ISSN 1897-5577
ONLINE ISSN 2545-0271

Ius Novum

Vol. 19
Number 1
2025

JANUARY–MARCH

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY

ISSN 1897-5577
ONLINE ISSN 2545-0271

Ius Novum

Vol. 19
Number 1
2025

JANUARY–MARCH

DOI: 10.26399/iusnovum.v19.1.eng.2025

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY

Warsaw 2025

The texts of articles in Polish and in English are available on:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/ and https://sciendo.com/pl/journal/IN

THE JOURNAL IS INCLUDED IN:

Arianta, Baidu Scholar, BazEkon, BazHum, CEEAS (Central & Eastern European Academic Source), CEEOL (Central and Eastern European Online Library), CEJSH (The Central European Journal of Social Sciences and Humanities), CNKI Scholar (China National Knowledge Infrastructure), CNPIEC – cnpLINKer, Dimensions, DOAJ (Directory of Open Access Journals), EBSCO, Electronic Journals Library, ERIH PLUS (European Reference Index for the Humanities and Social Sciences), EuroPub, ExLibris, Google Scholar, Index Copernicus, J-Gate, KESLI-NDSL (Korean National Discovery for Science Leaders), MyScienceWork, Naver Academic, Naviga (Softweco), ProQuest, ReadCube, Semantic Scholar, TDOne (TDNet), WanFang Data, WorldCat (OCLC), X-MOL

ADDITIONAL INFORMATION

In 2019 the *Ius Novum* quarterly, following the verification procedure and obtaining a positive parametric grade, was placed on the list of journals scored by the Ministry of Science with **100 points** awarded for a publication in the quarterly (the Communication of the Minister of Science of 5 January 2024 about the list of scientific journals and reviewed materials from international conferences, item 30019, no. 200245).

Further information on this topic are available at: https://www.gov.pl/web/edukacja-i-nauka/nowy-rozszerzony-wykaz-czasopism-naukowych-i-recenzowanych-materialow-z-konferencji-miedzynarodowych

ISSN 1897-5577, online ISSN 2545-0271

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

DOM WYDAWNICZY ELIPSA

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

CONTENTS

Zbigniew Czarnik
The scope of fair compensation when expropriating property for the construction of the central transport hub 1

Sławomir Kursa
Prevention of the abuse of the right to court: Roman *sacramentum* and contemporary SLAPPs 15

Piotr Krzysztof Sowiński
Exceeding authority by professional self-governing bodies of advocates and legal advisors: an analysis in light of § 19(8) of the Principles of Advocacy Ethics and Dignity of the Profession (the Code of Ethics for Advocates) and article 20 of the Code of Ethics for Legal Advisors 24

Ryszard A. Stefański
Notification of a gross breach of procedural obligations by a public prosecutor or a person conducting a preparatory proceeding 36

Łukasz Pilarczyk
Entities entitled to file a request for prosecution of the criminal offence of punishable mismanagement without damage – assessment of the amendment to article 296 § 4a of the Penal Code 59

Monika Lewandowska-Urbanowicz
Prohibition of marriage between a stepfather (stepmother) and a stepson (stepdaughter) 81

Łukasz Nosarzewski
Press access to public information in the light of administrative courts' case law 92

Kamil Dąbrowski
On binding individuals with non-constitutional executive acts from the perspective of rules of conventionalisation and formalisation 111

Dobrochna Minich, Janusz Karp
Human rights in the Anthropocene epoch and philosophy 124

Notes on the Authors 140

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 1–14

THE SCOPE OF FAIR COMPENSATION WHEN EXPROPRIATING PROPERTY FOR THE CONSTRUCTION OF THE CENTRAL TRANSPORT HUB

ZBIGNIEW CZARNIK*

DOI 10.2478/in-2025-0001

Abstract

The article undertakes an analysis of the provisions of the Act on the Central Transport Hub (CPK) concerning compensation for the expropriation of real property for the construction of the CPK. The detailed considerations focus on assessing the legal solutions adopted in the Act, which form the basis for determining the amount of compensation, with particular emphasis on the mechanisms introducing the possibility of its increase. The reference point for these considerations is the principle of fair compensation, as expressed in Article 21(2) of the Constitution of the Republic of Poland, which constitutes a necessary condition for the permissibility of expropriation under Polish law. This is analysed alongside the general model of compensation adopted in expropriation law and concretised in the Act on Land Management. Based on these assumptions, it is reasonable to conclude that the compensation provisions of the Act on CPK align with the general framework of expropriation law, thereby reproducing its unclear solutions for determining the amount of compensation. At the same time, they modify the benefit principle in a way that departs from general rules, introducing a mechanism which, in its substance, does not violate the constitutional principle of fair compensation, although it does not eliminate the doubts concerning the legal nature of the resulting increases in compensation.

Keywords: expropriation, fair compensation, special purpose law, Act on CPK, benefit principle, scope of compensation

* LLD hab., Professor of WSPiA, WSPiA University of Rzeszów (Poland); e-mail: zbigniew.czarnik@wp.pl, ORCID: 0000-0001-8459-1108

1. INTRODUCTION

Real property ownership is the cornerstone of modern legal orders based on the Roman law tradition. However, the ownership of real property is not an absolute right. This means that the subject to whom this legal title to real property is vested may be deprived of it, but only in exceptional circumstances and through a strictly defined legal procedure. In the Polish legal system, deprivation of the ownership right requires a statutory basis. This requirement is the primary formal condition for the compulsory seizure of property, as the law must specify not only the procedure for acquiring this right but also the entities entitled to carry out the seizure and the purposes justifying such a profound interference with ownership rights.

Various legal institutions can be used to forcibly seize the ownership of real property. In legal theory, nationalisation and expropriation[1] are indicated. In Poland, the classic method of forced seizure of real property is expropriation, i.e., seizure of the right based on an individual administrative act.[2] The normative system basis for such deprivation of ownership is the Act on Real Property Management.[3] The legal solutions adopted in this Act most fully define the standards of property protection resulting from the Constitution of the Republic of Poland[4] and acts of international law. However, these regulations also have limitations, as they shape the guarantees of property protection extensively in both formal and material dimensions. They regulate the expropriation procedure in detail and define the purposes justifying expropriation. While such solutions strengthen ownership rights, they also pose an obstacle to achieving political objectives, against which, according to many, ownership should give way.

The tensions arising in this area have led to the widespread introduction of special legislation, often referred to in legal journalism as 'special legislation. Of course, the special nature of such legislation is not due to extraordinary situations, except perhaps for the COVID-19 pandemic period, the crisis on Poland's eastern border, and the war in Ukraine, but it is most often dictated by the need to simplify and accelerate the forced acquisition of property. Economic considerations, particularly the necessity of utilizing various EU funds. As a consequence, various types of 'special purpose laws' appear, on the grounds of which constitutional guarantees of property protection become an illusion.

One such special act is the Act on the Central Transport Hub.[5] The solutions adopted in this legal act provide full grounds for recognising it as one of the special

---

[1] More extensively, T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, Warszawa, 2007, pp. 21 et seq., M. Habdas, *Publiczna własność nieruchomości*, Warszawa, 2012, pp. 132–135.

[2] See E. Drozd, Z. Truszkiewicz, *Gospodarka gruntami i wywłaszczenie nieruchomości. Komentarz*, Poznań, 1994, pp. 128–129; also, A. Wróbel, 'Ustawowe przesłanki zwrotu wywłaszczonej nieruchomości w orzecznictwie sądowym', in: *Obrót nieruchomościami w praktyce notarialnej*, Kraków, 1997, pp. 284–285; G. Bieniek, A. Hopfer, Z. Marmaj, E. Mzyk, R. Źróbek, *Komentarz do ustawy o gospodarce nieruchomościami. Tom II*, Warszawa–Zielona Góra, pp. 101–103.

[3] Act of 21 August 1997 on Real Property Management (Journal of Laws of 2024, item 1145), hereinafter 'the Land Management Act'.

[4] Journal of Laws of 1997, No. 78, item 483.

[5] Act of 10 May 2018 on the Central Airport Hub (Journal of Laws of 2024, item 545, as amended) hereinafter: 'the Act on CPK'.

laws, of which there are several dozen in the Polish legal order. The qualification of this regulation as special legislation allows one to assume *a priori* that the legal solutions adopted therein deviate from classic expropriation mechanisms, thereby simplifying the procedure of taking over ownership. Even without analysing the content of this Act, it can be assumed that taking over the ownership of real property for the construction of CPK does not take place on the basis of an expropriation decision within the meaning of the Act. Such an assumption is justified by the fact that the essence of all solutions functioning in special purpose acts is the abandonment of this form of expropriation in favour of extending the effects of investment decisions to include expropriation.

In particular special laws, investment decisions vary in nature, but they are always related to the investment process in a broad sense rather than directly to expropriation. Thus, in such decisions, the acquisition of real property ownership is a secondary consequence of the finality, and sometimes even merely the issuance, of these decisions. Under this framework, there is no expropriation decision, meaning that the takeover of property occurs *ex lege*. Undoubtedly, this constitutes a specific mode of expropriation. Without delving further into the subject at this point, it should be noted that acquiring ownership by virtue of law, despite its origin in a decision, does not constitute expropriation within the meaning of the Land Management Act and therefore does not meet the standards intended to safeguard constitutional guarantees of property protection. This situation is not remedied by references in special laws to the partial application of expropriation provisions from the Land Management Act, as such cross-references are either selectively applied or significantly modified by the provisions of special laws.

Undoubtedly, special legislation in the field of taking over ownership of real property should be assessed negatively. However, it is a contemporary reality in Polish law and should therefore be examined to counteract increasingly far-reaching simplifications, particularly as these have been, to some extent, accepted in the jurisprudence of the Constitutional Tribunal.[6] The acquisition of property for the construction of the CPK can be analysed on various levels. One such aspect is the scope of compensation for the property acquired. This issue is of particular importance, as the Act on the CPK introduces its own regulations on compensation, modifying the solutions provided in the Land Management Act. Against this background, the question arises as to whether the adopted legal solutions align with the constitutional standard set out in Article 21(2) of the Constitution of the Republic of Poland, which stipulates that expropriation is only permissible in return for fair compensation. The primary objective of this analysis is to assess the extent to which the provisions governing compensation for the acquisition of property for the construction of the CPK meet the standard of just compensation, which is a constitutional requirement for expropriation. This analysis is conducted using the dogmatic-legal method.

---

[6] See judgment of the Constitutional Tribunal of 16 October 2012, K 4/10, OTK – A 2012/9, item 106.

2. THE SCOPE OF FAIR COMPENSATION IN EXPROPRIATION LAW

The issue of fair compensation for the expropriation of real property is multifaceted. This complexity arises from the fact that the concept of expropriation under the Polish Constitution may be understood in various ways.[7] A broader analysis of this issue has been presented in numerous theoretical studies.[8] The present analysis focuses solely on one aspect of this problem – the scope of compensation. This scope refers to the amount and type of property damage that should be repaired as a result of the state's forced acquisition of property. As a starting point, it should be assumed that the scope of fair compensation in cases of expropriation should correspond to the way this term is understood in civil law. Such an assumption is justified, as legal doctrine has established that this type of compensation is civil in nature. Consequently, there is no reason why compensation for expropriated real property should be determined based on rules different from those inherent in the civil law understanding of compensation. In any case, compensation structured in this manner appears to meet the criterion of fair compensation in the constitutional sense.

It should also be emphasised that the requirement for full compensation for expropriated property does not necessarily mean that it must always be total, in the sense of fully covering the damage suffered. What constitutes fair compensation depends on the type of expropriation. This rule must be applied in light of the constitutional, and therefore broad, understanding of expropriation. However, this does not alter the general assumption that in cases where real property is expropriated by decision or *ex lege*, compensation should be full and equal to the value of the expropriated.

Full compensation includes both actual loss (*damnum emergens*) and lost profits (*lucrum cessans*). In this regard, two different approaches exist within European legal systems. According to one approach, expropriation always entails an obligation to provide full compensation,[9] under the other, compensation is limited solely to the actual loss, covering only the real value of the right. The latter approach is based on the premise that the State's obligation to compensate can be limited, because the basis for the damage results from a lawful action of the State, and in such a case the expropriated person, despite losing their property, at the same time obtains a 'benefit' by having the opportunity to make use of the public purpose realised with the expropriated property.

The Constitution of the Republic of Poland, in Article 21(2),[10] does not determine according to which model the issue of compensation for expropriation should be considered, therefore it seems reasonable to see this issue in a broader context,

---

[7] More extensively, K. Zaradkiewicz, in: Safjan M., Bosek L. (eds), *Konstytucja RP. Tom I. Komentarz. Art. 1–86*, Warszawa, 2016, pp. 580–590.

[8] See, for example, Z. Czarnik, *Słuszne odszkodowanie za wywłaszczenie nieruchomości*, Warszawa, 2019, pp. 15–63.

[9] See more extensively T. Woś, *Wywłaszczenie*…, op. cit., pp. 168–174.

[10] The absence of such determination has been met with criticism from legal doctrine, see J. Boć, *Wyrównywanie strat legalnych wynikłych z legalnych działań administracji*, Wrocław, 1971, pp. 10 and 86–87.

taking into account both legal solutions, and thus to consider the effects that the adopted solution generates on the scale of the entire legal system. The importance of the purpose of the expropriation should determine the choice of the principle for determining the amount of compensation. At the same time, it should be noted that the characteristics of the investment serving the public purpose may also play a role in this determination.[11]

In current law, the concept of fair compensation must be constructed on the basis of constitutional and statutory provisions. This assumption is important, as the terminology of the laws and the Constitution in this respect do not coincide. This discrepancy leads to conflicts between the scope of fair compensation, as referred to in Article 21(2) of the Constitution of the Republic of Poland, and compensation corresponding to the value of the expropriated property, as provided for in the Act on Land Management and special laws. An analysis of both sets of provisions suggests that neither excludes the principle of full compensation. In particular, it does not follow from juxtaposing the content of Article 21(2) and Article 77(1) of the Constitution of the Republic of Poland and adopting *a priori* the principle that whenever we are dealing with damage caused by unlawful action of a public authority, compensation is to be full, and in the case of lawful damage it should be limited only to *damnum emergens*. While such a distinction appears in legal scholarship[12] and jurisprudence,[13] it does not seem to be supported by current law.

The constitutional provisions use the concept of damage in Article 77(1) and fair compensation in Article 21(2). However, based on this distinction, it cannot be definitively asserted that full compensation is granted only in cases of unlawful infringement of property ownership. Article 77(1) of the Constitution of the Republic of Poland provides for the right to compensation for damage caused by public authority as a result of an unlawful act. On the other hand, Article 21(2) of the Constitution of the Republic of Poland, which provides for fair compensation but does not necessarily require full compensation,[14] confirms the permissibility of limiting the scope of compensation in cases of expropriation. However, deriving different scopes of compensation from this distinction appears inappropriate.

Full compensation includes loss, expenses, and lost profits.[15] The loss (*damnum emergens*) of the so-called 'actual damage'[16] consists of a decrease in assets or an

---

[11] Judgment of the Constitutional Court of 16 October 2012, K 4/10, OTK ZU 9A/2012, item 106.

[12] Thus, A. Agopszowicz, 'Odpowiedzialność odszkodowawcza gmin według przepisów KPA i ustawy o NSA', *Samorząd Terytorialny*, 1996, No. 11, p. 43.

[13] E.g., judgment of the Constitutional Tribunal of 20 July 2004, SK 11/02,OTK ZU 7A/2004, item 66; also: judgment of the Constitutional Tribunal of 23 September 2003, K 20/02, OTK ZU 7A/2003, item 76.

[14] Thus, in judgment of the Constitutional Court of 23 September 2003, K 20/02, OTK ZU 7A/2003, item 76.

[15] See W. Czachórski, *Zobowiązania. Zarys wykładu*, Warszawa, 1994, pp. 78–79.

[16] It is rightly pointed out in legal literature that such a term is incorrect, as all damages are always actual, see M. Kaliński, *Szkoda w mieniu i jej naprawienie*, Warszawa, 2008, p. 271.

increase in liabilities.[17] In cases of expropriation, the loss essentially consists of a reduction in assets, as the owner's property rights are lost. In real terms, the loss corresponds to the market value of this right, which should be established pursuant to Article 134(1) of the Act on Commercial Property or other relevant statutory provisions, where they introduce separate rules for establishing compensation.

Determining the scope of fair compensation for expropriated property also involves establishing its appropriate amount. The amount of compensation is an economic measure of the value of the expropriated right. This understanding of compensation was first articulated in case law in the 1990s, when the Constitutional Tribunal held that fair compensation must be equivalent compensation,[18] i.e., it should enable the expropriated person to replace the property taken over by the state.

This was the position of the jurisprudence before the entry into force of the Constitution of the Republic of Poland, i.e., prior to the existence of its Article 21(2), which explicitly refers to fair compensation. This legal framework existed even before the entry into force of the so-called 'Little Constitution',[19] but even then, Article 7 of the Constitution of 22 July 1952,[20] following the 1989 amendment to the Basic Law,[21] provided for the permissibility of expropriation only for public purposes and with fair compensation. Thus, when the Tribunal in the 1990s defined the principle of equivalent compensation in expropriation law, the requirement of fair compensation was already embedded in the constitutional order. The adoption of such a principle for expropriation law at the time did not justify the formulation of a radically different concept of the scope of compensation a decade later. This amendment should come as a surprise, as no rational justification was presented for it, and it appears to have been linked to the increasing use of special regulations[22] as alternatives to classic expropriation.

Under the applicable law, it can be reasonably argued that compensation for expropriated real property, if it corresponds to the market value of the expropriated right, meets the standard of fair compensation whenever the expropriation is carried out in relation to an individual entity, even if it is included in a group, as is the case, for example, with the owner of real property occupied for the construction of a road or the construction of a CPK. In these cases, despite the fact that the realisation of a public purpose affects multiple owners, the expropriation always concerns specific properties. Such a situation supports the view that this type of expropriation, even when conducted under a special procedure, retains its individual nature. Without

---

17 For more on this subject, see W. Czachórski, *Zobowiązania*…, op. cit., p. 76; M. Kaliński, *Szkoda*…, op. cit., pp. 270–273.

18 Cf. judgment of the Constitutional Court of 8 May 1990, K 1/90, OTK 1990, item 2, and judgment of the Constitutional Court of 19 June 1990, K 2/90, OTK 1990, item 3.

19 Act of 17 October 1992 on mutual relations between the legislative and executive authorities of the Republic of Poland and on local self-government, Journal of Laws No. 84, item 426.

20 Journal of Laws of 1976, No. 7, item 36.

21 Act of 29 December 1989 on Amending the Constitution of the People's Republic of Poland (Journal of Laws No. 75, item 444).

22 This was based on the road special purpose act – the Act of 10 April 2003 on Special Principles for Preparation and Implementation of Investments in Public Roads (Journal of Laws of 2024, item 311).

delving into the detailed principles of determining the value of real property for the expropriation purposes,[23] it should be noted that the market value of the expropriated right is the fairest basis for determining compensation. While this interpretation of value is sometimes questioned in legal scholarship,[24] it seems that only market value of the property guarantees the restoration of the property for the expropriated party.

With this understanding of fair compensation, doubts may arise regarding the determination of the expropriated property value and, consequently, the amount of compensation. In practice, they are related to the frequent appearance of divergent opinions of appraisers or the occurrence of price fluctuations on the real property market. Such phenomena are unavoidable, especially as, pursuant to the provisions of Article 130(1) of the Polish Act on Public Land, the amount of compensation is determined taking into account the condition, use, and value of the expropriated property. It follows that the amount of compensation depends on a number of factual and legal factors related to the property. Undoubtedly, the provisions governing the assessment of real property should aim to resolve these challenges as effectively as possible.

For this reason, it is important to accurately define the conditions relating to the state and use of real property, especially as these concepts are not unambiguous. While the condition of real property has a normative definition in Article 4(17) of the Real Property Management Act and denotes the development, legal, technical, and utilitarian condition, the degree of equipment with technical infrastructure facilities, as well as the surroundings of the real property, including the size and degree of urbanisation of the locality in which it is located, the intended use may also be understood as the future possibility of development in accordance with various legal regulations relating to land use. A precise indication of these conditions is not straightforward, and it is widely acknowledged that valuation inherently involves a degree of imprecision.[25] However, in such cases, the primary issue is not merely the lack of regulatory precision but, more significantly, the fact that the procedures for applying these regulations often preclude a fair resolution of the issues that arise. From this perspective, legislation must always be assessed, particularly when questions concerning its constitutionality arise. It is beyond dispute that fair compensation should correspond to the market value of the expropriated right, determined in accordance with legally indicated circumstances.

Against this background, questions arise in relation to the various types of bonuses provided for in the Acts, which may be paid under the conditions specified therein.

---

[23] These issues were regulated in detail until 9 September 2023 by the Ordinance of the Council of Ministers of 21 September 2004 on the valuation of real property and the preparation of an appraisal report (Journal of Laws of 2004, No. 207, item 2109, as amended). They are now regulated by the Ordinance of the Minister of Development and Technology of 8 September 2023 on the valuation of real property (Journal of Laws of 2023, item 1832).

[24] See M. Szewczyk, 'Konstytucyjna zasada pełnego odszkodowania i jej realizacja w ustawodawstwie zwykłym', in: Knosala E., Matan A., Łaszczyca G. (eds), *Prawo administracyjne w okresie transformacji*, Kraków, 1990, pp. 438–439.

[25] See the judgment of the Supreme Administrative Court of 17 November 2010, I OSK 95/10, LEX No. 953098.

The granting of such 'bonuses' in legislation is motivated by various considerations, primarily to foster a more favourable social attitude towards expropriation and to provide economic incentives for accepting the market value of expropriated property as established through the appraisal procedure. Although such regulations are not provided for in the Land Management Act, which establishes the model procedure for expropriation, they are commonly found in special purpose acts.[26] This raises questions about the scope of fair compensation within such a statutory framework. Additionally, Polish expropriation law, both in the Land Management Act and in special laws, incorporates the benefit principle.[27] It is only by considering these legal solutions that the concept of fair compensation for the expropriation of real property can be constructed.

3. FAIR COMPENSATION FOR TAKING OVER REAL PROPERTY FOR THE PURPOSE OF IMPLEMENTING THE CENTRAL TRANSPORT HUB (CPK)

Chapter Six of the Act on CPK contains provisions governing compensation for the expropriation of real property acquired for the construction of the airport and its accompanying infrastructure. Articles 58–71 of the Act form the core of the compensation-related provisions; however, this does not constitute a complete regulatory framework due to the content of Article 3(2) of the CPK Act, which stipulates that, in matters not regulated by the CPK Act concerning real property, the provisions of the Land Management Act shall apply accordingly. Thus, in cases where real property is transferred for the CPK project, the general provisions of the Land Management Act concerning the determination of compensation apply, provided that the Act on the CPK does not contain its own specific regulations on the matter. However, these provisions are subject to the condition of 'appropriate application', which in practice may involve modifying or even disregarding the

[26] For example, see Article 18(1e) and (1f) of the Act of 10 April 2003 on Special Principles for Preparation and Implementation of Investments in Public Roads (Journal of Laws of 2024, item 311); Article 18(1e): 'In the event that the previous owner or perpetual usufructuary of the real property covered by the decision on authorisation for the implementation of a road investment appropriately releases the property or releases the property and vacates the premises and other spaces immediately, but no later than within 30 days from the date:
– of delivery of the notice of issuance of the decision referred to in Article 17,
– of delivery of the decision granting immediate enforceability to the decision on permission for the implementation of a road investment, or
– on which the decision on authorisation for the implementation of a road investment became final, the amount of compensation shall be increased by an amount equal to 5% of the value of the real property or the value of the right of perpetual usufruct.'
Article 18(1f): 'If the decision on permission for the implementation of a road investment concerns real property developed with a residential building or a building with a separated residential unit, the amount of compensation referred to in paragraph 1, to which the previous owner or perpetual usufructuary residing in the building or unit is entitled, shall be increased by the amount of PLN 10,000 for that real property.'

[27] For more on this topic, see M. Gdesz, 'Zasada korzyści w prawie wywłaszczeniowym', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2022, No. 1, pp. 36–48.

standard rules for determining the scope of compensation as established by the model framework of the Land Management Act.[28]

It should be emphasised that expropriation for the purpose of the CPK involves the transfer of ownership of real property by operation of law. This follows directly from Article 48(1) of the Act on CPK. Highlighting this aspect of the issue is important, as the Act on CPK comprehensively regulates the method of determining the amount of compensation, and therefore its scope. In this context, the key question arises as to whether this solution satisfies the requirement of fair compensation as set out in Article 21(2) of the Constitution of the Republic of Poland. If it is assumed that this principle is upheld, it may lead to an assessment of the constitutionality of the compensation provisions in the Act on CPK.

For the correctness of such an assessment, it is important to note that the Act on CPK only appropriately refers to the general provisions concerning the determination of compensation for expropriated property. While other special laws also sometimes refer to the provisions of the Land Management Act, they do not independently regulate the understanding of the scope of compensation, particularly the determination of the value of real property, which serves as the basis for determining the amount of compensation. The Act on CPK constitutes a peculiar exception in this respect by introducing separate regulations on this issue. The consequence of this approach is that, for the purposes of expropriation under the Act on CPK, the amount of compensation is determined through the prism of the value of the real property, with the provisions of the Land Management Act not applying to this valuation. This conclusion follows logically from the relationship between the special Act on CPK and the general Act, i.e., the Land Management Act.

Under the Act on CPK, the basis for determining compensation is the market value of the property, as stipulated in Article 61(1) of the Act. Furthermore, pursuant to Article 60(1), the amount of compensation is determined according to the condition of the expropriated property on the date of the decision on the location of the CPK and the date of the decision on compensation. This mechanism mirrors the general rule inherent in Polish expropriation law. Therefore, a question arises as to the rationale behind this measure, given that it essentially repeats a general legal solution. The only plausible justification is that the legislator intended to explicitly emphasise that the scope of fair compensation under the Act on CPK is a distinct matter, separate from the framework adopted in the Land Management Act.

From the point of view of legislative principles, such an approach should be assessed negatively. While it emphasises the normative distinctiveness of this legal solution, it simultaneously disrupts the coherence of the compensation system in expropriation law. This is problematic, as it raises the question of whether this regulation fulfils the requirement of equity set out in Article 21(2) of the Constitution of the Republic of Poland. Ultimately, it leads to doubts as to whether

[28] See S. Pawłowski, 'Wybrane aspekty procesu wywłaszczania nieruchomości', in: Kijowski D.R., Suwaj P.J. (eds), *Wykładnia i stosowanie prawa administracyjnego. Tom IV. Kryzys prawa administracyjnego*, Warszawa, 2012, pp. 177–181, from the theoretical side, more generally, A. Korybski, 'Język prawny a wykładnia operatywna (wybrane zagadnienia)', in: Leszczyński L., Szot A. (eds), *Wykładnia operatywna prawa – perspektywa teoretyczna i dogmatyczna*, Toruń, 2017, pp. 44–45.

constitutionally defined equity can have different meanings depending on the public purpose pursued and the expropriation procedure adopted. A more appropriate solution would be to specify which provisions of the Land Management Act apply directly to the determination of compensation in expropriations for the purpose of the CPK and which are to be applied accordingly, as the same legal matter should not be repeated in different legal acts concerning the same legal institution. The core issue in expropriation cases is ensuring that the rules governing fair compensation, as required by Article 21(2) of the Constitution of the Republic of Poland, are correctly established. The type of public purpose justifying the expropriation is secondary in this regard, as compensation must always be fair, in accordance with constitutional standards.

The solution adopted in the Act on CPK is not justified either by the modification in that Act of the general principle of benefit inherent in expropriation law,[29] or by the introduction, in Articles 64 and 65 of the Act on CPK, of the possibility to increase the amount of compensation in relation to the originally established value of the expropriated property. If these issues were intended to be significant and regulated differently in the Act on CPK, appropriate provisions should have been dedicated to them, which, as special regulations, would constitute a derogation from the legal solutions existing in general expropriation law. At the same time, in the case of an increase in the amount of compensation by 5% of the value of the expropriated right in connection with the surrender of the real property by the entity to which the right had hitherto been vested, i.e., the case governed by Article 65 of the Act, similarly as in the case of an increase in compensation by PLN 10,000 for property developed with a residential building or premises, as provided for in Article 64 of the Act on CPK, such a measure would be unnecessary, as no such solutions exist in the Land Management Act. This means that the provisions indicated above would be applied as special solutions.

The benefit principle, however, must be assessed differently, as it is regulated in the Act on CPK and also provided for in Article 134(4) of the Land Management Act. The essence of this principle lies in the assumption that if the intended use of the property, in accordance with the purpose of the expropriation, leads to an increase in the property's value, then its value, for the purpose of determining the amount of compensation, is established according to the alternative use resulting from that purpose. This rule for determining the amount of compensation for expropriation introduces numerous uncertainties related to the valuation of the property and the determination of its market value.[30] Although these issues are of interest, they are not the subject of the present analysis and are therefore left outside its scope.[31] Nevertheless, the benefit principle is a solution that functions within expropriation law. Therefore, its modification or removal from the Act on CPK would require

---

[29] For more on the principle of benefit, see M. Wolanin, M. Gdesz, 'Zasada korzyści w wycenie nieruchomości przeznaczonych na cele publiczne', *Nieruchomości*, 2022, No. 2, C.H. Beck, Legalis, pp. 1–4.

[30] See M. Gdesz, 'Zasada korzyści w prawie…', op. cit., pp. 45–47.

[31] On the controversy and various aspects of the benefit principle, see M. Wolanin, M. Gdesz, 'Zasada korzyści w wycenie…', op. cit., p. 4.

a clear legislative intervention. Such action has been taken. From a systemic point of view, this is a correct step. Of course, the substantive scope of the adopted regulation may be subject to debate, but formally it is a proper choice.

The principle of equity has been regulated – or it may be said, modified – in Article 61(5) of the Act on CPK. The provision states that where the purpose of the expropriation leads to an increase in the value of the property, the value of the property is to be determined according to the permitted use arising from the purpose of the expropriation. Despite the strong similarity in the treatment of this institution in the Act on CPK and its original version in, Article 134(4) of the Land Management Act, the principle as formulated in the Act on CPK has its own distinct substantive scope. This should be borne in mind so as not to equate the two solutions—something that has occurred, particularly in legal journalism. Pursuant to Article 60(5) of the Act on CPK, if the expropriation of property for the CPK results in an increase in the property's value, then the value of the property for the purpose of determining compensation is increased by the difference between the value resulting from the permitted use possible in view of the purpose of the expropriation and the value based on the property's previous designated use.

The previous designation of the property is understood to mean the designation resulting from the local spatial development plan. Thus, under the Act on CPK, the benefit principle is formulated with a relatively high degree of precision, particularly in terms of identifying the conditions influencing the determination of the property's value. Two circumstances are relevant for this process: the property's previous designation, i.e., in accordance with the local development plan, and the permitted use of the property arising from the purpose of the expropriation. The consequence of this formulation of the benefit principle is a clear determination that the purpose of the expropriation, i.e., the designation of the property for the construction of the CPK, does not, in itself, the use of the property for the construction of CPK, does not of itself increase the value of the property.

The benefit principle formulated in this way does not eliminate all doubts associated with the increase in the value of expropriated property, but it introduces a clearer mechanism for adjusting value compared to the benefit principle regulated under the Land Management Act. Most importantly, it explicitly assumes that the purpose of expropriation, as a public purpose capable of being realised by a specific public entity, cannot in itself increase the value of the expropriated property. This solution is fundamentally different from that adopted in Article 134(4) of the Land Management Act, under which the increase in the value of the property in connection with expropriation is to be linked to an alternative use resulting from the purpose of the expropriation. In both legal doctrine and case law, determining the conceptual scope of 'alternative use of the property' proves to be highly problematic.[32] Ultimately, this leads to a situation in which the concretisation of this concept is shifted to the level of sub-statutory provisions,[33] which should be assessed

[32] See M. Gdesz, 'Zasada korzyści w prawie…', op. cit., pp. 40–42, and the case law cited therein.

[33] See Article § 36 of the Decree of the Council of Ministers of 21 September 2021 on the valuation of real property and preparation of an appraisal report (Journal of Laws of 2021,

negatively. Recognising these difficulties, the legislator undertook an attempt to change the rules on increasing compensation in expropriation law by abolishing the benefit principle and introducing, in its place, a system of percentage-based bonuses determined by the designated use of the property,[34] as a universal principle for expropriation law, including expropriations for the purposes of the CPK.

In light of the above findings, it must be concluded that the Act on CPK formulates the benefit principle in a more concrete manner than the Land Management Act. Of course, this does not mean that the solution adopted in the Act on CPK eliminates all controversies related to the increase in the value of property and, consequently, the expansion of the scope of compensation for expropriation. However, such doubts concern not only the determination of the increase in the value of the expropriated property itself, but also the legal nature of such an increase. In other words, the issue concerns the legal classification of this difference in the light of the constitutional principle of fair compensation. Under the current law, the question arises as to the admissibility of such an increase in view of the content of Article 21(2) of the Polish Constitution.

It appears that the concept of fair compensation, as a condition for expropriation, must now be understood broadly, that is, as allowing for both an increase and a reduction in the amount of compensation, even though, as a rule, such compensation should correspond to the market value of the expropriated right. However, in such a case, it is difficult to argue that the amount of compensation thus determined can be regarded as fair. This is because, whether increased or reduced, the compensation no longer reflects the market value of the lost right. Thus, it is difficult to claim that it is just – and thus fair – since its scope does not arise from the market value of the property, but rather results from a political decision by the legislature. Such a situation may give rise to constitutional concerns in light of the principle of equality, which should guarantee a uniform mechanism for determining compensation when pursuing public purposes.

4. CLOSING REMARKS

The considerations presented above lead to the conclusion that the mechanism for determining compensation for the acquisition of property for the implementation of the CPK, although set out in a separate statute, is not an original solution. Apart from the modification of the benefit principle as it functions in expropriation law, it remains based on the main assumptions laid down in the Land Management Act. On the one hand, this state of affairs should be viewed positively, as it appears to reflect the systemic assumptions of expropriation law, thereby ensuring uniformity

item 555), now the Decree of the Minister of Development and Technology of 8 September 2023 on the valuation of real property (Journal of Laws of 2023, item 1832).

[34] See the Act of 15 September 2022 on Amendments to the Act on Real Property Management and Certain Other Laws, for which the legislative process has not been completed, as the Sejm of the Republic of Poland has not voted on the proposed amendments to the Act following the Senate's position.

and consistency in the model for determining the amount of compensation. On the other hand, however, it replicates the shortcomings of those solutions that were carried over into the Land Management Act from expropriation provisions dating back to the 1980s,[35] that is, from an entirely different legal system. Such an approach results in ambiguity regarding the basis for determining the amount of compensation, especially from the perspective of the constitutional principle of equity, which is an inviolable condition for expropriation.

It follows from the essence of this principle, to which Article 21(2) of the Constitution of the Republic of Poland explicitly refers, that the forced acquisition of ownership must always be accompanied by fair compensation. Although the Constitution does not define this concept, ordinary legislation – namely the Land Management Act and special laws, including the Act on CPK – adopts the view that compensation should correspond to the market value of the expropriated right. This understanding of fairness in the context of expropriation is affirmed in both legal scholarship and case law. Approval of such a position does not, however, imply agreement as to the methods by which that value may be increased or decreased in specific situations, particularly in view of the pursuit of a given public purpose. In this regard, the Act on CPK does not introduce a breakthrough, although it does provide a clearer mechanism for determining increases in compensation than previously existed.

The intended purpose of the present analysis – namely, to assess the regulation concerning compensation for expropriation in the Act on CPK from the perspective of the constitutional principle of fairness – should take into account that the very purpose of the expropriation, i.e., the CPK, does not automatically lead to an increase in the scope of compensation. This follows from the modified benefit principle set out in the Act. It seems that such a solution falls within the meaning of fair compensation, since the amount of compensation determined in this way is higher than the market value of the expropriated right and therefore meets the constitutional standard. Another matter, however, is whether the increases in compensation for the acquisition of property provided for in the Act on CPK are components of the property's value or whether they are elements that do not shape that value but instead serve as instruments of the state's expropriation policy. These questions, however, are relevant in the context of many special-purpose acts, not just the Act on CPK.

BIBLIOGRAPHY

Agopszowicz A., 'Odpowiedzialność odszkodowawcza gmin według przepisów KPA i ustawy o NSA', *Samorząd Terytorialny*, 1996, No. 11.

Bieniek G., Hopfer A., Marmaj Z., Mzyk E., Źróbek R., *Komentarz do ustawy o gospodarce nieruchomościami. Tom II*, Warszawa–Zielona Góra, 1998.

Boć J., *Wyrównywanie strat legalnych wynikłych z legalnych działań administracji*, Wrocław, 1971.

Czachórski W., *Zobowiązania. Zarys wykładu*, Warszawa, 1994.

[35] See Z. Czarnik, *Słuszne odszkodowanie*…, op. cit., pp. 77–78.

Czarnik Z., *Słuszne odszkodowanie za wywłaszczenie nieruchomości*, Warszawa, 2019.
Drozd E., Truszkiewicz Z., *Gospodarka gruntami i wywłaszczenie nieruchomości. Komentarz*, Poznań, 1994.
Gdesz M., 'Zasada korzyści w prawie wywłaszczeniowym', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2022, No. 1.
Habdas M., *Publiczna własność nieruchomości*, Warszawa, 2012.
Kaliński M., *Szkoda w mieniu i jej naprawienie*, Warszawa, 2008.
Korybski A., 'Język prawny a wykładnia operatywna (wybrane zagadnienia)', in: Leszczyński L., Szot A. (eds), *Wykładnia operatywna prawa – perspektywa teoretyczna i dogmatyczna*, Toruń, 2017.
Pawłowski S., 'Wybrane aspekty procesu wywłaszczania nieruchomości', in: Kijowski D.R., Suwaj P.J. (eds), *Wykładnia i stosowanie prawa administracyjnego. Tom IV. Kryzys prawa administracyjnego*, Warszawa, 2012.
Szewczyk M., 'Konstytucyjna zasada pełnego odszkodowania i jej realizacja w ustawodawstwie zwykłym', in: Knosala E., Matan A., Łaszczyca G. (eds), *Prawo administracyjne w okresie transformacji*, Kraków, 1990.
Wolanin M., Gdesz M., 'Zasada korzyści w wycenie nieruchomości przeznaczonych na cele publiczne', *Nieruchomości*, 2022, No. 2, C.H. Beck, Legalis.
Woś T., *Wywłaszczenie nieruchomości i ich zwrot*, Warszawa, 2000.
Wróbel A., 'Ustawowe przesłanki zwrotu wywłaszczonej nieruchomości w orzecznictwie sądowym', in: *Obrót nieruchomościami w praktyce notarialnej*, Kraków, 1997.
Zaradkiewicz K., in: Safjan M., Bosek L. (eds), *Konstytucja RP. Tom I. Komentarz. Art. 1–86*, Warszawa, 2016.

Cite as:

Czarnik Z. (2025), *The scope of fair compensation when expropriating property for the construction of the central transport hub*, Ius Novum (Vol. 19) 1, 1–14. DOI 10.2478/in-2025-0001

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 15–23

PREVENTION OF THE ABUSE OF THE RIGHT TO COURT: ROMAN *SACRAMENTUM* AND CONTEMPORARY SLAPPS

SŁAWOMIR KURSA*

DOI 10.2478/in-2025-0002

Abstract

This article examines the issue of preventing the abuse of the right to a court. The author highlights that the phenomenon of abusing this right and the measures to prevent it have accompanied the development of law and legal regulations since ancient times. The article explores the abuse of the right to a court in relation to the Roman *sacramentum* and discusses the essence of contemporary SLAPPs (Strategic Lawsuits Against Public Participation) along with methods of counteracting them. *Sacramentum* was a procedural law institution with deep roots in the religious tradition of ancient Rome and significant symbolic meaning, whereas SLAPPs represent a modern, undesirable phenomenon linked to procedural and financial aspects of the legal system. The article also examines the relationships, similarities, and differences between the ancient Roman *sacramentum* and modern SLAPPs and attempts to answer the question whether an equivalent of the Roman *sacramentum* could effectively curb contemporary SLAPPs.

Keywords: *Sacramentum*, *legis actiones*, SLAPP, right to a court, abuse of the right to a court

* LLD hab., SWPS University in Warsaw (Poland), e-mail: slawomirpatrycjusz@wp.pl, ORCID: 0000-0001-9327-0728

There are several legal mechanisms designed to prevent the abuse of the right to a court, including judicial pettifogging.[1] One of the oldest was the *sacramentum*, employed in the ancient Roman *legis actiones* procedure. In contemporary legal systems, this function is primarily served by court fees and other procedural costs.[2] Both the *sacramentum* and the fees paid by the party initiating proceedings can deter the hasty filing of lawsuits, thereby preventing courts from being excessively burdened by parties who, for example, may not be fully convinced of the validity of their claims. On the other hand, the costs of litigation or even the mere fear of excessive expenses can serve as a deterrent, discouraging individuals with limited financial means or low legal awareness from pursuing legitimate claims or defending values they consider just. This, in effect, restricts their right to a court. Conversely, such costs pose no obstacle for wealthy entities, allowing them to engage in unjustified litigation, which may constitute an abuse of the right to a court. A significant contemporary example of this phenomenon are the so-called SLAPPs (Strategic Lawsuits Against Public Participation).

This article emphasises that the abuse of the right to a court and the means of preventing it have been present since the earliest legal systems. It examines this issue in relation to the Roman *sacramentum* and modern SLAPPs and seeks to determine whether the application of an equivalent of the Roman *sacramentum* could effectively limit modern SLAPPs.

1. *SACRAMENTUM* IN THE ANCIENT ROMAN *LEGIS ACTIONES* PROCEDURE

In ancient Rome, during the period of the oldest form of civil procedure – the *legis actiones* procedure – with its most important and, at the same time, fundamental method, *legis actio sacramento*,[3] which had general application, one of the most was important elements of procedural law was *sacramentum*. It played a key role in resolving legal disputes and securing the rights of the parties. This term, although ambiguous,[4] in legal proceedings referred to an asset security provided by the disputing parties. It is inseparably linked to the Roman *legis actiones* procedure.

The origins of the *sacramentum* date back to the early history of ancient Rome and are closely associated with the religious and cultural practices of the time. The term

---

[1] More on the subject of judicial pettifogging as a form of abuse of the right to a court, see L. Jamróz, *Prawo do sądu a zjawisko pieniactwa procesowego*, in: Balicki R., Jabłoński M. (eds), *Dookoła Wojtek…: księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław, 2018, pp. 495–504.

[2] See judgment of the Constitutional Tribunal of 17 November 2008, SK 33/07 (OTK ZU 2008, series A, No. 9, item 154); judgment of the Supreme Court of 20 December 2017, III KK 203/17, Legalis No. 1713870.

[3] G. 4,13: *Sacramenti actio generalis erat: de quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur* (…).

[4] For the etymology of the word *sacramentum* see A. Dębiński, 'Sacramentum: On the Legal Meaning of the Term as Used in the Letters of Pliny the Younger', *Studia Iuridica Lublinensia*, 2022, No. 3, pp. 46–48.

sacramentum in the context of legal proceedings most likely originally referred to a sacred oath taken by litigants, reflecting the religious aspects of securing rights and holding symbolic significance for both the parties involved and the legal procedure itself. In Roman society, religion played a central role in everyday life, including in the field of law. Taking an oath as part of the *sacramentum* carried religious seriousness, lending this act special weight and obligation. The religious nature of the *sacramentum* meant that its violation was not only seen as a deliberate breach of contract but also as a profanation of a divinely sacred duty. A party committing perjury incurred the wrath of the gods, and to prevent this, a propitiatory offering (*piaculum*) was made, which was forfeited to the temple. The offering could consist of sheep or oxen, which were deposited in the temple.[5] Only the party who had not committed perjury and simultaneously won the dispute recovered its *sacramentum*. In cases concerning property claims (*legis actio sacramento in rem*), if neither party was deemed correct, both forfeited their *sacramentum*.[6]

From the enactment of the *Laws of the Twelve Tables* in the 5th century BC, the *sacramentum*, instead of being a propitiatory sacrifice offered in the temple, evolved into a financial penalty paid to the state. This was required from the parties to the dispute as a result of mutual *provocatio sacramento*.[7] The payment was made by the party whose *sacramentum* was deemed *iniustum*,[8] i.e., the one who lost the dispute.[9] The penalty varied depending on the value of the subject matter of the dispute: 500 *asses* if the disputed property was worth at least 1,000 *asses*, or 50 *asses* in cases of lesser value or when concerning human freedom.[10] The 500 *asses* originally corresponded to the value of five oxen, while 50 *asses* equated to the value of five sheep,[11] maintaining the *sacramentum's* original nature, which was accompanied by a *piaculum* offered in the temple.

However, it is worth noting that the *sacramentum* was not without its flaws and certain associated controversies. In some cases, particularly those involving the lowest social classes, the required sum of either 500 or 50 *asses* could constitute an

---

[5] M. and J. Zabłoccy, *Ustawa XII tablic. Tekst – tłumaczenie – objaśnienia*, Warszawa, 2003, pp. 20–21; A. Dębiński, 'Sacramentum…', op. cit., p. 49; F. Bertoldi, 'I sacramenta nelle legis actiones. Da un processo "divino" a un processo laico', *Vergentis*, 2018, No. 6, pp. 165–168.

[6] F. Longchamps de Bérier, in: W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa, 2009, p. 163.

[7] G. 4,16: (…) *Deinde qui prior vindicaverat, dicebat: QUANDO TU INIURIA VINDICAVISTI, QUINGENTIS ASSIBUS SACRAMENTO TE PROVOCO; adversarius quoque dicebat similiter: ET EGO TE. Aut si res infra mille asses erat, quinquagenarium scilicet sacramentum nominabant* (…). See also W. Litewski, *Rzymski proces cywilny*, Kraków, 1988, pp. 24–25.

[8] E. Gintowt, *Rzymskie prawo prywatne w epoce postępowania legisakcyjnego (od decemwiratu do lex Aebutia)*, Warszawa, 2005, p. 10.

[9] G. 4,13: (…) *Nam qui victus erat, summam sacramenti praestabat poenae nomine eaque in publicum cedebat* (…).

[10] G. 4,14: *Poena autem sacramenti aut quingenaria erat, aut quinquagenaria, nam de rebus mille aeris plurisve quingentis assibus, de minoris vero quinquaginta assibus sacramento contendebatur, nam ita lege duodecim tabularum cautum erat. At si de libertate hominis controversia erat, etiamsi pretiosissimus homo esset, tamen ut quinquaginta assibus sacramento contenderetur* (…).

[11] K. Kolańczyk, *Prawo rzymskie*, Warszawa, 1999, p. 120. See also T. Frank, *An Economic Survey of Ancient Rome*, Vol. 1, Baltimore, 1933, p. 47.

insurmountable barrier. Not everyone had such financial resources at their disposal, or even if they did, they may have been unwilling to risk losing them in the event of an unfavourable judgment, even if they were convinced of the correctness of their position in the dispute. In other words, as Wiesław Litewski rightly observes, this system favoured the wealthier,[12] for whom the loss of even 500 *asses* was negligible. Consequently, they could afford to pursue a risky lawsuit or enter into a dispute even when uncertain of their claim's validity. This situation resembles that of poker or other gambling games, where even without good cards, a player with substantial funds is able to take the risk of losing some of them by raising the stakes or joining a stake to check the other player's hand. In this metaphor, good cards represent the equivalent of objective right in a dispute, while the stake corresponds to the *sacramentum*. As is well known, in card games, the winner is often the player who bluffs well rather than the one holding the best cards – or, putting aside this card metaphor, the one who is actually right in a dispute. The necessity of paying the *sacramentum* could lead to a similar negative effect. On the one hand, it served to prevent judicial pettifogging; on the other, it could, in practice, deprive individuals of access to court and a fair verdict.

As a result, less affluent or poor individuals had to seriously consider whether to initiate legal proceedings when they were not fully convinced of their arguments, which effectively prevented judicial pettifogging. However, the fear of losing the *sacramentum* did not pose a significant barrier to financially well-off individuals; on the contrary, their awareness of their strong financial standing in comparison to a potential opponent could encourage them to take a relatively small risk and enter into a dispute, even if they were not entirely convinced of their position. On the other hand, the poorest members of society, even if fully convinced of the validity of their claims, were deprived of procedural protection due to a lack of funds. Naturally, this was not an issue for the wealthy.

