

ISSN 1897-5577
ONLINE ISSN 2545-0271

IUS NOVUM

VOL. 20
NUMBER 2
2026

APRIL–JUNE

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY



ISSN 1897-5577
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DOI: 10.26399/IUSNOVUM.V20.2.ENG.2026

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY

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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).

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ISSN 1897-5577, online ISSN 2545-0271

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02-662 Warsaw, ul. Świeradowska 43
tel. +48 22 54 35 450
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**‘INTERVENTION’ DRAFT
AMENDMENT TO THE PENAL CODE
IN THE CONTEXT OF CHANGES
MADE TO CRIMINAL LAW
PURSUANT TO THE ACT OF 7 JULY 2022
(SELECTED PROBLEMS)**

MIROSŁAWA MELEZINI*

DOI 10.2478/in-2026-0013

ABSTRACT

This study examines the changes in substantive criminal law already made and planned for the years 2022–2025. The starting point for the analysis is the issue of the motives for and scope of the changes introduced to the Penal Code under the Act of 7 July 2022, which radically tightened criminal liability, significantly increasing the level of punitiveness of criminal law, while being based on an unreliable diagnosis of the reality concerning the picture of crime. In this context, proposals for a corrective and, at the same time, interventionist amendment to the Penal Code of 14 June 2024, presented by the Criminal Law Codification Commission, are discussed. Expressing a positive opinion on the proposed changes, it is considered that their scope is narrow, and the need to undertake work on the preparation of a new Penal Code in the near future is indicated. Following the comments made on the draft amendments to the Penal Code prepared by the Codification Commission, a proposal for the government draft amendment to the Penal Code of 28 October 2024 (UD 153), developed on the basis of the draft of the Criminal Law Codification Commission and adopted by the Council of Ministers on 15 July 2025, is presented. Although the direction of changes in both drafts is similar, not all solutions proposed by the Codification Commission received government support. The final part of the study indicates those proposals of the Codification Commission that were rejected by the government, which points to a very narrow, albeit necessary, scope of the

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proposed amendment. Nevertheless, in the opinion of the author of the study, the proposed changes presented in the draft significantly increase the court's discretion in the imposition of punishment and may contribute to the rationalisation of the administration of justice.

Keywords: criminal law, amendment to the Penal Code, Criminal Law Codification Commission, government draft amendment to the Penal Code

Against the background of over 100 amendments to the Penal Code of 1997 (hereinafter referred to as the 'PC'),¹ what stands out is the extensive and profound change in criminal law introduced under the Act of 7 July 2022.² Based on the belief that the effectiveness of criminal law depends on the severity of criminal repression, with a clearly populist³ undertone referring to the need to strengthen citizens' sense of security, it radically tightened criminal liability, significantly increasing the level of punitiveness of criminal law. This was not limited to a drastic tightening of the limits of statutory penalties assigned to particular types of prohibited acts, leading to a clear internal inconsistency in the criminal statute; systemic changes were also introduced in the general part of the Penal Code which, additionally, within the framework of such tightened criminal sanctions, limited the courts' freedom in determining the penalty, directing the courts towards the choice of more severe penal repression.

The legislator has, of course, the right to set a higher degree of punitiveness of the criminal law system than before, but changes aimed at making punishment more stringent require the drafter to indicate real axiological and criminal-policy reasons. This is required by the constitutional principle of proportionality contained in Article 31(3) of the Constitution of the Republic of Poland.⁴ Meanwhile, the justification for the Act shows that:

'The basic assumption underlying the draft amendments to the Penal Code was the need to strengthen criminal-law protection in the field of acts detrimental to such fundamental legal interests as human life and health, freedom, sexual freedom or property. The main objective of the draft is to strengthen criminal-law protection against the most serious categories of crimes by tightening criminal liability for: (1) the most serious crimes against sexual freedom, in particular to the detriment of minors, (2) road crimes committed while under the influence of alcohol or drugs, (3) crimes committed as part of organised criminal groups.'⁵

Later in the justification, it was indicated that 'The current legal state does not fully implement the protective function of criminal law and therefore does not provide

¹ Act of 6 June 1997 – Penal Code (Journal of Laws of 2015, item 383).

² Act of 7 July 2022 amending the Act – Penal Code and Certain Other Acts (Journal of Laws of 2022, item 2600). The Act entered into force on 1 October 2023 (Journal of Laws of 2023, item 403).

