*.[29] Similarly, when referring to a specific land the words *ager-fundus*[30] and *praedium-solum*[31] were used interchangeably.

It seems, however, that terminology fluctuated and the meaning of individual terms was being determined by Roman jurists when resolving individual cases. Although jurisprudence attempted to specify terms used in respect of land, Roman lawyers did not fully develop a complete division of land into individual categories.

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[28] The fact that *praedium* and *fundus* were used by Roman lawyers interchangeably to describe land property (i.e. land with everything on its surface) is evidenced, among others, by the following source texts: D.10,1,4 Paulus; D.33,7,3 Papinian; D.33,7,20 Scaevola; D.41,1,7,2 Gaius; D.50,16,60 Ulpian; I.2,1,21 and 22.

[29] The words *fundus* and *villa* (meaning landed property) appear interchangeably e.g. in D.7,8,12 Ulpian; D.8,1,9 Celsus; D.33,7,16 Alfenus; D.33,7,19 Paulus; D.33,7,21 Pomponius; I.2,3,1. The fact that the words *praedium* (understood as landed property) and *villa* were used interchangeably is evidenced, among others, in: I.2,3,1; C.Th.5,14,4 of the year 364 = C.11,66,2.

[30] The words *fundus* and *ager* may be used interchangeably, see among others D.39,3,1 – 3 Ulpian and Paulus; D.41,1,3 Gaius; D.44,2,25 Julianus.

[31] The fact that *praedium* and *solum* were used interchangeably is evidenced, among others, by the following source texts by Ulpian: D.50,16,60 and D.50,16,198.

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TERMINOLOGY USED TO DENOTE REAL PROPERTY IN THE SOURCES OF CLASSICAL ROMAN LAW

Summary

This paper has discussed a variety of terms used in classical Roman law to denote land, namely: praedium, fundus, locus, possessio, villa, ager, solum. Apart from those, terminology used for land in the classical law period comprised: res quae solo continentur/tenentur (things related to land), res solo cohaerentes (things attached to land) or simply res soli (real property), while the term res immobiles, meaning real property, appeared in the sources of Roman law as late as in the post-classical period.
The analysis of the selected sources of Roman law indicates that the scope of those terms was wider or narrower, which means that they sometimes coincided or overlapped, and as a result they were sometimes used interchangeably. The terminology in this respect fluctuated, and the scope of individual terms was being determined by Roman jurists when resolving individual cases. The preserved sources of Roman law indicate that although attempts were made to define individual terms used in respect of land, Roman lawyers did not fully develop a complete division of land into individual categories.

Keywords: land, real property, Roman law, praedium, fundus, locus, ager, solum

OKREŚLENIA NIERUCHOMOŚCI W ŹRÓDŁACH RZYMSKIEGO PRAWA KLASYCZNEGO

Streszczenie

W niniejszym artykule przedstawione zostały terminy jakie występowały w rzymskim prawie klasycznym na oznaczenie gruntu jako nieruchomości. Były używane m.in. takie określenia jak: *praedium*, *fundus*, *locus*, *possessio*, *villa*, *ager*, *solum*. Ponadto prawnicy okresu klasycznego używali dla oznaczenia gruntu jako rzeczy nieruchomej jeszcze takich sformułowań jak: *res quae solo continentur* (*tenentur*) (rzeczy pozostające w związku z gruntem), czy też *res solo cohaerentes* (rzeczy połączone gruntem), albo po prostu *res soli* (nieruchomość). Natomiast termin *res immobiles* oznaczający nieruchomość pojawił się w źródłach prawa rzymskiego dopiero w okresie poklasycznym.

Analiza fragmentów źródłowych prawa rzymskiego wskazuje, że zakres tych pojęć był szerszy lub węższy co powodowało, że niekiedy pokrywały się one lub krzyżowały w swoim znaczeniu i stąd też czasami stosowane były zamiennie. Terminologia w omawianym zakresie była dość płynna, a zakres pojęciowy poszczególnych określeń juryści rzymscy precyzowali przy rozstrzyganiu poszczególnych przypadków prawnych. Zachowane źródła prawa rzymskiego wskazują, że podejmowane były wprawdzie przez jurysprudencję próby zdefiniowania poszczególnych określeń gruntu, ale kompletnego podziału na poszczególne kategorie gruntów jako nieruchomości prawnicy rzymscy do końca nie wyprowadzili.

Słowa kluczowe: grunt, nieruchomość, prawo rzymskie, *praedium*, *fundus*, *locus*, *ager*, *solum*

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