Moreover, the fact that there were only two fixed rates for the *sacramentum* meant that the risk of forfeiture did not always correspond to the actual value of the subject of the dispute. Kazimierz Kolańczyk rightly observed that it was 'too great in trials for small values, where the value of the *sacramentum* exceeded the value of the subject of the dispute or differed little from it'.[13] In such cases, pursuing a dispute was not always a rational decision. The existence of two flat-rate, rather than percentage-based, *sacramentum* fees was particularly disadvantageous for poorer individuals, who, as one might expect, usually disputed small amounts. In these cases, the *sacramentum* amount often led individuals to forgo asserting their rights in court. This clearly conflicted with the principles of justice. One advantage, however, was that this system reduced the number of court cases concerning disputes over minor values.

Given the above, it is unsurprising that abuses and false oaths occurred in court practice, meaning that the *sacramentum* did not always guarantee honesty and fairness in trials. Initially, the *sacramentum* played an important role in the

[12] W. Litewski, *Rzymski proces*…, op. cit., p. 24.
[13] K. Kolańczyk, *Prawo*…, op. cit., p. 121.

social and moral life of ancient Rome, influencing both the perception of law and the practical functioning of the justice system. However, the abuses and doubts associated with it led to its gradual decline in significance over time. With the development of Roman law, the *sacramentum* was eventually replaced by other mechanisms for securing rights, such as *sponsio* or *fideiussio*.

2. SLAPPS AND WAYS TO COUNTERACT THEM

SLAPPs (Strategic Lawsuits Against Public Participation) are a significant tool for manipulating the legal process to silence critics and those engaged in public activities, as well as to spread disinformation or distract from matters of public importance.[14] They maintain the appearance of legality but, in reality, constitute an abuse of the right to a court, where the plaintiff files a lawsuit not to pursue a legitimate legal claim but to intimidate, discredit, or financially weaken individuals or organisations participating in public debate who hold opposing views on a given issue.

These lawsuits are typically filed against individuals or social organisations that monitor or criticise the actions of the state, politicians, large corporations, or other entities with an impact on public life.[15] SLAPPs are employed by individuals or institutions with substantial financial resources to suppress criticism or protests against their actions. They exploit court procedures and the high costs of legal defence to deter further public involvement in public activities or criticism of institutions and public figures. The considerable expenses associated with defending against SLAPPs can lead to abandonment of the defence, even when defendants are confident in the legitimacy of their position. Meanwhile, those initiating SLAPPs usually have significant financial resources, making legal costs negligible for them.

By abusing the judicial system, these baseless lawsuits pose a serious threat to freedom of speech, civic participation, and democratic values. Numerous examples illustrate their various forms of misuse.[16] NGOs, social activists, journalists, and others involved in the defence of human rights and environmental protection

---

[14] The concept of SLAPPs was introduced in the 1980s by Penelope Canan and George W. Pring. See P. Canan, G.W. Pring, 'Strategic Lawsuits Against Public Participation', *Social Problems*, 1988, No. 5, pp. 506–517; G.W. Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation', *Pace Environmental Law Review*, 1989, No. 1, pp. 5–21; P. Canan, 'The SLAPP from a Sociological Perspective', *Pace Environmental Law Review*, 1989, No. 1, pp. 23–32; P. Canan, G.W. Pring, 'Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches', *Law & Society Review*, 1988, No. 2, pp. 385–395.

[15] P.C. File, L. Wigren, 'SLAPP-ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?', *Journal of Civic Information*, 2019, No. 2, pp. 2–3; M. Fierens, F. Le Cam, D. Domingo, S. Benazzo, 'SLAPPs against journalists in Europe: Exploring the role of self-regulatory bodies', *European Journal of Communication*, 2023, Vol. 39, Issue 2, pp. 2–3.

[16] Ibidem, pp. 4–5; H. Young, 'Canadian Anti-SLAPPs Laws in Action', *SSRN Electronic Journal*, 2022, No. 1, pp. 186–222; A. Bodnar, A. Gliszczyńska-Grabias, 'Strategic Lawsuits Against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive', *European Constitutional Law Review*, 2023, Vol. 19, Issue 4, pp. 645 et seq.

are often targeted by SLAPPs, which serve as tools for silencing, intimidating, and discrediting them. Such lawsuits can lead to self-censorship, a decline in the quality of public debate, and restrictions on freedom of speech, all of which undermine fundamental principles of democracy and the rule of law.

In response to the growing threat of SLAPPs, special legal measures and actions are increasingly being introduced to prevent such abuses of the judicial process. In some jurisdictions, so-called anti-SLAPP laws have been enacted to safeguard freedom of speech and public participation from procedural misuse.[17] Such laws can enable a swift and effective defence against SLAPPs through dedicated court mechanisms, for example, by allowing the early dismissal of a lawsuit upon determination that it constitutes a SLAPP.[18] Additionally, they can provide legal support to individuals or organisations targeted by SLAPPs, helping them to identify such lawsuits, mount an effective defence, and potentially seek damages for abuse of process.[19] It is equally important to educate the public about SLAPPs, their consequences, and methods of defence. The more informed people are, the less effective intimidation through legal repression becomes. Beyond these measures, monitoring court cases involving SLAPPs is essential, as it can help identify trends and methods of abuse, enabling a swift and effective response to such tactics.

3. *SACRAMENTUM* AND SLAPPS

Sacramentum Roman procedural law was an important element of court procedures, combining religious, moral, and procedural aspects. Its genesis, characteristics, and evolution reflect profound changes in Roman society and law. The *sacramentum* was intended to serve both as asset security for a financial penalty and as a means of ensuring the fairness of the trial while limiting judicial pettifogging. Giving the *sacramentum* was a way of confirming commitment to the court process. Additionally, it was an element of court ritual, giving the trial ceremony and formality, which

---

[17] P.C. File, L. Wigren, 'SLAPP-ing Back…', op. cit., pp. 5 et seq.; H. Young, 'Canadian Anti-SLAPPs…', op. cit., pp. 187 et seq.; F. Farrington, M. Zabrocka, 'Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union', *ERA Forum*, 2023, Vol. 24, Issue 4, https://doi.org/10.1007/s12027–023–00774–5, pp. 1–16 [accessed on 17 March 2025]. An important example is the recently adopted Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), OJ L 2024/1069, 16.4.2024.

[18] M. Zabrocka, J. Borg-Barthet, B. Lobina, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, DG IPOL/Policy Department for Citizens' Rights and Constitutional Affairs 2021, https://www.researchgate.net/publication/361040431_The_Use_of_SLAPPs_to_Silence_Journalists_NGOs_and_Civil_Society, pp. 47–48 [accessed on 17 March 2025].

[19] J. Bayer, P. Bárd, L. Vosyliute, N. Chun Luk, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*, EU-CITIZEN: Academic Network on European Citizenship Rights, 2021, https://www.researchgate.net/publication/359790139_Strategic_Lawsuits_Against_Public_Participation_SLAPP_in_the_European_Union, pp. 59–60 [accessed on 17 March 2025].

contributed to respecting the court's decision. Parties to a dispute gave the *sacramentum*, which functioned as a guarantee in the event of defeat, serving to protect the opposing party's interests and encourage honest conduct and adherence to the truth. In the event of victory, the *sacramentum* was returned to the party that had given it. In the event of defeat due to failure to fulfil obligations or dishonest conduct, it served as a form of punishment.

Meanwhile, SLAPPs represent a modern form of abuse of process in legal systems. SLAPPs are strategic lawsuits against public participation intended to silence criticism, spread disinformation, or divert attention from socially significant issues. They exploit court procedures as a tool to intimidate and suppress critics, often through expensive litigation designed to financially and psychologically weaken the defendant.

Although the *sacramentum* no longer exists in modern legal systems and does not play the same role as in ancient Rome, it remains an important element of legal history and legal culture. This raises the question of whether introducing an equivalent of the *sacramentum* into modern court procedures could help reduce SLAPPs.

Paradoxically, although the Roman *sacramentum* and the modern phenomenon of SLAPPs are entirely different legal issues, a comparison of the practices associated with them reveals a common feature – one that is also problematic: the manipulative use of legal procedures and financial resources to achieve specific goals, such as pursuing unjustified claims or intimidating the opposing party. In both cases, legal mechanisms are exploited not primarily to achieve justice, but rather to secure individual advantages through the abuse of financial position.

However, there are also important differences between the *sacramentum* and SLAPPs. First, the *sacramentum* was an integral part of the Roman *legis actiones* civil procedure, deeply embedded in historical and cultural traditions, whereas SLAPPs are an undesirable modern phenomenon arising from specific social and political issues. Second, the *sacramentum* was essentially a mechanism to ensure procedural truth, whereas SLAPPs are designed to suppress the truth or restrict public debate, thereby distorting reality.

Despite these differences, analysing the relationship between the *sacramentum* and SLAPPs can provide valuable insights into the functioning of legal processes and their manipulation in various historical and contemporary contexts. In both cases, there is a need to protect the fairness of legal proceedings and ensure that legal procedures serve justice rather than manipulation or the silencing of social criticism. Therefore, combating contemporary SLAPPs requires effective legal, social, and political measures to protect freedom of speech and public participation, much like in ancient Rome, where procedural law was intended to serve truth and justice.

It is worth noting that although the *sacramentum* was designed as a mechanism to deter excessive litigation by providing security in case of losing a lawsuit, it was not a perfect solution. Manipulation and abuse of the process, particularly by wealthy citizens, could still occur. Consequently, as legal systems evolved, other measures and sanctions were introduced to more effectively prevent and penalize such practices. Given the shortcomings of the Roman *sacramentum*, introducing a modern equivalent into contemporary legal systems would not resolve issues

related to SLAPPs. Unfortunately, history seems to be repeating itself, as wealthy entities can once again exploit the law by filing costly lawsuits that impose financial burdens on both parties.

4. CONCLUSION

Analysing the connections, similarities, and differences between the ancient Roman *sacramentum* and SLAPPs provides a deeper understanding of their impact on legal effectiveness and, consequently, on society. Both *sacramentum* and SLAPPs have had a significant influence on the outcomes of judicial processes, both historically and in modern times. They have been and can be used as tools to manipulate legal proceedings, leading to inequalities in access to justice and a decline in democratic quality. Their use as instruments to intimidate and silence critics is another notable common element. In both cases, there is also a financial dimension – the *sacramentum* had a monetary aspect, while SLAPPs can be employed as a means of financially harassing critics.

The differences between *sacramentum* and SLAPPs primarily concern their nature and purpose. The *sacramentum* was a procedural institution with deep roots in the religious traditions of ancient Rome and a symbolic meaning, whereas SLAPPs are a modern, undesirable phenomenon linked to the procedural and financial mechanisms of contemporary legal systems. Understanding these connections, similarities, and differences is essential for the further development of legal systems and the pursuit of fairness, equality, and justice for all legal subjects.

BIBLIOGRAPHY

Bayer J., Bárd P., Vosyliute L., Chun Luk N., *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study*, EU-CITIZEN: Academic Network on European Citizenship Rights, 2021, https://www.researchgate.net/publication/359790139_Strategic_Lawsuits_Against_Public_Participation_SLAPP_in_the_European_Union [accessed on 11 March 2025].

Bertoldi F., 'I sacramenta nelle legis actiones. Da un processo "divino" a un processo laico', *Vergentis*, 2018, No. 6.

Bodnar A., Gliszczyńska-Grabias A., 'Strategic Lawsuits Against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive', *European Constitutional Law Review*, 2023, Vol. 19, Issue 4.

Canan P., 'The SLAPP from a Sociological Perspective', *Pace Environmental Law Review*, 1989, No. 1.

Canan P., Pring G.W., 'Strategic Lawsuits Against Public Participation', *Social Problems*, 1988, No. 5.

Canan P., Pring G.W., 'Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches', *Law & Society Review*, 1988, No. 2.

Dajczak W., Giaro T., Longchamps de Bérier F., *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa, 2009.

Dębiński A., 'Sacramentum: On the Legal Meaning of the Term as Used in the Letters of Pliny the Younger', *Studia Iuridica Lublinensia*, 2022, No. 3.

Farrington F., Zabrocka M., 'Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union', *ERA Forum*, 2023, Vol. 24, Issue 4, https://doi.org/10.1007/s12027-023-00774-5.

Fierens M., Le Cam F., Domingo D., Benazzo S., 'SLAPPs against journalists in Europe: Exploring the role of self-regulatory bodies', *European Journal of Communication*, 2023, Vol. 39, Issue 2.

File P.C., Wigren L., 'SLAPP-ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?', *Journal of Civic Information*, 2019, No. 2.

Frank T., *An Economic Survey of Ancient Rome*, Vol. 1, Baltimore, 1933.

Gintowt E., *Rzymskie prawo prywatne w epoce postępowania legisakcyjnego (od decemwiratu do lex Aebutia)*, Warszawa, 2005.

Jamróz L., 'Prawo do sądu a zjawisko pieniactwa procesowego', in: Balicki R., Jabłoński M. (eds), *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław, 2018.

Kolańczyk K., *Prawo rzymskie*, Warszawa, 1999.

Litewski W., *Rzymski proces cywilny*, Kraków, 1988.

Pring G.W., 'SLAPPs: Strategic Lawsuits Against Public Participation', *Pace Environmental Law Review*, 1989, No. 1.

Young H., 'Canadian Anti-SLAPPs Laws in Action', *SSRN Electronic Journal*, 2022, No. 1.

Zabłoccy M. and J., *Ustawa XII tablic. Tekst – tłumaczenie – objaśnienia*, Warszawa, 2003.

Zabrocka M., Borg-Barthet J., Lobina B., *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, DG IPOL/Policy Department for Citizens' Rights and Constitutional Affairs, 2021, https://www.researchgate.net/publication/361040431_The_Use_of_SLAPPs_to_Silence_Journalists_NGOs_and_Civil_Society [accessed on 11 March 2025].

Cite as:

Kursa S. (2025), *Prevention of the abuse of the right to court: Roman sacramentum and contemporary SLAPPs*, Ius Novum (Vol. 19) 1, 15–23. DOI 10.2478/in-2025-0002

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 24–35

EXCEEDING AUTHORITY BY PROFESSIONAL SELF-GOVERNING BODIES OF ADVOCATES AND LEGAL ADVISORS: AN ANALYSIS IN LIGHT OF § 19(8) OF THE PRINCIPLES OF ADVOCACY ETHICS AND DIGNITY OF THE PROFESSION (THE CODE OF ETHICS FOR ADVOCATES) AND ARTICLE 20 OF THE CODE OF ETHICS FOR LEGAL ADVISORS

PIOTR KRZYSZTOF SOWIŃSKI*

DOI 10.2478/in-2025-0003

Abstract

This article examines the rationale behind the establishment of professional self-governing bodies for advocates and legal advisors, as well as the ethical principles guiding these professions. It identifies a critical issue: these bodies have mandated that their members refrain from submitting motions for evidence in court if doing so would disclose confidential professional secrets. The author contends that this prohibition conflicts with the fundamental role of advocates and legal advisors, both in societal and procedural contexts. It undermines the core purpose of legal representation and contradicts the obligation to act in the best interests of clients. The article calls for further discussion to address these concerns.

Keywords: advocate, legal advisor, professional secrecy, legal assistance, client's interest, motions for evidence, evidence

* LLD, Professor of the University of Rzeszów, Head of Criminal Procedure Department, Law Institute, Rzeszów University (Poland), attorney at law; e-mail: psowinski@ur.edu.pl; ORCID: 0000-0003-2210-5877

I. OPENING REMARKS

In Poland, two distinct legal professions provide paid legal assistance: advocates and legal advisors. This 'legal assistance' constitutes the primary function of both advocates (Article 4(1) of the Law on Advocates)[1] and legal advisors (Article 4 of the Law on Legal Advisors).[2] However, it is a more specific concept than the broader 'professional duty' referenced in various provisions (e.g., Article 1(3), Article 7(1), Article 58(12)(m), and Article 80 of the Law on Advocates; Article 27(1), Article 60(8)(h), and Article 64(1) of the Law on Legal Advisors).[3] Legal assistance may be provided both in procedural contexts and out-of-court scenarios. For the purposes of this publication, however, the focus is exclusively on in-court representation, excluding out-of-court activities (see Article 4(1) *in fine* of the Law on Advocates; Article 6(1) *in fine* of the Law on Legal Advisors). Article 14 of the Law on Legal Advisors stipulates that legal advisors must maintain independence when representing clients before decision-making authorities. In contrast, the Law on Advocates does not contain an equivalent provision but generally requires advocates to perform their duties 'individually and duly' (Article 76(1) and Article 78d(1) of the Law on Advocates). While the laws governing advocates and legal advisors do not elaborate on additional principles for providing legal assistance, they clearly define the roles these professionals play in legal proceedings. Article 6(1) *in fine* of the Law on Legal Advisors states that legal advisors represent or defend clients in courts and before administrative bodies. Similarly, Article 77(2) of the Law on Advocates specifies that advocates act as defence lawyers in criminal proceedings and in cases involving financial offenses. The absence of additional principles governing legal assistance in legal proceedings is not an oversight but rather a reflection of the distinct nature of these two professions. The differences between advocates and legal advisors stem from varying licensing requirements, legal structures, organisational frameworks, and the responsibilities of their professional self-governing bodies. The rules governing the appearance of advocates and legal advisors before judicial and administrative authorities are set out in the relevant procedural codes, whether civil or criminal. However, these codes do not authorise any professional self-governing organisation to create new procedural solutions or modify existing ones.

II. DETERMINANTS OF PRACTISING LEGAL PROFESSIONS BY ADVOCATES AND LEGAL ADVISORS

One of the most important principles in the practice of legal professions by advocates and legal advisors – alongside 'scrupulousness' (Article 5 of the Law on Advocates; Article 27 of the Law on Legal Advisors) and 'diligence' (Article 3(2)

[1] Act of 26 May 1982 – The Law on Advocates (consolidated text: Journal of Laws of 2022, item 1184, as amended).

[2] Act of 6 July 1982 on Legal Advisors (consolidated text: Journal of Laws of 2022, item 1166).

[3] Judgment of the Supreme Court of 1 December 2016, SDI 65/16, LEX 2182292.

of the Law on Legal Advisors) – is the unconditional obligation to maintain confidentiality (secrecy) regarding 'everything learned in connection with providing legal assistance' (Article 6(1) of the Law on Advocates; Article 3(3) of the Law on Legal Advisors). Information obtained 'in the course of providing legal services', whether by advocates or legal advisors, is considered confidential even if there was a 'potential possibility' of obtaining it through other means.[4] This obligation aligns with the classification of both professions as public trust professions,[5] as stipulated in Article 17(1) of the Constitution of the Republic of Poland.[6]

The aforementioned provision also allows for the establishment, by legislation, of professional self-governing bodies for these professions, tasked with representing their members and overseeing 'the proper performance of these professions, in line with the public interest and for its protection'. The proper practice of these professions is ensured through supervision of compliance with professional regulations (Article 3(1)(3) of the Law on Advocates; Article 41(5) of the Law on Legal Advisors), continuous enhancement of professional qualifications (Article 3(1)(4) of the Law on Advocates; Article 41(4) of the Law on Legal Advisors), and the development of professional ethical standards (Article 3(1)(5) of the Law on Advocates; Article 57(7) of the Law on Legal Advisors).

These ethical standards appear to be equally important in the practice of the advocate and legal advisor professions as legal knowledge itself. In the case of legal advisors, this is explicitly stated in Article 3(2) of the Law on Legal Advisors and is reinforced by the oath of office outlined in Article 27(1) of the same law. A similar equivalence between ethical standards and legal knowledge can be inferred for advocates from their oath, which requires them to perform their professional duties in accordance with 'the provisions of the law' as well as 'the principles of dignity, honesty, fairness, and social justice' (Article 5 of the Law on Advocates). This equivalence is further supported by § 2(1) of the Regulation on the Practice of the Advocate Profession,[7] which derives the 'principles of practice' from the 'Law on Advocacy', the 'Collection of Principles of Advocacy Ethics and Dignity of the Profession',[8] as well as from the 'Regulation [itself] and the resolutions of the bodies of the Advocacy or the bodies of local bar associations (…)'. The observed equivalence between legal and ethical principles

---

4 Decision of the Supreme Court of 11 December 2019, II DSI 78/19, LEX 3364191.

5 Courts expect individuals in such professions (legal advisors, in this case) to conduct themselves in an exemplary manner, both in their professional duties and private lives, setting a standard that serves as an example for other members of society. See decision of the Supreme Court of 19 March 2019, II DSI 31/18, OSNID 2020, No. 1; decision of the Supreme Court of 14 December 2020, II DSI 63/20, LEX 3116096.

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

7 Resolution of the Polish National Bar Council No. 140/2023 of 1 December 2023 implementing the Regulation on the Practice of the Advocate Profession; available at https://www.adwokatura.pl/admin/wgrane_pliki/file-regulamin-wykonywania-zawodu-adwokata-1122023–39479.pdf [accessed on 27 December 2023].

8 The Collection of Principles of Advocacy Ethics and Dignity of the Profession (Code of Advocacy Ethics) – see § 1(5)(2) of the Regulation mentioned in footnote 7.

likely stems from the legislator's assumption that these principles do not conflict. However, this assumption becomes problematic when confronted with § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors.[9]

III. ISSUES RELATED TO § 19 OF THE CODE OF ADVOCACY ETHICS AND ARTICLE 20 OF THE CODE OF ETHICS FOR LEGAL ADVISORS

The ethical provisions cited above explicitly prohibit submitting motions for evidence[10] that would require advocates or legal advisors to testify as witnesses in order to disclose information obtained in the course of their professional duties (§ 19(8) of the Code of Advocacy Ethics). This prohibition also extends to legal advisors or any individuals with whom they may jointly practise their profession under the law (Article 20 of the Code of Ethics for Legal Advisors), specifically to prevent the disclosure of facts protected by professional confidentiality. Despite some textual differences, these provisions can be interpreted as prohibiting advocates or legal advisors from filing motions for evidence that would involve calling witnesses bound by confidentiality obligations. Such evidence is otherwise permissible – under specific conditions – under Article 180 § 2 of the Code of Criminal Procedure[11] and Article 261 § 2 of the Code of Civil Procedure.[12]

The likely intention behind these codes of ethics was to prevent members of both legal professions from being placed in a conflict where they would have to choose between their duty to maintain professional confidentiality and their duty to testify. However, this potential dilemma appears most relevant in civil cases under Article 261 § 2 of the Code of Civil Procedure, where the decision to testify

---

[9] Resolution No. 884/XI/2023 of the Presidium of the National Council of Legal Advisors on the Publication of the Consolidated Code of Ethics for Legal Advisors.

[10] In light of § 19(8) of the Code of Advocacy Ethics, the Supreme Court rejects the argument that the motion mentioned in this provision is not a submitted motion but one that has not yet been reviewed. According to the Court, any violation of this prohibition should be assessed 'in light of the original content of the motion for evidence presented to the judicial authority' (see decision of the Supreme Court of 12 December 2014, SDI 44/14, LEX 1565786). According to this judgment, 'submitting an evidentiary motion' is considered a disciplinary offence under § 19(8) of the Code of Advocacy Ethics, classified as 'committing an offence rather than merely attempting to commit it'. This position underscores that the subsequent outcome of the motion does not affect the grounds for holding the advocate accountable. However, the Supreme Court did not address any potential inconsistency between § 19(8) of the Code of Advocacy Ethics and other statutory provisions, nor did the appellant raise such an issue. Additionally, the provisions of § 19 of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors do not offer grounds for exoneration for individuals who submit a motion to question an advocate or legal advisor about matters protected by attorney-client privilege, even if it is known from the outset that such a motion will be ineffective.

[11] The Act of 6 June 1997 – Code of Criminal Procedure (consolidated text: Journal of Laws of 2024, item 37).

[12] Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws of 2023, item 1550, as amended).

is left to the discretion of the witness.[13] A similar conflict should not arise in criminal cases, where a court can waive confidentiality under Article 177 § 1 of the Code of Criminal Procedure, prioritising the duty to testify over other obligations.[14] Nonetheless, advocates and legal advisors remain opposed to the relative nature of their professional secrecy. It is also noteworthy that professional self-governing bodies recognise this potential dilemma only in relation to members of their own and related professions, yet they do not extend the same consideration to other professional secrets, such as medical or notarial confidentiality, even though these are also associated with public trust professions.[15] Interestingly, § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors restrict the initiation of evidentiary proceedings only in relation to personal sources of evidence, while overlooking physical evidence. However, physical evidence can also lead to breaches of confidentiality, as permitted under Article 226 in conjunction with Article 180 § 2 of the Code of Criminal Procedure and Article 248 § 2 in conjunction with Article 261 § 2 of the Code of Civil Procedure. A closer analysis of the legal provisions governing advocates and legal advisors is necessary, not only due to the issues outlined above but also because it is highly likely that both § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors are incompatible with several higher-ranking regulations.

The underlying premise of both provisions is highly problematic. At first glance, it evident that these provisions aim to limit the right to initiate evidence proceedings using a specific source of evidence. However, such a limitation should only be imposed by statutory provisions on evidence preclusion, such as Article 187(2)(1) of the Code of Civil Procedure in conjunction with Article 205^3(2), as well as Article 458^5 (1) and (2) and Article 381 of the Code of Civil Procedure). No other provision deprives parties, and consequently their professional legal representatives, of the right to introduce even the most misguided or absurd evidence, as such motions[16] remain subject to verification under Article 170 § 1(1)–(6) of the Code of Criminal Procedure[17]

---

[13] A. Turczyn, 'Komentarz do art. 261', in: Piaskowska O.M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany*, LEX 2023, comment 4.

[14] More importantly, a witness who is an advocate or legal advisor – even if acting at the request of a former client and 'in their interest' – cannot testify on matters heard in open court in cases other than criminal cases, without prior release in accordance with Article 180 § 2 of the Code of Criminal Procedure. This was affirmed by the Supreme Court in its ruling of 15 November 2012, SDI 32/12, LEX 1231613.

[15] E. Kosiński, 'Prawny status zawodu lekarza. Wybrane zagadnienia', *Studia Prawa Publicznego*, 2019, No. 3(15), pp. 18–20 (pp. 9–28); M. Modrzejewski, 'Pozycja ustrojowa notariusza', *Nowy Przegląd Notarialny*, 2008, No. 1, pp. 25–38; similarly, as to the status of notaries, decision of the Polish Constitutional Tribunal of 13 January 2015, SK 34/12, OTK-A 2015, No. 1, item 1.

[16] In this regard, the rights of the defence lawyer or legal representative align with those of the accused or other participants in the proceedings, which is not typically the case. For example, notable differences arise in relation to the right to participate in actions under Article 185a et seq. of the Code of Criminal Procedure, or in drafting and signing certain appeals. See also K. Wierzbicka, 'Uprawnienia obrońcy w procesie karnym – wybrane zagadnienia', *Themis Polska Nova*, 2018, No. 2(14), p. 160 (pp. 152–165).

[17] As noted in Polish scholarship, Polish criminal procedure follows a 'model of negative verification of motions for evidence', meaning that unless specific evidence is explicitly rejected,

or Article 235^2 § 1 (1)–(6) of the Code of Civil Procedure. The Supreme Court recognised this inconsistency in case II DK 94/21.[18] When examining the issue of liability for a disciplinary offence, the court focused solely on the inadmissibility of limiting the right to initiate evidence proceedings under § 19(8) of the Code of Advocacy Ethics, without addressing the broader implications of this provision. Specifically, the court failed to consider its compatibility with the primary duty of a legal representative: the obligation to act in the client's best interest, and more specifically, the duty to act in the interest of the defendant.[19] I have repeatedly highlighted the inconsistency between § 19(8) of the Code of Advocacy Ethics and Article 1(1) and Article 4(1) of the Law on Advocates, as well as between Article 20 of the Code of Ethics for Legal Advisors and Article 2 and Article 4 of the Law on Legal Advisors.[20] However, it seems that from a higher vantage point, these issues receive less attention – or perhaps the library resources at Krasiński Square, where the Polish Supreme Court is located, are not as extensive as one would hope for such a distinguished judicial authority. This suggests that the reasoning in the decision for case II DK 94/21 is not as thorough as one might expect. Moreover, the right to initiate evidence proceedings, though normatively distinct, is not an autonomous right but rather a component of the broader right to defence[21] – specifically, defence against a criminal indictment (Article 6 in conjunction with Article 167 of the Code of Criminal Procedure and Article 338 § 1 of the Code of Criminal Procedure), defence against civil lawsuits (Article 205^3 § 2 in conjunction with Article 235^1 of the Code of Civil Procedure), the right to prosecute (Article 55 § 2 in conjunction with Article 331 § 1(1) and (2) of the Code of Criminal Procedure; Article 487 of the Code of Criminal Procedure),[22] the right to pursue claims (Article 187 § 2 (1) of the Code of Civil Procedure in conjunction with Article 235^1 of the Code of Civil Procedure), and finally, the constitutionally guaranteed right to a court (Article 45(1) of the Constitution of the Republic of Poland).

Both § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors – which were not examined in case II DK 94/21 – are fundamentally indefensible. These provisions effectively undermine the i n d e p e n d e n c e that advocates and legal advisors are guaranteed under their

---

all other evidence is considered admissible. See P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006, p. 381.

[18] Judgment of the Supreme Court of 22 February 2022, II DK 94/21, LEX 3340991.

[19] This rule, however, does not apply to a person charged with a petty offence, as Article 41 § 4 (1) of the Act of 24 August 2001 – Code of Procedure in Petty Offences (consolidated text: Journal of Laws of 2022, item 1124, as amended) excludes the possibility of the court releasing a witness 'from confidentiality related to the practice of the profession of an advocate, legal adviser (…)'.

[20] P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004, pp. 176–177; idem, 'Jeszcze o tajemnicy adwokackiej z perspektywy przepisów art. 178 pkt 1 i art. 180 § 2 k.p.k. Uwagi polemiczne', *Roczniki Naukowe KUL*, 2019, No. 1, pp. 78–79.

[21] K. Woźniewski, *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdynia, 2001, pp. 32–40, where the author considers the evidentiary initiative to be a manifestation of the principle of the right to defence.

[22] E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym*, Lublin, 2016, p. 128.

governing laws.[23] The introduction of a restriction on the right to submit motions for evidence, as stipulated in § 19(8) of the Code of Advocacy Ethics, conflicts with Article 1(3) of the Law on Advocates, which states that advocates are subject only to statutory law in the performance of their professional duties. The provision in the Code of Ethics is clearly not statutory law. The situation for legal advisors appears similar, although Article 40(1) of the Law on Legal Advisors explicitly grants the attribute of independence to the professional self-governing body as a whole rather than to individual members. However, can an independent self-governing body, which is 'subject only to the provisions of statutory law,' truly consist of members who do not adhere to the same principle? It seems that the independence of legal advisors can also be derived from Article 9(1) and Article 14(1) of the Law on Legal Advisors,[24] which ascribe to them qualities such as 'autonomy' and an 'independent position' in conducting cases before adjudicating bodies. In Polish, 'autonomous' means 'not dependent on anyone', 'not influenced', 'independent', or 'sovereign'.[25] In legal literature, it is emphasised that the independence of advocacy self-governing organisations is expressed in their role of 'protecting advocacy values, which in turn serve the enforcement of rights and freedoms in their procedural aspect'.[26] While this statement is correct, it also highlights the servient nature of both the advocacy and legal advisory professions. Professional confidentiality is not a value in itself, nor one created for the benefit of advocates or legal advisors, but rather a safeguard in the interest of their clients. This applies equally to both current and former clients, as professional confidentiality does not expire and is not temporally limited (Article 6(2) of the Law on Advocates and Article 3(4) of the Law on Legal Advisors). One could attempt to defend § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors by arguing that their rationale – rooted in reciprocity and solidarity – serves the interests of clients represented by other advocates or legal advisors. However, does adherence to these prohibitions not render the legal assistance provided to one's own client deficient? Clients have the right to expect that their legal representatives' actions are both lawful and appropriate to the procedural situation. This expectation is legally sound, as such activity by an advocate acting as a defence lawyer or by a legal advisor in a criminal case is mandated by Article 86(1) of the Code of Criminal Procedure. It is worth noting that the phrase 'to undertake actions' in Article 86(1) of the Code of Criminal Procedure may appear to limit legal representatives to certain activities, such as 'making a decision to do something'.[27]

---

[23] The same principle of independence underlies the prohibition imposed on advocates by Article 4b(1)(1) of the Advocacy Law – see M. Gawryluk, *Prawo o adwokaturze. Komentarz*, Warszawa, 2012, comment 3 to Article 4b.

[24] See more on this in: P.K. Sowiński, 'Uchylenie tajemnicy zawodowej w trybie art. 180 § 2 k.p.k. a niezależność zawodowa radcy prawnego. Uwagi polemiczne', *Radca Prawny. Zeszyty Naukowe*, 2023, No. 2, pp. 92 et seq. (pp. 91–106).

[25] https://sjp.pwn.pl/doroszewski/samodzielny;5494777.html [accessed on 27 December 2023].

[26] M. Pietrzak, 'Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności', *Palestra*, 2019, p. 94 (pp. 89–95).

[27] https://wsjp.pl/haslo/do_druku/64514/przedsiebrac [accessed on 1 January 2024].

However, it is also pertinent to consider that, in certain cases, this article should be interpreted not literally but teleologically, acknowledging that omissions by the defence lawyer may also be inconsistent with it.[28] While not every omission amounts to negligence, W. Grzeszczyk, in his moderation of excessively radical assessments of defence behaviour, excludes from the scope of Article 86(1) of the Code of Criminal Procedure only those omissions that are 'obviously groundless' (e.g., failing to file an appeal).[29] However, § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors do not penalise unnecessary or groundless actions; instead, they impose a blanket prohibition on certain actions, including those that may be desirable or even necessary to strengthen a party's argument before the court or to demonstrate that the represented party is right. If seeking professional legal assistance is meant to enhance a party's procedural awareness and improve their chances in the adversarial[30] struggle over the outcome of the proceedings, it could – *o ierum, ierum, o quae mutatio rerum!* – result in self-represented parties being in a better position than those represented by professional attorneys, as the latter are constrained by extra-procedural considerations in their approach to evidence.

The provisions that guide the procedural activity of an advocate or legal advisor – and simultaneously serve as arguments against the continued validity[31] of § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors – are numerous. For example, Article 6 of the Code of Criminal Procedure addresses legal assistance as an element of the right to defence. Article 86 § 1 of the Code of Criminal Procedure should also be noted in this regard. Identical guidance regarding the expected activities of legal representatives in civil and criminal cases is found in Article 1(1) and Article 4(1) of the Law on Advocates, as well as Articles 2 and 4 of the Law on Legal Advisors. The 'legal assistance' referenced in these provisions is defined as 'an action supporting and improving the situation of the person',[32] receiving such assistance. Legal assistance *ex officio* is also recognised in civil proceedings, specifically in Title II of the Code of Civil

---

[28] H. Paluszkiewicz, 'Komentarz do art. 86', in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX 2023, comment 4; T. Grzegorczyk, *Kodeks postępowania karnego. Tom I. Artykuły 1–467. Komentarz*, LEX 2014, comment 3 to Article 86.

[29] W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, LEX 2014, comment 1 to Article 86.

[30] Submitting motions for evidence is considered an expression of the adversarial nature of criminal proceedings – see W. Juchacz, 'Zasada kontradyktoryjności w nowym procesie karnym', *Studia z zakresu nauk prawnoustrojowych. Miscellanea*, 2013, No. 3, p. 23 (pp. 21–30). Both regulations significantly impacted the interests of parties in criminal proceedings between 2015 and 2016, when the balance between the parties' evidentiary initiative and the court's *ex officio* action was temporarily replaced by the principle of party initiative – cf. S. Zabłocki, 'Art. 167 k.p.k. po nowelizacji – wstępne nakreślenie problemów', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2015, No. 2, p. 86 (pp. 83–111).

[31] The evolutionary approach to certain principles of professional ethics for advocates is discussed by P. Hofmański in: idem, 'Gwarancje prawa do obrony w świetle zmian Kodeksu postępowania karnego zawartych w ustawie z dnia 27 września 2013 r.', in: Kolendowska-Matejczuk M., *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 15 (pp. 7–16).

[32] https://sjp.pl/pomoc [accessed on 1 January 2024].

Procedure ('*Ex Officio* Legal Assistance'). The absence of this term in relation to party-appointed representatives is not problematic, as these representatives fulfil the same function (Article 86 § 1 in conjunction with Article 89 § 1 of the Code of Civil Procedure); the only difference lies in the source of their authorisation.

Such assistance should be unconditional and may be restricted only by statutory provisions ('in accordance with legal provisions' – Article 5 of the Law on Advocates; Article 27(1) of the Law on Legal Advisors), serving without exception the 'legal protection of the interests of persons for whom it is performed' (Article 2 of the Law on Legal Advisors). Such a restriction cannot be derived from Article 2 § 2 of the Code of Criminal Procedure, which states that 'true factual findings form the basis of all decisions,' nor from Article 3 of the Code of Civil Procedure, which explicitly requires parties and participants in the proceedings to 'provide explanations regarding the circumstances of the case truthfully and without concealing anything, and to present evidence' (a requirement that should also apply to their legal representatives). Although the principle of truth is not absolute and unconditional,[33] as it is a rule derived from statutory norms,[34] it cannot be modified by lower-ranking provisions, such as those contained in the ethical codes discussed in this paper.

Since § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors negatively impact the quality of legal assistance in general, they also adversely affect the specific form of assistance referred to in Article 6 of the Polish Code of Criminal Procedure. This is because these provisions do not afford special treatment to defence lawyers.[35] However, the assistance provided by defence lawyers is an integral part of the right to defence, a right enshrined in the Constitution (Article 42(2) of the Polish Constitution). For this reason, legislators drafting laws concerning advocates and legal advisors should carefully consider whether such limitations are admissible by means other than 'solely through statutory law'.[36] This consideration should also prompt legislators to assess whether any limitation of this right is necessary 'in a democratic state for the sake of public safety or order, or for environmental reasons, health, public morals, or the rights and freedoms of others', a requirement that appears to have been overlooked. Such an assessment is essential, given that the conditions for 'limitations on the exercise of constitutional rights' are outlined in Article 31(3) of the Polish Constitution, without distinguishing whether the potential limitation is direct or indirect or whether the exercise of those rights pertains to one's own rights or those of another, as is the case with individuals providing legal assistance. The right to defence may indeed be subject to certain limitations, even

---

[33] D. Pożaroszczyk, 'Prawda w procesie karnym', *Studia Iuridica*, 2011, No. 53, p. 211 (pp. 205–214).

[34] As to the possible constitutional basis for the principle of substantive truth in criminal proceedings, see more broadly Ł. Chojniak, 'O zasadzie prawdy materialnej w procesie karnym w świetle Konstytucji RP', *Państwo i Prawo*, 2013, No. 9, pp. 18–29.

[35] The question arises as to whether such a prohibition is reconcilable with the 'duty to undertake procedural actions' imposed on a court-appointed defence lawyer under Article 84 § 2 of the Code of Criminal Procedure.

[36] Statutory determinants of defence lawyers' activism were discussed by A. Malicka, 'Granice działań obrońcy w polskim procesie karnym', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, p. 433 (pp. 431–437).

though Article 42(2) of the Polish Constitution does not explicitly provide for such a possibility. More significant is the fact that this article does not prohibit limitations on the right to defence, just as Article 6(3)(c) of the European Convention on Human Rights[37] and Article 48(2) of the Charter of Fundamental Rights[38] do not. Therefore, even in the context of the right to defence, certain limitations may be acknowledged if they are necessary to protect other values. Disregarding the failure to meet the 'formal prerequisite',[39] it seems that § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors would not pass the test of necessity. This is because Article 167 of the Polish Code of Criminal Procedure does not exclude the possibility of using evidence in the form of witness testimony, including *ex officio* witness testimony, which may encompass matters covered by professional secrecy. Furthermore, Article 180(2) of the Polish Code of Criminal Procedure expressly allows such evidence, albeit under certain conditions.

IV. FINAL REMARKS

The Supreme Court ruling in case II DK 94/21, marked by a superficial analysis, merely foreshadows the urgently needed shift in the interpretation of § 19(8) of the Code of Advocacy Ethics and related deontological regulations. Even if this provision, along with Article 20 of the Code of Ethics for Legal Advisors, is viewed as an expression of the professional self-governments' oversight of advocates and legal advisors, such oversight must still be exercised with purpose and in accordance with the guidelines outlined in Article 17(1) of the Polish Constitution. This article mandates that such oversight be conducted 'within the limits of public interest and for its protection.' The restriction of the procedural freedom of advocates and legal advisors through these extra-statutory provisions violates constitutional principles, creating a conflict with the client's right to legal assistance. This conflict arises because § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors effectively 'force' advocates and legal advisors to omit certain actions that could benefit their clients. The establishment of professional self-governments is tied to the delegation of specific public authority powers to these bodies, reflecting a form of decentralisation. The scope of this decentralisation is defined by Article 17(1) of the Polish Constitution, alongside relevant legislation governing advocates and legal advisors. This legislation assigns various responsibilities to the self-governments, including 'drafting and promoting the principles of [advocate] professional ethics and ensuring their observance' (Article 3(1)(5) of the Law on Advocates) and 'adopting the principles of legal advisors' ethics' (Article 57(7) of the Law on Legal

---

[37] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

[38] Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1, as amended).

[39] P. Wiliński considers the requirement of a statutory form of restrictions to constitute such a condition, see: P. Wiliński, *Zasada*…, op. cit., pp. 449 et seq.

Advisors). However, the drafting of rules by professional self-governing bodies that extend to evidentiary matters exceeds the functions entrusted to them,[40] particularly since § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors are not mere recommendations but strict prohibitions enforceable through disciplinary measures. The continued existence of these provisions will inevitably lead to conflicts between advocates or legal advisors and their clients. These regulations compel legal professionals to forfeit significant aspects of their procedural autonomy, thereby undermining their ability to act fully in their clients' interests. Furthermore, they create grounds for liability, stemming from the inherent ambiguity surrounding disciplinary offenses as outlined in Article 80 of the Law on Advocates and Article 64(1) of the Law on Legal Advisors. This ambiguity results from the 'objective impossibility'[41] of legislatively cataloguing all such offenses.[42] As noted by P. Kruszyński, no action taken by a defence lawyer that is permitted by procedural law can be deemed a violation of substantive legal norms. Although his argument primarily concerns provisions of substantive criminal law,[43] is there any justification for excluding deontological rules from the application of this principle?

The current wording of § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors exacerbates these concerns. How should an advocate or legal advisor who complies with these provisions act toward their client? Should they remain silent, or should they disclose everything to the client? The first option results in what could be described as a form of 'recidivism' by the legal representative. By failing to actively defend the client's interests and concealing existing evidence, the lawyer not only neglects their duty to act in the client's best interest but also compromises the client's case. The second option, on the other hand, risks circumventing the deontological prohibition, as a client who is informed in advance may independently submit a motion to present evidence, interpreting the disclosure as a thinly veiled encouragement to take action – potentially under Article 167 of the Code of Criminal Procedure or Article 3 *in fine* of the Code of Civil Procedure. Neither of these alternatives is satisfactory. It appears that, in this instance, the inimitable Corporal Kuraś was correct when he quipped: 'No matter how you turn, your back is always behind you.' I trust that this perhaps audacious quotation will be forgiven for its vivid illustration of the dilemma at hand.

BIBLIOGRAPHY

Chojniak Ł., 'O zasadzie prawdy materialnej w procesie karnym w świetle Konstytucji RP', *Państwo i Prawo*, 2013, No. 9.

Gawryluk M., *Prawo o adwokaturze. Komentarz*, Warszawa, 2012.

Grzegorczyk T., *Kodeks postępowania karnego. Tom I. Artykuły 1–467. Komentarz*, LEX 2014.

[40] P. Tuleja, 'Komentarz do art. 17', in: Czarny P., Florczak-Wątor M., Naleziński B., Radziewicz P., Tuleja P., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX 2023, No. 1.

[41] Judgment of the Supreme Court of 8 June 2009, SDI 4/09, LEX No. 611833.

[42] The case law refers to an 'open construction of disciplinary offences'; see judgment of the Supreme Court of 5 April 2018, SDI 1/2018, LEX 2526748.

[43] P. Kruszyński, *Stanowisko prawne obrońcy w procesie karnym*, Białystok, 1991, p. 90.

Grzeszczyk W., *Kodeks postępowania karnego. Komentarz*, LEX 2014.
Hofmański P., 'Gwarancje prawa do obrony w świetle zmian Kodeksu postępowania karnego zawartych w ustawie z dnia 27 września 2013 r.', in: Kolendowska-Matejczuk M., *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014.
Juchacz W., 'Zasada kontradyktoryjności w nowym procesie karnym', *Studia z zakresu nauk prawnoustrojowych. Miscellanea*, 2013, No. 3.
Kosiński E., 'Prawny status zawodu lekarza. Wybrane zagadnienia', *Studia Prawa Publicznego*, 2019, No. 3(15).
Kruk E., *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym*, Lublin, 2016.
Kruszyński P., *Stanowisko prawne obrońcy w procesie karnym*, Białystok, 1991.
Malicka A., 'Granice działań obrońcy w polskim procesie karnym', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013.
Modrzejewski M., 'Pozycja ustrojowa notariusza', *Nowy Przegląd Notarialny*, 2008, No. 1.
Paluszkiewicz H., 'Komentarz do art. 86', in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX 2023.
Pietrzak M., 'Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności', *Palestra*, 2019.
Pożaroszczyk D., 'Prawda w procesie karnym', *Studia Iuridica*, 2011, No. 53.
Sowiński P.K., 'Jeszcze o tajemnicy adwokackiej z perspektywy przepisów art. 178 pkt 1 i art. 180 § 2 k.p.k. Uwagi polemiczne', *Roczniki Naukowe KUL*, 2019, No. 1.
Sowiński P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004.
Sowiński P.K., 'Uchylenie tajemnicy zawodowej w trybie art. 180 § 2 k.p.k. a niezależność zawodowa radcy prawnego. Uwagi polemiczne', *Radca Prawny. Zeszyty Naukowe*, 2023, No. 2.
Tuleja P., 'Komentarz do art. 17', in: Czarny P., Florczak-Wątor M., Naleziński B., Radziewicz P., Tuleja P., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX 2023.
Turczyn A., 'Komentarz do art. 261', in: Piaskowska O.M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany*, LEX 2023.
Wierzbicka K., 'Uprawnienia obrońcy w procesie karnym – wybrane zagadnienia', *Themis Polska Nova*, 2018, No. 2(14).
Wiliński P., *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006.
Woźniewski K., *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdynia, 2001.
Zabłocki S., 'Art. 167 k.p.k. po nowelizacji – wstępne nakreślenie problemów', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2015, No. 2.

Cite as:

Sowiński P.K. (2025), *Exceeding authority by professional self-governing bodies of advocates and legal advisors: an analysis in light of § 19(8) of the Principles of Advocacy Ethics and Dignity of the Profession (the Code of Ethics for Advocates) and article 20 of the Code of Ethics for Legal Advisors*, Ius Novum (Vol. 19) 1, 24–35. DOI 10.2478/in-2025-0003

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 36–58

NOTIFICATION OF A GROSS BREACH OF PROCEDURAL OBLIGATIONS BY A PUBLIC PROSECUTOR OR A PERSON CONDUCTING A PREPARATORY PROCEEDING

RYSZARD A. STEFAŃSKI*

DOI 10.2478/in-2025-0004

Abstract

The research problem of the article is the notification of a gross breach of procedural obligations by a public prosecutor or a person conducting a preparatory proceeding (Article 20 § 2 of the Code of Criminal Procedure). Its aim is to assess the usefulness of this measure in eliminating significant procedural irregularities committed by a public prosecutor and bodies conducting preparatory proceedings. The research thesis is the statement that this notification plays an important role in eliminating and preventing procedural irregularities in the activities of public prosecutors and in preparatory proceedings. The research hypothesis is the assumption that its regulation in the Code of Criminal Procedure – in order to increase its effectiveness – requires minor amendments. The basic research methods used are the formal-dogmatic and logical ones.

The subject-matter of the considerations includes: the development of the notification, its legal nature, the bodies authorised to notify (court, prosecutor), its subject-matter (gross violation of procedural obligations, public prosecutors, persons conducting preparatory proceedings), its addressees, and the notification proceeding. These considerations lead to the conclusion that this measure is, in principle, properly regulated. The court's or prosecutor's notification decision is not subject to appeal; however, due to the consequences for the person

* Professor, LLD, Head of the Department of Criminal Law of the Faculty of Law and Administration of Lazarski University in Warsaw (Poland), e-mail: ryszard.stefanski@lazarski.pl, ORCID: 0000-0003-0995-9499

concerned, an appeal against the court's decision should be lodged with a three-judge bench of the same court, and a complaint about a prosecutor's decision should be submitted to the superior prosecutor. In order to increase the effectiveness of notification, it is necessary to authorise the court and the prosecutor to request that the superior of the person who has not sent information on the measures taken within the specified time limit initiate an official proceeding and provide information on its outcome.