³ On the concept of 'penal populism', see W. Zalewski, 'Populizm penalny – próba zdefiniowania zjawiska', in: Sienkiewicz Z., Kokot R. (eds), *Populizm penalny i jego przejawy w Polsce*, Wrocław, 2009, pp. 13–32.

⁴ See K. Wojtyczek, 'Zasada proporcjonalności jako granica prawa karania', *Czasopismo Prawa Karnego i Nauk Penalnych*, 1999, No. 2, pp. 33–51.

⁵ *Uzasadnienie do projektu ustawy* (Sejm print No. 2024), Sejm of the 9th term, p. 1.

sufficient tools to reduce crime and safeguard important social values.⁶ It is difficult to find, in such arguments, real reasons for the need to drastically increase the degree of punitiveness of criminal law. In particular, there is a lack of reliable criminal-policy argumentation, that is, a proper diagnosis of the facts concerning the image of crime and the state of justice practice, which would support the need for changes or modifications in the area of criminal law in order to make it more repressive.

The statistical data referred to in the 'Regulatory Impact Assessment' attached to the justification, regarding the diagnosis of the state of crime in the area of the most serious crimes, do not confirm the thesis concerning the need for severe repression against perpetrators of acts with a high degree of reprehensibility. On the contrary, as demonstrated in the opinion prepared for the Senate of the Republic of Poland,⁷ 'Crime "targeted" by the draft initiator is systematically decreasing (...) the downward trend is evident.' The authors of the opinion note, among other things, that the number of identified crimes of rape decreased from 1,567 in 2010 to 1,326 in 2018 and to 1,034 in 2020; sexual abuse of minors (Article 200 PC) decreased from 1,532 in 2010 to 1,360 in 2020; murder decreased from 680 in 2010 to 641 in 2020; and the crime of participating in an organised criminal group (Article 258 PC) decreased from 1,311 in 2010 to 804 in 2020. In turn, the number of persons convicted of crimes against transport safety decreased from 71,861 in 2014 to 56,771 in 2018, including convictions for the crime of causing an accident resulting in death or serious bodily injury (Article 177 § 2 PC), which decreased from 1,999 in 2016 to 1,412 in 2020.⁸ It should be added that, in arguing for the thesis concerning the need to tighten the punishment system, the drafter also referred to the results of surveys carried out at the Institute of Justice on society's opinion regarding the tightening of criminal liability. However, as the authors of the opinion prepared for the Senate of the Republic of Poland correctly point out, surveys, partly conducted 'incorrectly', refer to the social 'acceptance of a specific criminal policy' and are not an appropriate tool for diagnosing the effectiveness of criminal law; therefore, 'They cannot determine the substantive necessity of interfering with civil rights and freedoms.'⁹

Moreover, the latest results of extensive research analysing, among other things, the state of crime in Poland and residents' sense of security, published by the Institute of Justice in the 'Atlas of Crime in Poland 7',¹⁰ not only confirm, in principle, the findings made by the authors of the opinion referred to above regarding the decline

⁶ Ibidem, p. 3.

⁷ J. Giezek, D. Gruszecka, K. Lipiński, *Opinia na temat ustawy z dnia 7 lipca 2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, Biuro Analiz, Dokumentacji i Korespondencji, Warszawa, 2022, pp. 1–97.

⁸ For more on this subject, see J. Giezek, D. Gruszecka, K. Lipiński, *Opinia...*, op. cit., pp. 12–13 and 19. See also M. Melezini, 'Tendencje w polityce karnej po reformie prawa karnego z 2015 r.', in: Góralski P., Muszyńska A. (eds), *Racjonalna sankcja karna w systemie prawa*, Warszawa, 2019, pp. 125–127.

⁹ For more on this subject, see J. Giezek, D. Gruszecka, K. Lipiński, *Opinia...*, op. cit., pp. 13–20.

¹⁰ P. Ostaszewski, J. Włodarczyk-Madejska, J. Klimczak, B. Gruszczyńska, P. Waszkiewicz, *Atlas przestępczości w Polsce 7*, Warszawa, 2025, pp. 5–246; <https://iws.gov.pl/product/atlas-przestepczosci-w-polsce-7/> (accessed: 6 July 2025).

in crime in the area of the most serious crimes in the crime categories listed by the draft initiator, but also indicate a continuing downward trend in crime in recent years. The summary of the research stated that

‘The most important finding presented in the “Atlas of Crime in Poland 7”, resulting from virtually every chapter, is the unprecedented state of security in Poland over the past three decades. In terms of criminal security, Poland is one of the safer European countries (...) Despite regularly publicised drastic cases of violations of social and legal norms in the media, people living in Poland feel safe and declare that they rarely fall victim to the most serious crimes.’¹¹