Keywords: public prosecutor, prosecutor, superior, gross breach of procedural obligations, court, notification

INTRODUCTION

The implementation of the objectives of criminal procedure laid down in Article 2 § 1 of the Code of Criminal Procedure ('CCP') requires that all participants in the proceedings, including procedural bodies and parties, fulfil their duties efficiently. This particularly applies to a prosecutor, who plays the role of both a body conducting and supervising a preparatory proceeding and a public prosecutor, as well as to other bodies involved in a preparatory proceeding and acting as public prosecutors. The Code of Criminal Procedure provides for special instruments that are to ensure the efficient course of a criminal proceeding at all stages. Such an objective is achieved, in relation to a suspect or the accused, by the application of coercive measures, which are ruled in order to secure the proper course of a proceeding (Article 249 § 1 CCP), and, in relation to a public prosecutor and a body conducting a preparatory proceeding, by a notification of a gross breach of procedural obligations by them (Article 20 § 2 CCP), which is the subject-matter of the article. Its aim is to assess the usefulness of this measure in eliminating significant procedural violations committed by a public prosecutor or a body conducting a preparatory proceeding. The research thesis is that this notification plays an important role in eliminating and preventing procedural irregularities in the activities of public prosecutors and in preparatory proceedings. The research hypothesis is the assumption that its regulation in the Code of Criminal Procedure, in order to increase its efficiency, requires minor amendments. The basic research methods used are formal-dogmatic ones.

DEVELOPMENT OF THE NOTIFICATION

The Codes of Criminal Procedure of 1928 and 1969 did not provide for the notification of a gross breach of obligations by a public prosecutor or a body conducting a preparatory proceeding. It was regulated for the first time in the Code of Criminal Procedure of 1997. In accordance with the original wording of Article 20 § 2 CCP, in the event of a gross breach of procedural obligations by a public prosecutor or a person conducting a preparatory proceeding, the court was obliged to notify the immediate superior of the person who committed the violation. Prosecutors also had such rights in relation to the Police and other investigative bodies.

The Act of 9 May 2007 amending the Act: Code of Criminal Procedure and some other acts[1] obliges the author of the notification to request that information be sent within 14 days on the actions taken as a result of the notification (Article 20 § 2 CCP), and the court is obliged to send a copy of the notification to the Prosecutor General if the violation is committed by a prosecutor, and, in the event the violation is committed by a public prosecutor who is not a prosecutor (of the Prosecution Service), to the competent authority that is superior to the immediate superior of this public prosecuting body (Article 20 § 2 CCP).

LEGAL NATURE OF THE NOTIFICATION

There is no conceptual terminology used in the literature to specify the measure laid down in Article 20 CCP. The determination of a correct term is important because it should reflect its legal nature.

In the literature, the notification referred to in Article 20 § 2 CCP is specified as signalling,[2] in the same way as the notification of a gross breach of procedural obligations by counsel for the defence or proxy (Article 20 § 1 CCP).[3] The same term is also used to refer to the notification of flagrant misconduct in the activities of state, self-government or social bodies, in particular when it contributes to the commission of a crime (Article 19 § 1 CCP), the initiation and completion of an *ex officio* proceeding (Article 21 CCP), collaboration in the commission of a crime to the detriment of a minor, with a minor or in circumstances that may indicate demoralisation of a minor or a demoralising influence on a minor (Article 23 CCP), and determination of groundlessness, illegality or irregularity of detention (Article 246 § 4 CCP).[4] Occasionally, it is called a notice.[5]

Article 20 § 2 CCP refers to the notification of a gross breach of procedural obligations, which indicates that in the normative sense the activity has the nature of a notification,[6] and this is how the activity regulated therein should be called.

As far as the legal nature of the notification is concerned, the doctrine rightly classifies it as a disciplinary measure, which is the procedural bodies' response

---

1 Journal of Laws of 2007, No. 99, item 664.

2 J. Karaźniewicz, in: Zagrodnik J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2024, p. 159.

3 S. Kowalski, 'Sygnalizacja rażącego naruszenia obowiązku procesowego przez radcę prawnego w postępowaniu karnym', *Radca Prawny. Zeszyty Naukowe*, 2023, No. 4, p. 63; M. Kurowski, in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 1–424*, Vol. I, Warszawa, 2024, p. 144; ruling of the Supreme Court of 18 August 2021, III KZ 35/21, LEX No. 3398328; ruling of the Supreme Court of 24 February 2021, I KZ 5/21, LEX No. 3171306.

4 J. Karaźniewicz, *Instytucja sygnalizacji w polskim procesie karnym*, Toruń, 2015, pp. 223–228.

5 A. Sakowicz, in: Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 135.

6 Thus it is defined in: F. Prusak, *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 1999, p. 128; T. Grzegorczyk, *Kodeks postępowania karnego. Artykuły 1–467. Komentarz*, Vol. I, Warszawa, 2014, p. 160; J. Kosonoga, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Vol. I, Warszawa, 2017, p. 364; the ruling of the Appellate Court in Lublin of 9 November 2008, II AKz 286/08, LEX No. 491020.

to procedural irregularities that result in the initiation of disciplinary proceedings placed outside the criminal proceeding, consisting in a request for this made to competent authorities.[7]

BODIES AUTHORISED TO ISSUE THE NOTIFICATION

The type of body authorised to issue the notification depends on the stage of the preparatory proceeding. In the course of the court proceeding, it is the court that is entitled to make it, and in the preparatory proceeding, it is a prosecutor.

1. COURT

In jurisdictional proceedings, this is an exclusive competence of the court, and this right is not held by the president of the court, the head of the division, or the judge presiding over the adjudicating bench. The conclusion results from the linguistic interpretation of Article 20 § 2 CCP, which expressly refers to the court. The Supreme Court expressed a different stance, stating that:

> 'The provision of Article 20 § 1 CCP authorises the "court" to act accordingly (and thus, in the appropriate form: a decision, not a ruling), and secondly, it concerns a breach of procedural obligations in specific cases being examined by this court. This opinion does not lead to the conclusion that a judge, in particular the head of the division, does not have legal grounds for signalling to competent corporate authorities that they noticed circumstances that, even based on their subjective assessment, are of great importance for the appropriate performance of defence-related obligations and, more broadly, for the proper functioning of the justice system. A legal situation in which a judge, and even more so the head of the division, would be deprived of the possibility of signalling their observations concerning the improper functioning of a specific sphere of the justice system to the competent authorities would not be acceptable.'[8]

Although this view was expressed on the basis of Article 20 § 1 CCP, due to the identical regulation in § 2 of the provision, it can also be applied to the measure in question. This opinion is incorrect because: firstly, it is in conflict with the literal wording of the provision, which clearly grants this right to the court; secondly, this notification may even result in the initiation of a disciplinary proceeding against the person concerned.

The mention of the court in Article 20 § 2 CCP makes it possible to assume that this provision is applicable at every stage of a jurisdictional criminal proceeding, i.e., in a proceeding before the court of first instance, as well as in cases concerning appeal, cassation, resumption of a proceeding, a complaint about the judgment of the court of appeal, and an extraordinary complaint. There is no doubt that it is

---

[7] J. Kosonoga, *System środków dyscyplinujących uczestników postępowania karnego*, Warszawa, 2014, p. 345.

[8] The Supreme Court resolution of 12 January 2006, SNO 61/05, LEX No. 569039.

permissible to submit a notification of a gross breach of procedural obligations by a prosecutor in the course of investigation or inquiry that the court found while performing activities in the preparatory proceeding, because Article 20 § 2 CCP does not require that the court find it in the course of the court proceeding. It is not clear whether the court also has the right when it finds a gross breach of procedural obligations by a prosecutor participating in a session in which the court performs procedural activities in a preparatory proceeding. A prosecutor participating in such a session neither acts as a public prosecutor nor as a person conducting a preparatory proceeding. In the course of these activities, a prosecutor, in accordance with Article 299 § 3 CCP, has the rights of a party.

In the literature, however, such possibility is rightly allowed based on reference made to teleological interpretation. It is argued that notification is not intended to improve the future work of given bodies in other proceedings, but mainly in the ongoing proceeding, so that the gross breach of procedural obligations does not hinder or prevent the achievement of the objectives of the proceeding.[9]

2. PROSECUTOR

In preparatory proceedings, a prosecutor has the exclusive right to make a notification. Article 20 § 2 in fine CCP indicates that 'also' a prosecutor has the right. The word 'also' 'signals that the given state of things is to some extent similar to another one, especially the one mentioned earlier'.[10] Thus, the its use before the word 'prosecutor' means that they, alongside the court, have the right to make a notification of a gross breach of procedural obligations by a person conducting a preparatory proceeding. This does not mean that the court has an unlimited right to use this institution. It is limited only to situations when they are revealed in a proceeding before the court.

A prosecutor is a person who meets the statutory requirements and is appointed to the position by the Prosecutor General at the request of the National Prosecutor (Article 74 § 1 and Article 75 of the Act of 28 January 2016 – Law on the Prosecution Service).[11] The right is also granted to an assessor of the prosecution service holding the so-called *votum*, i.e., entrusted by the Prosecutor General with the task of performing prosecution activities for a period of up to three years, without the right to: (1) participate in proceedings before the appellate court and a proceeding before the regional court, with the exception of first instance proceedings in cases in which they conducted preparatory proceedings; (2) appear before the Supreme Court, and prepare appeals and applications to the Supreme Court (Article 173 § 1). The notification they draft is not subject to their immediate superior prosecutor's approval, because it is not listed in Article 173 § 2 LPS as one that is subject to this activity.

---

[9] M. Kurowski, in: *Kodeks…*, op. cit., p. 144.

[10] B. Dunaj (ed.), *Nowy słownik języka polskiego*, Warszawa, 2005, p. 610.

[11] Journal of Laws of 2024, item 390, hereinafter referred to as 'LPS'.

NOTIFICATION SUBJECT MATTER

1. PROCEDURAL OBLIGATIONS AND A GROSS BREACH OF THEM

The source of the notification of both the court and prosecutor, in terms of the subject matter, is a gross breach of procedural obligations. A breach of procedural obligations means a discrepancy between the conduct required in a given procedural situation, corresponding to the standards of proper performance of duties, and the conduct of a particular participant in the proceeding.[12]

The clarification that it concerns procedural obligations indicates their limitation to obligations resulting from the provisions of the Code of Criminal Procedure and other legal acts. This is to be a breach of obligations in the course of a specific proceeding and in connection with it.

Not every breach of procedural obligations constitutes grounds for the notification, but only one that is gross. The word *gross (flagrant)* in various forms is also used in Article 20 § 1, Article 438(4), and Article 523 § 1 CCP. Taking into account the interpretation directive prohibiting homonymous interpretation, according to which the same phrases should not be given different meanings,[13] one can use the achievements of the doctrine and case law developed also on the basis of these provisions to interpret this term. The Supreme Court, based on Article 523 § 1 CCP, argued that a gross breach of law occurs when: it is very serious,[14] it is unquestionable and obvious,[15] it is easy to ascertain and of such gravity that it is of key importance for the correctness of the proceeding,[16] it is serious and plays an important role in resolving the case,[17] it is of such gravity and significance that it may be comparable to the rank of absolute grounds for appeal,[18] it is of clear, unquestionable nature that can be easily recognised, as well as when its gravity is of serious nature.[19]

---

[12] J. Karaźniewicz, 'Dyscyplinowanie obrońców i pełnomocników za pomocą sygnalizacji w świetle ograniczonego prawa do ingerencji organu procesowego w relacje między stroną a jej profesjonalnym przedstawicielem procesowym', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017, p. 135.

[13] L. Morawski, *Wstęp do prawoznawstwa*, Warszawa, 2014, p. 148; ruling of the Supreme Court of 6 September 2000, III KKN 337/00, ONSKW 2000, No. 9–10, item 81.

[14] Ruling of the Supreme Court of 9 July 2024, IV KK 184/24, LEX No. 3732534.

[15] Ruling of the Supreme Court of 8 May 2024, II KK 114/24, LEX No. 3722225.

[16] Ruling of the Supreme Court of 28 June 2024, II ZK 32/24, LEX No. 3748598.

[17] Ruling of the Supreme Court of 27 March 2024, IV KK 77/24, LEX No. 3704211; ruling of the Supreme Court of 13 December 2023, III KK 525/23, LEX No. 3717616; ruling of the Supreme Court of 29 November 2023, II KK 436/23, LEX No. 3637303; ruling of the Supreme Court of 27 September 2023, III KK 384/23, LEX No. 3609488; ruling of the Supreme Court of 26 April 2023, II KK 99/23, LEX No. 3572500; ruling of the Supreme Court of 1 February 2023, IV KK 9/23, LEX No. 3521810.

[18] Ruling of the Supreme Court of 21 February 2024, II ZK 92/22, LEX No. 3694891.

[19] Ruling of the Supreme Court of 24 January 2024, V KK 485/23, LEX No. 3672343; ruling of the Supreme Court of 6 December 2023, IV KK 435/23, LEX No. 3717552; ruling of the Supreme Court of 6 December 2023, IV KK 430/23, LEX No. 3717551; ruling of the Supreme Court of 18 October 2023, V KK 379/23, LEX No. 3617433.

The Polish word *rażące* [gross/flagrant] means 'too clear, obvious, unquestionable, beyond doubt; one that is conspicuous, impossible not to notice',[20] 'clear, striking'[21] and 'obvious, indisputable, beyond doubt, great, striking, significant, distinct'.[22] Having the above in mind, one can assume *mutatis mutandis* that a gross breach of procedural obligations occurs when it is beyond doubt and obvious, and has key importance for the correctness of the proceeding, in particular affecting the procedural guarantees of the accused or the aggrieved party. This concerns a clear and significant breach of an obligation. It is rightly noted in the literature that a gross breach of a procedural obligation is one that has additional features in comparison with an 'ordinary' breach.[23] It limits the notification to indisputable violations constituting a clear and significant breach of procedural obligations. This is an evaluative circumstance, which gives a body freedom to decide whether it should actually make a notification in the given circumstances.[24] It is also rightly indicated that the question whether the violation of specific procedural obligations is flagrant is not asked *in abstracto*, but only *ad casum*, taking into account whether it has had or could have had an exceptionally drastic effect on the procedural situation of the accused.[25]

What may be helpful for the assessment are the regulations contained in the Collection of Principles of Professional Ethics, which is an annex to the resolution of the National Council of Prosecutors at the Prosecutor General's Office of 12 December 2017.[26] They stipulate, *inter alia*, that a prosecutor is obliged to observe the law and public decency (§ 2 (1)), not to behave in a manner that could bring discredit on the dignity of the prosecutor or undermine trust in the office they hold (§ 3 (2)), as well to avoid behaviour and situations that could undermine trust in their independence, impartiality and professional integrity or give the impression of a lack of respect for the law (§ 4 (1)).[27] The impact of a breach of procedural obligations on the procedural guarantees of the participants in the proceeding, in particular the accused and the aggrieved party, should be an important circumstance decisive for such an assessment. It is rightly emphasised in the literature that irregularities have a negative impact on the rights of the aggrieved party, and it is primarily argued that, in accordance with Article 2 § 1 (3) CCP, the legally protected interests of the

---

[20] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 35, Poznań, 2002, p. 265.

[21] M. Szymczak (ed.), *Słownik języka polskiego PWN*, Vol. 2, Warszawa, 1998, p. 22; S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 4, Warszawa, 2003, p. 33.

[22] W. Doroszewski (ed.), *Słownik języka polskiego*, Vol. 7, Warszawa, 1965, p. 841.

[23] S. Kowalski, *Sygnalizacja*…, op. cit., p. 70.

[24] A. Małolepszy, 'Przesłanki odpowiedzialności porządkowej obrońcy za niedopełnienie obowiązków procesowych w toku postępowania karnego', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warszawa, 2011, p. 453.

[25] Z. Gostyński, S. Zabłocki, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I. Warszawa, 2003, p. 333.

[26] https://www.gov.pl/web/prokuratura-krajowa/zbior-zasad-etyki-zawodowej-prokuratorow [accessed on 23 December 2024].

[27] Judgment of the Supreme Court of 19 March 2015, SDI 5/15, LEX No. 1663832; thus also J. Kosonoga in: *Kodeks*…, op. cit., p. 352; C. Kulesza, in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, p. 83.

aggrieved party should be taken into account.[28] In this context, the view presented in the case law that

> 'The person conducting an investigation should allow the parties to the proceeding to participate in an activity that cannot be repeated at the main trial (Article 272 § 1d CCP and Article 316 § 1 CCP) deserves approval. Such actions should include the inspection of an item if it is to be handed over to an authorised person (Article 199d CCP), the removal of elements from it in order to use them for evidence related purposes, etc. Therefore, if these persons request participation in the activities, they should be notified of their place and date, and in the absence of proof of delivery of the notification to the non-appearing persons, the activities should be postponed (Article 102 §§ 1–3d CCP and Article 117 §§ 1–2 CCP). Failure to do so may affect the outcome of the case, because it deprives the parties of the opportunity to raise objections to the state of the exhibit.'[29]

It is indicated in the doctrine that such activities include: failure to apply to the court for the appointment of public counsel for the defence despite the existence of circumstances justifying mandatory defence and the accused not having an attorney of their choice; failure to inform the suspect of their rights contrary to the requirements under Article 300 CCP; failure to inform a witness about the right to refuse to testify although they have such a right and having their testimony taken; use or approval of the use of prohibited methods of questioning under Article 171 § 5 CCP; failure to make the required change of charges (Article 314 CCP); a public prosecutor's failure to supplement formal deficiencies of the indictment within the deadline required under Article 337 § 3 CCP; a public prosecutor's unjustified failure to appear at a trial; failure to submit translations of procedural documents drafted by them and submitted to the court into the language used by the accused;[30] violation of the freedom of speech;[31] failure to present one's stance on the planning and organisation of the main hearing on time or presenting it in a cursory or incomplete form, which may significantly prolong the proceeding;[32] failure to start dealing with the suspect's request to appoint counsel for the defence or proxy;[33] inconsistency of the indictment with the materials collected during the preparatory proceeding; lack of evidencing initiative; failure to prepare to participate in the taking of evidence; issuing a decision to discontinue a proceeding without substantive justification;[34] and exceeding the five-day deadline for questioning the suspect in the proceeding within the necessary scope.[35]

---

[28] J. Kosonoga, *System środków*…, op. cit., p. 369.

[29] Judgment of the Appellate Court in Kraków of 3 September 1998, II AKa 155/98, KZS 1998, No. 10, item 29.

[30] T. Grzegorczyk, *Kodeks*…, pp. 157–158.

[31] R. Koper, *Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym*, Warszawa, 2022, pp. 434–435.

[32] B.J. Stefańska, 'Rola prokuratora w posiedzeniu przygotowawczym sądu', in: Kala D., Zgoliński I. (eds), *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, Warszawa, 2018, p. 204.

[33] M. Kurowski, in: *Kodeks*…, op. cit., p. 146.

[34] J. Karaźniewicz, in: *Kodeks*…, op. cit., p. 159.

[35] P. Hofmański, E. Sadzik, K. Zgryzek, in: Hofmański P. (ed.), *Kodeks postępowania karnego. Komentarz do art. 1–296*, Warszawa, 2007, p. 174.

2. BODIES SUBJECT TO A BREACH OF PROCEDURAL OBLIGATIONS

The court's right to send the notification of a gross breach of procedural obligations applies to such violations committed by: (1) in jurisdictional proceedings – a public prosecutor, and (2) in a preparatory proceeding – a person conducting it.

A prosecutor has this right only in the event the body conducting a preparatory proceeding is other than a prosecutor (of the Prosecution Service).

2.1. PUBLIC PROSECUTORS

In accordance with Article 45 § 1 CCP, a prosecutor is a public prosecutor before the court.[36] A prosecutor, and not the prosecution service, has this status because a prosecutor is a procedural body and the term is used in the Code of Criminal Procedure, e.g., in Article 18 § 1, Article 45 § 1, Article 231 § 1, Article 298 § 1 therein. A prosecutor is an individual procedural entity equipped with authoritative powers, and an organisational unit of the prosecution service is an office that provides organisational and technical support for tasks performed by prosecutors.[37]

This may be an assessor to the prosecution service, either one that has the so-called *votum* or one that does not have it. The former, as was indicated earlier, is authorised to perform prosecution activities, including those falling within the scope of public prosecutor's ones (Article 173 § 1 LPS). The latter, who is not authorised to perform prosecution activities, may act as a public prosecutor in cases in which an investigation was conducted (Article 173 § 3 LPS).

This may also be a prosecutor trainee who, having completed a 12-month prosecution service training, may appear before the district court as a public prosecutor in cases concerning crimes carrying a penalty not exceeding five years of deprivation of liberty or a more lenient penalty, as well as in an execution proceeding before this court (Article 183 § 3 LPS).

A public prosecutor may also be another state body that derives this right from special statutory provisions that define the scope of their activities (Article 45 § 1 CCP) or a regulation issued pursuant to Article 325d CCP. The following may act in such capacity pursuant to special statutes:

– a forest ranger, forest manager, deputy forest manager, supervisory engineer, forester and deputy forester, provided that the object of the offence is timber from forests owned by the State Treasury (Article 47 (2)(7) and Article 48 of the Act of 29 September 1991 on Forests[38]). Although these entities do not have the status of a state body required under Article 45 § 2 CCP, as rightly indicated

---

[36] For more see R.A. Stefański, 'Oskarżyciel publiczny', in: Kulesza C. (ed.), *System prawa karnego procesowego. Strony i inni uczestnicy postępowania karnego*, Vol. VI, Warszawa, 2016, pp. 151–211.

[37] J. Smoleński, 'Prawno-ustrojowe problemy prokuratury', *Państwo i Prawo*, 1963, No. 1, pp. 78–79; H. Zięba-Załucka, *Instytucja prokuratury w Polsce*, Warszawa, 2003, p. 88; W. Grzeszczyk, 'Prokurator jako organ procesowy', *Prokuratura i Prawo*, 2003, No. 11, p. 163; R.A. Stefański, 'Prokurator jako organ postępowania karnego', in: Kwitkowski Z. (ed.), *System prawa karnego procesowego. Sądy i inne organy postępowania karnego*, Vol. V, Warszawa, 2015, pp. 831–840.

[38] Journal of Laws of 2024, item 530 as amemded.

in the doctrine, Article 45 § 2 CCP does not have superior rank over this Act; it is permissible to authorise these entities to act as public prosecutors. Article 47(2)(7) of this Act is *lex specialis* in relation to Article 45 § 2 CCP;[39]

– a warden of the State Hunting Guard in cases concerning offences against game (Article 39(2)(7) of the Act of 13 October 1995: Game Law[40]).

In accordance with § 1 of the Regulation of the Minister of Justice of 22 September 2015 on bodies authorised, in addition to the Police, to conduct investigations and bodies authorised to bring and support charges before the court of first instance in cases in which an investigation was conducted, as well as the scope of matters assigned to these bodies,[41] the following entities may conduct investigations and bring and support charges before the court of first instance within this scope, i.e., act as public prosecutors:

(1) bodies of the Trade Inspection in cases concerning offences they recognise in the course of inspection that are specified in Article 43(1) and (2) and Article 453(1) of the Act of 26 October 1982 on upbringing in sobriety and preventing alcoholism[42] and Article 38 of the Act of 15 December 2000 on the Trade Inspection;[43]
(2) bodies of the State Sanitary Inspection in cases concerning offences specified in Article 37b of the Act of 14 March 1985 on the State Sanitary Inspection,[44] Articles 96–99 of the Act of 25 August 2006 on the Security of Food and Feeding[45] and in Articles 31–34, Article 36–40, Article 50 and Article 51 of the Act of 25 February 2011 on Chemical Substances and Their Mixtures;[46]
   – in cases concerning offences specified in Articles 77–79 of the Act of 29 September 1994 on Accounting;[47]
(3) the head of a customs-tax office within the scope of customs-tax inspection;
(4) the head of a revenue office in other cases.[48]

Also, bodies of the Border Guard are authorised to bring and support charges before the court in cases concerning offences specified in Article 264 § 2, Article 264a § 1, Article 270, Article 271 §§ 1 and 2, and in Articles 272–277 CC, in Article 464 of the Act of 12 December 2013 on Foreigners,[49] in Article 125 of the Act of 13 June 2003 on the Provision of Protection to Foreigners in the Territory of the Republic

---

[39] S. Steinborn, 'Nieprokuratorskie organy oskarżycielskie', in: Kulesza C. (ed.), *System prawa karnego procesowego. Strony i inni uczestnicy postępowania karnego*, Vol. VI, Warszawa, 2016, pp. 213–214.

[40] Journal of Laws of 2023, item 1082.

[41] Journal of Laws of 2018, item 522.

[42] Journal of Laws of 2023, item 2151, as amended.

[43] Journal of Laws of 2024, item 312, as amended.

[44] Journal of Laws of 2024, item 416, as amended.

[45] Journal of Laws of 2023, item 1448.

[46] Journal of Laws of 2022, item 1816, as amended.

[47] Journal of Laws of 2023, item 120, as amended.

[48] § 1 (5) of this Regulation grants the President of the Office of Electronic Communications the right to carry out an investigation related to the offences laid down in Article 208(2) of the Act of 16 July 2004 – Telecommunications Law (Journal of Laws of 2024, item 34, as amended), but the provision was repealed by Act of 12 July 2024 – Provisions Introducing Act: Electronic Communications Law (Journal of Laws of 2024, item 1222), and thus the right has lapsed.

[49] Journal of Laws of 2024, item 769, as amended.

of Poland,[50] and in Article 9 and Article 10(1) and (2) of the Act of 15 June 2012 on the Employment of Foreigners Illegally Staying in the Territory of the Republic of Poland.[51]

2.2. BODIES CONDUCTING PREPARATORY PROCEEDINGS

Bodies that may carry out preparatory proceedings include: a prosecutor, an assessor to the prosecution service holding the so-called *votum*, the Police (Article 298 § 1 CCP) and bodies listed in Article 312 § 1 CCP within the scope of their competence, i.e., the bodies of the Border Guard (Article 9(1) in conjunction with Article 1(2)(4) of the Act of 12 October 1990 on the Border Guard[52]), the Internal Security Agency (Article 5(1)(2) of the Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency[53]), the National Revenue Administration (Article 2(1)(15) and (16), Article 28(1)(11), Article 33(1)(9) and (10) of the Act of 16 November 2016 on the National Revenue Administration[54]), the Central Anti-Corruption Bureau (Article 2(1)(1) of the Act of 9 June 2006 on the Central Anti-Corruption Bureau[55]) and the Military Police (Article 3(2)(1)–(7) of the Act of 24 August 2001 on the Military Police and Military Order Bodies[56]). The above-mentioned bodies playing the roles of public prosecutors in the cases they carry out also have those rights (Article 312 § 2 CCP).

In the context of the body conducting a preparatory proceeding, the question arises whether the notification analysed may also concern a prosecutor supervising a preparatory proceeding. In jurisprudence, it is claimed that Article 20 § 2 CCP should be broadly interpreted and also cover supervisory activities, which by their nature fundamentally affect the manner of conducting a preparatory proceeding, although it is noted that since this provision only refers to the body conducting a preparatory proceeding, it does not cover supervisory activities, especially since Article 326 § 1 CCP clearly distinguishes between both types of procedural activity. It is argued that a prosecutor who is *dominus eminens* is obliged to ensure the proper and efficient course of the entire proceeding they supervise (Article 326 § 2 CCP), and thus they have actual influence on the course of procedural activities, and their procedural duty is to take care of the course of the proceeding. A different interpretation would be at odds with the role a supervising prosecutor plays in a preparatory proceeding and would lead to depriving the court of the possibility of reacting to a gross breach of procedural obligations resulting from supervision, which would be in conflict with the *ratio legis* of Article 20 § 2 CCP. In order to eliminate these doubts, it is rightly proposed *de lege ferenda* to add the words

---

50 Journal of Laws of 2023, item 1404.
51 Journal of Laws of 2021, item 1745.
52 Journal of Laws of 2024, item 915, as amended.
53 Ibidem.
54 Journal of Laws of 2023, item 615, as amended.
55 Journal of Laws of 2024, item 184, as amended.
56 Journal of Laws of 2023, item 1266, as amended.

'or supervising' after the word 'conducting' a preparatory proceeding in Article 20 § 2 CCP.[57]

A prosecutor's powers to notify about a gross breach of procedural obligations in a preparatory proceeding are limited to the Police and other bodies conducting such proceedings. The form of a preparatory proceeding is irrelevant; it may be an investigation entrusted to the Police or another body to be conducted as a whole or to a specific extent. It may also be individual investigative activities entrusted to such bodies for execution (Article 311 § 2 CCP).

The subject matter of a prosecutor's notification cannot be a gross breach of procedural obligations by a prosecutor. The omission of a prosecutor under Article 20 § 2 *in fine* CCP is justified by the fact that there is no such need, since the superior prosecutor has at their disposal different means of response to a breach of official duties committed by a subordinate prosecutor, including procedural ones, which are provided for in the Act on the Prosecution Service.

A superior prosecutor:

(1) may give a written admonition to a prosecutor who committed a significant irregularity affecting the efficiency of a preparatory proceeding and request that the consequences of such irregularities be removed (Article 7 § 7 (1) and Article 139 § 1 LPS). A prosecutor concerned may, within seven days, submit a written objection to the superior prosecutor who gave them the admonition; however, this does not release them from the obligation to immediately remove the consequences of the irregularities. The admonished prosecutor shall inform the superior prosecutor about the activities taken for this purpose. In the event an objection is filed, the superior prosecutor who gave it shall either cancel it or refer it for hearing to a disciplinary court. Having heard a disciplinary spokesman and the admonished prosecutor, provided the hearing is possible, the disciplinary court shall issue a decision upholding the admonition or waiving it and discontinuing the proceeding. The disciplinary court's decision is not subject to appeal (Article 139 §§ 2–4 LPS). In the literature, a conclusion is rightly drawn from the requirement that the irregularity be significant that it concerns such irregularities that may cause procedural consequences of key significance[58] and cannot be classified as actions or omissions that may prevent or significantly hinder the functioning of the justice system or the prosecution service because in the latter case the perpetrator would incur disciplinary liability (Article 137 § 1 (2) LPS);[59]

(2) in the event of an obvious contempt of the legal provisions in the course of a proceeding, regardless of other rights, having requested explanations, points out this irregularity to the prosecutor who committed it. The finding and pointing out of the irregularity does not affect the resolution of the case; it only indicates the irregularity in accordance with the principles laid down in Article 140 (Article 7 § 7 LPS). The Supreme Court rightly indicated that:

---

[57] J. Kosonoga, *System środków*…, op. cit., pp. 367–368; C. Kulesza, in: *Kodeks*…, op. cit., p. 83.

[58] P. Czarnecki, 'Odpowiedzialność służbowa prokuratorów', in: Mistygacz M., Staszak A., Wszołek R. (eds), *Prokuratura wobec współczesnych wyzwań ustrojowych*, Warszawa, 2024, p. 174.

[59] P. Turek, *Prawo o prokuraturze. Komentarz*, Warszawa, 2023, p. 416.

> 'The contempt is obvious when the error committed is easy to determine, when the provision can be applied without a deeper analysis, when the understanding of the provision of law should not raise any doubts in the mind of an ordinary person with legal qualifications.'[60]

A prosecutor reproached for the irregularity may, within seven days, submit a written objection to a superior prosecutor who reproached them, however, this does not release them from the obligation to remove the effects of the irregularity. In the event of an objection, the superior prosecutor who reproached their subordinate for the irregularity shall either cancel the reproach or refer it for hearing to a disciplinary court. Having heard a disciplinary spokesman and the reproached prosecutor, provided that the hearing is possible, the disciplinary court shall issue a decision upholding the reproach for the irregularity or shall waive it and discontinue the proceeding. The decision on dismissing the objection lodged by the prosecutor reproached for the irregularity committed, may be appealed against. A different equivalent bench of the same disciplinary court shall hear the appeal (Article 140 §§ 2–4 LPS). The measure shall be applied in the event of an obvious, but not necessarily gross, contempt of law.[61]

These are the means of professional liability of prosecutors, which is supported by the placement of the provisions regulating them in the Act on the Prosecution Service, in Chapter 3 entitled 'Criminal, disciplinary and professional liability of prosecutors'.[62] The Supreme Court rightly indicated that:

> 'The institution of "prosecutor's reproach" as well as "a written admonition" are legal and administrative instruments used for disciplining prosecutors officially. They are of a signalling nature, aimed at correcting errors found in current work and avoiding similar flagrant irregularities in the application of law in the future. They differ from disciplinary measures that are only aimed at repression and punishment of the perpetrator of the given irregularity. The competence of the superior is limited to the possibility of initiating such proceedings, and the penalty is the matter to be resolved by a disciplinary court.'[63]

In the event of an obvious and gross contempt of the provisions of law, a superior prosecutor is obliged to request the initiation of a disciplinary proceeding against a prosecutor who committed it (Article 7 § 8 LPS). In accordance with Article 137 § 1 (1) LPS, a prosecutor is disciplinarily liable for professional (disciplinary) misconduct, including obvious and flagrant contempt of the provisions of law.

---

[60] Judgment of the Supreme Court of 4 September 2003, SNO 51/03, OSNSD 2003, No. 2, item 54.

[61] P. Turek, *Prawo o prokuraturze*…, op. cit., p. 419.

[62] P. Czarnecki, 'Odpowiedzialność służbowa…', op. cit., p. 173; A. Kiełtyka, W. Kotowski, W. Ważny, *Prawo o prokuraturze. Komentarz*, Warszawa, 2017, p. 542.

[63] Judgment of the Supreme Court of 24 September 2019, II DSI 56/19, OSNID 2020, No. 3. Thus also E. Gromek-Kukuryk, 'Odpowiedzialność służbowa o odpowiedzialność dyscyplinarna prokuratorów w świetle ustawy Prawo o prokuraturze', *Studia Prawnicze i Administracyjne*, 2018, No. 4, pp. 15–20.

NOTIFICATION ADDRESSEES

The court *verba legis* shall notify the immediate superior of the person who committed the irregularity (Article 20 § 2 CCP). Taking into account that it concerns an act committed by a public prosecutor or a person conducting a preparatory proceeding, the addressee of the notification is an immediate superior of the public prosecutor or a person conducting a preparatory proceeding. A superior is a person who 'has some authority, commands, manages, is a person in charge',[64] and an immediate superior is a superior who has authority over some persons directly, without anyone's intermediation. Indication of such a person requires an analysis of the organisational structure of a given body. Some constitutional acts or implementing acts issued based on them define superiors and immediate superiors.

In accordance with Article 31 § 1 LPS, immediate superior prosecutors include:

(1) Prosecutor General – in relation to the National Prosecutor and deputies of the Prosecutor General and Deputy National Prosecutors;
(2) National Prosecutor – in relation to prosecutors performing tasks in the National Prosecutor's Office, directors of departments of the National Prosecutor's Office, and regional prosecutors;
(3) other deputies of the Prosecutor General, within the scope of assigned tasks – in relation to prosecutors performing tasks in the National Prosecutor's Office, directors of departments of the National Prosecutor's Office, and regional prosecutors;
(4) Director of the Department for Organised Crime and Corruption – in relation to heads of Branches of the Department for Organised Crime and Corruption of the National Prosecutor's Office and prosecutors performing tasks in these departments;
(5) regional and provincial prosecutors and their deputies, within the scope of the assigned tasks – in relation to prosecutors performing tasks in a given unit and in relation to heads of organisational units of the prosecution service at the directly lower level in the territory of operation of a given unit, with the exception of prosecutors performing tasks in a given centre or district prosecutors in the territory of operation of a given branch centre of the provincial prosecution office;
(6) heads of branch centres of the provincial prosecution offices and, within the scope of assigned tasks, their deputies – in relation to prosecutors performing activities in a given branch centre of the provincial prosecution office;
(7) district prosecutors and, within the scope of assigned tasks – in relation to prosecutors of the given district prosecution office;
(8) heads of branch centres of district prosecution offices – in relation to prosecutors performing tasks in these centres.

Under Article 174 § 1 LPS, the provision is also applicable to assessors to the prosecution service.

---

[64] H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 33, Poznań, 2001, p. 347.

Directors of departments and bureaus of the National Prosecutor's Office, heads of sections, departments and bureaus of the National Prosecutor's Office, as well as departments in regional and provincial prosecution offices, and heads of sections in prosecution offices and branch centres of the regional and provincial prosecution offices are not immediate superior prosecutors. A prosecutor managing an organisational substructure in an organisational unit of the prosecution service, in accordance with Article 31 § 2 LPS, is an official superior in relation to prosecutors performing tasks in this unit.[65]

The Law on the Prosecution Service does not indicate an immediate superior prosecutor in relation to prosecution trainees acting as public prosecutors. As a result, a question arises as to whom the court should send a notification of a gross breach of procedural obligations by such a trainee. There is no obstacle to treating such a notification as a complaint, which – under Article 186 § 2 LPS – is subject to hearing by a prosecutor managing the organisational unit of the prosecution service.

As regards other bodies conducting preparatory proceedings or acting as public prosecutors, their immediate superiors determined in legal acts are:

(1) in the Police: a person holding a position directly superior to the position held by a given police officer, starting from the head of a county area (equivalent) or a platoon commander – (§ 1 (6) of the Regulation of the Minister of the Interior of 14 May 2013 concerning detailed rights and obligations and the course of police officers' service[66]);
(2) in the Border Guard: a person holding a managerial position directly superior to the position held by an officer subject to appraisal, staring from a platoon commander (equivalent) – § 5 (1) of the Regulation of the Minister of the Interior and Administration of 17 June 2002 concerning periodic appraisal of the officers of the Border Guard[67]);
(3) in the Internal Security Agency: a superior holding a position not lower than a head of section or an equivalent one to whom an officer reports directly (§ 1a (1) of the Regulation of the President of the Council of Ministers of 3 March 2011 on giving opinions on the officers of the Internal Security Agency and a specimen of the official opinion form;[68] § 2 (6) of the Regulation of the President of the Council of Ministers of 13 February 2003 concerning the attainment of the ranks of officers of the Internal Security Agency[69]).

Immediate superiors in other bodies are persons managing separate organisational units in relation to persons performing tasks in these units. And thus:

– organisational units of the Military Police include: (1) General Headquarters of the Military Police; (2) territorial organisational units of the Military

---

[65] R.A. Stefański, 'Nadzór służbowy prokuratora nad postępowaniem przygotowawczym', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017, p. 398.

[66] Journal of Laws of 2023, item 2269.

[67] Journal of Laws of 2023, item 2413.

[68] Journal of Laws of 2024, item 204.

[69] Journal of Laws of 2024, item 225.

Police: (a) detachments of the Military Police; (b) divisions of the Military Police; (3) specialist organisational units of the Military Police. The detachments or divisions of the Military Police may contain outposts of the Military Police as their internal units located outside (Article 7(1)–(2a) AMP). In addition, the Military Police is composed of the following functional divisions: (1) investigative; (2) preventive; (3) administrative-logistical-technical (Article 8(1) AMP). The functional operational-investigative division is composed of: (1) the Criminal Directorate in the General Headquarters of the Military Police; (2) criminal departments in the Military Police branches; (3) criminal sections in the MP departments (§ 2 of Regulation No. 11/MON of the Minister of National Defence of 21 April 2020 concerning the establishment of the operational-investigative department of the Military Police[70]);

– the Central Anti-Corruption Bureau is composed of: (1) Departments (Operational-Investigative, Security, Inspection Proceedings, Analytical); (2) Bureaus (Operational Technique, Legal, Finance, Human Resources and Training, Logistics, Telecommunications, Secretariat); (3) Agencies of the Central Anti-Corruption Bureau in voivodeship cities. The Central Anti-Corruption Bureau units may have departments located outside (§ 2 (1) and (2) of the Statute of the Central Anti-Corruption Bureau, which is an annex to Regulation No. 72 of the President of the Council of Ministers of 6 October 2010 on granting the Central Anti-Corruption Bureau a statute;[71]
– units of the National Revenue Administration include: (1) organisational units of the Minister of Development and Finance; (2) the National Fiscal Information; (3) fiscal administration chambers; (4) fiscal offices; (5) customs-fiscal offices together with customs departments subordinate to them; (6) the National Fiscal School (Article 36(1) of the Act on the National Revenue Administration). There are also agencies of the National Fiscal Information and customs-fiscal offices.[72] The detailed organisational structure of the units listed in paras. (1)–(6) herein is specified in the Regulation of the Minister of Finance of 5 February 2019 concerning the organisational structure of the National Fiscal Information, fiscal administration chambers, fiscal offices and customs-fiscal offices, and granting them statutes,[73] as well as in the statutes granted by this Regulation;
– units of the Forest Guard in the State Forests include: (1) outposts in forest districts subordinate to forest managers; (2) intervention groups in regional front offices of the State Forests subordinate to the director of the regional front office of the State Forests. The Forest Guard is managed by the Chief Inspector of the

[70] Official Journal of the Ministry of National Defence of 2020, item 69.
[71] Monitor Polski of 2010, No. 76, item 953, as amended.
[72] Regulation of the Minister of Development and Finance of 1 March 2017 concerning the establishment of agencies of the organisational units of the National Revenue Administration and the territorial range of their operation and location (Official Journal of the Ministry of Finance of 2024, item 93).
[73] Official Journal of the Ministry of Finance of 2023, item 61.

Forest Guard subordinate to the Director General (Article 47(1a) and (1b) of the Act on Forests);[74]

– the Voivodeship Trade Inspection, which is part of the consolidated government administration in a voivodeship, is managed by the voivodeship inspector of the Trade Inspection (Article 5(1)(2) of the Act on the Trade Inspection). The President of the Office of Competition and Consumer Protection manages the activities of the Inspection with the assistance of the Office of Competition and Consumer Protection (Article 7(1) ATI). The voivodeship inspectorate consists of: (1) inspection departments; (2) departments for out-of-court resolution of consumer disputes or multi-person workstations for out-of-court resolution of consumer disputes; (3) legal and organisational department; (4) budget and administration department; (5) secretariat of the permanent arbitration court. The voivodeship inspection agencies consist of an inspection team or teams (§ 2 (1) and § 3 (2) of the Regulation of the President of the Council of Ministers of 26 July 2001 concerning the organisational structure of the voivodeship inspectorates of the Trade Inspection);[75]
– the organisational units of the State Sanitary Inspection include: (1) Chief Sanitary Inspectorate; (2) voivodeship sanitary-epidemiological stations; (3) county sanitary-epidemiological stations; (4) border sanitary-epidemiological stations (Article 7(3) and Article 10(4) of the Act on the State Sanitary Inspection). The structure of sanitary-epidemiological stations is determined in their statutes. For example, Annexes No. 1–39 to the Regulation of the Minister of Health of 11 October 2002 concerning the granting of statutes to the Voivodeship Sanitary-Epidemiological Station in Warsaw and county sanitary-epidemiological stations in the Mazovian Voivodeship.[76]

Wardens of the State Hunting Guard are employees of the voivodeship offices (Article 38(2) of the Game Law).

NOTIFICATION PROCEEDINGS

The body authorised to submit the notification, as indicated earlier, is the court or a prosecutor. Taking the decision is mandatory. There is a phrase 'the court shall notify' used in Article 20 § 2 CCP, and this declarative mode expresses the obligation to act. Nevertheless, the evaluative premises for taking such an action

---

[74] The organisational structure and scope of operation of the Forest Guard outposts in forest districts and the intervention groups of the Forest Guard in regional front offices of the State Forests are specified in Annex No. 1 'Organisational structure and scope of operation of outposts of the Forest Guard in forest districts and intervention groups of the Forest Guard in regional front offices of the State Forests' to the Regulation No. 69 of the Director General of the State Forests of 14 November 2019 concerning the determination of the organisational structure and scope of operation of outposts of the Forest Guard in forest districts and intervention groups of the Forest Guard in regional front offices of the State Forests, and detailed rules of training forest rangers (Official Bulletin of the State Forests of 2019, No. 12, item 141).

[75] Journal of Laws of 2018, item 1173.

[76] Official Journal of the Ministry of Health of 2002, No. 10, item 56.

give the procedural body a lot of freedom in decision-making and thus mitigate the ruthlessness of the action.

The notification should indicate the name and function of the public prosecutor or the person conducting a preparatory proceeding who breached the procedural obligation, and the type of gross breach of this obligation.

An obligatory element of this notification consists in a request to send information about the action taken in response to the notification within a set deadline. Article 20 § 2 CCP explicitly states that it is necessary to include such a request. The deadline is to be strictly determined and cannot be shorter than 14 days. It is an indicative deadline; failure to meet it does not result in any negative procedural consequences. The Code of Criminal Procedure, unlike in the case of the notification of a gross breach of procedural obligations by counsel for the defence or proxy (Article 20 § 1a CCP), does not provide for a pecuniary penalty for failure to send information about actions taken within the set deadline. The court or prosecutor may only notify the superior of the person obliged to send information about the action taken. The inability to impose a pecuniary penalty in such a situation is criticised in the literature, as it violates the principle of equal treatment of the participants in the proceeding.[77] The effectiveness of the notification and the elimination of this inequality could be enhanced by the addition of § 2b to Article 20 CCP in the following wording: In the event of failure to submit information referred to in § 2 within a set deadline, at the request of the court or prosecutor, the superior of the person who committed this irregularity shall initiate official proceeding and inform the requesting party of its outcome. It is not justified to sanction this irregularity with a pecuniary penalty because it would lead to unequal treatment of employees of the state bodies.

The Code of Criminal Procedure does not indicate *expressis verbis* the form of notification. Article 93 § 1 CCP explicitly states that the court's notification takes the form of a decision. As far as a prosecutor's notification is concerned, there is no general provision that would specify what actions taken by them require the form of a decision, and such a requirement may result directly from the provision authorising them to undertake a given action or from its importance. Taking into account the fact that the notification is an important action – because a prosecutor recognises a gross breach of procedural obligations and requests that information about actions taken be sent within a set deadline, which can result in the initiation of a disciplinary proceeding – it is reasonable to opt for the form of a decision. There are no arguments for claiming that in court proceedings it has the form of a document signed by the president of the court, and in a preparatory proceeding – a document signed by the prosecutor.[78]

The court's or prosecutor's decisions are not subject to appeal. Due to the effects they have on the person concerned, it should be appealable; an appeal against a court's decision should be heard by a three-judge bench of the same court, and a complaint about a prosecutor's decision by a superior prosecutor.

---

[77] J. Grajewski, S. Steinborn, in: Paprzycki L.K. (ed.), *Kodeks postępowania karnego. Komentarz do art. 1–424*, Vol. I, Warszawa, 2013, p. 134.

[78] J. Skorupka, in: Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 89.

In the event of a breach committed by a prosecutor, the court shall send a copy of the notification to the Prosecutor General; in the event of a breach committed by a public prosecutor, the court shall send it to a competent body superior in relation to the immediate superior of this prosecutor (Article 20 § 2a CCP). This is intended to prompt the addressee of the notification to take effective measures to prevent the recurrence of similar irregularities and to draw adequate professional conclusions, thereby reinforcing the disciplinary value of this measure. It also allows for an appropriate response from bodies superior to the immediate superior of the person who committed the irregularity.[79] Superiors, like immediate superiors, are defined in certain legal acts, while in other cases they must be determined based on an analysis of the organisational structure of the respective bodies.

The below listed officials are superiors:

(1) In the Prosecution Service:
   A. the Prosecutor General is a superior of the prosecutors of the Prosecution Service organisational units and the prosecutors of the Institute of National Remembrance (Article 13 § 2 LPS);
   B. the National Prosecutor is a superior of the prosecutors of the National Prosecutor's Office and the prosecutors of other Prosecution Service organisational units (Article 18 § 2 LPS);
   C. a regional prosecutor is a superior of the prosecutors of the regional prosecution service, provincial prosecution offices, and prosecutors of district prosecution offices in the territory of operation of the regional prosecution service (Article 22 § 4 LPS);
   D. a deputy regional prosecutor is a superior in relation to the prosecutors of the regional prosecution service, the prosecutors of the provincial prosecution offices, and the prosecutors of the district prosecution offices within the territory of operation of the regional prosecution service (Article 22 § 5 LPS);
   E. a provincial prosecutor is a superior in relation to the prosecutors of the provincial prosecution service, as well as district prosecutors and prosecutors of district prosecution offices in the territory of operation of the provincial prosecution service (Article 23 § 4 LPS);
   F. a deputy provincial prosecutor is a superior in relation to the prosecutors of the provincial prosecution service, as well as district prosecutors and the prosecutors of the district prosecution offices in the territory of operation of the provincial prosecution service (Article 23 § 5 LPS);
   G. a district prosecutor is a superior of the prosecutors acting in this unit (Article 24 § 4 LPS); they are also a superior in relation to the prosecutors of other organisational units who perform activities in this district prosecution office, e.g., delegated prosecutors;
   H. a deputy district prosecutor is a superior in relation to the prosecutors performing activities in this unit within the scope determined by the district prosecutor (Article 24 § 5 LPS);

[79] J. Kosonoga, in: *Kodeks*…, op. cit., p. 365.

I. the Head of the Internal Affairs Department is a superior in relation to the prosecutors fulfilling their duties in this Department (Article 19 § 4 LPS);
J. the Head of the Branch of the Organised Crime and Corruption Department of the National Prosecution Service is a superior in relation to the prosecutors fulfilling their duties in this Department (Article 21 § 2 LPS).

(2) In the Police: the Chief Commander of the Police, the Commander of the Central Investigation Bureau of the Police, the Commander of the Internal Affairs Bureau of the Police, the Commander of the Central Counter-Cybercrime Bureau, the Director of the Central Forensic Laboratory of the Police, voivodeship commanders of the Police, or the Commander of the Metropolitan Police and county (city or regional) commanders of the Police, as well as the Commander--Rector of the Police Academy in Szczytno and commanders of police schools (Article 32(1) AP).
(3) In the Border Guard: the Chief Commander of the Border Guard, the Commander--Rector of the Higher School of Border Guard, the Commander of the Internal Affairs of the Border Guard, commanders of the Border Guard branches, and commanders of the Border Guard training centres (Article 36(1) ABG).
(4) In the Internal Security Agency: heads of the Agency's organisational units, the Deputy Head of the Internal Security Agency, and the Head of the Internal Security Agency (§ 2 (5) of the Regulation of the President of the Council of Ministers of 13 February 2003 on the attainment of the ranks of officers of the Internal Security Agency).[80]

The above-presented notification differs from the request of a prosecutor supervising a preparatory proceeding concerning the failure of a body that is not a prosecutor to implement their decision, ruling or instruction sent to the superior of the officer for information. It contains not only information about failure to implement a decision, ruling or instruction, but also a request for the initiation of an official proceeding. The prosecutor shall be informed about the outcome of this proceeding (Article 326 § 4 CCP).

CONCLUSIONS

1. The notification of a gross breach of procedural obligations by a public prosecutor or a person conducting a preparatory proceeding is one of the measures disciplining the participants in criminal proceedings that constitute a response of the procedural bodies to procedural irregularities.
2. The court is a body authorised to issue the notification in the proceeding before the court, and a prosecutor is one in a preparatory proceeding.

   The court issues such a notification in every proceeding before the court, including during the performance of activities in preparatory proceedings. The president of the court, the head of the division, and the judge presiding over

[80] Journal of Laws of 2024, item 225.

the bench do not have the right, which results from the linguistic interpretation of Article 20 § 2 CCP, which *expressis verbis* refers to the court.

A prosecutor has this right only in the course of a preparatory proceeding in relation to the Police and other bodies involved in the proceeding. It does not apply to the prosecutor conducting a preparatory proceeding because, regardless of the fact that a prosecutor is omitted in Article 20 § 2 *in fine* CCP, a superior prosecutor has other measures of response to breaches of professional, including procedural, obligations committed by a subordinate prosecutor, which are laid down in the Act on the Prosecution Service.

3. The subject matter of the notification is a gross breach of procedural obligations committed by a public prosecutor or a person conducting a preparatory proceeding, recognised in the course of a given preparatory proceeding, which is of an unquestionable nature and key importance for the correctness of the proceeding, in particular affecting the procedural guarantees of the accused and the aggrieved party.
4. The court's notification concerns the breach of obligations not only by a prosecutor acting as a public prosecutor, but also by other public prosecutors who are not prosecutors (of the Prosecution Service), such as state bodies having such rights based on special statutory provisions specifying the scope of their operation or provisions issued based on statute. The teleological interpretation of Article 20 § 2 CCP is in favour of applying the notification to prosecutors participating in a session concerning court activities in the preparatory proceeding. It is doubtful whether, within the scope of breaches committed in a preparatory proceeding, the notification can also cover a prosecutor supervising this proceeding. In order to eliminate all doubts in this respect, the *de lege ferenda* motion to supplement this provision with a prosecutor supervising a preparatory proceeding is justified.
5. The notification is addressed to a superior of a public prosecutor or a person conducting a preparatory proceeding. Indication of such a person requires an analysis of the organisational structure of the given body, although some acts or implementing acts issued based on them define immediate superiors, e.g., in relation to a prosecutor, a police officer, an officer of the Border Guard, or the Internal Security Agency.
6. The notification should indicate the name, surname, and function of the public prosecutor or the person conducting a preparatory proceeding who breached the procedural obligations. A request to send information about actions taken as a result of the notification within a set deadline is a mandatory element of the notification.
7. The decision of the court or prosecutor is not subject to appeal. However, due to the effects it has on the person concerned, it should be appealable; a complaint about the decision of the court should be dealt with by a three-judge bench of the same court, and of the prosecutor – by a superior prosecutor.
8. The Code of Criminal Procedure, unlike in the case of the notification of a gross breach of procedural obligations by counsel for the defence or proxy (Article 20 § 1a CCP), does not provide for the imposition of a pecuniary penalty for failure to submit information about actions taken within the set deadline. Failure to

sanction this omission in the discussed case may lead to disregarding this obligation and causes unequal treatment of the participants in a proceeding. Increasing the effectiveness of the notification and eliminating this inequality may result from the addition of § 2b to Article 20 CCP in the following wording: In the event of failure to submit information referred to in § 2 within a set deadline, at the request of the court or prosecutor, the superior of the person who committed this irregularity shall initiate official proceeding and inform the requesting party of its outcome.

BIBLIOGRAPHY

Czarnecki P., 'Odpowiedzialność służbowa prokuratorów', in: Mistygacz M., Staszak A., Wszołek R. (eds), *Prokuratura wobec współczesnych wyzwań ustrojowych*, Warszawa, 2024.

Doroszewski W. (ed.), *Słownik języka polskiego*, Vol. 7, Warszawa, 1965.

Dubisz S. (ed.), *Uniwersalny słownik języka polskiego*, Vol. 4, Warszawa, 2003.

Dunaj B. (ed.), *Nowy słownik języka polskiego*, Warszawa, 2005.

Gostyński Z., Zabłocki S., in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 2003.

Grajewski J., Steinborn S., in: Paprzycki L.K. (ed.), *Kodeks postępowania karnego. Komentarz do art. 1–424*, Vol. I, Warszawa, 2013.

Gromek-Kukuryk E., 'Odpowiedzialność służbowa o odpowiedzialność dyscyplinarna prokuratorów w świetle ustawy Prawo o prokuraturze', *Studia Prawnicze i Administracyjne*, 2018, No. 4.

Grzegorczyk T., *Kodeks postępowania karnego. Artykuły 1–467. Komentarz*, Vol. I, Warszawa, 2014.

Grzeszczyk W., 'Prokurator jako organ procesowy', *Prokuratura i Prawo*, 2003, No. 11.

Hofmański P., Sadzik E., Zgryzek K., in: Hofmański P. (ed.), *Kodeks postępowania karnego. Komentarz do art. 1–296*, Warszawa, 2007.

Karaźniewicz J., 'Dyscyplinowanie obrońców i pełnomocników za pomocą sygnalizacji w świetle ograniczonego prawa do ingerencji organu procesowego w relacje między stroną a jej profesjonalnym przedstawicielem procesowym', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017.

Karaźniewicz J., *Instytucja sygnalizacji w polskim procesie karnym*, Toruń, 2015.

Karaźniewicz J., in: Zagrodnik J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2024.

Kiełtyka A., Kotowski W., Ważny W., *Prawo o prokuraturze. Komentarz*, Warszawa, 2017.

Koper R., *Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym*, Warszawa, 2022.

Kosonoga J., *System środków dyscyplinujących uczestników postępowania karnego*, Warszawa, 2014.

Kosonoga J., in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Komentarz do art. 1–166*, Vol. I, Warszawa, 2017.

Kowalski S., 'Sygnalizacja rażącego naruszenia obowiązku procesowego przez radcę prawnego w postępowaniu karnym', *Radca Prawny. Zeszyty Naukowe*, 2023, No. 4.

Kulesza C., in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023.

Kurowski M., in: Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Art. 1–424*, Vol. I, Warszawa, 2024.

Małolepszy A., 'Przesłanki odpowiedzialności porządkowej obrońcy za niedopełnienie obowiązków procesowych w toku postępowania karnego', in: Grzegorczyk T. (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warszawa, 2011.

Morawski L., *Wstęp do prawoznawstwa*, Warszawa, 2014.
Prusak F., *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 1999.
Sakowicz A., in: Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023.
Skorupka J., in: Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020.
Smoleński J., 'Prawno-ustrojowe problemy prokuratury', *Państwo i Prawo*, 1963, No. 1.
Stefańska B.J., 'Rola prokuratora w posiedzeniu przygotowawczym sądu', in: Kala D., Zgoliński I. (eds), *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, Warszawa, 2018.
Stefański R.A., 'Nadzór służbowy prokuratora nad postępowaniem przygotowawczym', in: Grzegorczyk T., Olszewski R. (eds), *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, Warszawa, 2017.
Stefański R.A., 'Oskarżyciel publiczny', in: Kulesza C. (ed.), *System prawa karnego procesowego. Strony i inni uczestnicy postępowania karnego*, Vol. VI, Warszawa, 2016.
Stefański R.A., 'Prokurator jako organ postępowania karnego', in: Kwitkowski Z. (ed.), *System prawa karnego procesowego. Sądy i inne organy postępowania karnego*, Vol. V, Warszawa, 2015.
Steinborn S., 'Nieprokuratorskie organy oskarżycielskie', in: Kulesza C. (ed.), *System prawa karnego procesowego. Strony i inni uczestnicy postępowania karnego*, Vol. VI, Warszawa, 2016.
Szymczak M. (ed.), *Słownik języka polskiego PWN*, Vol. 2, Warszawa, 1998.
Turek P., *Prawo o prokuraturze. Komentarz*, Warszawa, 2023.
Zięba-Załucka H., *Instytucja prokuratury w Polsce*, Warszawa, 2003.
Zgółkowa H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 33, Poznań, 2001.
Zgółkowa H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 35, Poznań, 2002.

Cite as:

Stefański R.A. (2025), *Notification of a gross breach of procedural obligations by a public prosecutor or a person conducting a preparatory proceeding*, Ius Novum (Vol. 19) 1, 36–58. DOI 10.2478/in-2025-0004

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 59–80

ENTITIES ENTITLED TO FILE A REQUEST FOR PROSECUTION OF THE CRIMINAL OFFENCE OF PUNISHABLE MISMANAGEMENT WITHOUT DAMAGE – ASSESSMENT OF THE AMENDMENT TO ARTICLE 296 § 4A OF THE PENAL CODE

ŁUKASZ PILARCZYK*

DOI 10.2478/in-2025-0005

Abstract

This article analyses the amendment to Article 296 § 4a of the Penal Code, which broadened the circle of entities that may file a request for prosecution of the criminal offence of punishable mismanagement without damage. Prior to the amendment, only the aggrieved party had such a right, but now it is also available to a partner, shareholder, or stockholder of the aggrieved company or a member of the aggrieved cooperative. The purpose of this analysis is to assess whether this amendment was actually necessary and whether its introduction aligns with the principle of subsidiarity in criminal law. In the author's opinion, there is insufficient justification for this amendment, and its introduction appears to be the result of a faulty identification of the reasons for the rare application of the provision sanctioning the criminal offence of mismanagement without damage. The legislator has identified the limited circle of persons who may file a request for prosecution as the primary reason for its lack of practical application. However, in fact, the lack of application of this provision lies in its construction, which significantly limits the range of factual circumstances that can be qualified under its statutory elements. Furthermore, the introduced solution does not seem reconcilable with the principle of subsidiarity in criminal law, as it constitutes excessive interference of criminal law in corporate relations, increasing the risk of abuse of this institution.

Keywords: criminal law, criminal proceedings, request for prosecution, shareholder, punishable mismanagement

* LLD, Assistant Professor at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań (Poland), e-mail: lukasz.pilarczyk@amu.edu.pl, ORCID: 0000-0002-7278-9210

1. INTRODUCTION

The extensive amendment of the Penal Code of 7 July 2022[1] also included Article 296 § 4a of the Penal Code within its scope. To date, it read as follows: 'If the aggrieved is not the State Treasury, the prosecution of a criminal offence stipulated in § 1a shall take place at the request of the aggrieved party.' However, the amendment changed the wording of this provision to: 'If the aggrieved party is not the State Treasury, the prosecution of the criminal offence stipulated in § 1a shall take place at the request of the aggrieved party, partner, stockholder, or shareholder of the aggrieved company, or a member of the aggrieved cooperative.'

This provision refers to the prohibited act stipulated in Article 296 § 1a of the Penal Code, which consists in bringing about, as a result of abuse of granted powers or non-fulfilment of a duty, a direct threat of substantial property damage to a natural or legal person or an organisational unit without legal personality, by a person obliged, under a provision of law, a decision of a competent authority, or a contract, to deal with property affairs or business activities of one of the listed entities. The legislator considered it unjustifiable that only the aggrieved party – and therefore the entity that was in imminent danger of significant property damage – could file a request for prosecution for this prohibited act. As a result, the group of entities that can file this request was broadened to include a partner, stockholder, or shareholder of the aggrieved entity, or a member of a cooperative.

It is also worth noting at the outset that the method of initiating the prosecution of this prohibited act has, to date, generally not raised major questions.[2] For instance, P. Dębowski justified this by 'the lesser gravity of criminal offences of concrete exposure to danger than criminal offences of infringement of a legal interest'.[3] Furthermore, I. Sepioło even postulated that the entire Article 296 of the Penal Code should be covered by the procedure of prosecution at the request of the aggrieved party, arguing that it is justified that the right to initiate criminal proceedings concerning prohibited

---

[1] Journal of Laws of 2022, item 2600 of 13 December 2022.

[2] A different view was taken by J. Giezek (in: Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, p. 1391), who argued that the provision in that wording did not resolve doubts as to whether a request for prosecution could be filed by the partners or creditors of a given entity – an issue partially addressed in the present amendment. However, it should be noted that these entities simply could not file a request for prosecution under the previous legal framework, and it is difficult to speak of any doubt in this regard, as they clearly could not be considered the aggrieved by a criminal offence under the definition in Article 49 of the Code of Criminal Procedure. The author's objection therefore appears unfounded in this respect. The following also spoke negatively about this solution: M. Ligęza-Turlakiewicz, G. Turlakiewicz, 'Granice kreatywnego zachowania menedżerów w kontekście art. 296 § 1a kodeksu karnego', *Prokuratura i Prawo*, 2016, No. 5, pp. 73–74. These authors advocated for a solution analogous to the one currently introduced in this provision.

[3] P. Dębowski, 'Działanie na szkodę spółki w świetle wprowadzonych zmian w kodeksie karnym wraz z uwagami prawnoporównawczymi na gruncie prawa niemieckiego', in: Gil D. (ed.), *Problemy nowelizacji prawa sądowego*, Lublin, 2013, p. 55. Positive opinions on this way of regulating the mode of prosecution were also expressed, for example, by A. Korzeniewski, 'Przestępstwa menedżerskie po liftingu', *Rzeczpospolita*, 14 July 2011, p. C7; and R. Zawłocki, 'Nowe przestępstwo niegospodarności bezszkodowej z art. 296 § 1a Kodeksu karnego', *Monitor Prawniczy*, 2011, No. 18, p. 973.

acts indicated in this provision should be vested in an entity that is then actually able to exercise the rights of the aggrieved party in the course of criminal proceedings.[4] Moreover, the aggrieved entity itself 'is in the best position to determine the amount of loss it has suffered as a result of the perpetrator's conduct, as well as the benefits it might have obtained had it not been for the perpetrator's conduct'.[5] In the author's view, it is not always necessarily in the interest of the aggrieved entity to initiate criminal proceedings against the perpetrator. It should, therefore, be up to the aggrieved party alone to decide whether it demands the prosecution of the perpetrator.

However, the legislator has not only refrained from departing from the principle of *ex officio* prosecution for other types of the criminal offence of punishable mismanagement beyond that provided for in Article 296 § 1a of the Penal Code, but has also extended the possibility of initiating criminal proceedings for this act by granting it to entities other than the aggrieved party. On the other hand, a certain argument (although not cited in the explanatory memorandum for the amendment, which is discussed further below) for broadening the group of entities that can file a request for prosecution of this prohibited act could potentially be the fact that this provision is partly equivalent to Article 585 of the Commercial Companies Code. This provision was repealed, and Article 296 § 1a[6] (and, incidentally, the related Article 296 § 4a), which is a modified version, was introduced into the Penal Code. Meanwhile, Article 585 of the Commercial Companies Code did not provide for the possibility of its prosecution upon request at all. One may therefore get the impression that the amendment in question partly returns to the solution that previously existed in relation to the provision to which Article 296 § 1a of the Penal Code is a counterpart.

This line of thinking, however, would be a major simplification, as it is difficult to consider Article 296 § 1a of the Penal Code as a regulation analogous to the former Article 585 of the Commercial Companies Code.[7] First of all, it should be noted that Article 585 of the Commercial Companies Code simply penalised 'acting to the detriment of the company'. Article 296 § 1a of the Penal Code defines the causative act in much more specific terms[8] – as bringing about a direct danger of

---

[4] I. Sepioło, *Przestępstwo niegospodarności z art. 296 KK*, Warszawa, 2013, pp. 194–196. Analogously: R. Zawłocki, 'Przestępstwo niegospodarności', in: Zawłocki R. (ed.), *System prawa karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa, 2015, p. 491.

[5] I. Sepioło, *Przestępstwo…*, op. cit., p. 196.

[6] Pursuant to the Act of 9 June 2011 amending the Act – Penal Code and certain other acts (Journal of Laws of 2011, No. 133, item 767).

[7] See R. Zawłocki, 'Nowe przestępstwo…', op. cit., pp. 969–970 and 973. Similarly: A. Domarus, 'Skutek przestępny na gruncie przestępstwa nadużycia zaufania – zagadnienia wybrane', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2012, No. 3, p. 16, who admittedly points to the possibility of using the views of the doctrine and the theses of case law concerning Article 585 of the Commercial Companies Code when interpreting the elements of Article 296 § 1a of the Penal Code, but at the same time acknowledges that: 'It is not possible, however, to simply translate that every behaviour once penalised on the basis of a provision of the Commercial Companies Code could now be punished on the basis of Article 296 § 1a of the Penal Code.'

[8] At this point, it is worth noting that the doctrine has emphasised the very broad scope of application of Article 585 of the Commercial Companies Code. As stated by A. Cimarno, 'This norm was undoubtedly one of the most synthetic regulations, concerning economic criminal offences committed within commercial companies.' See A. Cimarno, 'Artykuł 296 KK jako karnoprocesowy instrument ochrony podmiotów gospodarczych przed nadużyciami ze strony kadry

causing significant property damage to a natural or legal person or an organisational unit without legal personality (thus, no longer only to a company), by abusing granted powers or failing to fulfil a duty. Only partially, therefore, is the scope of the causative act criminalised by Article 585 of the Commercial Companies Code consistent with the scope of criminalisation in Article 296 § 1a of the Penal Code. It would therefore appear that great caution should be exercised in drawing any analogies between the two provisions.

The explanatory memorandum for the amendment provides an extensive explanation of the reasons for this change, which it is reasonable to cite:

> 'The draft removes the dysfunctionality of the current provision of Article 296 § 4a of the Penal Code, which provides for the procedure of prosecution upon request regarding a criminal offence in the form of damage caused to business. (…) The idea is that such proceedings can be initiated by any interested party in terms of its property interest within the particular organisational structure. A formal expression of the will to prosecute by the competent statutory body of the aggrieved will therefore not be required, but such a will occurring on the part of an entity forming part of the aggrieved's organisational structure shall suffice. Such a regulation shall both contribute to the simplification of the proceedings on the subject of the formulation of the will to prosecute by the entitled entity and will ensure protection and subjectivity in this respect for all entities even indirectly exposed to the consequences of causing significant property damage to the aggrieved.'[9]

In the legislator's opinion, the current practice of applying Article 296 § 1a of the Penal Code is 'dysfunctional', and a legislative change is therefore necessary. It is possible that the reason for this decision – although not explicitly expressed in the explanatory memorandum for the amendment – was the extremely rare use of this provision in jurisprudential practice. Indeed, as can be seen from statistics,[10] the number of convictions for committing this criminal offence between 2011 and 2020 was as follows:[11]

– 2014: 1 person convicted;
– 2016: 1 person convicted;
– 2018: 1 person convicted;
– 2019: 1 person convicted, but on the basis of Article 296 § 2 of the Penal Code in conjunction with Article 296 § 1a of the Penal Code;
– in the years 2011–2013, 2015, 2017, and 2020, no convictions under Article 296 § 1a of the Penal Code were recorded.

---

menedżerskiej', in: Bienkowska B.T., Jędrzejewski Z. (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warszawa, 2016, p. 38. Similarly, for example, J. Giezek, P. Kardas, 'Odpowiedzialność karna za działanie na szkodę spółki – o potrzebie zmian', *Przegląd Prawa Handlowego*, 2011, No. 8, pp. 27–28.

[9] The draft is available at https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2024 [accessed on 4 May 2023], p. 92 of the draft.

[10] Study *Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l. 2008–2020*, available at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [accessed on 5 May 2023].

[11] This act was only introduced into the Penal Code by a law that entered into force on 13 July 2011 (Act of 9 June 2011 amending the Act – Penal Code and certain other acts, Journal of Laws of 2011, No. 133, item 767); therefore, data from 2008–2010, also included in this study, were not taken into account.

This therefore means that, in almost a decade since it entered into force, only four people have been convicted on the basis of this provision. The legislator apparently considered this to be an indication of the ineffectiveness of this regulation, believing that this results from the fact that only the aggrieved party may file a request for the prosecution of the prohibited act stipulated therein. In practice, therefore, for example, in relation to a limited liability company, this can only be done by the company's management board,[12] as the body authorised to represent it and exercise the company's rights as the aggrieved party in the criminal offence. If, on the other hand, the management board itself had made a risky business decision that may have caused damage to the company, it is, for obvious reasons, unlikely that the management board members would be eager to request their own prosecution as perpetrators of this criminal offence. This could only happen as a result of the dismissal of the management board, but if the majority shareholders approve of the actions taken by the management board, this is unlikely to happen. A minority shareholder who wished to file a request for prosecution for this criminal offence, in the face of the management board's risky business decisions, was thus deprived of this opportunity in this situation.

Thus, it seems that, in the legislator's opinion, the elements of the offence under Article 296 § 1a of the Penal Code are met in many cases, but criminal proceedings are not initiated only because of the unjustified limitation of the group of entities that may file a request for its prosecution.

From this perspective, the amendment may at first glance seem reasonable. However, this conclusion can be challenged by pointing to another reason for the rare convictions under this provision – namely, the lack of practical usefulness of Article 296 § 1a of the Penal Code, the elements of which are extremely rarely met. This is the actual reason for the negligible number of convictions under it. If it is assumed that this second reason for such rare application of this provision is true, the amendment in question can hardly be considered justified, since it does not solve the problem inherent in the very construction of this prohibited act. It is therefore advisable to verify whether the restrictions on the application of Article 296 § 1a do not arise from the very wording of this provision, and whether this amendment does not unduly interfere with corporate relations.

2. DOUBTS ABOUT THE CONSTRUCTION AND VALIDITY OF ARTICLE 296 § 1A OF THE PENAL CODE

The introduction of the analysed prohibited act into the Penal Code was, in fact, met with numerous objections from representatives of the doctrine. Focusing only on the most important ones, it is appropriate to begin with the observation made by

[12] Alternatively, the entity managing the company in the course of restructuring or bankruptcy proceedings, such as an administrator, interim court supervisor or trustee in bankruptcy. Case law also allows for the possibility of a commercial proxy holder to exercise the rights of the aggrieved where that party is a legal person – as stated by the Supreme Court in its decision of 26 November 2003, I KZP 28/03, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2004, No. 1, item 2.

A. Michalska-Warias,[13] which is difficult to dispute, that the scope of criminalisation under this provision covers situations where the perpetrator consciously undertakes, abusing their powers, highly risky actions, but which ultimately turn out to be accurate, and the managed entity obtains a benefit as a result.

This provision, therefore, criminalises the taking of risky actions, while, as A. Mucha quite rightly points out, 'the process of management is that sphere of human activity which is immanently connected with risk.'[14] Therefore, T. Oczkowski concludes that questioning certain transactions as, for example, economically irrational is a highly debatable practice and requires looking at the totality of economic activities undertaken by an entity, rather than verifying only one questionable transaction. Meanwhile, there is no uniform standard for considering certain investments as successful[15] – this is particularly evident in the context of Article 296 § 1a of the Penal Code, where no concrete damage appears at all, which could potentially be a relatively measurable indicator of the lack of legitimacy of a given transaction.

This author further stated, in the context of Article 296 § 1a of the Penal Code, that in practice, this act will cover cases of attempting to cause damage to a given entity by a person managing it (and thus falling within the scope of Article 296 § 1 of the Penal Code).[16] At the same time, it is difficult to refrain from the observation that, in a situation where the perpetrator did not cause any damage to the managed entity, it will be easier to attribute responsibility for committing an act under Article 296 § 1a than for attempting to commit an act under Article 296 § 1 of the Penal Code, as it will not be necessary to prove that the perpetrator's intent included causing damage.[17] This finding, however, makes it questionable to differentiate the functioning of these two prohibited acts in criminal law, serving as an argument for the redundancy of the regulation of Article 296 § 1a of the Penal Code.

It is worth recalling at this point the view that, in the case of a risky action, no intentional action can be imputed to the person taking it, but only unintentional action.[18] Acceptance of this view would make the presence of Article 296 § 1a in

---

[13] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 892.

[14] A. Mucha, *Struktura przestępstwa gospodarczego oraz okoliczności wyłączające bezprawność czynu w prawie karnym gospodarczym*, Warszawa, 2013, p. 268. For more on the concept of economic risk in a criminal law context: A. Zientara, *Przestępstwo nadużycia zaufania z art. 296 Kodeks Karnego*, Warszawa, 2010, pp. 147–176; T. Oczkowski, *Nadużycie zaufania w prowadzeniu cudzych spraw majątkowych*, Warszawa, 2013, pp. 161–172.

[15] T. Oczkowski, *Nadużycie zaufania…*, op. cit., pp. 120–121.

[16] To a certain extent, A. Domarus agrees with this view. While she clearly distinguishes between attempting an act under Article 296 § 1 of the Penal Code and committing an act under Article 296 § 1a of the Penal Code, she also acknowledges that § 1a will be applied primarily when the perpetrator cannot be attributed the effect specified in § 1 or § 3 of Article 296. In doing so, the author concludes that 'it is difficult to construct even abstractly a situation in which the criminal offence in question would be perpetrated'. See A. Domarus, 'Skutek przestępny…', op. cit., p. 19. Serious practical problems in distinguishing between these two prohibited acts are also pointed out by T. Pietrzyk, *Odpowiedzialność karna menedżerów spółek handlowych*, Warszawa, 2020, p. 79.

[17] See, for example, M. Dąbrowska-Kardas, P. Kardas, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363*, Warszawa, 2021, p. 612.

[18] H. Popławski, 'W kwestii rozwiązania zagadnienia ryzyka w płaszczyźnie winy', *Nowe Prawo*, 1969, No. 5, pp. 712–714. His concept was referred to by A. Zientara, who stated: 'If the

the Penal Code completely unjustified, since it can only be committed intentionally and is based precisely on the criminalisation of risky activities. However, even if this view is rejected, and it is accepted that it is possible to take – with conditional intent – a risky action that fulfils the elements of a criminal offence,[19] this does not change the fact that the way in which the subjective elements of this act are defined may create difficulties in its application. Indeed, since this criminal act can only be committed intentionally, it must be considered to apply only if the perpetrator acted with conditional intent. It is difficult to imagine a situation in which the perpetrator's aim was only to cause a danger of damage to the economic entity and not to cause the damage itself. This act appears to relate to a factual situation in which the perpetrator takes risky actions, accepting that they may lead to damage to the assets of the managed entity. However, such situations tend to occur far less frequently than inadvertent management errors leading to decisions that, as it ultimately turned out, were excessively risky. This is because, usually, managers either – in an extreme situation – act with the intention to cause concrete damage to the managed entity (which, however, will be qualified as attempting or committing an act under Article 296 § 1 of the Penal Code), or – more commonly – act with the intention to obtain a benefit for the managed entity but fail to achieve this benefit due to their own mistakes (which may be criminalised under Article 296 § 4 of the Penal Code when causing damage to the managed entity). However, none of these situations falls within the scope of Article 296 § 1a of the Penal Code, as it refers to a situation in which a manager takes certain actions with a view to potential profit for the company, accepting that these are excessively risky and cause real danger to the company's property interests, but does not ultimately cause damage to the company in this way.

It appears that such situations are extremely rare in practice, and this, above all, is a fundamental limitation in the application of the prohibited act in question. Indeed, far more often than not, managers take excessively risky actions as a result of misjudgment rather than intentional conduct. The decision to include only intentional conduct within the scope of this criminal offence has significantly reduced the number of cases to which it can be applied.

It is also legitimate to ask on what basis an action can be considered excessively risky if it did not ultimately result in damage to the assets of the entity concerned. Since the entity has made a profit as a result of a certain action of the manager, this action must, in principle, be considered justified. Article 296 § 1a of the Penal Code therefore only refers to a situation where a manager (by abusing his/her powers or failing to fulfil his/her duty) takes an action that s/he knows to be excessively

---

manager foresees the possibility of a loss, it cannot be said that he or she accepts this possibility, that he or she is indifferent to whether they make a profit or a loss. Indeed, he or she undertakes activities with the direct intention of increasing the value of the assets under management. If the limits of acceptable risk are exceeded, we are therefore only dealing with recklessness, i.e., an unfounded assumption that the fulfilment of the elements of the prohibited act will be avoided'. See A. Zientara, *Przestępstwo*…, op. cit., pp. 170–171.

[19] See also T. Oczkowski, *Nadużycie zaufania*…, op. cit., pp. 154–155; M. Bojarski, *Dozwolone ryzyko gospodarcze w polskim prawie karnym*, Wrocław, 1977, p. 55; K. Rozental, 'W sprawie karnoprawnego charakteru tzw. ryzyka zwykłego', *Państwo i Prawo*, 1991, No. 4, pp. 65–66.

risky and agrees to it in order to make a profit, and where his/her action does not lead to damage to the managed entity merely as a result of some event beyond his/her control and unlikely to occur. It is difficult not to conclude that situations of this kind are, however, extremely rare. For this reason alone, therefore, it seems reasonable to conclude that it is in the construction of Article 296 § 1a of the Penal Code, and not in the too limited circle of entities that may file a request for its prosecution, that the reasons for its rare application should be seen.

It should also be noted that, according to A. Cimarno, the introduction of this prohibited act into the Penal Code has created significant evidentiary difficulties, as proving the fulfilment of its elements requires the use of an expert opinion, not even so much in the field of accounting as in the theory of economic behaviour.[20] It is difficult to disagree with this view, seeing this issue as a further limitation on the application of the provision. As T. Oczkowski stated on the provision in question:

> 'I do not see any chance of applying this provision in practice, since in most cases it is practically impossible to establish that, as a result of the perpetrator's act, significant property damage was real and almost certain, without any doubt, especially if we take into account that the so-called almost certain damage must amount to at least PLN 200,000.'[21]

A further complication in the application of this provision may also lie in the fact – rightly pointed out by A. Domarus[22] – that Polish criminal law does not use anywhere else a regulation identical to the notion of 'direct threat of property damage', and although one may refer to the interpretation of similar elements found in Articles 160, 164, or 174 of the Penal Code, the prohibited acts stipulated therein have only an analogous, and not an identical set of elements.

3. AMENDMENT OF ARTICLE 296 § 4A OF THE PENAL CODE IN THE CONTEXT OF THE PRINCIPLE OF SUBSIDIARITY OF CRIMINAL LAW

The advisability of broadening the circle of entities that may file a request for prosecution of the criminal offence under Article 296 § 1a of the Penal Code also appears rather questionable in light of the fact that there are many other legal remedies available to a partner, stockholder, shareholder, or member of a cooperative

---

[20] A. Cimarno, 'Artykuł 296 KK…', op. cit., p. 54. An analogous view was expressed by J. Potulski (R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa, 2020, p. 1827). The need to refer in many cases of suspected commission of this act to an expert's opinion was also pointed out by J. Giezek in: idem, *Kodeks karny…*, op. cit., p. 1386; and R. Zawłocki in: idem, 'Nowe przestępstwo…', op. cit., p. 969. Evidentiary problems as to proving the fulfilment of the elements of this prohibited act were also pointed out by I. Sepioło: idem, *Przestępstwo…*, op. cit., p. 155.

[21] T. Oczkowski, *Nadużycie zaufania…*, op. cit., p. 187. A similar view was expressed by J. Potulski who stated: 'The legislator has imposed an almost impossible obligation on the procedural authorities to establish the effect of exposure to damage of a significant size.' Cf. R.A. Stefański (ed.), *Kodeks karny…*, op. cit., p. 1827.

[22] A. Domarus, 'Skutek przestępny…', op. cit., p. 13.

when persons managing a given entity take actions that create a state of imminent danger of causing significant property damage to it.

With reference primarily to commercial law companies, which in practice will most likely be affected by the applicability of the discussed regulation, it should be noted that, first and foremost, if the shareholders of, e.g., a limited liability company conclude that the management board of the company undertakes actions that are extremely risky in managing the company's assets, they have the possibility to adopt a resolution dismissing the members of the management board from their function, thus securing the property interests of the company.

When making the amendment, the legislator, however, seems to have primarily aimed at safeguarding the interests of minority shareholders or stockholders, who may have doubts about the actions of the management board, but which are not shared by the majority shareholders. However, such an entity also has the ability to block and challenge what it considers to be harmful actions of the management board (supported by the majority shareholders). Examples of some of their powers of this kind (in terms of a limited liability company) are:

– bringing an action for dissolution of the company pursuant to Article 271 of the Commercial Companies Code, if the achievement of the company's objective has become impossible or if there are other important reasons caused by the company's relations; such an action may be combined with a request to secure a claim by prohibiting the management board from taking certain actions that could harm the company;
– bringing an action to annul a shareholders' resolution that is contrary to the articles of association or good practices, and that harms the interests of the company or is intended to harm a shareholder (Article 249 § 1 of the Commercial Companies Code);
– challenging a resolution of the management board, supervisory board, or audit committee by means of an action for establishment (Article 189 of the Code of Civil Procedure in conjunction with Article 58 of the Civil Code), as is apparent, *inter alia*, from the resolution of seven judges of the Supreme Court of 18 September 2013[23] (also concerning a joint-stock company);
– making use of the institution of *actio pro socio* provided for in Article 295 § 1 of the Commercial Companies Code, consisting of the possibility for each shareholder to bring an action for remedying damage caused to the company, if the company itself does not bring an action for remedying the damage caused to it within a year from the date of disclosure of the act causing the damage;
– a request for the convening of an extraordinary general meeting of shareholders pursuant to Article 236 § 1 of the Commercial Companies Code by a shareholder or shareholders representing at least one-tenth of the share capital;
– a request for the inclusion of specific matters on the agenda of the next shareholders' general meeting by a shareholder or shareholders representing at least one-twentieth of the share capital (Article 236 §1[1] of the Commercial Companies Code).

[23] III CZP 13/13, *Orzecznictwo Sądu Najwyższego. Izba Cywilna*, 2014, No. 3, item 23.

Commercial law thus provides a rich catalogue of actions that can be used by a minority shareholder concerned about the actions of the company's managers when they do not lead to financial damage to the company.[24] Despite this, the legislator decided to grant these entities another right – this time, however, of a criminal law nature – to defend their interests, which is the possibility of submitting, in this situation, a request for prosecution of the perpetrators of an act under Article 296 § 1a of the Penal Code.

At this point, it is appropriate to cite the view of R. Zawłocki,[25] assessing the legitimacy of granting the possibility to file a request for prosecution of an act under Article 296 § 1a of the Penal Code only to the aggrieved party and not to a shareholder of the company or its unsatisfied creditor. In the author's opinion, the solution limiting the group of entities having such a right only to the aggrieved party is correct, as it corresponds to the *ultima ratio* principle of criminal law. Taking this into account, the departure from the solution endorsed by the author, made in the amendment, must be regarded as questionable in the context of the principle of subsidiarity of criminal law. Although a thorough discussion of the assumptions of this principle would exceed the framework of this study,[26] it is reasonable to synthetically recall its most important postulates, especially in the context of the interaction between criminal law and commercial law.

For example, A. Mucha characterised this principle as follows:

> 'In accordance with the subsidiarity directive, the measures that should primarily be used in the process of combating and preventing negative economic phenomena are instruments from the field of civil, administrative, and commercial law in the broadest sense. It is only as a complementary and, in a way, reinforcing element of the range of possible regulations that criminal law should appear in the management process.'[27]

Elsewhere, the author points out that criminal law should be regarded as 'a measure of last resort, in the sense that it is used only where it is necessary, and only when the regulation of a given section of economic relations cannot be fully functionally carried out by means of the rules of the area of civil, administrative, or commercial law'.[28] In this context, it is worth noting that the explanatory memorandum for the amendment does not refer at all to the fact that the civil law instruments that a minority shareholder could use to protect their interests are ineffective. Thus, it seems that the legislator did not consider at all whether the

---

[24] In turn, under the provisions of the Act of 16 September 1982 – Cooperative Law (Journal of Laws of 2021, item 648, consolidated text), a member of a cooperative also has the right to challenge the actions of the cooperative's bodies. For example, pursuant to Article 42 § 4 of the Act, any member of the cooperative may bring an action to annul a resolution of the general meeting.

[25] R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 973.

[26] A wider discussion of this principle has been presented, for example, in the following studies: S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warszawa, 2009, in particular, pp. 94–135; A. Zientara, *Przestępstwo…*, op. cit., pp. 254–260; O. Górniok, 'Znaczenie subsydiarności prawa karnego w jego interpretacji', *Państwo i Prawo*, 2007, No. 5, p. 50.

[27] A. Mucha, *Struktura…*, op. cit., pp. 49–50.

[28] Ibidem, pp. 55–56.

introduction of this solution was actually necessary due to the ineffectiveness of the solutions protecting the shareholder and provided for under commercial law.

It is worth noting that the filing of a request for prosecution is generally simpler to apply than some of the solutions described above, which often require the filing of a formalised lawsuit combined with the payment of a court fee. It may therefore appear as a more attractive option for a minority shareholder to influence the actions of the company's managers. In addition, by risking criminal prosecution of the company's managers, filing a request for prosecution and thus initiating criminal proceedings may have a greater impact on the company's management and majority shareholders than using the civil law route. Since the act under Article 296 § 1a of the Penal Code concerns matters that are usually difficult to assess unequivocally and the criteria for its application are very vague (as indicated in the previous section of this work), even if the company's management board is convinced that the management actions were lawful, in practice it can be expected that the risk of potential criminal liability will lead the management board and majority shareholders to negotiate with the shareholder filing a request for prosecution to withdraw the request in exchange, for example, for a change in the company's investment plans in line with the shareholder's suggestion.

The danger of the instrumental use of criminal law in corporate relations, above all by those who do not have a decisive influence on the management of the company, which has already been highlighted earlier, therefore arises here. S. Pawelec pointed out, for example, that:

> 'Preparatory proceedings concerning the commission of a criminal offence under Article 296 § 1 of the Penal Code (…) or a more particularised property criminal offence from the sphere of economic relations may be initiated on the basis of information obtained by the judicial authority from any source. Hence, notifications on suspicion of such a criminal offence are often made by people who play a marginal role in the company, but who have access to inside information and use the possibility of reporting as one element of corporate blackmail. If one adds to this the fact that many of the decisions taken by members of the management board to impose significant financial obligations on the company are not based on easily verifiable *ex post* indications, but are based on their expertise, their sense of the market, and their subjective assessment of the benefits and risks of a particular transaction adopted at a particular point in time, it is easy to create a divergence of judgment between categorising certain behaviour as criminal activity to the detriment of the company or, on the contrary, as acting in its best interests.'[29]

Until now, this type of corporate blackmail was effectively difficult to carry out in the context of a notification concerning the possibility of committing an offence under Article 296 of the Penal Code, as a necessary prerequisite for establishing that

---

[29] S. Pawelec, *Spółka kapitałowa jako pokrzywdzony w procesie karnym*, Warszawa, 2011, p. 112. The threat of instrumental use of Article 296 of the Penal Code in corporate relations was also pointed out by M. Romanowski, 'Kto ma decydować o interesie spółki: menedżer czy prokurator?', *Rzeczpospolita*, 16 June 2011, p. C9. On the other hand, the instrumental use of Article 585 of the Commercial Companies Code, due to the fact that the criminal offence was prosecuted *ex officio* and not upon request, was highlighted by E. Hryniewicz, 'Karalne działanie na szkodę spółki', *Prokuratura i Prawo*, 2012, No. 10, p. 82.

its elements had been fulfilled was demonstrating that the company had suffered significant as a result of the actions of its managers. If this harm did not exist, the person subjected to this type of blackmail could treat the threat of criminal liability on this basis as purely hypothetical. In such a situation, the blackmailer would be able to rely on Article 296 § 1a as a basis for notification, but they would not be able to file a request for prosecution for this act if they was not acting on behalf of the aggrieved entity. Blackmail concerning the filing of a notification of committing this act was therefore also of little effect, since it could not lead to criminal proceedings against the blackmailed person. In practice, therefore, if the financial situation of the entity in question was good, it was unlikely that the blackmailed persons could be effectively influenced in this way.

Now, however, the legislator is facilitating this kind of corporate blackmail by allowing criminal law instruments to be used for actions that are difficult to defend from an ethical point of view.

It also appears – as evidenced by the cited passage in the explanatory memorandum for the amending act – that the legislator intended to place greater emphasis on the interests of the company's shareholders rather than the interest of the company itself. Indeed, if a company does not file a notification of a criminal offence under Article 296 § 1a of the Penal Code, it evidently sees no basis for doing so or even considers the filing of such a notification, together with a request for prosecution, to be detrimental to its interests. Following the amendment, however, the company's interest in refraining from filing a request for prosecution becomes arguably less relevant than the interests of the shareholders, who are now entitled to file such a request – acting, in effect, fundamentally against the company's interest.

Naturally, such competence is already available to the shareholders under Article 296 § 1 of the Penal Code, where they can file a notification of a criminal offence regardless of the fact that the company did not consider it advisable to do so. However, in that case, the primacy of the interests of the shareholders over the interests of the company is justified by the fact that there is significant property damage to the company, which is also property damage (even if indirect) to its shareholders – after all, damage to the company's property reduces its value, and this reduces the value of the property of its owners, who are the shareholders. Intentionally causing damage to the company's assets is therefore an exceptional situation that justifies the possibility for a shareholder to initiate criminal proceedings, even if the company itself has no interest in doing so.

However, on the basis of Article 296 § 1a of the Penal Code, this argument cannot apply, since only an imminent danger of such damage is involved. The property interests of the company's shareholders have not suffered any loss, so it does not appear that their interest in initiating criminal proceedings should take precedence over the company's interest in not initiating them. It is worth bearing in mind that the initiation of criminal proceedings, even if they do not lead to the formulation of an indictment or other complaint by the public prosecutor, can have a destabilising effect on the operations of the company. This may involve, for example, the application of preventive measures, such as a ban on leaving the country against members of the company's management board, making it difficult for them to

conduct business cooperation with foreign entities. Additionally, it may lead to the suspension of members of the management board (or supervisory board) from their duties under Article 276 of the Code of Criminal Procedure, which would, of course, make it impossible for the company's existing management board to function – a potential primary objective of the person submitting the notification of a criminal offence. Even if no charges are brought against anyone during these proceedings, it is likely that company records will be seized, often as a result of a search of the company. Such litigation may not only hinder the company's operations (since some of its original documentation will be secured by law enforcement authorities) but may also trigger a highly negative reaction from the company's employees and counterparties if they become aware of it. Such extremely negative consequences for the functioning of the company may therefore result from granting minority shareholders or stockholders the right to file a request for the prosecution of an act under Article 296 § 1a of the Penal Code.[30]

The legislator therefore *de facto* places the interests of shareholders or stockholders – including minority ones – above the interests of the organisation as a whole. Meanwhile, as S. Pawelec points out, the reverse principle is generally accepted in Polish law: 'The company's interest is that initial category behind which the interests of other actors can only hide, cross, and clash.'[31] This is also confirmed by R. Stefanicki,[32] who states that 'A person exercising their shareholding rights in a company must take into account the fact that the scope of their rights in the company depends on the proportion of their share in the company's capital.'[33] However, the solution in question appears to depart from this principle by conferring powers on the designated entities that do not correspond to the size of their shareholding.

The principle of the primacy of the company's interests over those of the partners or shareholders is obviously weaker in partnerships, which could justify the application of the amended Article 296 § 4a of the Penal Code to companies of this type. On the other hand, however, in a general partnership, pursuant to Article 29 of the Commercial Companies Code, each partner has the right to represent the

---

[30] At the same time, it is unlikely that shareholders or stockholders will be deterred from the instrumental use of this provision by the threat of liability under Article 238 of the Penal Code for filing a false notification of a criminal offence. Indeed, if they present objective facts in the notification and express the opinion that, in their view, the action may have caused negative business consequences for the company, it will be difficult to pursue charges under this prohibited act.

[31] S. Pawelec, *Spółka kapitałowa*…, op. cit., p. 214. It is also worth noting that the resolution of the Supreme Court, in which the Court stated that, for the purposes of criminal law, the property of a limited liability company is not the property of its shareholders, remains valid (resolution of 20 May 1993, I KZP 10/93, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 1993, No. 7–8, item 44). This further calls into question the legitimacy of shareholders filing a request for prosecution under Article 296 § 1a of the Penal Code, as the offence concerns the creation of a danger of damage to the company, not to the shareholders themselves.

[32] R. Stefanicki, *Należyta staranność zawodowa członka zarządu spółki kapitałowej*, Warszawa, 2020, p. 59.

[33] In doing so, the author points out that the shareholders of a capital company have, at least to some extent, a duty of loyalty towards the company, and that it is unlawful, as well as contrary to principles of good conduct, for minority shareholders or stockholders to block resolutions of the ownership body. See R. Stefanicki, *Należyta staranność*…, op. cit., pp. 82–84.

company anyway,[34] hence they would be entitled to file a request for prosecution in the case of an act under Article 296 § 1a regardless of the amendment. An analogous principle applies in a professional partnership.[35] Thus, in those types of companies where the interests of the partners are most closely aligned with the interests of the company itself, they still have the right to represent the company in principle, hence in many situations, the amendment will not change anything regarding their competence to file a request for prosecution.

On the other hand, however, in a joint-stock company, for example, the situation is quite different, and it is difficult to consider that the object of protection in Article 296 of the Penal Code, in the context of acting to the detriment of a joint-stock company, is the property interest of the stockholders rather than the company itself. As S. Pawelec rightly points out:

> 'Extending the direct object of protection in joint-stock companies beyond the company itself would constitute a departure from (…) the characterisation of these entities as pure capital companies, i.e., legal persons basing their asset structure on stockholders' contributions from a wide and variable range of entities in their composition, who are excluded from direct management of the company and not liable for its obligations.'[36]

In general, an analogous view is also expressed by the author regarding limited liability companies.[37] It is therefore difficult to conclude that Article 296 of the Penal Code protects the interests of the shareholders or stockholders above all, rather than the interests of the company itself. However, this seems to be precisely the effect of the amendment, as it allows shareholders or stockholders to file a request for prosecution, even against the interests of the company itself.[38]

As a result of the amendment, minority shareholders or stockholders may gain significant, albeit informal influence over the operations of the company – informal because it does not reflect the size of their shareholding or the number of shares they hold. The solution introduced by the legislator therefore appears to contradict the principle of subsidiarity of criminal law, not only because the legislator has introduced a criminal law model for the reaction of minority shareholders to what

---

[34] Although the articles of association may provide that a partner is deprived of the right to represent the company or that he or she is entitled to represent the company only jointly with another partner or a proxy (Article 30 § 1 of the Commercial Companies Code).

[35] An analogous situation applies to a professional partnership where, pursuant to Article 96 § 1 of the Commercial Companies Code in conjunction with Article 97 § 1 CCC, each partner has the right to represent the partnership independently, unless the articles of association provide otherwise or management of the company's affairs has been entrusted to the management board.