Referring to the data presented in the above-mentioned publication regarding recorded crimes in selected categories, limited to 2013 (from that year onwards, the Police has used a new statistical system) and to 2023, it should be noted that the total number of recorded crimes decreased from 992,978 in 2013 to 792,014 in 2023, including: the number of murders decreased from 570 to 559, rape from 1,256 to 1,040, robberies from 7,822 to 1,966, burglary from 126,553 to 68,185, and thefts from 197,498 to 110,443. The number of recorded crimes of sexual intercourse with a minor (Article 200 § 1 PC) was variable and amounted to: 1,078 in 2013, 954 in 2015, 1,126 in 2019, and 1,089 in 2023. It is also worth noting that the number of convictions for driving offences decreased from 141,906 in 2013 to 59,812 in 2023, including convictions for driving a motor vehicle under the influence of alcohol or drugs, which decreased from 55,792 in 2013 to 36,682 in 2023, and convictions for repeated driving under the influence of alcohol or drugs, which decreased from 11,444 in 2013 to 6,506 in 2023.¹² Therefore, it should be stated that the increase in the level of repressiveness of criminal law by the Act of 7 July 2022, in the face of the decreasing level of crime and citizens’ high sense of security, should be considered irrational. It was based on a faulty diagnosis of reality. Thus, it does not respect the constitutional principle of necessity in the field of criminal regulations (Article 31(3) of the Constitution of the Republic of Poland).

The justification for the amendment to the Penal Code shows that the normative transformations fundamentally rebuilding the criminal law system concerned three levels, i.e. changes in the severity of criminal sanctions and the structure of individual types of prohibited acts, changes expanding the grounds for the extraordinary aggravation of penalties, and changes in general penalty directives aimed at selecting more severe penal repression.¹³ However, a comprehensive analysis of the changes introduced allows one to conclude that they increased the punitiveness of the entire Penal Code.¹⁴

¹¹ P. Waszkiewicz, ‘Zakończenie’, in: Ostaszewski P., Włodarczyk-Madejska J., Klimczak J., Gruszczyńska B., Waszkiewicz P. (eds), *Atlas przestępczości...*, op. cit., p. 243.

¹² For more on this subject, see J. Klimczak, J. Włodarczyk-Madejska, ‘Przestępstwa stwierdzone’, in: Ostaszewski P., Włodarczyk-Madejska J., Klimczak J., Gruszczyńska B., Waszkiewicz P. (eds), *Atlas przestępczości...*, op. cit., pp. 17–56; P. Ostaszewski, ‘Prawnokarna reakcja na popełniane przestępstwa i wykroczenia’, in: Ostaszewski P., Włodarczyk-Madejska J., Klimczak J., Gruszczyńska B., Waszkiewicz P. (eds), *Atlas przestępczości...*, op. cit., pp. 77–118.

¹³ *Uzasadnienie do projektu ustawy...*, op. cit., p. 1.

¹⁴ See, among others, the previously cited opinion on the Act by J. Giezek, D. Gruszecka,

A change of key importance for a number of other new solutions in the Penal Code was the modification of the catalogue of penalties as a result of the new shaping of the limits of so-called term imprisonment (Article 37 PC), along with the removal of the point-based penalty of 25 years' imprisonment from the catalogue of penalties (repealed Article 32(4) PC). Consequently, in accordance with Article 37 PC, term imprisonment, which previously could generally be imposed from one month to 15 years, currently has an upper limit of 30 years. There has been discussion in the doctrine about long-term prison sentences for many years. On the one hand, it was pointed out that there was such a large gap between the upper limit of imprisonment, set at 15 years, and the point-based penalty of 25 years' imprisonment that, in cases concerning serious crimes, it made it difficult to fully implement the principle of individualisation of criminal responsibility and prevented the achievement of the so-called internal justice of the judgment. On the other hand, it was argued that increasing the upper generic limit of term imprisonment could increase the degree of repressiveness of criminal law, because, following the change in the maximum limit of term imprisonment from 15 years to 25 years, there would be a need to revise certain criminal sanctions within the provisions of the special part of the Penal Code defining crimes. This is precisely what happened. The legislature not only filled the gap between the penalty of 15 years' imprisonment and the penalty of 25 years' imprisonment, but even increased the upper generic limit of imprisonment to 30 years, completely omitting the justification for this decision.¹⁵ There is no doubt that this increases the repressiveness of the Penal Code and may lead to an increase in the punitiveness of the practice of justice, which is highly probable, among other things, in the context of changes made to the regulation contained in Article 53 PC, specifying general directives for judicial sentencing, which adheres to the idea of negative general prevention.