[36] S. Pawelec, *Spółka kapitałowa*…, op. cit., p. 216. In doing so, the author notes that also in the doctrine of civil law, the prevailing view is that a tort committed against a joint-stock company does not imply that its stockholders are also deemed to be harmed by this tort (ibidem, pp. 218–220 and the literature cited therein).

[37] Ibidem, pp. 216–217.

[38] S. Pawelec also notes that sometimes, even in the event of damage to the company's assets, there is no actual damage to the assets of its shareholders or stockholders, for example, due to insurance coverage against such occurrences or the mobilisation of a loss reserve (ibidem, p. 218, fn 534).

they consider undesirable actions of the management board, in a situation where alternative solutions provided by commercial law are possible. This is because the amendment of Article 296 § 4a of the Penal Code allows these entities to interfere further in the management of the company than the provisions of commercial law, using this institution in a manner completely contrary to its assumptions. The amendment, therefore, does not merely allow minority partners, shareholders, or stockholders to exercise their rights under civil law more efficiently – it even grants them powers beyond their role in companies, as designated by civil law. In the light of the above-mentioned opinions on the principle of subsidiarity of criminal law, it is therefore difficult to consider that the solution under consideration is compatible with this principle.

As a side note, irrespective of the amendment in question, that doubts may arise as to whether the very validity of Article 296 § 1a of the Penal Code is compatible with the principle of subsidiarity.[39] A. Zientara is of the opinion that an expression of the principle of subsidiarity with regard to commercial criminal law provisions is the requirement that behaviour prohibited by commercial criminal law must also be prohibited by another branch of law. If it is not unlawful under another branch of law, then the unlawfulness of the perpetrator's action is also excluded under criminal law.[40] Meanwhile, even if a general obligation of proper management of a collective entity can be derived from acts other than the Penal Code, there is no provision explicitly prohibiting the taking of unjustified economic risks that do not cause damage.[41] The only provision of this kind, it would seem,

---

[39] The position on the lack of such compliance was taken, for example, by R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 967; T. Oczkowski, *Nadużycie zaufania*…, op. cit., p. 188.

[40] I. Sepioło, *Przestępstwo*…, op. cit., pp. 258–260. Similarly, for example: R. Zawłocki, *Podstawy odpowiedzialności karnej za przestępstwa gospodarcze*, Warszawa, 2004, p. 322; J. Skorupka, *Prawo karne gospodarcze. Zarys wykładu*, Warszawa, 2005, p. 47; I. Sepioło, *Przestępstwo*…, op. cit., p. 29; S. Żółtek, *Prawo karne*…, op. cit., p. 177.

[41] However, it is worth noting that, in general, in the context of Article 296 of the Penal Code, there is some doubt as to whether, when assessing a manager's actions as regards their criminal liability, we should rely solely on formalised criteria for evaluating such actions, or whether it is also permissible to apply non-formalised criteria, such as, for example, the concept of a 'good host' (more extensively, see M. Gałęski, G. Grupa, 'Karnoprawna ocena decyzji menedżerskich', *Monitor Prawa Handlowego*, 2014, No. 1, pp. 7–17 and the literature cited therein; R. Zawłocki, *Przestępstwo niegospodarności*…, op. cit., pp. 480–483). In the context of Article 296 § 1a of the Penal Code, this dispute appears to lose some of its relevance, as the key question becomes whether commercial criminal law can criminalise actions that are not sanctioned at all by civil or commercial law. Nevertheless, it is necessary to agree with R. Stefanicki that 'The requirements of professionalism in the management of a company by members of the management board would be difficult to enclose within the normative framework of actions understood strictly (statutory orders and prohibitions).' See R. Stefanicki, *Należyta staranność*…, op. cit., p. 192. Acceptance of this view, however, must lead to the conclusion that criminal liability under Article 296 of the Penal Code will often – if not always – be based on the perpetrator's failure to observe a standard of diligence not expressly set out in the law. While in the context of mismanagement resulting in damage, such liability may still be justified by the harm caused to the managed entity (even if the soundness of this concept remains debatable), in the context of mismanagement without resulting damage, the question arises whether it makes sense to criminalise behaviour that has not caused damage and merely fails to meet a certain standard of conduct, which is not, however, reflected in statutory provisions. This would amount to criminal

could be Article 209[1] § 1 of the Commercial Companies Code,[42] which states that a management board member should, in the performance of their duties, exercise the diligence resulting from the professional nature of their activities and maintain loyalty to the company.[43] However, this provision does not introduce the possibility of holding a company's management board financially liable if their actions violated this principle but did not lead to damage to the managed entity. It is therefore difficult to identify a legal basis for awarding damages to a company from a member of its management board who takes excessively risky and unjustified decisions concerning the management of its assets, if these decisions have not resulted in any damage.[44]

Criminal law, in penalising such behaviour, therefore introduces criminal liability where sanctions are not provided for under commercial law. From this perspective, there is no axiological justification for the validity of Article 296 § 1a, which makes all the more critical an amendment that could lead to an increase in the frequency of initiating proceedings concerning this criminal offence, while at the same time increasing the risk of criminal law interfering with corporate relations in this way.

---

liability for a person who neither directly violated any provision of the law nor caused damage through their actions.

[42] In the Commercial Companies Code, the provision with similar content is Article 293 § 3 (its counterpart with regard to a joint-stock company is Article 483 § 3 of the Commercial Companies Code, and, as regards a simple joint-stock company, Article 300[125] § 2 of the Commercial Companies Code). According to this provision, a member of the management board, supervisory board, audit committee, or a liquidator does not breach the duty to exercise due care arising from the professional nature of their activity if, acting loyally towards the company, they act within the limits of reasonable business risk, including on the basis of information, analyses, and opinions which, in the given circumstances, should be taken into account when making a careful assessment. However, this provision expressly refers to paragraph one of the same article, which concerns the liability of, *inter alia*, a management board member towards the company for damage caused by an act or omission contrary to the law or the company's articles of association, unless they are not at fault. Paragraph three, therefore, appears to indicate when a management board member is not at fault for the damage caused to the company, and thus cannot serve as a basis for reconstructing the correct standard of conduct for a management board member when discussing the criminalisation of mismanagement without damage.

[43] Although some doubts may arise as to whether a provision formulated in such general terms can serve as the basis for defining the duties of an administrator – the failure to fulfil which could result in criminal liability – this concern becomes particularly relevant if one accepts the view of R. Zawłocki, who states: 'The perpetrator of an economic crime can only be attributed with the violation of those conditions of proper activity which arise directly and simply from the content of the specific authorisation and duty.' See R. Zawłocki, 'Karalna niegospodarność', in: Pohl Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, p. 639.

[44] It is even more difficult to identify such grounds in the case of persons performing management functions in a given entity on a basis other than the provisions of the Commercial Companies Code, for example, on the basis of a contract which would have to impose on them an obligation not to undertake risky actions that could result in a danger of property damage to the company.

4. THE UNIQUENESS OF A REQUEST FOR PROSECUTION SUBMITTED BY A PARTNER, SHAREHOLDER OR STOCKHOLDER OF THE AGGRIEVED COMPANY OR A MEMBER OF THE AGGRIEVED COOPERATIVE

It is also worth noting that the new wording of Article 296 § 4a of the Penal Code introduces a unique solution in Polish criminal law. This becomes apparent when analysing which entities are entitled to file a request for prosecution for criminal offences prosecuted upon request as provided for in the Penal Code. Leaving aside the military part of the Code, where a request for prosecution can be filed by, for example, the commander of a military unit, as a general rule, whenever the Penal Code provides that a request for prosecution is necessary to initiate criminal proceedings, the only subject entitled to submit the request is exclusively the aggrieved entity. This is the case in 24 instances where the specific part of the Code provides for prosecution upon request. It follows that, as a general rule, a request for prosecution under Polish law can only be submitted by the aggrieved party.

The only exception to this rule is Article 209 § 2 of the Penal Code, according to which the prosecution of the criminal offence of non-maintenance, in both its basic and aggravated forms, takes place at the request of: the aggrieved party, a social welfare body, or a body taking action against the maintenance debtor. This exception, however, is more apparent than real. This is because the social welfare body and the body taking action against the maintenance debtor are state bodies (governmental or local government administration bodies). The possibility for these entities to initiate criminal proceedings for the criminal offence of non-maintenance effectively means that the state itself decides whether to proceed. Thus, the principle of prosecution upon request is severely limited for this criminal offence, as the state is always in a position to initiate criminal proceedings, even if the aggrieved party does not file a request for prosecution. This is indirectly confirmed by the content of Article 209 § 3 of the Penal Code, which states that if the aggrieved party has been granted appropriate family benefits or cash benefits paid in the event of ineffective enforcement of maintenance, the prosecution of the criminal offence of non-maintenance is already carried out *ex officio* and not on request.[45]

With this one specific exception, if the legislator makes the initiation of criminal proceedings for a prohibited act from the special part of the Penal Code conditional on a request from an authorised person, the entity authorised to initiate such proceedings is the aggrieved party. The request for prosecution is, therefore, generally an institution closely linked to the rights of the aggrieved in the course of a criminal trial. This is confirmed by M. Kurowski, who states: 'The legitimacy to file

[45] An analogous view was expressed by T. Grzegorczyk, in: P. Hofmański (ed.), *System prawa karnego procesowego. Tom I. Zagadnienia ogólne. Część 2*, Warszawa, 2013, pp. 346–347, who indicated that there are four groups of criminal offences prosecuted upon request in Polish criminal law, divided according to who can file such a request: (1) only the aggrieved; (2) the aggrieved or another body (which is precisely what Article 209 § 2 of the Penal Code refers to); (3) only the military commander; (4) the aggrieved or the military commander. The solution introduced by the legislator, therefore, clearly does not fall into any of these categories.

a request for prosecution of the perpetrator rests, in principle, with the aggrieved.'[46] Similarly, J. Skorupka makes it clear that this authority 'is an independent, personal right of the aggrieved'.[47] The solution under discussion deviates from this principle, as entities other than the aggrieved are now also entitled to submit a request for prosecution. However, the question arises as to whether such a solution contradicts the nature of criminal offences prosecuted upon request, where it is the aggrieved party who is supposed to decide whether to initiate criminal proceedings. In justifying the idea of prosecution upon request, the primacy of the aggrieved party's interest over the public interest, as well as protection from the phenomenon of secondary victimisation, is strongly emphasised.[48] Meanwhile, the solution introduced by the legislator here entirely disregards the interests of the aggrieved, who may not wish to prosecute the perpetrator of the criminal offence, and yet another entity is granted the right to initiate criminal proceedings, ignoring the aggrieved party's preference. From this perspective, the solution introduced by the legislator appears to contradict the fundamental assumptions underpinning the institution of prosecution upon request as a mode of initiating criminal proceedings.

As a consequence of this solution, those who are not formally the aggrieved party will be partially granted the rights to which the aggrieved party is entitled. This is because they will be able to file a request for prosecution of the perpetrator, and in the event of a refusal to initiate criminal proceedings or their discontinuation, they will likely be entitled to lodge a complaint about this decision pursuant to Article 306 § 1 (3) CCP or Article 306 § 1a (3) CCP.

It should also be noted that granting the right to submit a request for prosecution to an entity other than the aggrieved party may lead to practical problems previously unknown in Polish criminal law. Indeed, one has to wonder how the situation should be treated when a shareholder of a company files a request for prosecution and then sells their shares in the company. Such a situation does not seem to affect the effectiveness of a filed request for prosecution, although this is not regulated in any way by law. However, the opposite situation may also raise questions: a shareholder disposes of their shares and only later learns that the company's management has taken irresponsible actions that may have led to significant financial damage to the company. Can they file for prosecution then? They are no longer a shareholder, but they were at the time the criminal act was committed. Assuming that the purpose of the institution in question is to protect minority shareholders from actions that could potentially jeopardise their interests, they should have this power. However, such a solution does not derive from the law in any way. Another question arises: can a new shareholder who has only recently acquired shares in the company file a request for prosecution for a criminal offence committed before they became a shareholder? According to the assumption made above – that the purpose of this institution is to protect the property interests of

---

[46] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, Warszawa, 2022, p. 100.

[47] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 59.

[48] This is pointed out by A. Sakowicz, in: A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018, p. 75.

minority shareholders – it would seem that they should not have such competence, given that the criminal act occurred before they acquired the shares. On the other hand, however, one could argue that the amended Article 296 § 4a of the Penal Code does not differentiate between shareholders based on the time of acquisition – it simply states that a shareholder has the right to file a request for prosecution.

Further complications may arise in relation to a shareholder's ability to withdraw a request for prosecution. Assuming that the shareholder is also the person who submitted a notification of a criminal offence, they will be notified of the sending of the indictment to the court in accordance with Article 334 § 3 CCP. However, they will not be further informed about the proceedings of the first-instance court hearing, as they do not have the status of the aggrieved party. They will therefore have no way of knowing when their opportunity to withdraw the request for prosecution will expire – which, according to Article 12 § 3 CCP, is possible until the closing of the judicial examination at the first-instance court hearing. There is also the question of whether a shareholder who has disposed of shares after the request has been filed will be able to withdraw the request. It is difficult to see any analogy here with situations involving, for example, an aggrieved creditor who has disposed of a claim after a request for prosecution has been filed. The aggrieved party's entitlement to file a request for prosecution was based on the fact that its legal interest has been infringed or threatened, which does not apply in this case to a shareholder of the company. If the shareholder loses the right to withdraw the request after the transfer of shares, does the person acquiring the shares from them acquire the right in question as well? After all, the right to file a request is strictly dependent on the ownership of shares in the company – hence, perhaps the right to withdraw the request should also be linked to this fact?

Unfortunately, the fact that so many questions arise from the amendment suggests that it cannot be regarded as the result of fully considered legislative reflection.

5. CONCLUSION

When assessing the legitimacy of the introduction of the discussed amendment, it is worth remembering the opinion of R. Zawłocki that 'The criminalisation of harmless or unintentional economic behaviours should be the result of absolute certainty as to its practical necessity.'[49] Meanwhile, it is difficult to conclude that the amendment to Article 296 § 4a of the Penal Code – facilitating, ultimately, the initiation of criminal proceedings for harmless economic behaviours – was indeed necessary. Its introduction appears to be the result of a faulty definition of the reasons for the poor application of Article 296 § 1a of the Penal Code, which the legislator identified as the excessively limited circle of persons who may file a request for prosecution of this criminal offence.

[49] R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 967.

Meanwhile, in fact, the lack of practical application of this provision lies in its construction, which significantly limits the range of factual circumstances that can be qualified under its statutory elements. The legislator should therefore first consider amending Article 296 § 1a of the Penal Code rather than the provision concerning the initiation of its prosecution. Worse still, this solution does not seem to be reconcilable with the principle of subsidiarity of the criminal law, since minority shareholders or stockholders have a number of rights under commercial law to defend their interests. Granting them the right to file a request for prosecution for the criminal offence of mismanagement without damage therefore does not seem in any way necessary for the defence of their rights and constitutes an excessive interference of criminal law in corporate relations, threatening to abuse this institution for purposes not covered by Article 297 § 1 CCP.[50]

At the very end, it is only appropriate to hint at an issue that goes beyond the scope of this thesis, namely the legislator's recently increased interest in regulating corporate relations by means of criminal law norms. Indeed, it should be noted that under the Act of 9 February 2022 amending the Act – Commercial Companies Code and certain other acts,[51] Articles 587^1 and 587^2 were added to the Commercial Companies Code. These provisions criminally sanction inadequate cooperation of the company's management board (as well as, for example, commercial proxy holders) with the supervisory board. The legislator therefore apparently considered that the threat of a criminal sanction was a necessary element to stabilise relations between company bodies. On the other hand, the amendment of Article 296 § 4a of the Penal Code constitutes a criminal law interference in the relationship primarily between minority and majority shareholders and the company's management board or commercial proxy holders. Meanwhile, it is difficult to identify reasons

[50] In this context, a certain inconsistency on the part of the legislator in introducing the solution in question should be considered a less significant drawback. Even in the case of other criminal offences, a minority shareholder of a company may be indirectly harmed by the conduct of the company's governing body, yet still will not be able to initiate criminal proceedings, as such a request can only be filed by the aggrieved company. An example of such a situation is the criminal offence under Article 300 § 1 of the Penal Code (frustrating or depleting the satisfaction of one's creditor in the event of the debtor's threatened insolvency or bankruptcy), which can only be prosecuted upon request of the aggrieved party (unless the State Treasury is the aggrieved). Meanwhile, a situation may arise in which a capital company is a creditor of a debtor disposing of its assets, and the management of that company does not take all possible steps against the debtor due to business or personal ties between the management board and the debtor. A dissatisfied minority shareholder could, in such a case, file a notification that the company's management has committed a prohibited act under Article 296 § 1 or 1a of the Penal Code, but this will only be justified if the company's claim is significant enough to speak of substantial financial damage. If there is no risk of significant financial damage, the only criminal law action available to the minority shareholder would be to report the unreliable debtor under Article 300 § 1 of the Penal Code. However, this will not be possible, as only the company, as the aggrieved party, may file such a request – and this will not occur due to the connections between the company's management board and the debtor. As can be seen, therefore, also with regard to other criminal offences, in order to protect the interests of the minority partner, stockholder, shareholder, or member of a cooperative, it would be justified to broaden the group of entities entitled to file a request for prosecution. It is therefore incomprehensible why such a possibility has been limited solely to the offence under Article 296 § 1a of the Penal Code.

[51] Journal of Laws of 2022, item 807.

for the necessity of such intense interest of the legislator in regulating these issues by means of criminal law. This situation can therefore be seen as a manifestation of the legislator's disbelief that commercial law is capable of adequately regulating intra-corporate relations and, therefore, that a broader intervention of criminal law norms is necessary in this respect. However, this can hardly be regarded as a fully accurate assessment of the prevailing economic situation and is rather an expression of the dangerous belief that criminal law is the best way to safeguard the correctness of social relations.

BIBLIOGRAPHY

Bojarski M., *Dozwolone ryzyko gospodarcze w polskim prawie karnym*, Wrocław, 1977.
Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016.
Cimarno A., 'Artykuł 296 KK jako karnoprocesowy instrument ochrony podmiotów gospodarczych przed nadużyciami ze strony kadry menedżerskiej', in: Bieńkowska B.T., Jędrzejewski Z. (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warszawa, 2016.
Dębowski P., 'Działanie na szkodę spółki w świetle wprowadzonych zmian w kodeksie karnym wraz z uwagami prawnoporównawczymi na gruncie prawa niemieckiego', in: Gil D. (ed.), *Problemy nowelizacji prawa sądowego*, Lublin, 2013.
Domarus A., 'Skutek przestępny na gruncie przestępstwa nadużycia zaufania – zagadnienia wybrane', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2012, No. 3.
Gałęski M., Grupa G., 'Karnoprawna ocena decyzji menedżerskich', *Monitor Prawa Handlowego*, 2014, No. 1.
Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021.
Giezek J., Kardas P., 'Odpowiedzialność karna za działanie na szkodę spółki – o potrzebie zmian', *Przegląd Prawa Handlowego*, 2011, No. 8.
Górniok O., 'Znaczenie subsydiarności prawa karnego w jego interpretacji', *Państwo i Prawo*, 2007, No. 5.
Hofmański P. (ed.), *System prawa karnego procesowego. Tom I. Zagadnienia ogólne. Część 2*, Warszawa, 2013.
Hryniewicz E., 'Karalne działanie na szkodę spółki', *Prokuratura i Prawo*, 2012, No. 10.
Korzeniewski A., 'Przestępstwa menedżerskie po liftingu', *Rzeczpospolita*, 14 July 2011.
Ligęza-Turlakiewicz M., Turlakiewicz G., 'Granice kreatywnego zachowania menedżerów w kontekście art. 296 § 1a kodeksu karnego', *Prokuratura i Prawo*, 2016, No. 5.
Mucha A., *Struktura przestępstwa gospodarczego oraz okoliczności wyłączające bezprawność czynu w prawie karnym gospodarczym*, Warszawa, 2013.
Oczkowski T., *Nadużycie zaufania w prowadzeniu cudzych spraw majątkowych*, Warszawa, 2013.
Pawelec S., *Spółka kapitałowa jako pokrzywdzony w procesie karnym*, Warszawa, 2011.
Pietrzyk T., *Odpowiedzialność karna menedżerów spółek handlowych*, Warszawa, 2020.
Popławski H., 'W kwestii rozwiązania zagadnienia ryzyka w płaszczyźnie winy', *Nowe Prawo*, 1969, No. 5.
Romanowski M., 'Kto ma decydować o interesie spółki: menedżer czy prokurator?', *Rzeczpospolita*, 16 June 2011.
Rozental K., 'W sprawie karnoprawnego charakteru tzw. ryzyka zwykłego', *Państwo i Prawo*, 1991, No. 4.
Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018.
Sepioło I., *Przestępstwo niegospodarności z art. 296 KK*, Warszawa, 2013.

Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020.
Skorupka J., *Prawo karne gospodarcze. Zarys wykładu*, Warszawa, 2005.
Stefanicki R., *Należyta staranność zawodowa członka zarządu spółki kapitałowej,* Warszawa, 2020.
Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2020.
Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, Warszawa, 2022.
Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363*, Warszawa, 2021.
Zawłocki R., 'Karalna niegospodarność', in: Pohl Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009.
Zawłocki R., 'Nowe przestępstwo niegospodarności bezszkodowej z art. 296 § 1a Kodeksu karnego', *Monitor Prawniczy*, 2011, No. 18.
Zawłocki R., *Podstawy odpowiedzialności karnej za przestępstwa gospodarcze*, Warszawa, 2004.
Zawłocki R., 'Przestępstwo niegospodarności', in: Zawłocki R. (ed.), *System prawa karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa, 2015.
Zientara A., *Przestępstwo nadużycia zaufania z art. 296 kodeksu karnego*, Warszawa, 2010.
Żółtek S., *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warszawa, 2009.

Cite as:

Pilarczyk Ł. (2025), *Entities entitled to file a request for prosecution of the criminal offence of punishable mismanagement without damage – assessment of the amendment to article 296 § 4a of the Penal Code*, Ius Novum (Vol. 19) 1, 59–80. DOI 10.2478/in-2025-0005

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 81–91

PROHIBITION OF MARRIAGE BETWEEN A STEPFATHER (STEPMOTHER) AND A STEPSON (STEPDAUGHTER)

MONIKA LEWANDOWSKA-URBANOWICZ*

DOI 10.2478/in-2025-0006

Abstract

This article addresses the prohibition of marriage between in-laws in the direct line. It focuses on affinity as a legal family relationship that arises between a stepchild and a stepfather (stepmother) when the stepfather (stepmother) marries the stepchild's biological parent. The considerations in this article aim to demonstrate the fundamental thesis: that the prohibition of such marriages between persons related by affinity in the direct line should be lifted due to the lack of rational grounds for its maintenance.

Keywords: family law relationship, marriage ban, direct affinity, stepchild, stepfather, stepmother

INTRODUCTION

The issue of personal relations between in-laws, as regulated by the provisions of the Family and Guardianship Code (hereinafter 'the FGC'), includes various regulations concerning the prohibition of marriage between in-laws in the direct line. This issue is significant from the perspective of the legal status of the stepchild within the family group. The relevant regulation focuses on personal relations between in-laws, particularly regarding the prohibition of marriage between a stepson (stepdaughter) and a stepmother (stepfather). The interpretative assumption adopted in the following analysis can be formulated as the thesis that the interpretation of provisions regulating the prohibition of marriage between in-laws in the direct line

* LLM, Lazarski University in Warsaw (Poland), e-mail: m.lewandowska25@vp.pl, ORCID: 0000-0002-3538-4249

should strengthen the position of the stepchild as a member of the reconstituted family, bringing their situation closer to that of children in a biological family. This prohibition is set out in Article 14 § 1 FGC. In considering its application to the stepchild and their adoptive parent, it is necessary to assess whether its retention in the code is justified, as it raises significant doctrinal concerns.

AFFINITY

Affinity is understood as a legal family relationship between one spouse and the relatives of the other. It is solely a legal bond.[1] The stepchild's inclusion in the family (Articles 23 and 27 FGC) determines the stepparent's involvement in their upbringing. The stepfather (stepmother), despite not having parental authority over the stepchild, is obliged to support their spouse in raising and maintaining the foster child. Obstructing contact, mistreating the stepchild, or restricting the spouse's ability to fulfil their rights and obligations towards the stepchild may even lead to divorce. Such actions may be recognised by the court as a cause of marital breakdown, and in such a case, the stepfather (stepmother) may be held solely responsible for the dissolution of the marriage.

Affinity, like consanguinity, exists both in the direct and collateral lines. In the direct line, the parents of the husband and wife (in-laws) and the spouse's child (stepchild) are related by law. In-laws in the ascending line include the spouse's parents (in-laws) and their ascendants, while in-laws in the descending line include the spouse's child (stepchild). As shown above, parents and children are first-degree affinities.

The relationship of affinity also has implications for alimony, as defined in the Family and Guardianship Code, particularly concerning the maintenance obligation between a stepchild and a stepfather (stepmother), as well as the provisions on the prohibition of marriage between persons related by affinity in the direct line.[2]

Affinity affects not only relationships between family members but also their rights and obligations. Among the legal consequences of affinity, one should consider not only the stepchild's inclusion in the family (Articles 23 and 27 FGC), the possibility of the stepchild taking the stepfather's surname (Article 90 FGC), and the maintenance obligation between the stepmother or stepfather and the stepchild (Article 144 FGC), but also the prohibition of marriage between persons related by affinity in the direct line (Article 14 FGC), which is discussed later.

---

[1] See K. Pietrzykowski, in: Pietrzykowski K. (ed.), Gajda J., Ignatowicz J., Winiarz J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2010; 'There is no relationship of affinity between the relatives of one spouse and the relatives of the other spouse', cited from J. Ignaczewski, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2010, pp. 448–449; W. Żukowski, 'Projektowana nowelizacja przepisów regulujących dziedziczenie ustawowe', *Kwartalnik Prawa Prywatnego*, 2008, No. 1, p. 262; H. Haak, *Kodeks rodzinny i opiekuńczy. Komentarz*, Toruń, 2009, pp. 16–17; T. Sokołowski, 'Komentarz do art. 61(8) krio', in: Dolecki H., Sokołowski T. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, 1st edn, Warszawa, 2010, p. 460; J. Winiarz, in: Piątowski J.S. (ed.), Winiarz J., Ignatowicz J., Gwiazdomorski J., *System prawa rodzinnego i opiekuńczego. Komentarz*, Wrocław, 1985, pp. 623–624, commentary on Article 61(8).

[2] See Z. Tyszka, *Rodzina we współczesnym świecie*, Poznań, 2002, p. 33.

PROHIBITION OF MARRIAGE BETWEEN STEPSON (STEPDAUGHTER) AND STEPMOTHER (STEPFATHER)

As mentioned earlier, among the obstacles to contracting marriage, the prohibition of affinity in the direct line raises the most doubts in legal doctrine regarding the advisability of maintaining this regulation in the code.[3] This is particularly due to considerations of the well-being of children who may be born into such a relationship and the stability of the family to be formed.[4] On the other hand, the purpose of prohibiting marriage between in-laws, according to some scholars, including M. Domański, is 'to protect proper family relations and to prevent conflict situations from arising'.[5]

However, this prohibition cannot be equated with other, more significant marriage impediments, such as the prohibition of marriage between an adopter and an adopted person (Article 15 FGC) or the prohibition of bigamy (Article 13 of the Criminal Code). This is reflected in the way doctrine and jurisprudence approach it, including a relatively flexible stance on determining the circumstances that may constitute 'important reasons' for the court to grant permission to marry despite the prohibition of affinity (Article 14 § 1 FGC *in fine*). The impediment of affinity in marriage is therefore a relative impediment. Its removal is permitted through dispensation. According to Article 14 § 1, second sentence of the FGC, the court may grant permission for marriage between affines in the direct line, provided that important reasons, as discussed above, are present. At the same time, it needs to be emphasised that the 'important reason' cannot be a threat to life.

Under the Family and Guardianship Code, there are two substantive prerequisites for the court to grant permission for marriage despite the existence of an affinity relationship between the parties: (1) the existence of affinity in the direct line, and (2) the presence of so-called 'important reasons'. The first criterion is unambiguous – if there is no affinity in a direct line between the prospective spouses, there is no impediment to marriage based on affinity, allowing the marriage to proceed. The legislator did not define the concept of 'important reasons' justifying a court's permission to marry despite an affinity relationship. For instance, it has been observed that 'only if the age difference between the parties is not very significant and there are no objections based on the positive social value of the intended marriage, would

---

[3] See A. Zielonacki, *Zawarcie małżeństwa*, Wrocław, 1982, p. 93.

[4] See A. Szlęzak, *Prawnorodzinna sytuacja pasierba*, Poznań, 1985. p. 42; S. Grzybowski, *Prawo rodzinne. Zarys wykładu*, Warszawa, 1980, p. 61; J. Górecki, *Unieważnienie małżeństwa*, Kraków, 1958, p. 19; S. Szer, *Prawo rodzinne*, Warszawa, 1966, pp. 53–54; B. Walaszek, *Zarys prawa rodzinnego i opiekuńczego*, Warszawa, 1971, p. 48; J. Winiarz, *Prawo rodzinne*, Warszawa, 1983, p. 62; A. Zielonacki, *Zawarcie…*, op. cit., p. 93.

[5] See M. Domański, *Względne zakazy małżeńskie*, Warszawa, 2013, pp. 331–332; K. Pietrzykowski, in: Pietrzykowski K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2015, Article 14 II margin number 1; A. Zielonacki, in: Dolecki H., Sokołowski T., Andrzejewski M., Haberko J., Lutkiewicz-Rucińska A., Olejniczak A., Sylwestrzak A., Zielonacki A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, 2nd edn, Warszawa, 2013, pp. 68–69; J. Gajda, 'System prawa prywatnego', in: Smyczyński T., Gajda J., Nazar M., Panowicz-Lipska J., Sokołowski T., Stojanowska W. (eds), *Prawo rodzinne i opiekuńcze*, Vol. 11, Warszawa, 2012, pp. 174–175.

there be no reason to refuse permission to marry.'[6] Conversely, the Supreme Court has ruled that 'a particularly large age difference between the spouses, especially if the woman is significantly older, may – as life experience suggests – lead to the breakdown of the marriage.'[7] Similarly, K. Piasecki, J. Gajda, K. Pietrzykowski, and A. Zielonacki argue that a significant age difference between prospective spouses may pre-emptively threaten the stability of their cohabitation and should, in principle, be grounds for refusing court permission to marry. A different perspective is presented by M. Domański, who maintains that even a very large age difference between spouses does not constitute a marriage impediment under Polish law. The author rightly points out that assuming a significant age difference will inevitably lead to the breakdown of marriage is highly unjustified.[8] Furthermore, Domański highlights the particular concern of one party's young age, especially when the financial dependence of the younger spouse on the older, wealthier in-law raises suspicions that the younger spouse may have been pressured into marriage.[9]

When attempting to specify the concept of 'important reasons' as referred to in Article 14 FGC, M. Domański and J. Gajda cite the views of J. Winiarz and unanimously emphasise that, in accordance with the principle of family protection,

> 'The court, in proceedings for granting a marriage licence between persons related by affinity in the direct line, should take into account: the existence of minor children of one of the prospective spouses, their attitude towards the change of roles in the family, and a prognosis regarding the impact of the marriage on their psychological well-being. According to these authors, the acceptance of the marriage by the closest family members, particularly adult children from a previous marriage, is also important. Furthermore, the court should consider whether the spouse from the relationship that established the affinity is still alive, the nature of their relationship with the father or mother, and whether the marriage of in-laws could negatively impact these relationships. (…) An important circumstance that may lead to an application being approved is when the bride becomes pregnant or gives birth to a child from a relationship with a relative by affinity.'[10]

It seems that the assessment of the validity of the reasons necessary for the court's consent to the marriage should also take into account the previous family situation of the relatives involved. It may be the case that the stepchild has remained within the same family unit as the stepmother (stepfather) or, conversely, that they were never part of this family dynamic. In the first scenario, the situation preceding the issue of marriage between in-laws may resemble a parent-child relationship – for instance, if the stepson (stepdaughter) had played the social role of a child within the family, and the stepmother (stepfather) had assumed a parental role.

---

[6] See Z. Wiszniewski, in: Grudziński M. (ed.), Ignatowicz J., Wiszniewski Z., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1966, p. 55.

[7] See judgment of the Supreme Court of 16 March 1956, ref. No. IV CR 127/55, OSN 1956, item 112, Legalis No. 637418.

[8] See M. Domański, *Względne zakazy*…, op. cit., p. 338; J. Gajda, 'System prawa…', op. cit., pp. 177–178; K. Pietrzykowski, in: Pietrzykowski K. (ed.), Gajda J., Ignatowicz J., Winiarz J., op. cit., p. 278; A. Zielonacki, in: Dolecki H., Sokołowski T., Andrzejewski M., Haberko J., Lutkiewicz-Rucińska A., Olejniczak A., Sylwestrzak A., Zielonacki A. (eds), op. cit., pp. 69–70.

[9] See M. Domański, *Względne zakazy*…, op. cit., pp. 338–339.

[10] See ibidem, p. 340; J. Gajda, 'System prawa…', op. cit., pp. 177–178.

In the second scenario, no such relationship would have ever existed, making it fundamentally different from that of a biological family. From this, it follows that the moral considerations that led to the introduction of the prohibition on marriage between in-laws into the Family and Guardianship Code would be particularly relevant in the first scenario. However, even in such cases, a liberal interpretation of the legal provisions governing this institution should be applied. This is because a marriage between in-laws could only take place after the termination of the marriage between the stepfather (stepmother) and the biological parent of the stepson (stepdaughter). In such instances, the previously established system of social roles – which may have given rise to concerns about the moral implications of the marriage – also ceases to exist. This situation is somewhat analogous to the dissolution of adoption. In such cases, the marriage between a former adopter and former adoptee is not subject to court approval. Similarly, in the second scenario – where in-laws have never shared a common family unit – moral considerations should play an even lesser role. In such cases, refusals to grant permission for marriage should be exceptionally rare, and only based on exceptionally important circumstances. Furthermore, a significant age difference between in-laws should not constitute an obstacle to marriage.

In legal doctrine, there are also divergent positions regarding the possibility – or lack thereof – of the court granting permission *ex post* for marriage between persons related by affinity in a direct line. The dominant view supports the admissibility of such permission.[11] Taking into account the literal interpretation of Article 14 § 1, second sentence of the FGC, which indicates the possibility of obtaining the court's permission 'to enter into' a marriage between persons related by affinity, it simultaneously argues against the permissibility of granting such permission *ex post*, once this marriage has already been concluded. In such a case, the court may only dismiss the claim for annulment of marriage due to an impediment of affinity, indicating that there were so-called 'important reasons' justifying the granting of permission to enter into the marriage. According to some authors, including K. Pietrzykowski and J. Gajda, the court's dismissal of an annulment claim due to an obstacle of affinity in such circumstances should be regarded as *de facto* permission to conclude a marriage *ex post*.[12]

Summing up, it seems that the ban on marriages between persons related by affinity contained in Article 14 FGC deserves criticism. Firstly, as indicated in the literature on the subject, marriages between in-laws are very rare, and the refusal to

---

[11] See ibidem, pp. 176–177; K. Pietrzykowski, in: Pietrzykowski K. (ed.), Gajda J., Ignatowicz J., Winiarz J., op. cit., Article 14 II, margin number 5; A. Zielonacki, in: Dolecki H., Sokołowski T., Andrzejewski M., Haberko J., Lutkiewicz-Rucińska A., Olejniczak A., Sylwestrzak A., Zielonacki A. (eds), op. cit., p. 70; K. Gromek, in: Gromek K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, 5th edn, Warszawa, 2016, Article 14 III, margin number 3; K. Piasecki, in: Piasecki K. (ed.), Czech B., Domińczyk T., Kalus S., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2011, p. 100; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa, 2010, pp. 106–107.

[12] See judgment of the Supreme Court of 14 February 1961 (ref. No. 1 CR 938/59, OSPIKA 1962, No. 10, item 265); LEX No. 1634095; resolution of the Supreme Court of 25 April 1983 (III CZP 12/83, OSNCP 1983, No. 11, item 174), Legalis No. 23682; resolution of the Supreme Court of 9 May 2002 (ref. No. III CZP 7/02 OSP 2004, No. 1, item 1), LexPolonica No. 355229.

grant consent to enter into such a marriage is also rare, which makes the justification for this prohibition questionable.[13]

Another example would be a situation where a family consists of spouses and children, each of whom is descended from one of the spouses and is therefore a stepchild of the other spouse. In the eyes of the law, these children are legally unrelated to each other. The Family and Guardianship Code does not prohibit marriages between them. However, the situation is different when the family includes a stepchild and a biological child of the spouses, as in this case the inadmissibility of marriage between such children results from the prohibition of consanguinity, which also applies to half-siblings. Since each of the children is biologically related to only one spouse and is legally unrelated to the other, yet resides within the same family unit, the legal provisions on siblings could be applied to them. This raises the question of whether marriage between them should also be prohibited. It seems fair to argue against such a proposal. However, this contradicts the thesis that if the relationship between in-laws resembles that between biological parents and children, it would be reasonable to introduce legal regulations governing the relationship between a stepfather (stepmother) and stepson (stepdaughter), modelled on biological parent-child relationships. Similarly, in a situation where the family includes children of each spouse who are not also children of the other spouse, the regulation on sibling relations should apply to them. Meanwhile, in the above considerations, opposition was expressed to the ban on marriages between a stepfather (stepmother) and a stepson (stepdaughter), as well as to the prohibition of marriage between the children of each spouse, even if they were raised in the same family unit. This criticism does not seem entirely justified. This is because, where the situation within a reconstituted family corresponds to that of a biological family, the analogy to the prohibition of marriage between in-laws is absolutely justified. However, in cases where there was an intention to marry, it should be recognised that the system of relationships between the individuals wishing to marry – either during their time as members of the same family unit or after leaving it – was or became different from the relationships between parents and children or between siblings in a biological family. In such a case, since there are no legal or eugenic obstacles, marriage between such individuals should be allowed. The only possible objection to such a marriage would be moral considerations, which would not apply in such a situation due to the absence of relationships covered by the scope of these norms. Such considerations could be invoked in cases where the individuals wishing to marry had previously shared an emotional bond characteristic of parent-child or sibling relationships. However, in a situation where such ties no longer exist or have never existed, there is no reason why there should be a ban on marriage between such persons, despite the fact that in the past, these persons were members of the same family community. A solution of this kind therefore suggests that, in most cases, the persons mentioned above who intend to marry do not have the same relationship as parents and children or siblings. The hypothesis put forward here is reflected in the sporadic cases of refusal to consent to marriage, referred to

[13] See A. Zielonacki, *Zawarcie małżeństwa*, op. cit., p. 93.

in Article 14 FGC. However, this does not exclude the possibility of entering into marriages between persons who were once connected by emotional ties, such as those found in parent-child relationships. It seems pointless to introduce a ban on marriages between in-laws or to introduce a new ban that would prohibit marriages between the children of each spouse. This is because, as mentioned earlier, firstly, situations of this kind, concerning the conclusion of marriages by the above-mentioned persons, would be very rare, potentially resulting in the introduction of a redundant regulation into the code. Secondly, increasing the number of bans reduces the attractiveness of marriage as an alternative to cohabitation, which, in turn, would lead to far more unfavourable consequences than those the ban seeks to prevent.

Another contentious issue in the doctrine is the nature of the legitimacy of prospective spouses by affinity to submit an application for a marriage permit. According to some, such an application should be submitted jointly by both parties; however, in a situation where such an application is submitted by only one of the prospective spouses, it should be rejected. This view is justified by the nature of the obstacle of affinity, which applies to both parties.[14] According to the second view, such a request may be submitted by either of the persons related by affinity. The other prospective spouse is then considered an interested party in the case and should participate in the proceedings in that capacity.[15] It should be emphasised that in the case of a minor stepdaughter who wishes to marry a widowed stepfather, the application for a marriage permit must be submitted by the stepdaughter herself, as it is not sufficient for her to join the proceedings initiated by the stepfather. This follows from the content of Article 561 § 1, first sentence of the Code of Civil Procedure (hereinafter 'CCP') in conjunction with Article 10 § 1 FGC, which lists as the applicant only a person who has not reached the prescribed age and is therefore entitled to submit the application in question.[16] At the same time, one should agree with the view expressed in the doctrine that considerations of procedural efficiency favour granting a joint permit in relation to both submitted applications. However, there are procedural complications in this situation. Namely, in cases involving a marriage licence for a woman under 18, the decision is made by the guardianship court in non-litigious proceedings (Article 561 § 1, first sentence of the CCP; Article 10), whereas in cases concerning a marriage licence between persons related by affinity, the decision is made by the district court in non-contentious proceedings (Article 507 CCP). This is because, in the first case, the applicant is a minor woman, whereas in the second case, both spouses are involved. At the same time, it is necessary to support the doctrinal view that the age-related obstacle extends further than the affinity obstacle. Therefore, in cases where a permit is issued for a minor to marry a person related in a direct line,

---

[14] See J. Gudowski, in: Ereciński T., Gudowski J. (eds), *Kodeks postępowania cywilnego*, Vol. 3, Warszawa, p. 149; P. Cioch, 'Postępowanie nieprocesowe w sprawach o udzielenie zezwolenia na zawarcie małżeństwa', *Przegląd Sądowy*, 2010, No. 3, p. 62.

[15] See J. Gajda, 'System prawa…', op. cit., p. 197.

[16] See commentary on Article 10 of the Family and Guardianship Code in: K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, 8th edn, Warszawa, 2023.

the procedural rules under Article 10 FGC shall apply, in particular the provisions of the CCP governing guardianship court proceedings. It would be unacceptable for the court to grant a separate permit under Article 14 FGC, while leaving open the issue of permission from the guardianship court under Article 10. There can be only one permit, which must take into account the entire situation.[17]

In proceedings for obtaining a marriage permit for in-laws, it is most important that both prospective spouses participate and that both consent to the marriage.

Evidence proceedings in cases for permission to marry between in-laws should be based on documentary evidence as well as evidence from 'personal sources'. Prospective parties should provide copies of birth certificates, a copy of the marriage certificate that established the affinity, proof of its dissolution, and proof that both spouses are unmarried. Regarding 'important reasons', these should be verified and assessed by interviewing both prospective spouses and hearing from relatives, particularly the children of the individuals intending to marry. The court may also order an environmental interview (Article 561^1 CCP). If there are doubts regarding the mental health of the participants, the court should obtain an expert opinion from a psychiatrist.[18]

CONCLUSION

In the doctrine of family law, the above-mentioned solution has been criticised. There have been a number of arguments in favour of abandoning the ban on marriages between persons related by affinity in a direct line. According to A. Zielonacki, there are no rational grounds for maintaining it. As indicated earlier, such marriages occur very rarely, and the ease of obtaining court permission to conclude such a marriage prevents the effective operation of the ban. According to the above author, it is easy to obtain the court's permission to enter into this type of marriage due to the lack of rational grounds for rejecting the application. At the same time, Zielonacki pointed out that a situation in which the exception becomes the rule has a negative impact on respect for the law. Thus, maintaining obsolete regulations has a similar effect.[19]

There have also been positions in the doctrine defending Article 14 FGC. According to J. Gajda, a liberal interpretation regarding the possibility of granting a permit does not undermine the validity of this marriage obstacle. The purpose of the provision is to allow the annulment of a marriage whose validity seems questionable from the perspective of the family unit it establishes. As noted by the

---

[17] See commentary on Article 14 of the Family and Guardianship Code in: K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, 8th edn, Warszawa, 2023; J. Winiarz, in: Piątowski J.S. (ed.), Winiarz J., Ignatowicz J., Gwiazdomorski J., op. cit., pp. 191; Z. Wiszniewski, S. Gross, in: Dobrzański B. (ed.), Ignatowicz J. (ed.), Wiszniewski Z., Gross S., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1975, p. 55.

[18] See M. Domański, *Zezwolenie na zawarcie małżeństwa powinowatym w linii prostej*, Warszawa, p. 28.

[19] See A. Zielonacki, *Zawarcie…*, op. cit., pp. 169 et seq.

above author, the court is not obliged to grant permission for a marriage that, from its inception, does not present a positive prognosis for its proper functioning.[20]

To sum up, referring to the arguments of the supporters of maintaining the ban, it should be pointed out that it does not seem that the regulation of Article 14 FGC was an effective or useful instrument for annulling marriages whose existence would be questionable from the perspective of the family unit thus established. The mere identification of a prohibition arising from affinity by the head of the Registry Office is not a complicated matter. Prospective couples must provide evidence of the termination of a previous marriage. Such evidence will unequivocally indicate the existence of affinity. Considering the rarity of marriages between persons related by affinity in the direct line, it should be assumed that a marriage contrary to the prohibition may actually occur only in theory. In addition, the ease of obtaining a permit to enter into such a marriage does not encourage prospective couples to attempt to conceal the prohibition. On the other hand, obtaining a permit excludes the possibility of annulling the marriage on these grounds.

Another issue is the limited group of persons entitled (legitimised) to file a lawsuit for annulment of marriage. Such authorisation, pursuant to Article 14 § 3 FGC, is available only to spouses. This type of marriage cannot be annulled after its termination (Article 18 of the Civil Code).

Problems arising from the application of Article 14 result from the weak justification for the prohibition of marriages between in-laws. As it turns out, in fact, this prohibition is justified mainly by moral beliefs and ethical considerations, and the legislative concept itself stems from a rather inconsistent duplication of previously binding solutions, including those adopted in canon law. Assigning a pragmatic function to the ban proves difficult, but when excluding arguments in favour of this solution, the only remaining justification is the rather unpredictable argument of family unity and stability.

However, the fundamental issue is that the arguments supporting the justification for the prohibition of marriages between persons related by affinity in the direct line are, in fact, arguments against any form of cohabitation between such persons. The prohibition formulated in Article 14 FGC has no real capacity to achieve the objectives it is intended to serve.

Thus, the first objection to the ban under analysis is its ineffectiveness in achieving its assumed objectives. There are no criminal provisions penalising sexual relations between in-laws in the direct line. Likewise, there are no provisions preventing the upbringing of children from a marriage between in-laws or from a factual relationship between in-laws in the direct line.

Taking into account factual, psychological, and emotional considerations, there is no difference between a marriage between persons related by affinity in the direct line and a marriage between individuals who are not formally related by affinity but have developed a so-called actual affinity through a long-term factual relationship. Thus, there would be no legal obstacles for a grandfather to become a stepfather to

[20] See J. Gajda, 'System prawa…', op. cit., p. 197.

his grandchildren. This means that the existing legal framework is both ineffective and inconsistent.

The lack of a strong justification for the prohibition directly impacts the issues surrounding the granting of permission to enter into a prohibited marriage. An analysis of Article 14 FGC reveals that an 'important reason' justifying the marriage licence is simply the absence of any grounds for rejecting such an application. This represents a reversal of the legislator's intent. Such a widely accepted view contradicts the very purpose of the marriage prohibition. In fact, Article 14 FGC does not prohibit marriage between persons related by affinity in the direct line; rather, it establishes that such marriages are permitted unless there are important reasons against them. The liberal approach to this prohibition suggests that its moral and ethical justification is weak and unconvincing.

Another aspect concerns the doubts raised in proceedings for a marriage licence for persons related by affinity in the direct line, particularly regarding personal, financial, housing, and health considerations for adults who are otherwise fully capable of making independent legal decisions. These individuals may also, without any special procedure, enter into marriage with any other person, including persons related by affinity in the collateral line. In such cases, no one would question the housing or personal circumstances of the prospective spouses. Thus, the adopted legal framework can be criticised as an unjustified and excessive interference in the private lives of the spouses.

In light of the above considerations, the prohibition on marriage between persons related by affinity in the direct line should be removed from the catalogue of marriage bans.

BIBLIOGRAPHY

Cioch P., 'Postępowanie nieprocesowe w sprawach o udzielenie zezwolenia na zawarcie małżeństwa', *Przegląd Sądowy*, 2010, No. 3.

Domański M., *Względne zakazy małżeńskie*, Warszawa, 2013.

Domański M., *Zezwolenie na zawarcie małżeństwa powinowatym w linii prostej*, Warszawa, 2010.

Gajda J., 'System prawa prywatnego', in: Smyczyński T., Gajda J., Nazar M., Panowicz-Lipska J., Sokołowski T., Stojanowska W. (eds), *Prawo rodzinne i opiekuńcze*, Vol. 11, Warszawa, 2012.

Górecki J., *Unieważnienie małżeństwa*, Kraków, 1958.

Gromek K., in: Gromek K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, 5th edn, Warszawa, 2016.

Grzybowski S., *Prawo rodzinne. Zarys wykładu*, Warszawa, 1980.

Gudowski J., in: Ereciński T., Gudowski J. (eds), *Kodeks postępowania cywilnego*, Vol. 3, Warszawa, 2009.

Haak H., *Kodeks rodzinny i opiekuńczy. Komentarz*, Toruń, 2009.

Ignaczewski J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2010.

Ignatowicz J., Nazar M., *Prawo rodzinne*, Warszawa, 2010.

Piasecki K., in: Piasecki K. (ed.), Czech B., Domińczyk T., Kalus S., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2011.

Pietrzykowski K., in: Pietrzykowski K. (ed.), Gajda J., Ignatowicz J., Winiarz J., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2010.
Pietrzykowski K., in: Pietrzykowski K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2015.
Pietrzykowski K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, 8th edn, Warszawa, 2023.
Sokołowski T., 'Komentarz do art. 61(8) krio', in: Dolecki H., Sokołowski T. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, 1st edn, Warszawa, 2010.
Szer S., *Prawo rodzinne*, Warszawa, 1966.
Szlęzak A., *Prawnorodzinna sytuacja pasierba*, Poznań, 1985.
Tyszka Z., *Rodzina we współczesnym świecie*, Poznań, 2002.
Walaszek B., *Zarys prawa rodzinnego i opiekuńczego*, Warszawa, 1971.
Winiarz J., *Prawo rodzinne*, Warszawa, 1983.
Winiarz J., in: Piątowski J.S. (ed.), Winiarz J., Ignatowicz J., Gwiazdomorski J., *System prawa rodzinnego i opiekuńczego. Komentarz*, Wrocław, 1985, commentary on Article 61(8).
Wiszniewski Z., in: Grudziński M. (ed.), Ignatowicz J., Wiszniewski Z., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1966.
Wiszniewski Z., Gross S., in: Dobrzański B. (ed.), Ignatowicz J. (ed.), Wiszniewski Z., Gross S., *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1975.
Zielonacki A., in: Dolecki H., Sokołowski T., Andrzejewski M., Haberko J., Lutkiewicz-Rucińska A., Olejniczak A., Sylwestrzak A., Zielonacki A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, 2nd edn, Warszawa, 2013.
Zielonacki A., *Zawarcie małżeństwa*, Wrocław, 1982.
Żukowski W., 'Projektowana nowelizacja przepisów regulujących dziedziczenie ustawowe', *Kwartalnik Prawa Prywatnego*, 2008, No. 1.

Cite as:

Lewandowska-Urbanowicz M. (2025), *Prohibition of marriage between a stepfather (stepmother) and a stepson (stepdaughter)*, Ius Novum (Vol. 19) 1, 81–91. DOI 10.2478/in-2025-0006

sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 92–110

PRESS ACCESS TO PUBLIC INFORMATION IN THE LIGHT OF ADMINISTRATIVE COURTS' CASE LAW

ŁUKASZ NOSARZEWSKI*

DOI 10.2478/in-2025-0007

Abstract

This article deals with the issue of press access to public information. It presents the thesis that press access to public information, in comparison to the general rules applicable to ordinary citizens, has been limited by additional non-statutory formal requirements. This thesis is supported by numerous judgments of administrative courts regarding the disclosure of public information. This limitation primarily resulted from changes in the interpretation of regulations that have been in force for years and their application by administrative courts and, in part, from changes in the regulatory environment. Therefore, it is postulated that the journalistic right to information should be strengthened, and the function and mission of the press should be recognised to actualise citizens' rights to reliable information, openness of public life, and social control and criticism. The article employs the dogmatic and legal analysis method and an analysis of Polish administrative courts' case law.

Keywords: press, journalist, press law, access to public information, re-use

1. INTRODUCTION

The constitutionally guaranteed freedom of the press is implemented through various guarantees concerning freedom of communication, freedom of speech, prohibition of censorship, and the right to information. According to W. Sokolewicz, it is most commonly assumed that freedom of the press (media), as proclaimed

* LLD, Assistant Professor in the Department Administrative, Constitutional and Employment Law, Faculty of Law and Administration of Lazarski University in Warsaw (Poland), legal advisor to the General Counsel to the Republic of Poland, attorney at law, e-mail: lukasz.nosarzewski@lazarski.pl, ORCID: 0000-0001-8769-6757

in Article 14 of the Constitution of the Republic of Poland, represents a specific aspect of freedom of expression within Polish constitutional law. This freedom of expression, which includes the right to express one's views, obtain, and disseminate information, is guaranteed under Article 54(1) of the Constitution of the Republic of Poland. Freedom of expression should be understood as the freedom to present opinions, beliefs, views, or factual information in various forms. The right to record, reproduce, and disseminate such messages constitutes an integral part of freedom of expression, at which point it transforms into freedom of the press.[1] However, for the press to record, reproduce, and disseminate messages, it must first acquire knowledge.

In a democratic state, the press plays a fundamental role, particularly in election campaigns and in the political process, where it is essential for competing political parties and the politicians representing them in parliament.[2] The goal of every political party is to participate in public life by exerting democratic influence on state policy and the exercise of public authority. Thus, the press plays a crucial role in controlling public authorities, and the right to obtain information about the activities of public authorities and public officials serves as a tool for this oversight. Consequently, there is a strong connection between freedom of the press and the right to public information as enshrined in Article 61 of the Constitution of the Republic of Poland. Legal doctrine and case law recognise that, while the freedom to obtain information under Article 54 does not impose any obligation on other entities to provide information, meaning that individuals – including journalists – are free to seek information independently, the situation is clearly different under Article 61. The right to public information, classified as a political right, correlates with the obligation of public authorities to disclose information.[3] Furthermore, the press access to information should be examined in light of the fundamental principle of a democratic state governed by the rule of law – the principle of openness in public life.[4] For this reason, any restrictions on the exercise of constitutional freedoms and rights may be imposed only by statute and only in compliance with the principle of proportionality, as expressed in Article 31(3) and Article 61(3) of the Constitution of the Republic of Poland. These restrictions must not violate the essence of freedoms and rights.

As J. Sobczak noted years ago, the legislator does not privilege journalists in any way regarding access to public information and, it seems, sees no grounds for journalists to have access to such information on different terms than ordinary citizens.[5] Nothing has changed in this respect. However, the press not only lacks

---

1 See W. Sokolewicz, 'Wolność prasy i jej konstytucyjne ograniczenia', *Państwo i Prawo*, 2008, No. 6, p. 22. Also see cited therein: J. Sobczak, 'Swoboda wypowiedzi w orzecznictwie Trybunału Praw Człowieka w Strasburgu. Część I', *Ius Novum*, 2007, No. 2–3, p. 5.

2 Ibidem, p. 23.

3 See P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. II, Warszawa, LEX 2016. Also judgment of the Supreme Administrative Court of 28 June 2005, OSK 1733/04, CBOSA.

4 E. Ferenc-Szydełko, *Prawo prasowe. Komentarz*, Warszawa, LEX 2013, Article 3(a).

5 See J. Sobczak, 'Dostęp do informacji publicznej – zagadka i parawan', *Środkowoeuropejskie Studia Polityczne*, 2008, No. 1, pp. 17–18.

privileges but may also encounter difficulties in obtaining information. In this article, I present the thesis that press access to public information, in comparison with the general rules applicable to ordinary citizens, has been restricted by additional non-statutory formal requirements. This occurred primarily due to changes in the interpretation of regulations that have been in force for years and their application by administrative courts, and partly due to changes in the regulatory environment. I support my thesis with examples of administrative court judgments concerning the provision of public information upon request, as well as the transfer of public information for re-use. This work primarily employs the method of dogmatic and legal analysis and an examination of Polish administrative courts' case law.

2. PRESS ACCESS TO PUBLIC INFORMATION IN THE LIGHT OF LEGAL REGULATIONS

The press, in accordance with the Constitution of the Republic of Poland, exercises freedom of expression and fulfils the right of citizens to reliable information, openness of public life, and social control and criticism, as stipulated in the Act of 26 January 1984 – Press Law.[6] In the light of the legal definition, the press includes periodical publications with specific characteristics, such as dailies and magazines, as well as all existing and emerging media that disseminate periodical publications. It also encompasses teams of people and individuals engaged in journalistic activities.[7] A journalist is defined as a person who edits, develops, or prepares press materials, is in an employment relationship with an editorial office, or is involved in such activities for an editorial office and authorised by it to do so.[8] In this approach, the concept of the press includes journalists employed by or acting on behalf of a specific editorial office.

The issue of press access, including that of journalists, to public information is regulated in Article 3a of the Press Law, which states that the provisions of the Act of 6 September 2001 on Access to Public Information[9] shall apply to the press right to access public information. The legislator moved the regulation of journalists' access to public information from the Press Law to the Access Act, indicating that it is more favourable.[10] The Access Act provides the right of access to public information to 'everyone'. This includes the right to obtain public information, including processed

---

[6] Journal of Laws of 2018, item 1914, hereinafter referred to as 'the Press Law'.

[7] See Article 7(2)(1) of the Press Law. Due to the subject matter of the article, the problems with the definition of the concept of 'the press' is not analysed herein. Attention should be drawn to the fact that with the development of new technologies, numerous doubts have arisen regarding the scope of meaning of the terms 'press', 'newspaper', and 'periodical'. Considerable issues have emerged particularly in relation to online press; see, e.g., M. Siwicki, 'Prasa internetowa a obowiązek rejestracji prasy', *Przegląd Sądowy*, 2011, No. 1, pp. 61 et seq.

[8] See Article 7(2)(5) Press Law.

[9] Journal of Laws of 2022, item 902, hereinafter referred to as 'AAPI' or 'the Access Act'.

[10] See the justification for the parliamentary Bill on access to public information, print no. 2094, the Sejm of the 3rd term, pp. 20–21, https://orka.sejm.gov.pl/proc3.nsf/opisy/2094.htm [accessed on 5 March 2024].

information where it is particularly important for the public interest, as well as the right to inspect official documents and access meetings of collegial bodies of public authorities elected in general elections. A person exercising the right to public information must not be required to demonstrate a legal or factual interest. The obliged entity must immediately provide public information containing current knowledge of public matters.[11]

The provision of public information, within the above-mentioned limits, may occur through publication in the Public Information Bulletin (BIP), making it available upon request, displaying or posting it in publicly accessible places, or installing a device enabling public access to the information. In addition, providing access to meetings and materials documenting those meetings, as well as publishing information on the data portal, may also serve as means of making information available.[12] The interpretation of the term 'public information' poses a significant problem under the Access Act. It appears that the objective approach to this concept has dominated the Supreme Administrative Court's case law for years. The definition refers to the concept in Article 1 AAPI, which stipulates that any information on public matters constitutes public information. Thus, when examining cases, the Supreme Administrative Court seeks to determine whether the requested data relate to the functioning of the state in a broad sense.[13] Under the subjective approach, the focus was primarily on whether the information concerned the activities of public authorities and persons performing public functions. Further, the disclosure of public information at the request of the press was analysed, since other methods of disclosure do not require the conduct of administrative proceedings. Any failure to provide public information may result in the initiation of a request procedure, leading either to the transfer of information or to a restriction on availability, which remains subject to administrative court review.[14]

At the same time, in addition to the reference concerning press access to public information, Article 4 of the Press Law remains in force. It regulates journalists' right to information by obliging entrepreneurs, entities outside the public finance sector, and non-profit organisations to provide the press with information. These entities do not coincide with the catalogue of entities obliged to provide public information under the Access Act. Under this obligation, they must inform the press about their activities, provided that the information is not confidential and does not violate the right to privacy under other provisions. If they refuse to provide information, they must, at the request of the editor-in-chief, deliver a written refusal with formalised content to the concerned editorial office within three days.[15] Such a refusal or failure to comply with the formal requirements may be appealed before an administrative

---

[11] See Articles 2 and 3 AAPI.

[12] See Article 7(1), Articles 10 and 11 AAPI.

[13] P. Szustakiewicz, 'Orzecznictwo Naczelnego Sądu Administracyjnego z lat 2015–2018 w sprawach dotyczących informacji publicznej', *Przegląd Prawa Publicznego*, 2019, No. 7–8, p. 11.

[14] See also Articles 16 and 21 AAPI.

[15] A decision of refusal should include the name of authority, organisational unit, or person who issued it, date of issue, editorial office concerned, type of information requested, and reasons for the refusal.

court within 30 days. Within court proceedings, the provisions on appealing administrative decisions apply accordingly. In these proceedings, only an editor-in-chief is entitled to demand delivery of the refusal and to represent an editorial office before an administrative court. The editor-in-chief manages the editorial office, meaning the unit responsible for organising the process of preparing (collecting, evaluating, and developing) materials for publication in the press.[16] Under the Press Law, everyone, in accordance with the principle of freedom of speech and the right to criticism, may provide information to the press. In addition, state bodies, state-owned enterprises, other state organisational units and cooperatives, trade unions, local governments, and social organisations within the scope of their public activities are obliged to respond to press criticism submitted to them without undue delay, but no later than within one month. The press must not be prevented from collecting critical material, and criticism must not be suppressed in any way.[17] We should share the view that the right to public information and the journalistic right to information are two distinct rights. Firstly, one is of a constitutional nature, while the other is not. Secondly, they have different subjective scopes (although there is certain overlap, it should also be noted that entrepreneurs are obliged to provide information). Thirdly, the mode of exercising these rights differs. For this reason, the journalistic right to information is generically distinct from the right to public information. In addition to the right to public information, which everyone is entitled to under the Access Act, a journalist also has the rights laid down in Article 4 of the Press Law.[18] However, this law only applies to certain specific entities and information about their activities, and exercising these rights requires the involvement of an editor-in-chief. This limits journalists acting as freelancers, i.e., those not working on behalf of a specific editorial office.[19] As a result, the press right to access public information under the Access Act is becoming increasingly important for individual journalistic investigations.

3. LEGAL DOCTRINE'S VIEWS ON THE PRESS ACCESS TO PUBLIC INFORMATION

Views within the legal doctrine on Articles 3a and 4 of the Press Law are fairly uniform and consistent. It is recognised that, regarding press access to public information, the provisions of the Press Law are excluded, and a journalist has the same rights and obligations as any other person requesting public information. A journalist, like any other natural person, may request public information, and a public administration body cannot ask or demand to know the purpose for which the information is sought or how it will be used. A journalist must not be asked to show identification

---

16 See Article 7(2)(8) and Article 25(1) Press Law.

17 See Articles 5 and 6 Press Law.

18 E. Czarny-Drożdżejko, 'Dziennikarz i jego uprawnienia', *Przegląd Prawa Publicznego*, 2014, No. 5, pp. 28–29.

19 Cf. A. Augustyniak, in: Kosmus B., Kuczyński G. (eds), *Prawo prasowe. Komentarz*, Warszawa, 2018, Article 4, margin reference 6, Legalis.

or provide any confirmation of their profession. The applicant's profession is irrelevant – if the request concerns public information, it must be provided to anyone who requests it. The request may be submitted in writing, by email, by fax, or orally. For access to public information, all these forms are legally permissible and binding on the authority.[20] In terms of press access to public information, the rights of journalists have been equalised with those of any other entity that may request such information.[21] It is necessary to share the view that the press right to information (publisher, broadcaster) as a collective entity under Article 61 of the Constitution of the Republic of Poland, as specified in Article 3a of the Press Law, is implemented through individual activities performed by journalists acting on behalf of a publisher or broadcaster. It is the journalist who exercises access to documents and the right to attend meetings of collegiate public authorities to obtain public information. In this situation, every journalist is 'the press', and Article 3a of the Press Law applies to both collective entities and individual journalists who constitute 'the press'. A different interpretation would exclude journalists not affiliated with any press title or publisher from the scope of 'the press' definition.[22] Therefore, a journalist, or more broadly, the press has the right to access public information on the same terms as other citizens. The placement of this reference reflects the role of the press as an entity that exercises citizens' right to reliable information.[23] It is also worth emphasising that the purpose of Article 3a of the Press Law is to unify the rules governing the press right to access information with the general principles set out in the Access Act.[24]

There are also legitimate critical voices in jurisprudence. It is pointed out that the adopted solution to some extent weakens the constitutional determination of the role and importance of the press in a democratic state governed by the rule of law and, above all, diminishes the autonomy and distinctiveness of the procedure for obtaining information by the press.[25] The reference in Article 3a of the Press Law is considered a solution that is only seemingly sound. In practice, this solution has limited journalists' right to information. First of all, a journalist has been treated as an ordinary citizen. The Access Act does not provide for any additional rights for journalists, who nonetheless satisfy the public demand for information and, in accordance with Article 1 of the Press Law, realise citizens' right to reliable information, transparency of public life, and social scrutiny and criticism. Currently, anyone who wishes to obtain public information can do so personally, using the universal right to information. If a journalist requests information, they must wait in line like any other person for their case to be processed. Moreover, the deadlines

---

[20] M. Brzozowska-Pasieka in: Olszyński M., Pasieka J., Brzozowska-Pasieka M., *Prawo prasowe. Komentarz praktyczny*, Warszawa, LEX 2013, Article 3(a).

[21] J. Sobczak, *Prawo prasowe. Komentarz*, Warszawa, LEX 2008, Article 3(a).

[22] Ibidem.

[23] A. Chajewska, K. Orlik, 'Prawo prasowe. Komentarz tezowy', in: Orlik K. (ed.), *Prawo prasowe. Postępowania sądowe w sprawach prasowych*, Warszawa, 2017, p. 4.

[24] M. Bidziński, in: Bidziński M., Chmaj M., Szustakiewicz P., *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2023, Article 24, margin reference 1, Legalis.

[25] M. Jabłoński, K. Wygoda in: Piskorz-Ryń A., Sakowska-Baryła M. (eds), *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, LEX 2023, Article 24(7).

specified in the Access Act are not suited to the nature of journalists' work.[26] The critical voices on this issue should be partly and, as a rule, accepted, as the Access Act is, in fact, not an instrument suited either to the work of journalists or to effective communication between administrative bodies and the press. It serves merely as a formal basis for such interaction. At the time the Access Act was passed, it appeared to be 'more beneficial' for the press. However, at present, the citizens' political right to knowledge and control of public authorities, implemented through the Access Act, should not be equated with the journalistic right to information and its correlate, i.e., public authorities' obligations towards the press. As indicated above, these are two distinct legal rights. The Access Act serves as a framework for administrative bodies to handle press-related matters but is not an adequate or efficient tool for daily interactions and the provision of current information. The source of the problem, however, lies in the current regulation of the Press Law, not in the Access Act, which is intended for all citizens in their relations with the state. Nonetheless, critical opinions focus on the legislator's decision to equate journalists with ordinary citizens in their right of access to public information. The problem, however, runs deeper, as an analysis of administrative court case law shows that press access to public information has been restricted in comparison to access granted to 'any' other entity.

4. ADMINISTRATIVE COURTS' CASE LAW IN CASES CONCERNING THE PRESS ACCESS TO PUBLIC INFORMATION

In administrative courts' judgments between 2012 and 2014, there was a noticeable discrepancy in the assessment of whether providing public information at the request of the press should be based on Article 4 of the Press Law or whether Article 3a of the Press Law should be applied. Proponents of the first solution argued that the legal basis of a press request determines the procedure by which the obliged entity should process the request. Conversely, it was argued that the authority is always obliged to determine whether the requested information constitutes public information (regardless of the content and legal basis of the request). Therefore, the assessment of the nature of the requested information and the type of the request's addressee was to determine the applicable procedure. Initially, in order to provide the press with information, regardless of its nature, the procedure laid down in Article 4 of the Press Law was applied. However, case law policy gradually shifted towards the view that the nature of the press request must be assessed individually in each case.[27] As a result, administrative courts distinguished two procedures for press access to information: the so-called 'ordinary' or 'access' procedure under Article 3a of the Press Law, and the 'press procedure' under Article 4 of the Press Law.

Then, the Supreme Administrative Court departed from this interpretation, pointing out that the legal nature of the reference used in Article 3a of the Press

[26] E. Czarny-Drożdżejko, 'Dziennikarz...', op. cit., pp. 29–30.
[27] C. Chabel, *Udzielenie informacji publicznej na wniosek prasy*, 2015, LEX/el.

Law serves only as a reference concerning the manner of disclosing information that meets the definition of public information, and does not result in a change of the procedure for disclosing such information from the 'press' procedure to the 'ordinary' one.[28] At the same time, it was pointed out that when applicants demand that information be provided to the press, i.e., when they refer to their status as journalists or the press, they must prove it, as they cannot obtain the information otherwise. This was justified by the fact that anonymous individuals may apply for public information under the access procedure, and there is no requirement to determine their true identity, unless a decision is issued. On the other hand, the press is referred to in the Press Law in both an objective aspect (publications) and a subjective aspect (teams of people and journalists). However, such teams must be formalised in some way and actively engaged in journalistic activities. Likewise, journalists must demonstrate membership in such teams, be in an employment relationship with an editorial office, or be authorised by an editorial office to act on its behalf. Although it was pointed out that no provision expressly requires that an individual demonstrate their status as press or a journalist, the Supreme Administrative Court held that such an obligation arises from the nature of the request procedure. This requirement could be fulfilled in any way, using any means of evidence. However, failure to provide such proof would prevent the request from being processed, and, moreover, such an approach by the authority would not constitute inaction. In distinguishing the two procedures, the Supreme Administrative Court concluded that transitioning to access regulations would be possible only upon an appropriate request from the press. 'Appropriate' in this context means that if applicants claim the special status of the press, they must demonstrate it; otherwise, it cannot be recognised that authorised persons under the Access Act submitted the request. Since the authority must first establish appropriate information, then determine the content of the request, and finally decide on the applicable procedure and the manner and form of handling the matter, failure to demonstrate action on behalf of the press makes it impossible to initiate proceedings to provide access to public information.[29] Thus, the Supreme Administrative Court reduced the issue of demonstrating journalist status and acting on behalf of the press to the requirement of a formal application, regardless of whether it would be processed under the 'ordinary' or 'press' procedure. In the justification of this stance, there is a noticeable inconsistency and a smooth transition between the procedures. Eventually, however, the adopted interpretation clearly limits the press access to public information, creating non-statutory requirements for an access request, solely because the applicant is a journalist and refers to the provisions of the Press Law in the application. In this respect, one should share the doubts expressed in dissenting

[28] See judgments of the Supreme Administrative Court of 21 July 2017, I OSK 1533/15; of 26 July 2016, I OSK 1645/15, I OSK 2161/15, 1924/15, I OSK 2189/15, I OSK 1529/15; of 17 March 2016, I OSK 1452/15, I OSK 1411/15, I OSK 1400/15, I OSK 1088/15; of 15 February 2016, I OSK 1120/15, I OSK 1105/15, I OSK 1119/15; of 12 February 2016, I OSK 1238/15 and I OSK 1280/15, CBOSA.

[29] See judgments of the Supreme Administrative Court of 17 March 2016, I OSK 1088/15 and I OSK 1411/15, CBOSA.

opinions, which argue that it is the authority that qualifies the submitted request, regardless of the legal basis cited, and that there is no justification for treating journalists and other applicants differently in proceedings concerning the provision of public information.[30] In some cases, although it used similar arguments, the Supreme Administrative Court rightly stated that, since the applicant failed to prove journalist status, they should be treated as a natural person requesting information under the Access Act. However, this did not prevent the court from recognising a cassation appeal as justified, even though it lacked confirmation of the applicant's journalist status.[31]

The thesis repeatedly cited in case law regarding the nature of the reference to Article 3a of the Press Law is erroneous. The two different procedures, 'ordinary' (Article 3a of the Press Law) and 'press' (Article 4 of the Press Law), are determined by the scope of entities obliged to provide information and the subject matter of the information provided, not by the person of a journalist. Therefore, Article 3a of the Press Law not only affects the way in which information is provided, but, above all, establishes a different 'access' procedure in comparison with the 'press' procedure. One should share the opinion that the Press Law extends the circle of entities obliged to provide information to the press by including entrepreneurs, entities outside the public finance sector, and non-profit organisations. However, it also narrows the scope of the information they must provide, limiting it to information about their activities.[32] This is the so-called 'press' procedure. Thus, if an application does not provide grounds for it to be classified as submitted under the provisions of the Access Act, the failure to demonstrate the status of a journalist or press representative may prevent it from being processed – but only under the 'press' procedure. In contrast, where an application can be processed based on the Access Act, the obliged entity should provide the requested information to the press even if the applicant's journalist status has not been confirmed. The formal limitation applied by courts should therefore concern only the 'press' procedure under Article 4 of the Press Law, but not the 'ordinary' ('access') procedure under Article 3a of the Press Law.

However, in the practice of applying these provisions, the obligation to prove journalist status and acting on behalf of the press has been extended to both procedures, including the 'access' procedure. Numerous judgments of the Supreme Administrative Court have established this stance. Admittedly, it is noted that if the information requested by the press is public in nature, its disclosure or refusal to disclose should be made in accordance with the Access Act. Therefore, in this respect, the press does not benefit from legal regulations other than those applicable to the general public. However, there is an inconsistency because, despite the distinction between the procedures, it is still required to document acting on behalf of the press even when a request concerns public information under the Access Act. This requirement does not apply to the general public. As a result, the Supreme

[30] Ibidem, M. Jaśkowska's voice of dissent to judgments of the Supreme Administrative Court of 17 March 2016, OSK 1088/15 and I OSK 1411/15, CBOSA.

[31] Judgment of the Supreme Administrative Court of 21 July 2017, I OSK 1533/15, CBOSA.

[32] Judgment of the Supreme Administrative Court of 5 April 2016, I OSK 1487/15, CBOSA.

Administrative Court has established a flawed case law direction, according to which Article 3a of the Press Law grants the press the right of access to public information, but in order to create an obligation to fulfil the request submitted under this procedure, it is necessary to prove beyond any doubt that it originates from the press. In other words, requesting public information does not exempt an applicant claiming to be a journalist from the obligation to confirm their status as a representative of the press.[33] Therefore, to apply Article 3a of the Press Law in a case, it is necessary not only to request information that is public in nature but also to undertake these activities as the press, including as a journalist. The status of a journalist, i.e., the existence of a relationship with an editorial office, must also be proved.[34] Subsequent case law has followed this interpretation.[35] This interpretation contradicts the legislator's intent and the uniform views of the legal doctrine in this respect. Moreover, it introduces non-statutory, unconstitutional restrictions on access to public information for 'everyone' who is a journalist, or, more broadly, the press.

Such a restrictive case law policy is accompanied by excessive formalism. In one judgment, the Supreme Administrative Court stated that the applicant determines the method of access to the requested information by specifying their journalist status and requesting that the information be provided to the press. In such a case, they act as a special entity rather than simply as 'everyone' within the meaning of Article 2(1) of the Access Act. Referring to the Press Law in the request necessitates the application of the legal regime first.[36] This stance is erroneous in two ways. First, it assumes that a journalist cannot act as both a special entity and 'everyone' at the same time within the meaning of the Access Act. Second, it suggests the existence of a separate 'journalistic' legal regime, whereas a journalist's reference to the Press Law in an access request should at most result in the application of the Access Act based on the reference in Article 3a of the Press Law, i.e., providing information under the so-called 'ordinary' procedure. It is rightly pointed out that being a journalist and having a professional obligation to seek public information should not be perceived as a 'handicap' but rather as irrelevant to the scope and procedures applied by obliged entities when providing such information. Therefore, even if a journalist discloses their professional interest in obtaining public information, it cannot be expected that an official representative of an editorial office or an editor-in-chief should submit a request concerning a public matter to the obliged entity under Article 4 of the Access Act.[37] In case law and administrative practice, it is emphasised that a journalist must demonstrate their special status, otherwise the

---

[33] Judgments of the Supreme Administrative Court of 13 January 2016, I OSK 302/15; of 16 February 2016, I OSK 1135/15, I OSK 1136/15, I OSK 1231/15 and I OSK 1228/15; of 17 February 2016, I OSK 1102/15; of 18 February 2016, I OSK 1239/15 and I OSK 1427/15; of 26 February 2016, I OSK 438/15; of 26 July 2016, I OSK 1912/15, CBOSA.

[34] Judgment of the Supreme Administrative Court of 26 July 2016, I OSK 2031/15, CBOSA.

[35] Judgment of the Voivodeship Administrative Court in Białystok of 19 June 2019, II SAB/Bk 33/19, CBOSA.

[36] Judgment of the Supreme Administrative Court of 26 February 2016, I OSK 568/15/CBOSA.

[37] See M. Jabłoński, K. Wygoda, in: Piskorz-Ryń A., Sakowska-Baryła M. (eds), *Ustawa o dostępie…*, op. cit., Article 24(16).

request will not be processed. Thus, a journalist who conceals their status is in a more favourable position because the authority will not require proof 'beyond any doubt' that they are acting on behalf of the press, making the provision of an answer conditional. Each additional request also requires additional time, delaying access to information and often preventing its use in the press material being prepared. This leads to paradoxical practical consequences. A journalist seeking public information encounters difficulties that ordinary citizens do not face. Therefore, it is easier for a journalist to conceal their press-related status, as they do not have to prove anything to obtain information. Revealing their profession only hinders their activities.[38] This issue applies to all possible cases, whether access to simple information or processed information.[39] Ultimately, a journalist must prove their status, regardless of whether an administrative decision will be issued and whether the provisions of the Act of 14 June 1960 – Code of Administrative Procedure[40] will apply, or whether the proceedings will be conducted solely under the Access Act and concluded with a letter providing information. In the former case, each applicant is also required to sign the request and meet other formal requirements, such as specifying the object of the request precisely.[41] Thus, in every case, when an applicant is a journalist, their only additional obligation will be to prove their status, otherwise the request will not be processed.

It is worth noting that during the development of the above-mentioned case law policy, administrative courts presented a different stance in some judgments. According to this view, under Article 3a of the Press Law, a journalist's request addressed to an obliged entity for public information should be processed in accordance with the procedure determined by the Access Act. In this context, it is insignificant whether the request originates from a citizen acting independently or from the press. It should also be noted that the Access Act does not impose any formal requirements on applications for access to public information. The request may take any form, as long as its subject matter is clear.[42] This means that information qualifying as public information is made available to the press under the 'access' procedure, rather than under Article 4 of the Press Law. A journalist is treated in the same way as any other citizen submitting a request for access to public information.[43] It was also later stated that public information is provided to the press under the Access Act, while Article 4(1) of the Press Law extends the catalogue of entities obliged to provide information to the press to include entities not listed in the Access Act. As a result, in determining the appropriate procedure of granting access to specific information requested by the press, what matters

---

[38] See A. Augustyniak, in: B. Kosmus, G. Kuczyński (eds), *Prawo prasowe*…, op. cit., Article 3a, Legalis.

[39] See Article 3(1)(1) AAPI.

[40] Journal of Laws of 2023, item 775, as amended, hereinafter referred to as 'CAP'; see also Article 16(2) AAPI.

[41] See Article 63 §§ 2 and 3, as well as Article 64 CAP.

[42] Judgment of the Voivodeship Administrative Court in Warszawa of 16 April 2015, II SAB/Wa 1053/14, CBOSA.

[43] Judgment of the Voivodeship Administrative Court in Kraków of 12 May 2016, II SAB/Kr 72/16, CBOSA.

is not who submits the request or how it is made, but rather the nature of the requested information and the nature of the addressee of the request.[44] In other words, a person seeking public information for journalistic purposes has the same rights as any other person acting under the provisions of the Access Act.[45] Despite these several correct and equitable judgments issued by voivodeship administrative courts, one can still observe a consistently upheld stance that, in the case of a request submitted by a journalist, the applicant should be asked to document that they are acting on behalf of the press, since merely being a journalist does not exempt them from the obligation to prove that they are a representative of the press. After such confirmation, in accordance with Article 3a of the Press Law, the request should then be processed pursuant to the regulations of the Access Act.[46] Eventually, case law assumes that the obligation to confirm acting on behalf of the press applies not only in the 'press' procedure but also in the 'access' procedure.[47]

5. ISSUE OF RE-USE

In addition to the right of access, the legislator has regulated the right to re-use public sector information in the Act of 11 August 2021 on Open Data and the Re-Use of Information of the Public Sector.[48] This right also applies to everyone, just like the right of access to public information, and also extends to public sector information that is: made available without a request in the Public Sector Bulletin, data portal, or other IT systems of the obliged entities, and transferred on request for re-use.[49] Public sector information refers to any content or part thereof, regardless of the method of recording, that is in the possession of an obliged entity.[50] Therefore, it also qualifies as public information, meaning any information concerning public matters.[51] The catalogue of obliged entities is based on the criteria laid down in public procurement law. These include: public finance sector units, state organisational units without legal personality, public law entities, and public enterprises.[52] According to the legal definition, re-use refers to the use of public sector information by users (any natural person, legal person, or organisational unit without legal personality) for any purpose, with the exception of information exchange between obliged entities

---

[44] Judgment of the Voivodeship Administrative Court in Rzeszów of 1 June 2021, II SAB/Rz 29/21, judgment of the Voivodeship Administrative Court in Opole of 23 February 2021, II SAB/Op 76/20, CBOSA.

[45] Judgment of the Voivodeship Administrative Court in Kielce of 31 May 2023, II SAB/Ke 45/23, CBOSA.

[46] Judgment of the Supreme Administrative Court of 2 March 2023, III OSK 2286/21, CBOSA.

[47] See also judgment of the Voivodeship Administrative Court in Gliwice of 27 June 2023, III SA/Gl 255/23 and judgment of the Voivodeship Administrative Court in Opole of 27 July 2023, II SA/Op 203/23, CBOSA.

[48] Journal of Laws of 2023, item 1524, hereinafter referred to as 'the Act on Re-Use'.

[49] See Article 5 of the Act on Re-Use.

[50] See Article 2(8) of the Act on Re-Use.

[51] Cf. Article 1(1) of the Act on Re-Use.

[52] See Article 3 of the Act on Re-Use.

solely for the implementation of public tasks.[53] The institution of re-use of public sector information has been part of national legislation since 2011 and reflects the implementation of EU law.[54] It should be noted that the essence of the right resulting from the discussed regulation remains unchanged regarding the presented issue. Therefore, the case law and the achievements of the doctrine relating to previously applicable provisions remain up to date.

The right consists in the possibility of re-using public sector information. Its implementation depends on the availability of the information itself and may also occur without the need to provide or share information, e.g., by informing about the lack of conditions. Therefore, it is the right to exploit information, which everyone has.[55] Re-use involves the process of opening up public data. In connection with this process, the role and importance of public data have begun to be emphasised as a resource that has high economic value, is in the possession of public authorities, and may serve the general public. This is because public data constitute an attractive 'raw material' for the corporate sector, which can be used for economic development. However, the re-use of information cannot be perceived solely in economic terms, as it also has democratic foundations. It assumes sharing the common good (data) by public authorities in the common interest. The benefits of data release are therefore both economic and non-economic.[56] Thus, the right to re-use public sector information is economic, not political, in nature, and also has a utility value, as new goods, products, and services with added value can be created based on public information.

In this way, in addition to the right of access to public information, the legislator has regulated a separate right to re-use. Both rights may be exercised upon request; however, while access to public information under the Access Act is, in principle, deformalised and may be requested anonymously, an application for re-use must meet numerous formal requirements, and failure to comply may result in it not being processed.[57] The legislator did not grant the press any privileged status as an authorised entity in such cases. Instead, this new right has further complicated the legal environment surrounding journalists' right to information. A doubt arises as to whether the press or a journalist requesting information to prepare press material is actually submitting an application for the re-use of public sector information. After all, re-use, according to the legal definition, is the use of information by users (here, the press) for any purpose. Additionally, the acquisition of data by a journalist

---

[53] See Article 2(12) and (14) of the Act on Re-Use.

[54] I outline the course of implementation and subsequent regulations in detail in: Ł. Nosarzewski, *Prawne ograniczenia ponownego wykorzystywania informacji publicznej*, Warszawa, 2022, pp. 68–74.

[55] D. Sybilski, in: Sibiga G., Sybilski D. (eds), *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, 2022, Article 5, Legalis.

[56] B. Fischer, A. Piskorz-Ryń, M. Sakowska-Baryła, J. Wyporska-Frankiewicz, in: Fischer B., Piskorz-Ryń A., Sakowska-Baryła M., Wyporska-Frankiewicz J. (eds), *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, LEX 2022, Article 1.

[57] See Article 39(3) and (5) of the Act on Re-Use.

would not constitute an exchange of public sector information between obliged entities solely for the purpose of implementing public tasks.

This time, however, administrative courts interpreted the regulations correctly. In subsequent rulings, they indicated that the right of access to public information for re-use is a public subjective right that guarantees the obtaining of public information for a specific purpose. This purpose is for the applicant to obtain 'benefits' in a broad sense. Therefore, it goes beyond merely ensuring transparency in the state's decision-making process and actions; it also creates real opportunities for citizens to exercise and defend their constitutional rights against public authorities. Thus, the concept of re-use of public information should be interpreted in a way that better incorporates systemic and purposefulness-related directives. When an applicant's aim is to exercise social control and to engage a wider group of entities in the information obtained – e.g., by posting it online or sending it to the media – this serves only to strengthen the above-mentioned social control and to initiate and sustain public debate on a matter of public interest. In no circumstances can this be interpreted as an activity undertaken for the purpose of 're-using' public information.[58]

The introduction of the institution of re-use did not affect the implementation of the right of access to public information. Access to data constituting public information is linked to the constitutional freedom to acquire and disseminate information (Article 54 of the Constitution of the Republic of Poland), the scope of which partially overlaps with the right to public information (Article 61 of the Constitution of the Republic of Poland). This means that a person who acquires public information from an obliged entity has, in principle, the right to disseminate it. The possible application of the re-use procedure to information provided upon request depends on the purpose of its acquisition. Therefore, the right to disseminate information should not be equated with its re-use. Although running an online portal or a print journal may constitute a business activity generating income for a given entity, the scope of journalistic work includes, among other things, efforts to promote transparency of public entities. In this sense, journalists' applications are, in principle, not subject to the re-use regime. Publishing information acquired through access to public information should not be identified with the 'benefits' referred to in Directive 2003/98/EC.[59] Similarly, the new Directive 2019/1024 states that its objectives are: to facilitate the creation of Union-wide information products and services based on public sector documents, and to ensure the effective cross-border

---

[58] Judgment of the Supreme Administrative Court of 18 February 2016, I OSK 2136/14, CBOSA.

[59] Judgment of the Supreme Administrative Court of 9 April 2015, I OSK 1029/14, CBOSA; see also judgment of the Constitutional Tribunal of 20 March 2006, K 17/05, OTK ZU 3A/2006, item 30, cited therein; similarly, judgment of the Supreme Administrative Court of 6 February 2015, I OSK 681/14, CBOSA. The judgments mention Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L 345, 31.12.2003, p. 90). It was repealed pursuant to Article 19 of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) (OJ L 172, 26.6.2019, pp. 56–83), hereinafter referred to as 'Directive 2019/1024'.

use of public sector documents, both by private businesses for added-value information products and services, and by citizens to facilitate the free circulation of information and communication.[60] The Polish legislator adopted these objectives, as the proposed provisions of the Access Act were primarily aimed at implementing Directive 2019/1024, as well as: increasing the supply of open data, including high-value information resources with potential for creating new services and products, and creating an optimal regulatory environment for the effective use of public sector information in Poland.[61] That is why Directive 2019/1024 builds upon, and does not prejudice Union and national access regimes.[62] This is also confirmed by the conflict rule in the Polish statute, which states that the provisions of the Access Act do not infringe: the right of access to public information, the freedom to disseminate public information, or the provisions of other statutes that specify the rules, conditions, and procedure of access to or re-use of information that constitutes public sector information.[63] For the press, Article 3a and Article 4 of the Press Law serve as such special provisions. However, a similar conflict rule was previously in force,[64] yet in practice, it did not dispel administrative bodies' doubts, which opened the way for judicial interpretation of the provisions.

Therefore, a request for information for the purpose of journalistic work cannot be automatically classified as a request for re-use, as this would render the concept of access to public information meaningless.[65] An obliged entity cannot deprive an applicant of the right of access to public information by arbitrarily determining that the application concerns re-use and should be left without consideration due to failure to meet formal requirements – if such a circumstance (i.e., the purpose of its re-use) does not directly result from the content of the application.[66] Currently, we can partially agree that the rules regarding re-use of public information apply to situations other than its use in a local newspaper, as they refer to a systematic process involving constant data processing.[67] A distinction must be made between an 'ordinary' application for re-use and the so-called application for online access, which concerns making possible the re-use of public sector information in a permanent, direct, and real-time manner, as collected and stored in the obliged entity's ICT system.[68] However, re-use differs from mere access to information in that it is, as

---

[60] See recital 70 of the Directive 2019/1024.

[61] See the justification for the governmental Bill on open data and the re-use of public sector information, print no. 1338, Sejm of the 9th term, p. 1, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1338 [accessed on 5 March 2024].

[62] See Article 1(3) Directive 2019/1024.

[63] See Article 7(1) AAPI.

[64] See Article 7(1) of the Act of 25 February 2016 on the Re-Use of Public Sector Information, Journal of Laws 2016, item 352.

[65] Similarly, also in judgment of the Voivodeship Administrative Court in Rzeszów of 23 June 2015, II SAB/Rz 48/15, CBOSA.

[66] Judgment of the Voivodeship Administrative Court in Kraków of 16 January 2017, II SAB/Kr 146/16, CBOSA.

[67] Judgment of the Voivodeship Administrative Court in Olsztyn of 25 February 2014, II SAB/Ol 5/14, CBOSA.

[68] Cf. Article 39(1) and (2) of the Act on Re-Use.

a rule, continuous, rather than one-off, in nature. This is further confirmed by the requirements specified for the used information that has the features of a work, as well as the concluded agreement on the re-use of this information, which, in fact, constitutes a temporary copyright licence. Once the application is processed, the obliged entity may, *inter alia*, make an offer containing the terms of re-use.[69] This offer, if accepted, results in the conclusion of a civil law contract.[70] Thus, in practice, the distinction between the access procedure and the re-use of information is based on the criterion of directness or indirectness in implementing the principle of openness of public life. If the purpose of the application is solely the exercise of the political right to information, it falls primarily under the framework of access. However, when this transparency serves other purposes, whether economic or non-economic, the Act on Re-Use shall be applied.[71] For this reason, journalists' requests should, as a rule, be processed under the Access Act, as their primary objective is the oversight of public life.[72]

At the same time, however, the mere fact that a person submitting a request is a journalist does not automatically mean that the re-use procedure is never applicable to this applicant-journalist. The very liberal definition of a journalist allows for situations where a request should be treated as a classical application for the re-use of public sector information. A 'journalist' is a person involved in editing, developing, and preparing press materials. Editing means drafting a text, amending it, and correcting stylistic and grammatical mistakes. Developing refers to creating the content of the press material. Preparing the press material is actually a chronologically earlier stage than 'developing' or 'editing'.[73] Therefore, in the course of journalistic work, there may be 're-use' of information obtained from administrative bodies. However, it is justified to claim that the exercise of access rights by the press cannot involve a cascading process through various access procedures, including the re-use procedure. This also indirectly proves that this procedure should be regulated separately and independently, taking into account the constitutional role and significance of the press in a democratic state ruled by law and respecting the freedoms and rights of persons (and entities) about whom information will be made public.[74]

---

[69] See Article 41(1)(4) of the Act on Re-Use in conjunction with Article 14(2) of the same act.

[70] See the justification for the governmental Bill on open data and the re-use of public sector information, print no. 1338, Sejm of the 9th term, pp. 57–58, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1338 [accessed on 5 March 2024].

[71] M. Jaśkowska, 'Ponowne wykorzystywanie informacji sektora publicznego w świetle orzecznictwa sądów administracyjnych a zasada transparentności władz publicznych', in: Jagielski J., Wierzbowski M. (eds), *Prawo administracyjne dziś i jutro*, Warszawa, 2018, pp. 148–149.

[72] Ibidem, p. 149.

[73] P. Sitniewski, *Ustawa o ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, 2017, p. 34.

[74] Thus also M. Jabłoński, K. Wygoda, in: Piskorz-Ryń A., Sakowska-Baryła M. (eds), *Ustawa o dostępie*…, op. cit., Article 24(25).

6. CONCLUSIONS

The analysis above leads to the conclusion that the stance established years ago, according to which journalists applying for access to public information must prove their status each time, continues to dominate in current administrative courts' case law. The exercise of the journalistic right to information in accordance with the Access Act is possible only after proving that the journalist is acting on behalf of the press. While such an obligation is justified in the exercise of the journalistic right to information under Article 4 of the Press Law, it lacks any legal basis in the press right of access to public information under Article 3a of the Press Law. This access procedure entitles everyone, including an anonymous applicant, to submit a request, with the only requirement being a precise indication of the public information requested. Thus, compared to the general principles applicable to ordinary citizens, the press access to public information has been additionally restricted by non-statutory formal requirements for applications. Furthermore, another informative right – the right to re-use public sector information – introduces a separate application procedure for acquiring public sector information for the purpose of 're-use'. As a result, applications for access submitted by journalists, who use obtained information in press materials, may be subjected to the much more formalised procedure of the Act on Re-Use, which does not provide any conveniences for the press access to information. The evolving regulatory environment of informative rights applicable to everyone increasingly highlights the problem of the lack of specific legal solutions dedicated to the press. Admittedly, the Press Law provides for journalists' right to information and a general obligation to respond to press criticism. However, such rights may prove to be insufficient. Especially since, as demonstrated, the broadest and constitutionally established right of access to information about the activities of public authorities and persons performing public functions in practice faces restrictions that do not apply to other citizens.

De lege lata it should be postulated that the interpretation of Article 3a of the Press Law, in accordance with the legislator's intention, *de iure* and *de facto*, equates the press right with the right of 'everyone' interested in obtaining information. It is unacceptable that journalists must hide their status to avoid the risk of their request not being processed for formal reasons. In addition, the assessment of the requirement to prove action on behalf of the press by a journalist is discretionary. However, this is a minimal demand, as under the current legal framework, a journalist still cannot expect to obtain information more quickly, and the two-month maximum deadline for processing the request under the Access Act or the Act on Re-Use is entirely insufficient. Currently, in accordance with Article 4 of the Press Law, only the editor-in-chief is authorised to file a complaint or to demand the delivery of a refusal to provide information, meaning that a journalist's individual rights are not taken into account.

That is why, *de lege ferenda*, legislative changes in the Press Law and the abandonment of the reference contained in Article 3a should be postulated. The press right of access to public information should be regulated separately as part of a journalist's broader right to information. The Press Law should define the scope

of entities obliged to provide information to the press and combine the categories of entities laid down in the current provisions of the Access Act and the Act on Re-Use. The legislator should also determine the specific scope of information provided to avoid doubts regarding what constitutes public information under the AAPI. The press access should include the widest possible range of information. Here, the broad definition of public sector information provided in the Act on Re-Use may indicate necessary exclusions and limitations resulting from Article 61(3) and Article 31(3) of the Constitution of the Republic of Poland. The Press Law should also regulate procedural issues, taking into account a journalist's individual rights so that they can effectively exercise their right before authorities and courts. The rights of editors-in-chief and editorial offices could only supplement individual measures. Importantly, a journalist should still have the right to public information just like any other citizen, in accordance with the Access Act. Strengthening the journalistic right to information and recognising the function and mission of the press is necessary to actualise citizens' rights to reliable information, openness of public life, and social control and criticism.

BIBLIOGRAPHY

Bidziński M., Chmaj M., Szustakiewicz P., *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2023, Legalis.

Brzozowska-Pasieka M., in: Olszyński M., Pasieka J., Brzozowska-Pasieka M., *Prawo prasowe. Komentarz praktyczny*, Warszawa, LEX 2013.

Chabel C., *Udzielenie informacji publicznej na wniosek prasy*, 2015, LEX/el.

Chajewska A., Orlik K., 'Prawo prasowe. Komentarz tezowy', in: Orlik K. (ed.), *Prawo prasowe. Postępowania sądowe w sprawach prasowych*, Warszawa, 2017.

Czarny-Drożdżejko E., 'Dziennikarz i jego uprawnienia', *Przegląd Prawa Publicznego*, 2014, No. 5.

Ferenc-Szydełko E., *Prawo prasowe. Komentarz*, Warszawa, LEX 2013.

Fischer B., Piskorz-Ryń A., Sakowska-Baryła M., Wyporska-Frankiewicz J. (eds), *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, 2022.

Jaśkowska M., 'Ponowne wykorzystywanie informacji sektora publicznego w świetle orzecznictwa sądów administracyjnych a zasada transparentności władz publicznych', in: Jagielski J., Wierzbowski M. (eds), *Prawo administracyjne dziś i jutro*, Warszawa, 2018.