It should also be emphasised that the consequence of increasing the upper limit of the generic penalty of imprisonment from 15 years to 30 years and removing the point-based penalty of 25 years' imprisonment from the catalogue of penalties was an increase in the upper thresholds of the statutory threat for a number of crimes. For example, instead of the previous sanction setting the upper limit of the statutory penalty at 12 years' imprisonment, a penalty of up to 15 years' imprisonment was introduced (e.g. in Article 163 § 3, Article 166 § 1, Article 190 § 3, Article 223 § 2 and Article 280 § 1 PC), and instead of the sanction providing for the upper limit of deprivation of liberty at 15 years, a penalty of up to 20 years' imprisonment was

K. Lipiński, *Opinia...*, op. cit., pp. 1–97; A. Barczak-Oplustil, M. Małecki, S. Tarapata, M. Iwański, *Ekspertyza. Populistyczna nowelizacja prawa karnego. Ustawa z dnia 7.07.2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, Kraków, 19 July 2022; <https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego/> (accessed: 14 April 2026); T. Gardocka, *Opinia dotycząca projektu zmian w Kodeksie karnym (druk sejmowy nr 2024, data projektu: 22 lutego 2022 r.)*, Warszawa, 2022.

¹⁵ For the ongoing discussion in the literature, see M. Melezini, 'Proponowane zmiany w regulacji kar', in: Mozgawa M., Poniatowski P., Wala K. (eds), *Aktualne problemy i perspektywy prawa karnego*, Warszawa, 2022, pp. 166–173; O. Sitarz, 'Najważniejsze zmiany w zakresie przepisów dotyczących kar w Kodeksie karnym z 1997 roku', in: Lachowski J. (ed.), *Polskie prawo karne po 25 latach obowiązywania kodeksu karnego z 1997 roku*, Warszawa, 2024, pp. 92–99.

introduced (e.g. in Article 156 § 1, Article 189a § 1, Article 197 § 3, Article 252 § 1 and Article 270a § 2 PC). The scale of changes in the provisions of the special part of the Penal Code is considerable, and only in some individual cases is a modification of the statutory threat justified (e.g. in Article 130 PC). New types of crimes were also introduced (e.g. accepting an order to commit murder – Article 148a PC), including new qualified types, e.g. due to the great value of the subject of the executive act in Article 228 § 5a PC and in Article 229 § 4 PC, i.e. in the regulations concerning the crimes of venality and bribery. In addition, some existing qualified types were modified, extending the qualifying features (e.g. in Article 197 § 3 PC concerning the crime of rape), and at the same time the upper limit of the statutory threat was increased from 15 years to 20 years. It is evident that the legislature used the increase in the upper limit of term imprisonment to significantly increase sanctions for numerous crimes, without comparing these sanctions with others in the provisions of the Penal Code, which led to a deep internal inconsistency in the system of criminal sanctions.

The changes that increase the punitiveness of the Penal Code correspond to numerous changes that significantly limit judicial discretion in imposing penalties. The lack of trust in judicial sentencing is expressed, among other things, by the introduction of additional casuistic regulations specifying higher lower limits of non-custodial penalties, i.e. stand-alone and cumulative fines (Article 33 § 1a–2a PC) and penalties of restriction of liberty (Article 34 § 1aa PC), the severity of which was linked to the level of the statutory threat of imprisonment. At the same time, the modified content of Article 37a PC established higher thresholds for fines (150 daily rates) and restriction of liberty (four months) in the event of the imposition of a non-custodial penalty instead of the statutory penalty of imprisonment not exceeding eight years under the institution of substitution of penalty.

The tightening of penal repression is also facilitated by new solutions regarding the concurrence of grounds for the extraordinary aggravation or mitigation of punishment, contained in Article 57 § 3 PC. Pursuant to this provision, if the grounds for the extraordinary mitigation or aggravation of a penalty of a mandatory and optional nature coincide, the court applies the mandatory basis. However, it should be noted that the Penal Code generally provides for mandatory extraordinary aggravation, while mitigation of punishment in most cases is optional. This means that, in the vast majority of cases, there will be an obligation to apply extraordinary aggravation of the penalty.