Kosmus B., Kuczyński G. (eds), *Prawo prasowe. Komentarz*, Warszawa, 2018, Legalis.

Nosarzewski Ł., *Prawne ograniczenia ponownego wykorzystywania informacji publicznej*, Warszawa, 2022.

Piskorz-Ryń A., Sakowska-Baryła M. (eds), *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, LEX 2023.

Sarnecki P., in: Garlicki L., Zubik M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. II, Warszawa, LEX 2016.

Sibiga G., Sybilski D. (eds), *Ustawa o otwartych danych i ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, 2022.

Sitniewski P., *Ustawa o ponownym wykorzystywaniu informacji sektora publicznego. Komentarz*, Warszawa, 2017.

Siwicki M., 'Prasa internetowa a obowiązek rejestracji prasy', *Przegląd Sądowy*, 2011, No. 1.
Sobczak J., 'Dostęp do informacji publicznej – zagadka i parawan', *Środkowoeuropejskie Studia Polityczne*, 2008, No. 1.
Sobczak J., *Prawo prasowe. Komentarz*, LEX.
Sobczak J., 'Swoboda wypowiedzi w orzecznictwie Trybunału Praw Człowieka w Strasburgu. Część I', *Ius Novum*, 2007, No. 2–3.
Sokolewicz W., 'Wolność prasy i jej konstytucyjne ograniczenia', *Państwo i Prawo*, 2008, No. 6.
Szustakiewicz P., 'Orzecznictwo Naczelnego Sądu Administracyjnego z lat 2015–2018 w sprawach dotyczących informacji publicznej', *Przegląd Prawa Publicznego*, 2019, No. 7–8.

Cite as:

Nosarzewski Ł. (2025), *Press access to public information in the light of administrative courts' case law*, Ius Novum (Vol. 19) 1, 92–110. DOI 10.2478/in-2025-0007

Ius Novum
2025, vol. 19, no. 1, pp. 111–123

ON BINDING INDIVIDUALS WITH NON-CONSTITUTIONAL EXECUTIVE ACTS FROM THE PERSPECTIVE OF RULES OF CONVENTIONALISATION AND FORMALISATION

KAMIL DĄBROWSKI*

DOI 10.2478/in-2025-0008

Abstract
Understanding the Constitution as the essential act of a legal system prompts us to turn to it in search of answers to even the most difficult questions. One such question is the issue of binding individuals with executive regulations that violate constitutional guarantees. While the question of binding common courts with such acts is beyond doubt, the scope of the rights of the addressees of these acts is not unambiguously settled in legal commentary. Therefore, the purpose of this study is to determine the extent to which individuals are bound by unconstitutional regulations. This paper employs the method of investigation of the law in force, particularly using the perspective of describing executive acts as products of conventional activities. In the author's opinion, it is precisely this perspective that makes it possible to formulate and justify the thesis that, in the case of certain types of unconstitutionality of executive acts, individuals may also refuse to apply them.

Keywords: conventional activities, executive acts, rules of conventionalisation and formalisation

* LLD, Faculty of Law and Administration, University of Szczecin (Poland), e-mail: dabrowski91kamil@gmail.com, ORCID 0000-0003-1714-6260

I.

The notion that an executive act may be defined as a substantive substrate of a conventional act is undisputed. Despite this, legal scholars and commentators rarely refer to this concept to explain complex legal problems. However, this does not mean that there is no value in examining studies that adopt this perspective without explaining terms specific to a particular branch of law. Janusz-Pohl[1] and Gutowski[2] offer interesting articles in this context, where they use presumptions of the concept of conventional acts to assess the validity of acts in criminal proceedings and acts in civil law.

Since this study shares the belief in the significance of the concept of conventional acts for legal scholarship, it also relies on the presumption of this concept to address a specific legal issue. It seeks to reflect on the binding force of executive acts on individuals from the perspective of the rules of conventionalisation and formalisation. The primary aim is to answer the question of whether an individual is always obliged to abide by a given executive act if a court rules it unconstitutional, or whether they may then disregard it. While it is widely accepted that courts are competent to review and refuse to apply executive acts,[3] the existence of a similar entitlement for individuals is far less certain. Nevertheless, even though it is difficult to derive such a right directly from the text of the Constitution, the adoption of certain legal theoretical presumptions sometimes appears to legitimise a comparable entitlement, even among administrative bodies or authorities.

It should be noted, however, that the title of this paper was not chosen randomly. It is the product of the author's reflections, developed around the debate on the effects of the judgment of the Polish Supreme Court of 18 January 2022, ref. no. I KK 171/21, which took place during a scholarly meeting of the Chair of Criminal Law at Jagiellonian University. Nevertheless, this paper does not aspire to be a comprehensive study of all the issues raised during that debate; rather, it constitutes a contribution to the discussion, illustrating another possible perspective for defining the effects of the unconstitutionality of executive acts. Accordingly, the starting point will be a reflection on the concept of the rules of conventionalisation and formalisation and the effects of their violation. This discussion will then lead to an analysis of the Constitution as a source of the rules of conventionalisation and formalisation governing the issuance of an executive act and the consequences of their violation.

II.

The concept of conventional acts has been present in Polish legal thought since the 1970s, when authors affiliated with the Szczecin-Poznań school of legal theory began examining the characteristics of behaviours which, due to specific cultural

---

1 See B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań, 2017.

2 See M. Gutowski, *Nieważność czynności prawnej*, Warszawa, 2017.

3 See Order of the Constitutional Tribunal of 13 January 1998 r., case No. U 2/97 (OTK 1998, No. 1, item 4).

rules – also known as cultural conventions – are assigned a meaning different from what would result from their mere psycho-physical essence.[4] This concept was subsequently developed by later legal scholars and commentators,[5] introducing into Polish legal studies a universal basis for analysing the existence, materiality, and effectiveness of legally significant acts in the broadest sense.

The starting point for this concept is the notion of a conventional act, which, in the most general terms, is equated with a psycho-physical act (or a lower-level conventional act) that, due to a specific rule of reasoning developed within a culture – referred to as a rule of conventionalisation – is assigned a new meaning. It is further pointed out that this newly assigned meaning essentially constitutes the creation of a conventional act (Ck), which is realised by performing a psycho-physical act (C) or a lower-level conventional act (Ck^{-1}), yet at the same time cannot be reduced to it.[6] Moreover, a conventional act is distinguished from its substantive substrate, which, as the carrier of its content and meaning, may take the form of specific gestures, words, behaviours, or written records.[7] Recognising these presumptions as fundamental to this study, it is worth formulating a few more specific comments and reflections.

First and foremost, it must be emphasised that the aforementioned rules of reasoning are cultural rules characteristic of the specific cultural groups that created them.[8] Although this does not mean that the rules of conventionalisation of particular acts cannot be shared by certain cultural groups, the presumption of their cultural nature allows for their differentiation – both within distinct societies and within the same cultural group, depending on the moment at which their content is established. The evolution of societies also entails changes in the semantic rules of language, which, as a fundamental element of every cultural group, often shapes the essence of a given conventional act. The simultaneous connection between rules of reasoning and the culture of a given society encourages the search for their content within the norms of a legal system. Every culture incorporates certain procedural norms concerning interpersonal relations, based on the presumption that an individual is a social being and that other individuals in their environment are

---

[4] See L. Nowak, S. Wronkowska, M. Zieliński, 'Czynności konwencjonalne w prawie', *Studia Prawnicze*, 1972, No. 33, pp. 73–99.

[5] See Z. Ziembiński, M. Zieliński, *Dyrektywy i sposób ich wypowiadania*, Warszawa, 1992; T. Gizbert-Studnicki, 'O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych', *Państwo i Prawo*, 1975, No. 4, pp. 70–82; S. Czepita, *Reguły konstytutywne a zagadnienia prawoznawstwa*, Szczecin, 1996, W. Patryas, *Performatywy w prawie*, Poznań, 2005.

[6] See S. Czepita, 'O pojęciu czynności konwencjonalnej i jej odmianach', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 1, p. 86; O. Bogucki, 'O konstytutywnej współzależności wyjaśniania i identyfikowania czynności konwencjonalnych', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2019, No. 2, p. 52; M. Herman, 'Stwierdzenie niekonstytucyjności jako czynność konwencjonalna unieważnienia aktu normatywnego', in: Bernatt M., Królikowski J., Ziółkowski M. (eds), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa, 2013, p. 249.

[7] See P. Kroczek, 'Teologiczne podstawy reguł sensu czynności konwencjonalnych i norm kompetencyjnych w prawie kanonicznym i ich konsekwencje dla decyzji prawodawczych', *Annales Canonici*, 2013, No. 9, p. 57; S. Czepita, 'O pojęciu…', op. cit., p. 87.

[8] See S. Czepita, 'O pojęciu…', op. cit., p. 87; O. Bogucki, 'O konstytutywnej…', op. cit., p. 52.

persons, not objects, thereby creating certain obligations towards them.[9] Given the phenomenon of the increasing juridification of social relations, it seems natural to seek many rules of conventionalisation within legal norms.

Secondly, it should be noted that not every legal norm that shapes a legal position associated with a conventional act serves as a source of rules that define its essence (sense). This definition intentionally does not equate rules of conventionalisation with legal norms. As noted in the literature, legal norms may indicate elements that are constitutive of a given conventional act, as well as elements that merely formalise it. While the former determines the essence of a specific conventional act, justifying the assignment of a reason for performing it to specific acts, the latter, most often defined as rules of formalisation, merely indicate the desired manner of performing the act. This is also why their violation does not affect the existence of the conventional act itself but may result in its classification as illegal, invalid, ineffective, or simply defective.[10] Furthermore, while rules of conventionalisation set out the necessary criteria for an act to be classified as a specific type of conventional act, rules of formalisation only establish a recommended (desired) manner of performing the act. In cases of formalisation through the setting of consequences, they may also define the legal effects of non-compliance with the prescribed manner.[11]

It is also worth noting that, even though constitutive rules indicate how a given act must be performed to acquire the attributes of a specific type of conventional act, this presumption does not justify equating rules of reasoning solely with the specification of requirements reflecting the characteristics of a given behaviour. As Patryas rightly points out, rules of conventionalisation consist of at least three conjunctively linked elements: (1) subject, (2) situation it is in; and (3) the nature of the act itself. Only when all three are met can it be concluded that a specific act has acquired the attributes of a conventional act of a specific type.[12] Some approaches also supplement this possible catalogue of elements with content requirements, recognising that, particularly in the case of operations constituting legal acts, the scope of the content of conventional acts also plays a role in determining their essence.[13]

---

[9] S. Czepita, 'O pojęciu…', op. cit., p. 102.

[10] S. Czepita, 'Formalizacja i konwencjonalizacja w systemie prawnym', in: Bogucki O., Czepita S. (eds), *System prawny a porządek prawny*, Szczecin, 2008, pp. 110–111; J. Wieczorkiewicz-Kita, 'O konwencjonalnych i formalnych aspektach procesu karnego', in: Choduń A., Czepita S. (eds), *W poszukiwaniu dobra wspólnego*, Szczecin, 2010, pp. 753–756; M. Gutowski, *Nieważność…*, op. cit., pp. 8–9; B. Janusz-Pohl, 'O konstrukcji niedopuszczalności czynności karnoprocesowej', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 2014, No. 4, p. 162.

[11] S. Czepita, 'Formalizacja a konwencjonalizacja działań w prawie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, pp. 11–13; S. Czepita, 'Formalizacja i konwencjonalizacja…', op. cit., pp. 110–111; J. Wieczorkiewicz-Kita, 'O konwencjonalnych…', op. cit., pp. 753–756; R. Piszko, 'Sposoby i niektóre skutki formułowania treści czynności konwencjonalnych doniosłych prawnie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, p. 121.

[12] See W. Patryas, *Performatywy …*, op. cit., pp. 28–29.

[13] See K. Gmerek, 'Z problematyki treści czynności konwencjonalnych w prawie', *Krytyka Prawa*, 2022, No. 2, p. 98.

Thirdly, the distinction between the possible character of legal norms as those establishing rules of conventionalisation or formalisation of a given act also contributes to assessing the effects of their violation. While the violation of norms that merely formalise a given act justifies, depending on the legislator's decision, assigning it attributes such as unlawfulness, invalidity, or defectiveness, the violation of norms that set out requirements for conventionalisation means that the given act must be classified as a so-called conventional non-act or non-activity (e.g., a non-judgment or non-statute).[14] Although such a qualification excludes the possibility of labelling a non-act with a name reserved for a conventional act of a specific kind, this does not necessarily mean that an act so defective cannot produce any legal effects whatsoever. It cannot be ruled out that the legislator may attach specific legal effects to the defective act (other than those arising from the execution of a valid act) or may impose an obligation on law-applying individuals to accept a legal fiction regarding the correctness of a conventional act.[15]

Fourthly, it must be emphasised that the differentiation of the nature of legal norms described above does not depend on their position within the hierarchy of legal sources. While Kardas is correct in highlighting the need to regard the Constitution as a normative source of criteria delineating the non-transgressible limits of the law,[16] and while Czepita rightly argues that the rules of conventionalisation of law-making acts should primarily be derived from constitutional norms,[17] it must simultaneously be stressed that the concept of a conventional act does not assume that every constitutional norm must be the source of a specific constitutive rule or that only constitutional norms can serve as sources of such rules. This perspective allows for the differentiation of the effects of violations of norms within a uniform legal act, including the Constitution itself. At the same time, this view aligns with arguments put forward by legal scholars and commentators who emphasise the necessity and validity of gradually assessing the effects of violations of constitutional norms.[18]

Therefore, the criterion for qualifying a specific legal norm as a rule of conventionalisation or formalisation remains somewhat puzzling. While the differentiation of the effects of their violation appears relatively clear, establishing an unequivocal criterion for determining the specific classification of a given legal norm is far less straightforward. Although the literature suggests that such a criterion is based on '(…) the meaning – or, more specifically the linguistic content – of the name for a conventional act of a given type',[19] the decision as to which attributes of

---

[14] Cf. J. Wieczorkiewicz-Kita, 'Zagadnienia wyrokowania w procesie karnym w świetle koncepcji czynności konwencjonalnych', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, pp. 60 et seq.

[15] See S. Czepita, 'Czynności konwencjonalne i formalne w prawie a proces prawotwórczy i rola Trybunału Konstytucyjnego', *Państwo i Prawo*, 2014, No. 12, pp. 14–15.

[16] See P. Kardas, 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 9, p. 9.

[17] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 17.

[18] See W. Brzozowski, 'Stopniowalność naruszeń Konstytucji', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 4, pp. 5–13.

[19] S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 7.

the referents of a given name constitute its essence is often disputed or, at the very least, debatable. Nevertheless, this does not imply that the described concept allows for such broad discretion that it becomes unusable in legal scholarship and practice. As noted in the literature, rules of reasoning essentially define the terms that denote these acts.[20] While it must be acknowledged that almost any definition may be contested to some degree, the usefulness of such definitions is rarely questioned. Regardless of the disputes that may arise in this context, they typically capture the fundamental nature of the *definiendum* in a relatively uniform manner. For this reason, even though assigning a specific norm to the category of a rule of reasoning based on the name content of a given conventional act may often be imprecise, this does not preclude the possibility of indisputably differentiating a group of norms that determine its essence.

Moreover, it cannot be overlooked that, although the actual burden of determining whether a given norm constitutes a rule of reasoning or a rule of formalisation often falls on judicial decisions and the interpretations of legal scholars and commentators, this task is primarily the responsibility of the legislator, who – for example, through various legal definitions – identifies the constitutive elements of a given conventional act.[21] In some instances, even the mere fact of leaving successive versions of specific legal provisions unamended may suggest that the norms they express are regarded as determining the essential features of the regulated conventional act.[22]

III.

Taking these considerations as a starting point, we must acknowledge that defining executive acts as a form of conventional act naturally leads to further reflection on the concept of non-executive acts – acts that, despite resembling executive acts, do not qualify as such. This presumption opens the door to exploring questions concerning the legal force of non-executive acts and the extent to which individuals are bound by them, particularly in the context of the effective presumption of constitutionality of promulgated legal acts.

At the same time, it remains unclear which legal norms constitute rules of conventionalisation in relation to executive acts and, therefore, determine the characteristics of an executive act as a conventional act. Given the scope limitations of this paper, a comprehensive analysis of this issue is not possible. However, there should be no doubt that the concept (as expressed in constitutional norms) of an executive act as an implementing act of a statute, issued by executive bodies pursuant to delegated authority, is fundamental to its essence as a conventional act. This characteristic of an executive act appears deeply embedded in the Polish constitutional tradition, which dates back to the interwar period and was certainly

---

[20] See S. Czepita, 'O koncepcji czynności konwencjonalnych w prawie', in: Smolak M. (ed.), *Wykładnia Konstytucji. Aktualne problemy i tendencje*, Warszawa, 2016, p. 132.

[21] See M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., p. 254.

[22] See S. Czepita, 'O pojęciu czynności…', op. cit., p. 101.

not overlooked by the drafters of the current Constitution.[23] For this reason, it must be assumed that, for example, the issuance of an executive act without proper authorisation or by a body outside the executive branch does not, in fact, constitute the issuance of an executive act.[24] While this observation does not define all rules of conventionalisation applicable to the issuance of executive acts, it nonetheless effectively illustrates the research perspective adopted in this paper. It underscores that a violation of at least certain constitutional norms may not only justify a claim of unconstitutionality regarding a given executive act but may also warrant refusing to recognise it as an executive act at all.

Another crucial question that arises is what legal effects follow from the issuance of a non-executive act. A review of the literature reveals at least two opposing perspectives on this issue.

The first view holds that non-executive acts are, in essence, non-existent acts. Consequently, '(…) each entity, whether private or public, should regard such an act as having no consequences, even in the absence of a prior, authoritative determination of the issue by a state authority.'[25] Any decision by such an authority, particularly a ruling of the Supreme Court, would be declaratory in nature, and the specific sanction of 'non-existence' or 'invalidity' of a legal act would apply *ex tunc*.[26]

The second view, expressed by legal scholars and commentators, directly opposes this position. It primarily argues that the declaratory nature of potential tribunal decisions cannot be reconciled with constitutional provisions, particularly Article 190(3) of the Constitution.[27] The presumption of constitutionality, as established in that provision, requires that normative acts – despite violating the Constitution – be recognised as binding until they are declared otherwise by a competent authority through a statutorily prescribed constitutional review procedure.[28] Thus, even though a defective legal act is, in essence, a non-act, the presumption of constitutionality imposed by the legislator appears to oblige legal actors to accept the legal fiction of its correctness. As a result, they are required to attribute appropriate legal consequences to the act from the moment it enters into force until a relevant ruling of the Constitutional Tribunal is announced, or another date specified by the Tribunal under Article 190(3) of the Constitution.[29]

Despite clear criticism of the first view from one of the co-creators of the contemporary concept of conventional acts, its outright rejection does not seem justified, at least for several reasons.

---

[23] See M. Wiącek, 'Komentarz do art. 92 Konstytucji', in: Safjan M., Bosek L. (eds), *Konstytucja RP. Komentarz do art. 87–243*, Warszawa, 2016, pp. 172–174; K. Działocha, 'Komentarz do art. 92', in: Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2008, pp. 2 et seq.; M. Wiącek, 'Wpływ konstytucji marcowej na treść i praktykę stosowania Konstytucji z 1997 r.', *Państwo i Prawo*, 2018, No. 11, p. 45.

[24] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 16.

[25] M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., pp. 259–260.

[26] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 14.

[27] Ibidem, p. 14.

[28] See M. Gutowski, P. Kardas, 'Domniemanie konstytucyjności a kompetencje sądów', *Palestra*, 2016, No. 5, p. 56.

[29] S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 15.

First and foremost, it must be noted – contrary to what some authors argue[30] – that the principle of the presumption of constitutionality does not confer exclusive competence on the Constitutional Tribunal to assess the compliance of legal acts with the Constitution.[31] The literature instead interprets this principle as a rule governing the distribution of the burden of argumentation in proceedings before the Tribunal, or as an interpretative directive requiring the search for and preference of constitutional or at least pro-constitutional interpretations wherever possible.[32] Moreover, it has been rightly pointed out that a broader, so-called formal approach to the presumption of constitutionality is not only substantively flawed but also lacks textual grounding in the Constitution.[33] Nowhere in the fundamental law can a clear justification be found for interpreting the presumption in strictly formal terms. Consequently, since this presumption is a creation of legal scholarship and judicial decisions – particularly rulings of the Constitutional Tribunal[34] – it cannot be binding on individuals, who are subject to a closed system of legal sources, or on judges, who are bound solely by the Constitution and statutes.

Secondly, it must be noted that, when referring to the wording of Article 190(3) of the Constitution, the formal approach to the presumption of constitutionality appears to fail to distinguish between the concepts of 'force' and 'application' of the law. While the former signifies that a given norm (provision) is an element of a particular legal system, the latter concerns the establishment of legal effects in a specific individual case.[35] Although the application of the law is inherently linked to the question of whether it remains in force, the legislator is also clearly aware of the need to differentiate between these two concepts. Adhering to the prohibition of homonymous interpretation, it cannot be overlooked that the legislator consistently employs both terms in distinct semantic contexts within Article 91(3) and Article 190(3) of the Constitution. Furthermore, this differentiation aligns with judicial interpretations, including rulings of European courts,[36] which have also justified departing from a formal understanding of the presumption of constitutionality. In light of this, it seems reasonable to interpret Article 190(3) of the Constitution merely as a confirmation of the derogative effect of Tribunal judgments and as the source of the Tribunal's competence to determine the precise moment at which an unconstitutional act is removed from the legal system.[37] Consequently, this provision does not preclude

---

[30] See S. Wronkowska, 'W sprawie bezpośredniego stosowania Konstytucji', *Państwo i Prawo*, 2001, No. 9, p. 21.

[31] See W. Sanetra, 'Bezpośrednie stosowanie Konstytucji RP przez Sąd Najwyższy', *Przegląd Sądowy*, 2017, No. 2, p. 25.

[32] See M. Florczak-Wątor, A. Grabowski (eds), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz*, Kraków, 2021, pp. 862–863.

[33] See ibidem, pp. 874–876; P. Radziewicz, 'Wzruszenie "domniemania konstytucyjności" aktu normatywnego przez Trybunał Konstytucyjny', *Przegląd Sejmowy*, 2008, No. 5, p. 74.

[34] See W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., p. 24; M. Florczak-Wątor, A. Grabowski (eds), *Argumenty…*, op. cit., p. 863.

[35] See S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań, 2005, pp. 51 and 140.

[36] See W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., pp. 11–13.

[37] See M. Gutowski, P. Kardas, 'Sądowa kontrola konstytucyjności', *Palestra*, 2016, No. 4, pp. 12 et seq.

entities other than the Tribunal from being granted the power to refuse to apply acts issued in violation of rules of reasoning (so-called 'non-acts'), especially since it simultaneously legitimises the distinction between the entitlement to refuse to apply a legal act and the power to determine the its non-binding nature.

Thirdly, it cannot be overlooked that even if we accept the formal approach to the presumption of constitutionality, its application to so-called non-acts remains debatable. As noted in Constitutional Tribunal rulings, '(…) the principle of a democratic rule of law primarily gives rise to the presumption of constitutionality of a law that has been correctly enacted and promulgated.'[38] Accordingly, since a non-act is not a correctly enacted normative act, it may be argued that it does not fall within the scope of the presumption of constitutionality.[39] Nevertheless, while not fully endorsing such a radical position adopted by certain legal scholars, it must be acknowledged that the Constitutional Tribunal itself recognises that the presumption of constitutionality may be overridden by means other than its own executive act.[40] It is, after all, commonly accepted, that courts have, among other things, the power to refuse to apply unconstitutional substatutory acts[41] or the obligation to not apply an unconstitutional legal act as of the moment of the ruling's promulgation, rather than its official publication by the Constitutional.[42] Hence, the question also remains open as to why other legal events, such as an established position in legal doctrine and case law, could not break the presumption of constitutionality, understood as the binding force on individuals of an act issued in violation of the rules of conventionalisation, until it is formally repealed or declared unconstitutional by the Constitutional Tribunal. While some might argue that such a conclusion risks destabilising the legal system, it must be noted that the current model of judicial review already allows for the gradual resolution of interpretative and application-related discrepancies over time.[43]

Fourthly, it should be noted that the option to refuse to apply an 'executive act' that violates constitutional constitutive rules may also be understood as an expression of the direct application of the Constitution within the meaning of Article 8(2).[44] Since the direct application of the Constitution primarily involves transferring constitutional axiology onto the plane of other legal regulations in the process of their interpretation,[45] it is inadmissible for any act of law application to be based on a legal provision contrary to the Constitution.[46] Therefore, it is rightly pointed out in the literature that one manifestation of the direct application

---

[38] Judgment of the Constitutional Tribunal of 5 May 2011, case No. P 110/08 (OTK-A 2011, No. 4, item 31).

[39] See M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., p. 258.

[40] See M. Gutowski, P. Kardas, 'Domniemanie konstytucyjności…', op. cit., pp. 57–58.

[41] See R. Hauser, J. Trzciński, 'O formach kontroli konstytucyjności przez sądy', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2008, No. 2, pp. 14–16.

[42] See Resolution of the General Assembly of the Supreme Court of 26 April 2016.

[43] See M. Gutowski, 'Bezpośrednie stosowanie Konstytucji w orzecznictwie sądowym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, No. 1, p. 94.

[44] Cf. P. Kardas, M. Gutowski, 'Konstytucja z 1997 r. a model kontroli konstytucyjności prawa', *Palestra*, 2017, No. 4, p. 23, W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., p. 7.

[45] See P. Tuleja, *Stosowanie Konstytucji w świetle zasady jej nadrzędności*, Kraków, 2003, pp. 327 et seq.

[46] See P. Kardas, M. Gutowski, 'Konstytucja z 1997 r. a model…', op. cit., p. 13.

of the Constitution is the so-called collisional application, which justifies omitting a provision when its application cannot be reconciled with norms in force at the constitutional level.[47] Although it must be acknowledged that such observations are currently most often made in the context of discussions concerning the legitimisation of dispersed constitutional review of statutes, they remain valid in relation to the research problem discussed here.

It is worth noting at this point that the obligation to apply the Constitution directly is not limited to courts but extends to all individuals involved in the application of the law.[48] As is rightly pointed out in the literature, '(…) after the adoption of the Constitution, it became clear that its application cannot be the sole domain of the Constitutional Tribunal and that other individuals also hold the right to apply it (…).'[49] The wording of Article 8(2) of the Constitution not only suggests the existence of an obligation to apply it directly – as indicated by the use of the phrase 'shall apply' rather than 'may apply' – but also emphasises its universality by not explicitly limiting the addressees of this obligation. Consequently, it applies both to public authorities and to individuals seeking to establish the legal consequences of their actions. For this reason, they too appear to be entitled to refuse to apply non-executive acts that violate constitutional constitutive rules.

Fifthly, it is also worth noting that the right to refuse to apply a non-act is deeply rooted in the axiology of the legal system. Legal scholarship rightly asserts that fragmented constitutional review should be regarded as one of the ways in which individuals realise their claim to the justice of the law.[50] Its essence lies primarily in enhancing individual protection by affirming the Constitution's status as a normative act that establishes real subjective rights.[51] In this regard, invoking one of the fundamental legal topoi (*lex iniusta non est lex*)[52] the hierarchical structure of legal sources. Furthermore, it is justified by the praxeological coherence of the legal system. Just as it is difficult to justify a situation in which an administrative body is required to issue a decision despite being aware of the unconstitutionality of the executive act on which it is based – a situation that may be justified, for example, by the jurisprudential stance of administrative courts in analogous cases – it is equally difficult to find praxeologically coherent arguments for requiring individuals to base their behaviour on defective executive acts, even when they are aware that, in the event of legal disputes, such acts will be deemed ineffective due to their unconstitutionality.[53] From this perspective, restricting the ability to refuse to apply non-executive acts solely to courts appears unjustified.

---

[47] See L. Garlicki, 'Stosowanie konstytucji przez sądy i trybunały (ile monopolu, a ile dekoncentracji?)', *Studia Prawnicze*, 2022, Vol. 226, No. 2, p. 35.

[48] See M. Florczak-Wątor, 'Komentarz do art. 9 Konstytucji', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2019, p. 51.

[49] R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warszawa, 2010, p. 25.

[50] See P. Kardas, 'Rozproszona kontrola…', op. cit., p. 17.

[51] See P. Kardas and M. Gutowski, 'Konstytucja z 1997 r. a model…', op. cit., p. 29.

[52] See M. Florczak-Wątor, A. Grabowski (eds) *Argumenty…*, op. cit., pp. 417 et seq.

[53] Cf. A. Preisner, 'Dookoła Wojtek. Jeszcze o bezpośrednim stosowaniu Konstytucji RP', in: Balicki R., Jabłoński M., Wójtowicz K. (eds), *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław, 2018, pp. 43–44.

It is also worth noting that the possibility of refusing to recognise an executive act that violates constitutional constitutive rules is, in essence, a modernised reference to the thesis of statutory lawlessness in a constitutional state. If we assume that the Constitution itself is the nucleus of the constitutional state governed by the rule of law, then, in line with Radbruch's reasoning,[54] it seems reasonable to distinguish three levels of injustice (unconstitutionality) within a given legal framework. The first level consists of unjust laws, which, nonetheless, remain binding due to considerations such as legal certainty, even though they do not constitute statutory lawlessness. These are regulations that, while formally compliant with the Constitution, do not necessarily reflect its axiology. The second level includes unjust laws that, having exceeded a certain threshold of unconstitutionality (injustice), should be deemed non-binding by a competent constitutional court. The third level encompasses regulations that so severely violate the Constitution that they are no longer merely unjust laws but entirely devoid of the character of law.[55] Although it may be difficult to draw clear-cut boundaries between these categories,[56] acts that violate constitutional constitutive rules must undoubtedly be classified within the third category. This understanding of the levels of injustice within a constitutional state highlights the foundation of the thesis advanced in this paper: only such extreme unconstitutionality of an executive act, which effectively precludes it from being recognised as an executive act at all, justifies individuals being bound by its norms.

IV.

In light of these considerations, it should be acknowledged that recognising the act of issuing an executive act as a conventional act legitimises, in cases of severe inconsistency with the Constitution, the right of individuals or administrative bodies to refuse its application. While it must be acknowledged that this thesis is based solely on certain legal-theoretical assumptions, the Constitution neither unequivocally prohibits nor expressly grants such a right, just as it does not explicitly endorse the right to fragmented constitutional review of statutes.[57] However, the author argues that this concept lacks a strong constitutional basis, particularly as it may be viewed not only as an adaptation of the Radbruch formula (adjusted to the reality of a constitutional state governed by the rule of law and widely accepted), but also as an essential guarantee of upholding constitutional standards of individual rights.

---

[54] G. Radbruch, 'Ustawowe bezprawie i ponadustawowe prawo', in: Radbruch G., *Filozofia prawa*, transl. Nowak E., Warszawa, 2009, pp. 244–254.

[55] M. Florczak-Wątor, A. Grabowski (eds.), *Argumenty…*, op. cit., pp. 418–419, and the literature cited therein.

[56] Ibidem, p. 432.

[57] Cf. A. Rytel-Warzocha, 'Jak nie Trybunał Konstytucyjny to co? O rozproszonej kontroli konstytucyjności prawa w Polsce', *Przegląd Prawa Konstytucyjnego*, 2022, No. 3, pp. 27.

BIBLIOGRAPHY

Bogucki O., 'O konstytutywnej współzależności wyjaśniania i identyfikowania czynności konwencjonalnych', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2019, No. 2.

Brzozowski W., 'Stopniowalność naruszeń Konstytucji', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 4.

Czepita S., 'Czynności konwencjonalne i formalne w prawie a proces prawotwórczy i rola Trybunału Konstytucyjnego', *Państwo i Prawo*, 2014, No. 12.

Czepita S., 'Formalizacja a konwencjonalizacja działań w prawie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006.

Czepita S., 'Formalizacja i konwencjonalizacja w systemie prawnym', in: Bogucki O., Czepita S. (eds), *System prawny a porządek prawny*, Szczecin, 2008.

Czepita S., 'O koncepcji czynności konwencjonalnych w prawie', in: Smolak M. (ed.), *Wykładnia Konstytucji. Aktualne problemy i tendencje*, Warszawa, 2016.

Czepita S., 'O pojęciu czynności konwencjonalnej i jej odmianach', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 1.

Czepita S., *Reguły konstytutywne a zagadnienia prawoznawstwa*, Szczecin, 1996.

Działocha K., 'Komentarz do art. 92', in: Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2008.

Florczak-Wątor M., 'Komentarz do art. 9 Konstytucji', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2019.

Florczak-Wątor M., Grabowski A. (eds), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz*, Kraków, 2021.

Garlicki L., 'Stosowanie konstytucji przez sądy i trybunały (ile monopolu, a ile dekoncentracji?)', *Studia Prawnicze*, 2022, Vol. 226, No. 2.

Gizbert-Studnicki T., 'O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych', *Państwo i Prawo*, 1975, No. 4.

Gmerek K., 'Z problematyki treści czynności konwencjonalnych w prawie', *Krytyka Prawa*, 2022, No. 2.

Gutowski M., 'Bezpośrednie stosowanie Konstytucji w orzecznictwie sądowym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, No. 1.

Gutowski M., *Nieważność czynności prawnej*, Warszawa, 2017.

Gutowski M., Kardas P., 'Domniemanie konstytucyjności a kompetencje sądów', *Palestra*, 2016, No. 5.

Gutowski M., Kardas P., 'Sądowa kontrola konstytucyjności', *Palestra*, 2016, No. 4.

Herman M., 'Stwierdzenie niekonstytucyjności jako czynność konwencjonalna unieważnienia aktu normatywnego', in: Bernatt M., Królikowski J., Ziółkowski M. (eds), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa, 2013.

Hauser R., Trzciński J., 'O formach kontroli konstytucyjności przez sądy', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2008, No. 2.

Hauser R., Trzciński J., *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warszawa, 2010.

Janusz-Pohl B., *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań, 2017.

Janusz-Pohl B., 'O konstrukcji niedopuszczalności czynności karnoprocesowej', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2014, No. 4.

Kardas P., 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 9.

Kardas P., Gutowski M., 'Konstytucja z 1997 r. a model kontroli konstytucyjności prawa', *Palestra*, 2017, No. 4.
Kroczek P., 'Teologiczne podstawy reguł sensu czynności konwencjonalnych i norm kompetencyjnych w prawie kanonicznym i ich konsekwencje dla decyzji prawodawczych', *Annales Canonici*, 2013, No. 9.
Nowak L., Wronkowska S., Zieliński M., 'Czynności konwencjonalne w prawie', *Studia Prawnicze*, 1972, No. 33.
Patryas W., *Performatywy w prawie*, Poznań, 2005.
Piszko R., 'Sposoby i niektóre skutki formułowania treści czynności konwencjonalnych doniosłych prawnie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006.
Preisner A., 'Dookoła Wojtek. Jeszcze o bezpośrednim stosowaniu Konstytucji RP', in: Balicki R., Jabłoński M., Wójtowicz K. (eds), *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław, 2018.
Radbruch G., 'Ustawowe bezprawie i ponadustawowe prawo', in: Radbruch G., *Filozofia prawa*, transl. Nowak E., Warszawa, 2009.
Radziewicz P., 'Wzruszenie 'domniemania konstytucyjności' aktu normatywnego przez Trybunał Konstytucyjny', *Przegląd Sejmowy*, 2008, No. 5.
Rytel-Warzocha A., 'Jak nie Trybunał Konstytucyjny to co? O rozproszonej kontroli konstytucyjności prawa w Polsce', *Przegląd Prawa Konstytucyjnego*, 2022, No. 3.
Sanetra W., 'Bezpośrednie stosowanie Konstytucji RP przez Sąd Najwyższy', *Przegląd Sądowy*, 2017, No. 2.
Tuleja P., *Stosowanie Konstytucji w świetle zasady jej nadrzędności*, Kraków, 2003.
Wiącek M., 'Komentarz do art. 92 Konstytucji', in: Safjan M., Bosek L. (eds), *Konstytucja RP. Komentarz do art. 87–243*, Warszawa, 2016.
Wiącek M., 'Wpływ konstytucji marcowej na treść i praktykę stosowania Konstytucji z 1997 r.', *Państwo i Prawo*, 2018, No. 11.
Wieczorkiewicz-Kita J., 'O konwencjonalnych i formalnych aspektach procesu karnego', in: Choduń A., Czepita S. (eds), *W poszukiwaniu dobra wspólnego*, Szczecin, 2010.
Wieczorkiewicz-Kita J., 'Zagadnienia wyrokowania w procesie karnym w świetle koncepcji czynności konwencjonalnych', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006.
Wronkowska S., *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań, 2005.
Wronkowska S., 'W sprawie bezpośredniego stosowania Konstytucji', *Państwo i Prawo*, 2001, No. 9.
Ziembiński Z., Zieliński M., *Dyrektywy i sposób ich wypowiadania*, Warszawa, 1992.

Cite as:

Dąbrowski K. (2025), *On binding individuals with non-constitutional executive acts from the perspective of rules of conventionalisation and formalisation*, Ius Novum (Vol. 19) 1, 111–123. DOI 10.2478/in-2025-0008

Ius Novum

sciendo

2025, vol. 19, no. 1, pp. 124–139

HUMAN RIGHTS IN THE ANTHROPOCENE EPOCH AND PHILOSOPHY

DOBROCHNA MINICH*
JANUSZ KARP**

DOI 10.2478/in-2025-0009

Abstract

The subject of this article is the issue of human and civil rights in the context of the Anthropocene. This is a multi-faceted, complex, and highly relevant issue. The origins of human rights date back to Antiquity and the natural law concept, flourishing during the Enlightenment. Nowadays, human rights have evolved into a generational framework. The advent of the Anthropocene epoch (referred to as the human epoch) has made mankind aware of its domination over nature. Human activity has led to unprecedented threats and the degradation of the natural environment, which is the material foundation of human existence.

In order to mitigate the effects of the ecological crisis, it is proposed to adopt a different way of thinking – an alternative human attitude shifting from anthropocentrism to anti-anthropocentrism. The classic concept of the 'common good' has been revisited. Planet Earth is the common good of all of us and embodies the highest good for the individuals who constitute the political community. Human rights should provide the legal framework for environmental law, including climate law.

Keywords: human rights, environmental/climate law, common good, Anthropocene, postmodernity, anti-anthropocentric attitude

* LD – Department of Theory and History of Law, Faculty of Law and Administration of Lazarski University (Poland), e-mail: dobrochna.minich@lazarski.pl, ORCID: 0000-0002-9987-7835

** LLD – Department of Comparative Political System Law, Faculty of Law and Administration, Jagiellonian University in Kraków (Poland), e-mail: j.karp@uj.edu.pl, ORCID: 0000-0002-6752-4314

I. INTRODUCTION – EVOLUTION OF THE RIGHTS OF MAN AND CITIZEN

Human rights are among the most important issues in contemporary constitutionalism and the philosophy of law. Although they are one of the youngest concepts in the dictionary of politics and societies, they constitute a breakthrough social and political value.[1] Four stages of the evolution of human rights and freedoms can be clearly identified: prehistoric (from Ancient Greece to noble privileges at the end of the Middle Ages); statutory (in which parliaments and statutes were to guarantee rights and freedoms); constitutional (when rights and freedoms became a constitutional matter); and international (since 1945, when rights and freedoms began to receive international protection).[2]

Doctrinal inquiry into the origins of the concept of human rights leads to political thought in Ancient Greece. It was in the Mediterranean cultural sphere that trends in natural law emerged, seeking the natural order of all things not only in nature but also in society. However, there was no ideology of freedom rights in Greece.[3] The concept of citizens' rights, particularly the right to participate in political life and the right to property, did not appear before Aristotle's philosophy. Stoicism was the first philosophical system to make the human individual an object of philosophical reflection, freeing them from socio-political conditions and emphasising their status as an independent part of the social order. At the same time, Stoicism became the most significant legal and natural trend of Antiquity, shaped by philosophical thought and Roman *iuris prudentia*.[4] The foundation of natural law-based concepts of human rights is the idea of protecting individuals and groups against the abuse of power by authorities. It was only in Roman jurisprudence (under the influence of Cicero[5] and Seneca[6]) that an individual was recognised as having the ability to act freely within designated areas protected by the state. Following Stoic principles, freedom came to be considered an inherent feature of human nature.

In the political thought of the Middle Ages, the legal status of an individual depended on many factors. A person's belonging to a particular social class was most important, and rights were usually granted not to individuals, but to communities.[7] Medieval rights and immunities were privileges, not rights in their

---

1 W. Osiatyński, *Wprowadzenie do praw człowieka*, Helsinki Foundation for Human Rights Report, Warszawa, 2000, p. 1, https://hfhr.pl/publikacje/wprowadzenie-do-pojecia-praw-czlowieka [accessed on 19 March 2024].

2 See S. Sagan, *Prawo konstytucyjne Rzeczpospolitej Polskiej*, Warszawa, 2001, pp. 58–64.

3 J. Lande, 'Historia filozofii prawa', in: Lande J., *Studia z filozofii prawa,* Warszawa, 1959, pp. 452–454.

4 K. Sójka-Zielińska, *Drogi i bezdroża prawa. Szkice z dziejów kultury prawnej Europy*, Wrocław–Warszawa–Kraków, 2000, p. 97.

5 T. Banach, *Res Publica est Res Populi. Myśl polityczno-prawna Marka Tulliusza Cycerona*, Łódź, 2023, pp. 99–105; J. Zajadło, *Cyceron dla prawników*, Gdańsk, 2019, pp. 105–122, 135–156.

6 R. Brague, *Mądrość świata. Historia ludzkiego doświadczenia wszechświata*, Warszawa, 2021, pp. 247–249, 253–254.

7 T. Jurczyk, 'Geneza rozwoju praw człowieka', *Homines Hominibus*, 2009, No. 1(5), pp. 29–44; K. Sójka-Zielińska, *Drogi i bezdroża…*, op. cit., pp. 99–101.

modern sense. Only with the emergence of egalitarianism could the privileges of particular individuals or social groups evolve into universal rights.[8]

In modern times, there was a breakaway from the medieval universalistic and hierarchical worldview. The Renaissance rediscovered man and the world around him, while the Enlightenment gave birth to the idea of freedom, which liberated man from religious superstitions, feudal rights and privileges, and all restrictions on economic entrepreneurship.[9] It gave rise to the idea of individualism. For this trend, it is important to highlight the role of the individual in relation to society. An individual's values are higher than those of all collectives, such as the state, nation, class, or race. Individualism made human dignity supreme. Society and the state exist only to serve the individual good, but a man can never be a means to an end for another man.[10]

Based on the above considerations, it can be stated without doubt that the issue of human rights has a long history. However, in 'the evolution of the understanding of the individual's position in society and the state, it is only the events associated with the era of great social revolutions that hold groundbreaking significance – when constitutional documents emerged, guaranteeing fundamental human rights derived from natural law.'[11] It should be emphasised that there was no systematic theory of natural rights until the 17th century. Michael Freeman was right to indicate that 'the concept of natural rights in the 17th and 18th centuries was associated with: (1) opposition to absolute monarchy; (2) the emergence of capitalism; and (3) dissident Protestantism or the secularisation of political thought.'[12]

The breakthrough came during the Enlightenment, when the ideals of the French Revolution – freedom, equality, and fraternity – began to be implemented. These principles became the foundation of democratic and liberal states. This era can therefore be characterised by the following features: optimism, individualism, and scepticism. Reason enables a human being to shape their own personality, environment, and socio-political system, as well as reject irrational ideologies and concepts. Individualism expresses the idea of inherent natural rights, which are universal to all humankind. In turn, the sceptical attitude demands the verification of all statements, assumptions, and opinions (including scientific ones). The era rejected existing cognitive values and Christian spiritual experiences, instead aiming to establish the Newtonian scientific method as the primary means of discovering truth.[13]

The above-mentioned assumptions formed the basis of the modern concept of human and civil rights. This is the foundation on which, as Ernst Cassirer rightly stated, 'the edifice of the doctrine of human and civil rights was built in the form

---

[8] W. Osiatyński, *Prawa człowieka i ich granice*, Kraków, 2011, p. 26.

[9] G.L. Seidler, *W stronę nowożytności*, Lublin, 2002, pp. 62–65.

[10] G.L. Seidler, *W poszukiwaniu idei ustrojowej*, Lublin, 2000, pp. 39–41.

[11] A. Pułło, *Zasady ustroju politycznego państwa. Zarys wykładu*, Gdańsk, 2014, p. 113.

[12] M. Freeman, 'Prawa człowieka w dwudziestym pierwszym wieku', in: Zajadło J. (ed.), *Antologia tekstów dotyczących praw człowieka*, transl. Fronia M., Warszawa, 2008, p. 747.

[13] See E. Voegelin, *Od Oświecenia do rewolucji*, Warszawa, 2011, p. 13.

in which it developed in the 18th century'.[14] He sought in these rights 'a spiritual centre' where all aspirations towards moral renewal and towards social and political reform converge.

In paragraph 1 of The Declaration of Rights, adopted on 12 June 1776 by the Convention of the People of Virginia, we read: 'All men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'.[15] It was in this normative act that the concept of human rights was used for the first time.[16] According to Georg Jellinek, the act served as a prototype for later constitutional legislation and became a model for the French Declaration of the Rights of Man and Citizen, adopted on 26 August 1789.[17] This Declaration was based on the thought of John Locke, Montesquieu, American constitutions, and the liberal concept of human rights. Article 1 states directly that people are born and remain free and equal in rights, while Article 2 declares that the aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety, and Resistance to Oppression. Article 4 defines Liberty in a negative sense, i.e., as the ability to do anything that does not harm others and is not against the law. This was directly related to the marginalisation of equality law,[18] which later appeared in the drafted Jacobin Declaration of the Rights of Man and of the Citizen, dated 24 June 1793. Article 2 of the draft stated that the basic rights of man and citizen are: equality, liberty, security, and property. The social egalitarianism postulated here is presented as the basis of society's happiness (Article 1), while all men are equal by nature and before the law (Article 3).[19] As a result, the right to property ceased to be a natural right. Property no longer belonged to man by nature but was considered a social institution created and regulated by the state. These Declarations focused on personal and political freedoms and marked the first modern stage of human rights. This shift involved a departure from natural-law constructions (both theological and secular) and a turn towards legal positivism.

In the second half of the 19th century, there was a paradigm shift: the former cult of nature was replaced by the cult of statute, which had a direct impact on the understanding of human and civil rights. As is commonly known, legal positivism (in its model approach) is based on two fundamental theses. The first thesis states that law has its sources in certain types of social facts (usually a convention adopted

---

[14] E. Cassirer, *Filozofia Oświecenia*, Warszawa, 2010, pp. 227–228.

[15] 'Deklaracja Praw Wirginii z 12 czerwca 1776 r.', in: Sarnecki P. (selection, translation, and introduction), *Najstarsze Konstytucje z końca XVIII i I połowy XIX wieku*, Warszawa, 1997, p. 11.

[16] M. Piechowiak, 'Pojęcie praw człowieka', in: Wiśniewski L. (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa, 1997, p. 12.

[17] G. Jellinek, *Deklaracja praw człowieka i obywatela*, transl. Libkind-Lubodziecka Z., Warszawa, 1905, pp. 5–10.

[18] See 'Deklaracja Praw Człowieka i Obywatela z 26.08.1789 r.', in: *Najstarsze Konstytucje…*, op. cit., pp. 18–19.

[19] 'Konstytucja Francji z 24 czerwca 1793 r.' and 'Deklaracja Praw Człowieka i Obywatela', in: *Najstarsze Konstytucje…*, op. cit., p. 69.

in a given community that determines which facts are considered legal). The basis for the validity of law is not of a metaphysical nature and is not derived from any 'nature' understood in any way. The second thesis asserts the absence of a necessary link between law and morality. In order to be valid, law does not need to meet any moral criteria, although the 'soft' (inclusive) version does not deny the practical connections between these rules of social control.[20] Based on this, it can be concluded that the sphere of individual rights (a citizen's rights) became part of the legal order established by the state. Since the adoption of the first constitutions, fundamental rights have been incorporated into them, leading to their designation as fundamental rights.[21] As every individual, by the very fact of existence, has the right to demand that other citizens and the state behave in a specific way towards them, the applicable law contains the idea of inherent natural rights.[22] This assumption still embodies the principle of universalism, according to which there is: one universal law of nature, universally recognised human rights, one universal political system suitable for all, and one universal truth.[23] Positivism remained in the mainstream of universalistic rationalism. Therefore, it can be questioned whether this attitude was truly a novelty and established an undeniable new trend.[24]

II. TOWARDS POSTMODERNITY[25]

According to Isaiah Berlin, it is not universalism but diversity and pluralism that have determined and continue to determine the directions of contemporary change.[26] Cultural diversity is an undeniable feature of modern societies in which a number of objective and knowable values function. They are 'goals that people pursue for their own sake, with other things as means. (…) There are different forms of life, and there are numerous goals and principles. But not infinitely many – they must be within the limits of human experience, otherwise they fall outside the human

---

[20] See A. Dyrda, 'Pozytywizm pochowany żywcem? W obronie miękkiego pozytywizmu', *Studia Prawnicze*, 2010, Vol. 184, No. 2, pp. 5–36; J. Woleński, 'O pozytywizmie prawniczym', in: Pawlica J. (ed.), *Etyka a prawo i praworządność*, Kraków, 1998, pp. 9–16; M. Zirk-Sadowski, 'Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania', in: Stelmach J. (ed.), *Studia z filozofii prawa*, Kraków, 2001, pp. 83–95; T. Pietrzykowski, '"Miękki" pozytywizm i spór o regułę uznania', in: Stelmach J. (ed.), *Studia z filozofii prawa*, Kraków, 2001, pp. 97–121.

[21] K. Sójka-Zielińska, *Drogi i bezdroża…*, op. cit., p. 121; see R. Alexy, *Teoria praw podstawowych*, Warszawa, 2010, *passim*.

[22] G.L. Seidler, *W poszukiwaniu…*, op. cit., p. 41.

[23] I. Berlin, 'Upadek idei utopijnej na Zachodzie', in: Hardy H. (ed.), *Pokrzywione drzewo człowieczeństwa*, Warszawa, 2004, pp. 31–33.

[24] See T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*, Warszawa, 2016, pp. 41–78; A. Dyrda, *Spory teoretyczne w prawoznawstwie. Perspektywa holistycznego pragmatyzmu*, Warszawa, 2017, pp. 80–96, 458–478.

[25] Considerations in article by D. Minich, A. Moskwa, 'Wolności i prawa człowieka w dobie ponowoczesnej', in: Haczkowska M., Tereszkiewicz S. (eds), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowania w przestrzeni europejskiej*, Opole, 2016, pp. 235–250.

[26] I. Berlin, 'Apoteoza woli romantycznej: bunt przeciw mitowi idealnego świata', in: Hardy H. (ed.), op. cit., pp. 181 et seq.

sphere.'[27] This is reflected in the emergence of a new approach to the issue of human rights – the so-called 'dynamic approach'. According to this stance, human rights are fluid and undergo transformation in relation to social and legal development. They are also influenced by cultural diversity, the evolution of civilisation, and the transformation of the material basis of human existence. The principle of constitutionalism, understood as a system of assumptions and values respected in the operation of the state, represents a specific legal structure. It is based on the priority role of the constitutional act, with all the resulting consequences. The principle of constitutionalism directly defines a democratic constitutional state in the material sense, reinforcing the principle of the supremacy of the constitution and the inalienability of fundamental rights. It is the Constitution that secures and protects the rights of man and citizen, thereby setting boundaries of the legal order and establishing the axiological foundation of political community life.[28]

In the era of postmodernity, the belief in the possibility of achieving an ideal political system was abandoned. Thanks to the constitutionalisation of social life, we have become masters of our own fate. Postmodern society is created and functions through the process of shaping individual identities and mutual relations between them. 'Individualisation' means the transformation of human 'identity' from 'given' to 'assigned' and making individuals responsible for the performance of the tasks and all the consequences (and side effects) of this performance. In other words, it means the establishment of *de jure* autonomy (regardless of whether it is accompanied by *de facto* autonomy).[29] However, law should not be equated with the adopted positive legal text. It should be understood as textualism justified by political morality and the rationality of law-making by political authorities. Legal acts are always interpreted within a context, including, where possible, the context of 'natural law' (with its variable content), general and fundamental legal principles, and the law of nations.[30]

This led to the distinction of another typology within the category of human rights: the generations of human rights, as defined by Karol Vasak. According to Vasak, first-generation rights encompass personal and political freedoms, reflecting the idea of liberty. Second-generation rights cover social, economic, and cultural rights, expressing the idea of equality. Third-generation rights are group rights and are based on the idea of fraternity (now referred to as solidarity).[31] It can be stated

---

[27] I. Berlin, *Dwie koncepcje wolności i inne eseje*, Warszawa, 2001, pp. 32–33; see B. Polanowska-Sygulska, *Filozofia wolności Isaajacha Berlina*, Kraków, 1998, pp. 47–80; B. Polanowska-Sygulska, *Pluralizm wartości i jego implikacje w filozofii prawa*, Kraków, 2008, *passim*.

[28] For more on the issue see D. Minich, 'Konstytucjonalizm a rozumienie prawa', *Roczniki Administracji i Prawa*, 2019, Vol. XIX, No. 2, pp. 35–48; D. Minich, 'Konstytucja – konstytucjonalizm – neokonstytucjonalizm', *Przegląd Prawa Publicznego*, 2018, No. 12, pp. 68–75; D. Minich, 'Konstytucjonalizm – autorytaryzm. Tak daleko a tak blisko', *Przegląd Prawa Publicznego*, 2022, No. 9, pp. 23–38.

[29] Z. Bauman, *Płynna nowoczesność*, Kraków, 2000, pp. 49–50.

[30] A. Vermeule, *Common Good Constitutionalism. Recovering the Classcal Legal Tradition*, Cambridge, 2022, pp. 7–8.

[31] K. Vasak, 'A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights', *The UNESCO Courier. A Window Open to the World*, 1977, No. 11, p. 29; M. Maciejewski, 'Teoretyczne aspekty ochrony wolności i praw jednostki', in: Bator A.,

without doubt that there has been a shift in value priorities concerning protection against the exclusion of individuals (or social groups) based on nationality, gender, race, beliefs, sexual preferences, etc.[32] Therefore, these rights also serve as a safeguard against governmental arbitrariness. The dynamics of social life, driven by individualistic personality development, combined with the negative impact of individuals, groups, and communities on the material basis of human existence (both animate and inanimate nature, whose resources enable human survival), has led to the emergence of fourth-generation human and civil rights.[33]

The arrival of the 20th century and the events that took place during this period and after World War II revealed the crisis of modernity (modernism) and were the main factor in the emergence of a new era constituting its opposite, i.e., postmodernity.[34] The very construction of the term expresses a definite break with the past.[35] There was a transition from the 'solid' to the 'soft' phase of modernity. It became evident that the social forms typical of modernity, such as structures that limit individual choices and institutions that uphold routines and patterns of acceptable behaviour, could no longer exist in the same form. The erosion of the nation-state and the emergence of global space led to a separation and split between authority and politics. The foundations of solidarity, traditional social structures, and community life – which were previously based solely on the state – became weakened and began to disappear. Such strongly emphasised individualism led to the breaking of all community ties.[36]

III. ANTHROPOCENE AND ITS IMPACT ON THE UNDERSTANDING OF HUMAN AND CIVIL RIGHTS

Nowadays, mankind faces new challenges that cannot be tackled individually. These are changes resulting from human actions that affect the entire Earth's ecosystem. The rapid growth of the human population, the progressive food crisis, lack of access to water, accelerated melting of Antarctic ice (leading to sea level rise), extinction of flora and fauna species, and rising carbon dioxide levels have resulted in significant losses of arable soil resources.[37] These changes are evident in the depletion of non-

---

Jabłoński M., Maciejewski M., Wójtowicz K. (eds), *Początki koncepcji oraz regulacji praw i wolności człowieka do czasów oświecenia*, Wrocław, 2013, pp. 10–11.

[32] See A. Kalisz, 'Prawa kolektywne na tle klasycznego ujęcia praw człowieka', in: Kalisz A. (ed.), *Prawa człowieka. Współczesne zjawiska, wyzwania, zagrożenia*, Vol. I, Sosnowiec, 2015, pp. 23–47.

[33] M.E. Rodriguez Palop, *La nuevageneracion de derechoshumanos. Origen yjustificacion*, Madrid, 2010, *passim*; J. Alvear, 'Los derechos humanos en el constitucionalismo contemporáneo', in: Ayuso M. (ed.), *El problema de los derechos humanos. Historia, filosofía, política y derecho*, Madrid, 2023, pp. 111–141.

[34] G. Vattimo, *Koniec nowoczesności*, Kraków, 2006, *passim*.

[35] G. Dziamski, 'Ponowoczesna świadomość estetyczna', in: Zeidler-Janiszewska A. (ed.), *Trudna ponowoczesność. Rozmowy z Zygmuntem Baumanem. Część I*, Poznań, 1995, p. 147 (147–160); Z. Bauman, *Płynne czasy. Życie w epoce niepewności*, Warszawa, 2007, p. 7; Z. Bauman, *Ponowoczesność, jako źródło cierpień*, Warszawa, 2000, *passim*.

[36] Z. Bauman, *Płynne czasy…*, op. cit., pp. 7–10.

[37] P. Kingsnorth, *Wyznania otrzeźwiałego ekologa*, transl. Sikora T., Kraków, 2024, pp. 9–13.

renewable natural resources, the decline of biodiversity, progressive deforestation and desertification, increasing soil, water, and air pollution, and huge amounts of waste. The consequences of the environmental crisis affect every person, both individually and socially.[38] It was only in the 1970s that we began to recognise that 'human activity is significantly changing the physical and biological functions of the planet, leading to a transition to a new period in the geological history of the Earth, i.e., the Anthropocene.'[39] As a species, we have modified – and continue to modify – many parameters of our planet. Through exploitation, our activities have become comparable in scale to geological processes that have occurred over millions of years. One could go further and argue that it took only a single species to destabilise the entire Earth's ecosystem. The role of mankind itself has also changed: it is now seen as a global agent of environmental change. We are facing unprecedented ontological threats and potential eco-social breakdowns that we must confront.[40] Such perspectives reflect an anthropocentric attitude. Man, occupying the highest position in the hierarchy of living creatures, treats animate and inanimate nature as a 'thing' to be exploited and used for his own purposes. Notably, the very act of naming this epoch the Anthropocene, due to the transformation of geological strata, serves as the proverbial 'final nail in the coffin of mankind'.[41]

It should be kept in mind that the Anthropocene is not only a geological epoch. It is believed to be a narrative through which eternal dilemmas (including philosophical ones) relate to the nature of the Anthropocene and its socio-political and legal aspects.[42] Despite all claims about the 'twilight of philosophy',[43] these ideas must be reconsidered and revised.[44] Bruno Latour rightly noted that, until recently, for all of us, the world consisted only of things and was devoid of agency. On the other hand, there are 'living things' – the subjectivity of people who perceive and imagine the world in various ways. That is why this epoch has a metaphysical dimension. 'The metaphysical essence of the world, in which we exist, consists of a world of living creatures composed of everything that lives'.[45] The Anthropocene has been described as 'the second Copernican revolution', based on the argument

---

[38] R.F. Sadowski, 'Ekologia integralna', in: Janeczek S., Starościc A. (eds), *Filozofia społeczna. Część II – Problemy i dyskusje*, Lublin, 2022, p. 367.

[39] R. Dun, *Historia naturalna przyszłości. Co prawa przyrody mówią o losie człowieka*, Kraków, 2023, p. 133; E. Pietrzak, *Antropocen. Pytania z zakresu ludzkiej sprawczości i odpowiedzialności*, Blog Politechniki Łódzkiej – nowa strona technologii, Łódź, 2021, https://blog.p.lodz.pl/nauka-i-badania/antropocen-pytania-o-zakres-ludzkiej-sprawczosci-i-odpowiedzialnosci, [accessed on 20 March 2024].

[40] N. Oreskes, E.M. Conway, *Upadek cywilizacji zachodniej. Spojrzenie z przyszłości*, Warszawa, 2018, p. 27.

[41] P. Tryjanowski, 'Przedmowa. Wyprawa bardzo sentymentalna', in: von Brackel B., *Świat, który nadchodzi. Jak wielka wędrówka przyrody wpływa na nasze życie*, Kraków, 2024, p. 10.

[42] M. Zirk-Sadowski, 'Wprowadzenie', in: Chmielnicki P., Minich D. (eds), *Prawo jako projekt przyszłości*, Warszawa, 2022, pp. 17–22; see S. Langella, M. Damonte, A. Massaro, 'Sulla filosofia e l'Antropocene', in: Langella S., Damonte M., Massaro A. (eds), *Antropocene e Bene comune tra nuove tecnologie, nuove epistemologie e nuovi virus*, Genoa, 2022, pp. 11–26.

[43] J. Hartman, *Zmierzch filozofii*, Kraków–Budapeszt–Syrakuzy, 2023, *passim*.

[44] E.C. Ellis, *Antropocene: A Very Short Introduction*, Oxford, 2018, pp. 75–102.

[45] B. Latour, *Zamieszkać na Ziemi. Wywiady z Nicolasem Truongiem*, transl. Marczewska K., Warszawa, 2023, p. 24.

that it represents the potential for a fundamental shift in the approach to and understanding of humanity and nature.[46]

We have been living in the Anthropocene biosphere since prehistoric times. However, for most of history, researchers have focused only on the period of the Industrial Revolution, as this was when humanity began exploiting the Earth's full potential for its own short-term benefits.[47] The anthropocentric attitude made humans aware of their ability to use and exploit the Earth's resources for the benefit of mankind. This also stimulated the development of science and technology and the potential to influence the environment. However, it has also led to domination over nature and the emergence of destructive ways of interacting with the environment.[48] It is humankind that is making the Earth an increasingly dangerous and insecure place. People have become the main drivers of planetary change, radically altering the Earth's biosphere. We are facing a development-related paradox, where, as the level of trust decreases, the sense of uncertainty increases.[49]

In order to avoid the effects of the ecological crisis, it is proposed to adopt a different way of thinking – an alternative vision that will not lead us back to the starting point.[50] We are thus facing the need to shift our attitude to an anti-anthropocentric one, focused on the good of our planet. The Earth and its resources constitute the 'material substrate', and as humankind, we form an integral part of nature while also being dependent on it. The material foundation secures our physical existence, and its resources are obviously limited. It is worth referring to Józef Lipiec's conception, in which he assumes that social existence is structured in three layers: a set of individuals and the relations between them, the material foundation, and culture. The function of the material and symbolic cultural layer is to protect the 'human world' (protection of man against himself) and the 'world of nature' (both animate and inanimate) from human devastation. This protection is implemented through law, which is backed by state coercion.[51]

The climate crisis is disrupting the balance of life across the entire planet. Climate change, driven by anthropocentric forces, is bringing serious and even catastrophic consequences to non-human species on Earth.[52] Their disappearance negatively affects the 'human layer' of social existence. The fundamental existential question has shifted from asking what it means to exist as beings to asking what

---

46 E.C. Ellis, *Antropocene*…, op. cit., p. 4.

47 E.C. Ellis, J.O. Kaplan, D.Q. Fuller, S. Vavrus, K. Klein Goldewijk, P.H. Verburg, 'Used Planet: A Global History', *Proceedings of the National Academy of Sciences*, 2013, No. 110(20), pp. 7978–7985.

48 M. Adams, 'Welcome to the Anthropocene', in: Adams M., *Ecological Crisis, Sustainability and the Psychosocial Subject, Beyond Behaviour Change*, London, 2016, pp. 11–38.

49 For more on the issue see H. Tapia, P. Conceição, *New Threats to human security in the Anthropocene. Demanding greater solidarity*, United Nations Development Programme, New York, 2022, pp. 45–62.

50 See M. Zirk-Sadowski, *Wprowadzenie*…, op. cit., pp. 28–36; D. Minich, 'Antropocen w świetle filozofii bytu społecznego oraz prawa', *Przegląd Prawa Publicznego*, 2023, No. 9, pp. 28–36.

51 J. Lipiec, *My – ludzie. Studia z filozofii społecznej*, Kraków, 2022, pp. 132–135.

52 S. Vanderheiden, *Atmospheric Justice. A Political Theory of Climate Change,* Oxford, 2008, p. 9.

prevents beings from existing.[53] The inevitability and disorienting nature of the Anthropocene should mobilise humankind to increase its ecological commitment.[54] The guarantee of our survival is a 'healthy' planet in James Lovelock's sense. He referred to the Gaia hypothesis, a concept rooted in myth that envisions the planet as a self-regulating system maintaining the composition of Earth's atmosphere in a state of dynamic balance. Lovelock hypothesised that 'If only organisms could influence this composition, they would probably be able to regulate the climate on Earth so that it was conducive to life.'[55] The global atmosphere is a finite resource that belongs not only to humans but also to all non-human life forms. It is crucial for the survival of life across the planet and serves as the foundation for human flourishing.[56] We are currently in a situation where Gaia's ability to regenerate the atmosphere alone is insufficient. Humankind must support her. Ewa Domańska rightly argues that the Anthropocene, understood as Gaiocentrism, signifies a fundamental change in the human condition: 'The recognition of climate change as being fundamental to the future of the Earth and its inhabitants constitutes the epochal consciousness (…) of our times.'[57]

The advent of the Anthropocene era has further expanded the responsibilities of humankind, society, and the state in terms of empowering all non-human life forms.[58] The inclusion of human rights within the legal system (as part of the Constitution) has changed the state's role in this area. Individuals' rights oppose the omnipotence of the state, advocating for the status of the individual and the respect for dignity, needs, and aspirations.[59] An important role is also played by regulations that clearly limit the scope and power of the state, derived from the species-like nature of humankind, which is now being discovered and extended to non-human life forms. The role of law is evolving, and 'It will have to meet the challenge posed not only by the modernising state but also by the situation of the emancipated individual and the position of humankind, increasingly aware of its specific qualitative global unity.'[60] One can observe processes characteristic of supra-specific opposition, aiming to undermine the supremacy of political structures, for example, in favour of ecological movements. This marks a departure from the traditional understanding of the state, which is no longer an end in itself.

---

[53] J.V. Stein Pedersen, B. Latour, N. Schultz, 'A Conversation with Bruno Latour and Nikolaj Schultz: Reassembling the Geo-Social', *Theory, Culture & Society*, 2019, Vol. 36, No. 7–8, pp. 215–230.

[54] N. Schultz, *Land Sickness*, Cambridge, 2023, *passim*.

[55] J. Lovelock, *The Vanishing Face of Gaia a Final Warning*, New York, 2009, p. 163; see B. Latour. *Zamieszkać na Ziemi…*, op. cit., pp. 35–40; D. Chakrabarty, 'Humanistyka w czasach antropocenu', in: Domańska E., Sugiera M. (eds), *Humanistyka w czasach antropocenu*, Kraków, 2023, pp. 228–240.

[56] Cf. S. Vanderhaiden, *Atmospheric Justice…*, op. cit., pp. 79 and 104.

[57] E. Domańska, 'Dipesh Chakrabarty: Od subalternizmu do planetaryzmu', in: D. Chakrabarty, *Humanistyka w czasach…*, op. cit., p. 379.

[58] See K. Gurczyńska-Sady, W. Sady, *Antropocen. Szanse i zagrożenia*, Warszawa, 2022, *passim*; D. Minich, *Anropocen w świetle…*, op. cit., pp. 28–36.

[59] Cf. J. Zajadło, 'Jaka aksjologia praw człowieka?', *Państwo i Prawo*, 2019, No. 11, pp. 3–29.

[60] J. Lipiec, *My – ludzie…*, op. cit., p. 189.

These changes are reflected in a balanced stance on ecological protection adopted by the Polish constitutional legislator. Article 74 of the Constitution of the Republic of Poland stipulates:

> '1. Public authorities shall pursue policies ensuring the ecological security of current and future generations.
> 2. Protection of the environment shall be the duty of public authorities.
> 3. Everyone shall have the right to be informed of the quality of the environment and its protection.
> 4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.'[61]

In the postmodern world, the idea of freedom, based solely on the human individual, is of fundamental importance. This creates difficulties in constructing a constitutional system for postmodern society. Thanks to the constitutionalisation and internationalisation of fundamental rights in the sphere of freedom, equality, and solidarity (fraternity), we can protect human beings. Nowadays, it is particularly important that these rights are also applied to the natural world, whose ability to regenerate is severely limited due to human activities. Following the anthropocentric perspective, we should support both animate and inanimate nature because, for now, it is the only environment in which we live and function. It must be acknowledged that: 'A proper attitude towards the environment is almost a model example of a true common good, which concerns everyone equally, while also constituting a good for every individual and probably for the enjoyment of other goods.'[62]

Human rights, which include the right to live in a state governed by law and the right to a democratic system of power, 'constitute a meaning-creating horizon'.[63] In this case, it refers to the right to membership in a political community living on the same planet and equally responsible for it. Planet Earth is our common good. It has even been stated that: 'We live in the times of the religion of human rights.'[64]

Since the 16th century, human knowledge about the natural environment has been steadily increasing. Circumstances have also been changing objectively. A proper attitude towards the environment has become a model example of the true common good. Contemporary environmental protection law is permeated with individualistic premises, which, although inconsistent with the constitutionalism of the common good, in essence, reflect the doctrine of public trust. Already in the past, in one form or another, the state was granted both the right and the obligation to manage key environmental resources for the benefit of society. Even in Justinian's

---

[61] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483); M. Florczak-Wątor, 'Komentarz do art. 74', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2023, pp. 267–269; R. Mędrzycki, *Zasada solidarności społecznej w prawie samorządu terytorialnego*, Warszawa, 2021, pp. 180–181.

[62] A. Vermeule, *Common Good…*, op. cit., p. 173.

[63] B. Wojciechowski, *Tożsamość narracyjna jako warunek autentycznej podmiotowości prawnej*, Łódź, 2023, p. 158.

[64] M. Merkwa, *U źródeł idei praw człowieka: kształtowanie prawnych i filozoficznych podstaw koncepcji praw człowieka*, Lublin, 2018, p. 10.

Institutions, one can read that: 'The air, running water, the sea, and the seashore are common resources, available to all by natural law.'[65] The development of this doctrine assumes expanding this group to include the natural environment and climate. The principle of the common good can therefore be considered fundamental for the 'administrative state',[66] while also emphasising that environmental management should be based on public trust.[67] From a constitutional perspective, the common good is the flourishing of a well-organised political community. It is not a collection of individual benefits, but rather uniform and indivisible, embodying the highest good of the individuals constituting the political community. This is an expression of a return to the classic principle of legal justice: 'Act honourably, do not harm others, and give them what is justly theirs.' Nowadays, the triad of peace, justice, and wealth corresponds to health protection, public safety, and economic security.[68]

IV. CONCLUSIONS – HUMAN RIGHTS IN THE FACE OF ENVIRONMENTAL PROTECTION

The above-presented changes in the functioning of environmental processes, resulting from the advent of the Anthropocene epoch, have caused unprecedented climate changes. This has a direct impact on the ecosystem and the functioning of human civilisation. It is mankind that is both the cause and the victim of these processes. Nowadays, counteractions by individuals and states have proven to be insufficient and ineffective. This issue represents the greatest challenge ever faced by humankind, as climate change is a matter of global concern. Therefore, changes in all environmental processes require regulation and reflection in public international law.[69] Undoubtedly, these changes pose a threat to the full enjoyment of human rights. Human counteractions in this area must be consistent with the obligations arising from these laws. The Paris Agreement, which should be considered the first international environmental treaty (adopted on 12 December 2015, ratified by 192 parties, and entered into force on 4 November 2016), is an expression of this recognition.[70] It represents the acknowledgment by the international community that climate change is an unacceptable threat to the full enjoyment of human rights. Actions aimed at combating climate change must be consistent with obligations

---

[65] T. Palmirski (ed.), *Institutiones Iustiniani*, pp. 106–107 (2.1.1. *et quidem naturali iure omnim communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris*), Warszawa, 2018.

[66] C.R. Sunstein, A. Vermeule, *Law and Leviathan. Redeeming the Administrative State*, Cambridge, 2020, *passim*.

[67] A. Vermeule, *Common Good…*, op. cit., pp. 177–178.

[68] Ibidem, pp. 164–169.

[69] See K.J. Marciniak, 'Zmiany klimatu jako wspólna sprawa ludzkości: współczesne uwarunkowania międzynarodowo-prawne, ze szczególnym uwzględnieniem Porozumienia Paryskiego', in: Cała-Wacinkiewicz E., Menkes J. (eds), *Wspólne wartości prawa międzynarodowego*, Warszawa, 2018, pp. 105–125.

[70] Paris Agreement – Status of Ratification, https://unfccc.int/process/the-paris-agreement/status-of-ratification [accessed on 20 March 2024].

concerning human rights.[71] The Agreement recognises and treats human rights as part of the legal framework for the protection of the natural environment. It perceives climate change as the common heritage of humankind, thereby obliging all countries to take specific actions to protect the environment. It is worth emphasising that the Agreement departs from the clear differentiation of obligations between developed and developing countries.[72] Climate and environmental protection law is subject to negotiations at the national, EU, and international levels. Understandably, while human rights agreements are the result of negotiations, they define fundamental rights that must be strictly respected, even during negotiations on environmental and climate regulations. In this way, a normative connection is established between two legal regimes – environmental protection and human and civil rights protection – which previously developed independently but in parallel.[73] Such a connection serves to strengthen these two legal orders.

The broadly understood security of humankind in the Anthropocene epoch must go beyond securing individuals and their communities. It must take into account human interdependence and the relationship between people and the planet. It is worth emphasising that the Covid-19 pandemic, overlapping with the unprecedented Anthropocene context, has exposed the fragility of modern civilisation's progress.[74] The state of the pandemic, as an extraordinary legal situation, required maintaining the effective and efficient operation of public authorities and the functioning of the state under special conditions. The restrictions on individual rights, justified by the protection of basic human rights (protection of health and life), resulted from the implementation of the main value of the state's political system, which is the constitutional principle of the common good.[75] The Covid-19 context of the Anthropocene is an example of interconnected threats to human security. This issue is not limited to relationship between people, but also includes the relationship between the planet – which constitutes our existential foundation – and human activity. As J. Lipiec rightly observed, only a person equipped with extraordinary rights and dispositions is capable of 'carrying forward the course of creative evolution' in two directions: by changing the world and by changing oneself.[76] Humanity faces serious undertakings on a global scale: the creation of a comprehensive programme to counteract not fully recognised threats to future generations.

---

[71] M. Stoczkiewicz, *Prawo ochrony klimatu w kontekście praw człowieka*, Warszawa, 2021, p. 213.

[72] See S. Maljean-Dubois, 'Zmiany klimatu jako wspólna sprawa ludzkości: współczesne uwarunkowania międzynarodowo-prawne, ze szczególnym uwzględnieniem Porozumienia Paryskiego', in: Cała-Wacinkiewicz E., Menkes J. (eds), *Wspólne wartości prawa międzynarodowego*, Warszawa, pp. 151–159.

[73] D. Bodansky, 'Climate Change and Human Rights: Unpacking the Issues', *Georgia Journal of International and Comparative Law*, 2010, Vol. 38, No. 3, p. 516.

[74] H. Tapia, P. Conceição, *New threats*…, op. cit., p. 142.

[75] J. Karp, 'Rola zasady dobra wspólnego w okresie pandemii', *Przegląd Prawa Publicznego*, 2023, No. 12, pp. 30–34.

[76] J. Lipiec, *Drogi życia. Studia z filozofii człowieka*, Kraków, 2020, p. 18.

BIBLIOGRAPHY

Adams M., 'Welcome to the Anthropocene', in: Adams M., *Ecological Crisis, Sustainability and the Psychosocial Subject, Beyond Behaviour Change*, London, 2016.

Alexy R., *Teoria praw podstawowych*, Warszawa, 2010.

Alvear J., 'Los derechos humanos en el constitucionalismo contemporáneo', in: Ayuso M. (ed.), *El problema de los derechos humanos. Historia, filosofía, política y derecho*, Madrid, 2023.

Banach T., *Res Publica est Res Populi. Myśl polityczno-prawna Marka Tulliusza Cycerona*, Łódź, 2023.

Bauman Z., *Płynna nowoczesność*, Kraków, 2000.

Bauman Z., *Płynne czasy. Życie w epoce niepewności*, Warszawa, 2007.

Bauman Z., *Ponowoczesność jako źródło cierpień*, Warszawa, 2000.

Berlin I., 'Apoteoza woli romantycznej: bunt przeciw mitowi idealnego świata', in: Hardy H. (ed.), *Pokrzywione drzewo człowieczeństwa*, Warszawa, 2004.

Berlin I., *Dwie koncepcje wolności i inne eseje*, Warszawa, 2001.

Berlin I., 'Upadek idei utopijnej na Zachodzie', in: Hardy H. (ed.), *Pokrzywione drzewo człowieczeństwa*, Warszawa, 2004.

Bodansky D., 'Climate Change and Human Rights: Unpacking the Issues', *Georgia Journal of International and Comparative Law*, 2010, Vol. 38, No. 3.

Brague R., *Mądrość świata. Historia ludzkiego doświadczenia wszechświata*, Warszawa, 2021.

Cassirer E., *Filozofia Oświecenia*, Warszawa, 2010.

Chakrabarty D., 'Humanistyka w czasach antropocenu', in: Domańska E., Sugiera M. (eds), *Humanistyka w czasach antropocenu*, Kraków, 2023.

Domańska E., 'Dipesh Chakrabarty: Od subalternizmu do planetaryzmu', in: Domańska E., Sugiera M. (eds), *Humanistyka w czasach antropocenu*, Kraków, 2023.

Dun R., *Historia naturalna przyszłości. Co prawa przyrody mówią o losie człowieka*, Kraków, 2023.

Dyrda A., 'Pozytywizm pochowany żywcem? W obronie miękkiego pozytywizmu', *Studia Prawnicze*, 2010, Vol. 184, No. 2.

Dyrda A., *Spory teoretyczne w prawoznawstwie. Perspektywa holistycznego pragmatyzmu*, Warszawa, 2017.

Dziamski G., 'Ponowoczesna świadomość estetyczna', in: Zeidler-Janiszewska A. (ed.), *Trudna ponowoczesność. Rozmowy z Zygmuntem Baumanem. Część I*, Poznań, 1995.

Ellis E.C., *Anthropocene: A Very Short Introduction*, Oxford, 2018.

Ellis E.C., Kaplan J.O., Fuller D.Q., Vavrus S., Klein Goldewijk K., Verburg P.H., 'Used Planet: A Global History', *Proceedings of the National Academy of Sciences*, 2013, No. 110(20).

Florczak-Wątor M., 'Komentarz do art. 74', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2023.

Freeman M., 'Prawa człowieka w dwudziestym pierwszym wieku', in: Zajadło J. (ed.), *Antologia tekstów dotyczących praw człowieka*, transl. Fronia M., Warszawa, 2008.

Gizbert-Studnicki T., Dyrda A., Grabowski A., *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*, Warszawa, 2016.

Gurczyńska-Sady K., Sady W., *Antropocen. Szanse i zagrożenia*, Warszawa, 2022.

Hartman J., *Zmierzch filozofii*, Kraków–Budapeszt–Syrakuzy, 2023.

Jellinek G., *Deklaracja praw człowieka i obywatela*, transl. Libkind-Lubodziecka Z., Warszawa, 1905.

Jurczyk T., 'Geneza rozwoju praw człowieka', *Homines Hominibus*, 2009, No. 1(5).

Kalisz A., 'Prawa kolektywne na tle klasycznego ujęcia praw człowieka', in: Kalisz A. (ed.), *Prawa człowieka. Współczesne zjawiska, wyzwania, zagrożenia*, Vol. I, Sosnowiec, 2015.

Karp J., 'Rola zasady dobra wspólnego w okresie pandemii', *Przegląd Prawa Publicznego*, 2023, No. 12.
Kingsnorth P., *Wyznania otrzeźwiałego ekologa*, transl. Sikora T., Kraków, 2024.
Latour B., *Zamieszkać na Ziemi. Wywiady z Nicolasem Truongiem*, transl. Marczewska K., Warszawa, 2023.
Lande J., 'Historia filozofii prawa', in: Lande J., *Studia z filozofii prawa*, Warszawa, 1959.
Langella S., Damonte M., Massaro A., 'Sulla filosofia e l'Antropocene', in: Langella S., Damonte M., Massaro A. (eds), *Antropocene e Bene comune tra nuove technologie, nuove epistemologie e nuovi virus*, Genoa, 2022.
Lipiec J., *Drogi życia. Studia z filozofii człowieka*, Kraków, 2020.
Lipiec J., *My – ludzie. Studia z filozofii społecznej*, Kraków, 2022.
Lovelock J., *The Vanishing Face of Gaia: A Final Warning*, New York, 2009.
Maciejewski M., 'Teoretyczne aspekty ochrony wolności i praw jednostki', in: Bator A., Jabłoński M., Maciejewski M., Wójtowicz K. (eds), *Początki koncepcji oraz regulacji praw i wolności człowieka do czasów oświecenia*, Wrocław, 2013.
Maljean-Dubois S., 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?', *Review of European Community & International Community Law*, 2016, Vol. 25, No. 2.
Marciniak K.J., 'Zmiany klimatu jako wspólna sprawa ludzkości: współczesne uwarunkowania międzynarodowo-prawne, ze szczególnym uwzględnieniem Porozumienia Paryskiego', in: Cała-Wacinkiewicz E., Menkes J. (eds), *Wspólne wartości prawa międzynarodowego*, Warszawa, 2018.
Merkwa M., *U źródeł idei praw człowieka: kształtowanie prawnych i filozoficznych podstaw koncepcji praw człowieka*, Lublin, 2018.
Mędrzycki R., *Zasada solidarności społecznej w prawie samorządu terytorialnego*, Warszawa, 2021.
Minich D., 'Antropocen w świetle filozofii bytu społecznego oraz prawa', *Przegląd Prawa Publicznego*, 2023, No. 9.
Minich D., 'Konstytucja – konstytucjonalizm – neokonstytucjonalizm', *Przegląd Prawa Publicznego*, 2018, No. 12.
Minich D., 'Konstytucjonalizm – autorytaryzm. Tak daleko a tak blisko', *Przegląd Prawa Publicznego*, 2022, No. 9.
Minich D., 'Konstytucjonalizm a rozumienie prawa', *Roczniki Administracji i Prawa*, 2019, Vol. XIX, No. 2.
Minich D., Moskwa A., 'Wolności i prawa człowieka w dobie ponowoczesnej', in: Haczkowska M., Tereszkiewicz S. (eds), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowania w przestrzeni europejskiej*, Opole, 2016.
Oreskes N., Conway E.M., *Upadek cywilizacji zachodniej. Spojrzenie z przyszłości*, Warszawa, 2018.
Osiatyński W., *Prawa człowieka i ich granice*, Kraków, 2011.
Osiatyński W., *Wprowadzenie do praw człowieka*, Helsinki Foundation for Human Rights Report, Warszawa, 2000.
Palmirski T. (ed.), *Institutiones Iustiniani*, Warszawa, 2018.
Piechowiak M., 'Pojęcie praw człowieka', in: Wiśniewski L. (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa, 1997.
Pietrzak E., *Antropocen. Pytania z zakresu ludzkiej sprawczości i odpowiedzialności*, Łódź, 2021.
Pietrzykowski T., '"Miękki" pozytywizm i spór o regułę uznania', in: Stelmach J. (ed.), *Studia z filozofii prawa*, Kraków, 2001.
Polanowska-Sygulska B., *Filozofia wolności Isaiaha Berlina*, Kraków, 1998.
Polanowska-Sygulska B., *Pluralizm wartości i jego implikacje w filozofii prawa*, Kraków, 2008.
Pułło A., *Zasady ustroju politycznego państwa. Zarys wykładu*, Gdańsk, 2014.

Rodriguez Palop M.E., *La nueva generación de derechos humanos. Origen y justificación*, Madrid, 2010.
Sadowski R.F., 'Ekologia integralna', in: Janeczek S., Starościc A. (eds), *Filozofia społeczna. Część II – Problemy i dyskusje*, Lublin, 2022.
Sagan S., *Prawo konstytucyjne Rzeczpospolitej Polskiej*, Warszawa, 2001.
Sarnecki P. (selection, translation, and introduction), *Najstarsze Konstytucje z końca XVIII i połowy XIX wieku*, Warszawa, 1997.
Schultz N., *Land Sickness*, Cambridge, 2023.
Seidler G.L., *W poszukiwaniu idei ustrojowej*, Lublin, 2000.
Seidler G.L., *W stronę nowożytności*, Lublin, 2002.
Sójka-Zielińska K., *Drogi i bezdroża prawa. Szkice z dziejów kultury prawnej Europy*, Wrocław–Warszawa–Kraków, 2000.
Stein Pedersen J.V., Latour B., Schultz N., 'A Conversation with Bruno Latour and Nikolaj Schultz: Reassembling the Geo-Social', *Theory, Culture & Society*, 2019, Vol. 36, Issue 7–8.
Stoczkiewicz M., *Prawo ochrony klimatu w kontekście praw człowieka*, Warszawa, 2021.
Sunstein C.R., Vermeule A., *Law and Leviathan. Redeeming the Administrative State*, Cambridge, 2020.
Tapia H., Conceição P., *New Threats to Human Security in the Anthropocene. Demanding Greater Solidarity*, United Nations Development Programme, New York, 2022.
Tryjanowski P., 'Przedmowa. Wyprawa bardzo sentymentalna', in: von Brackel B., *Świat, który nadchodzi. Jak wielka wędrówka przyrody wpływa na nasze życie*, Kraków, 2024.
Wojciechowski B., *Tożsamość narracyjna jako warunek autentycznej podmiotowości prawnej*, Łódź, 2023.
Woleński J., 'O pozytywizmie prawniczym', in: Pawlica J. (ed.), *Etyka a prawo i praworządność*, Kraków, 1998.
Vanderheiden S., *Atmospheric Justice. A Political Theory of Climate Change*, Oxford, 2008.
Vasak K., 'A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights', *The UNESCO Courier. A Window Open to the World*, 1977, No. 11.
Vattimo G., *Koniec nowoczesności*, Kraków, 2006.
Vermeule A., *Common Good Constitutionalism. Recovering the Classical Legal Tradition*, Cambridge, 2022.
Voegelin E., *Od Oświecenia do rewolucji*, Warszawa, 2011.
Zajadło J., *Cyceron dla prawników*, Gdańsk, 2019.
Zajadło J., 'Jaka aksjologia praw człowieka?', *Państwo i Prawo*, 2019, No. 11.
Zirk-Sadowski M., 'Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania', in: Stelmach J. (ed.), *Studia z filozofii prawa*, Kraków, 2001.
Zirk-Sadowski M., 'Wprowadzenie', in: Chmielnicki P., Minich D. (eds), *Prawo jako projekt przyszłości*, Warszawa, 2022.
Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Journal of Laws 1997, No. 78, item 483).

Cite as:

Minich D., Karp J. (2025), *Human rights in the Anthropocene epoch and philosophy*, Ius Novum (Vol. 19) 1, 124–139. DOI 10.2478/in-2025-0009

Ius Novum
2025, vol. 19, no. 1

NOTES ON THE AUTHORS

Zbigniew Czarnik	LLD hab., Professor of WSPiA, WSPiA University of Rzeszów (Poland)
Sławomir Kursa	LLD hab., SWPS University in Warsaw (Poland)
Piotr Krzysztof Sowiński	LLD, Professor of the University of Rzeszów, Head of the Department of Criminal Procedure at the Institute of Legal Sciences at the University of Rzeszów (Poland), attorney at law
Ryszard A. Stefański	Professor, LLD hab., Head of the Department of Criminal Law of the Faculty of Law and Administration of Lazarski University in Warsaw (Poland)
Łukasz Pilarczyk	LLD, Assistant Professor at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań (Poland)
Monika Lewandowska-Urbanowicz	LLM, Lazarski University in Warsaw (Poland)
Łukasz Nosarzewski	LLD, Assistant Professor in the Department Administrative, Constitutional and Employment Law, Faculty of Law and Administration of Lazarski University in Warsaw (Poland), legal advisor to the General Counsel to the Republic of Poland, attorney at law
Kamil Dąbrowski	LLD, Faculty of Law and Administration, University of Szczecin (Poland)
Dobrochna Minich	LLD – Department of Theory and History of Law, Faculty of Law and Administration of Lazarski University in Warsaw (Poland)
Janusz Karp	LLD – Department of Comparative Political System Law, Faculty of Law and Administration, Jagiellonian University in Kraków (Poland)

INFORMATION FOR AUTHORS

1. The quarterly publishes scientific articles devoted to issues within a broad field of law as well as reviews and reports on scholarly life in higher education institutions. Articles are subject to evaluation by two reviewers and their positive opinion is a precondition for their publication.
2. Manuscripts should be submitted in one copy of a standard typescript (30 lines of 60 characters each, i.e. ca. 1,800 characters per page) together with a digital version saved on a data storage device and e-mailed to: wydawnictwo@lazarski.edu.pl.
3. Footnotes should be placed at the bottom of a page providing the initials of the author's given name(s), surname, the title (printed in italics), the name of a journal or a publisher, the place of publication (in case of books), the year of publication, and a page number. In case of books with multiple authors, the first name and surname of their editor with additional information: (ed.) shall be provided.
4. An article should be accompanied by its abstract specifying its aim, methodology, work findings, and conclusions. The abstract should not exceed 20 lines of standard typescript. If the abstract contains specialist, scientific or technical terms, their English equivalents should be provided.
5. An article should not exceed 22 pages of a standard typescript and a review, scientific news or information: 12 pages.
6. The editor reserves the right to introduce changes in the manuscript submitted for publication, e.g. to shorten it, change the title and subheadings as well as correct the style.
7. Detailed guidelines for authors are available on Lazarski University Press website: http://www.lazarski.pl/pl/badania-i-rozwoj/oficyna-wydawnicza/dla-autorow/. Authors are obliged to provide bibliography.
8. A manuscript shall contain the author's full given name and surname, their residence address with the telephone/fax number, their e-mail address, scientific degree or title and the name of the scientific institution the author works for.

IUS NOVUM PUBLICATIONS REVIEW PROCEDURE

1. The thematic editors shall take preliminary decisions on accepting articles for review.
2. The Editor-in-Chief shall take the final decision to refer an article to a reviewer, having checked that an article meets all formal requirements, i.e. the author has provided all necessary information: affiliation, correspondence address, e-mail address, telephone number, co-authors' confirmation of cooperation and their input to the article, an abstract in the Polish language and key words.
3. A review should take into consideration the type of work (original, experimental, reviewing, casuistic, methodological), its scientific level, whether the work matches the subject matter suggested in its title, whether it meets the requirements of a scientific publication, whether it contains essential elements of novelty, the appropriate terminology use, reliability of findings and conclusions, layout, size, cognitive value and language, and provide recommendation to accept the article after necessary changes or decline it. The review shall be developed on a special review form.
4. Reviews shall be provided by standing reviewers and reviewers selected at random. Those shall be scientists with considerable scientific achievements in the given discipline. The list of standing reviewers is published on the quarterly website. Each issue of the quarterly publishes a list of reviewers of articles and glosses published in the issue.
5. Two independent reviewers shall review each publication.
6. Reviewers shall not be affiliated to the same scientific institution as authors.
7. Reviewers and authors shall not know their identity.
8. Reviewers appointed to review an article must not reveal that fact.
9. A review shall be developed in writing, following a special template (the review form) and provide recommendation to accept a manuscript for publication or decline it.
10. Reviewers shall submit their reviews in two formats: electronic and a hard copy with a handwritten signature. Such review is archived for two years.
11. An author is provided with a reviewer's comments and he/she is obliged to respond to them. The reviewer shall verify the text after changes introduced thereto.
12. In the event of a negative assessment of an article by a reviewer, the Editor-in--Chief, after consulting a thematic editor, shall take a final decision whether to publish the article or not.

REGULAR REVIEWERS

Prof. WSH dr hab. Maciej Borski, Wydział Nauk Społecznych i Humanistycznych, Wyższa Szkoła Humanitas

Prof. WSPiA dr hab. Zbigniew Czarnik, Rzeszowska Szkoła Wyższa w Rzeszowie

Prof. UAM dr hab. Joanna Długosz-Jóźwiak, Wydział Prawa i Administracji Uniwersytetu im. Adama Mickiewicza w Poznaniu

Prof. dr hab. Katarzyna Dudka, Wydział Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej w Lublinie

Prof. UZ dr hab. Andrzej Gorgol, Wydział Prawa i Administracji Uniwersytetu Zielonogórskiego

Prof. PAN dr hab. Jolanta Jakubowska-Hara, Zakład Prawa Karnego Instytutu Nauk Prawnych Polskiej Akademii Nauk

Prof. dr hab. Jerzy Jaskiernia, Wydział Prawa, Administracji i Zarządzania Uniwersytetu Jana Kochanowskiego w Kielcach

Prof. UWr dr hab. Tomasz Kalisz, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego,

Prof. dr hab. Violetta Konarska-Wrzosek, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu

Prof. dr hab. Radosław Koper, Wydział Prawa i Administracji Uniwersytetu Śląskiego

Prof. dr hab. Zbigniew Kwiatkowski, Wydział Prawa i Administracji Uniwersytetu Opolskiego

Prof. UMK dr hab. Jerzy Lachowski, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu

Prof. UŁaz dr hab. Aneta Łazarska, Wydział Prawa i Administracji Uczelni Łazarskiego w Warszawie

Dr Eliza Maniewska, Wydział Prawa i Administracji, Uniwersytet Warszawski

Prof. dr hab. Mirosława Melezini, Wydział Nauk Społecznych i Humanistycznych, Akademia Nauk Stosowanych w Łomży

Prof. dr hab. Hanna Paluszkiewicz, Wydział Prawa i Administracji Uniwersytetu Szczecińskiego

Prof. UW dr hab. Mateusz Pilich, Wydział Prawa i Administracji Uniwersytetu Warszawskiego

Prof. UMK dr hab. Piotr Rączka, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu

Prof. dr hab. Maciej Rogalski, Wydział Prawa i Administracji Uczelni Łazarskiego w Warszawie

FOREIGN REVIEWERS

1. Prof. Regina Hučková, Faculty of Law of Pavol Jozef Šafárik University in Košice, Slovakia
2. Prof. Maciej Małolepszy, PhD hab., Faculty of Law of the European University Viadrina Frankfurt (Oder), Germany
3. Prof. Rodrigo Ochoa Figueroa, attorney, Department of Administrative Law of the Michoacan University of Saint Nicholas of Hidalgo, Mexico
4. Prof. Alembert Vera Rivera, Catholic University of Santiago de Guayaquil, Ecuador; attorney of the President of the Republic of Ecuador
5. Katarzyna Krzysztyniak, PhD, attorney, Czech Republic
6. Miguel Bustos Rubio, PhD, Faculty of Law of the University of Salamanca, Spain

ETHICAL STANDARDS

IUS NOVUM Editorial Board strives to ensure high ethical standards. Articles submitted for publication in IUS NOVUM are assessed for their integrity, compliance with ethical standards and contribution to the development of scholarship.

The principles listed below are based on the COPE's Best Practice Guidelines for Journal Editors.

STANDARDS FOR EDITORS

Decision on publication
The Editor-in-Chief must obey laws on libel, copyright and plagiarism in their jurisdictions and is responsible for the decisions which of the submitted articles should be published.

Confidentiality
No member of the Editorial Board is allowed to reveal information on a submitted work to any person other than the one authorised to be informed in the course of the editorial procedure, its author, reviewers, potential reviewers, editorial advisors or the Publisher.

Conflict of interests and its disclosure
Unpublished articles or their fragments cannot be used in the Editorial Board staff's or reviewers' own research without an author's explicit consent in writing.

STANDARDS FOR AUTHORS

Authorship
Authorship should reflect individuals' contribution to the work concept, project, implementation or interpretation. All co-authors who contributed to the publication should be listed.

Conflict of interests and its disclosure
Authors should disclose all sources of their projects funding, contribution of research institutions, societies and other entities as well as all other conflicts of interests that might affect the findings and their interpretation.

Originality and plagiarism
Authors must only submit original works. They should make sure that the names of authors cited in the work and/or cited fragments of their works are properly acknowledged or referenced.

Ghost/guest authorship
Ghost and guest authorship are manifestations of a lack of scientific integrity and all such cases will be disclosed. In order to prevent ghost or guest authorship, authors are requested to provide declarations of authorship.

STANDARDS FOR REVIEWERS

Confidentiality
All reviewed works should be treated as confidential documents.

Anonymity
All reviews are made anonymously, and the Editor does not reveal information on authors to reviewers.

Objectivity standards
Reviews should be conducted in an objective and diligent manner.

Conflict of interests and its disclosure
Confidential information and ideas arising as a result of a review must be kept secret and cannot be used for other purposes. Reviewers should not review works of authors where there is a conflict of interests resulting from their relationship.


UCZELNIA ŁAZARSKIEGO
ŁAZARSKI
WARSZAWA