New solutions regarding perpetrators committing crimes in conditions of repeated recidivism lead to increased criminal liability. First of all, a new form of special recidivism was introduced (Article 64a PC) in relation to the crime of murder in connection with rape or an offence against sexual freedom punishable by imprisonment whose upper limit is at least eight years. It should be noted that very severe penalties are provided for this type of crime under the so-called ordinary statutory sentencing range, and a previous conviction for an intentional crime is an aggravating circumstance (Article 53 § 2a(1) PC); meanwhile, the legislature has introduced a further tightening of criminal liability in the event of their being committed again, because the court will have to impose a prison sentence ranging

from the lower limit of the statutory threat increased by half to the upper limit of the statutory threat increased by half. A new wording has also been given to Article 64 § 1 and § 2 PC, under which, in the case of special recidivism, there was introduced, among other things, the obligation to impose a penalty above the lower limit of the statutory threat with the possibility of imposing it up to the upper limit of the statutory threat increased by half (§ 1), and, in the case of multiple recidivism, the obligation to impose a penalty of imprisonment from the lower limit of the statutory threat increased by half to the upper limit of the statutory threat increased by half (§ 2). Regulations designed in this way make it impossible to respond flexibly to acts committed in the context of recidivism.

An expression of the legislature's desire to change the philosophy of punishment is also the modification of the content of Article 53 PC regarding the principles and directives of judicial sentencing. Namely, the principle of guilt, with its limiting role in sentencing the perpetrator and in setting an insurmountable threshold of severity in a given case, was moved to the end of Article 53 § 1 PC, which may be interpreted as reducing the significance of the degree of guilt in the process of imposing a penalty, especially since the legislature gave priority to the directive concerning the act's degree of social harmfulness and then to the requirement to take into account aggravating and mitigating circumstances (Article 53 § 2a and § 2b PC). Moreover, the content of the preventive directives was significantly modified. In place of general positive prevention, previously formulated as 'the need to shape the legal awareness of society', general negative prevention was introduced, related to the goals of punishment in terms of social impact, emphasising the deterrent function of punishment, which, through its severity, is intended to deter other potential perpetrators from committing crimes. The modification of the content of Article 53 § 1 PC also covered the individual prevention directive. The educational goals that the punishment was supposed to achieve in relation to the convict were abandoned, leaving only the preventive goals of the punishment.

Moreover, drastic aggravations even included life imprisonment. Namely, the possibility was introduced for the court to impose, in a sentencing judgment, even a prohibition on conditional release for a person sentenced to life imprisonment who has again been sentenced to life imprisonment or to imprisonment for a period of not less than 20 years (Article 77 § 3 PC), and for a person sentenced to life imprisonment whose remaining at liberty will pose a danger to others (Article 77 § 4 PC). Furthermore, the minimum period of serving the sentence after which a person sentenced to life imprisonment will be able to apply for conditional early release was increased from 25 years to 30 years (Article 78 § 3 PC). Two new provisions of Article 77 PC, commonly criticised in the doctrine and authorising a ban on conditional release, were found to be in violation of Articles 30 and 40 of the Constitution of the Republic of Poland and Article 3 of the European Convention on Human Rights. There is no doubt that a sentence of life imprisonment without the right to apply for parole is an inhuman and cruel punishment. It should be added that, in the event of a sentence of life imprisonment, the court may, already in the sentencing judgment, set stricter restrictions on the convict's use of conditional release (Article 77 § 2 PC).

A separate, significant issue is the lowering of the age of criminal responsibility for minors as a result of the introduction of the possibility of attributing criminal liability to a minor who commits an offence under Article 148 § 2 or § 3 PC after reaching the age of 14 and before reaching the age of 15, provided that additional conditions are met (Article 10 § 2a PC). This means that a person who has reached the age of 14 can be sentenced to as much as 30 years' imprisonment. It is easy to notice that, instead of applying educational measures to such a minor, the possibility of applying severe penal repression related to placing the minor in prison was introduced. This change is all the more surprising because the Act on Support and Resocialisation of Minors of 2022¹⁶ introduced the possibility for a family court to order, against minors who have committed the most serious criminal acts, including those specified in Article 148 § 1, § 2 or § 3 PC, placement in a correctional facility beyond the age of 21, i.e. until they reach the age of 24. At the same time, in accordance with the assumptions of the Act, it is envisaged to create a new type of facility, namely a correctional facility for minors who have reached the age of 21. This type of solution, introduced by the Act on Support and Resocialisation of Minors, allows for a *quasi*-penal measure to be applied to a 14-year-old for a period of 10 years. Therefore, it is difficult to rationally justify the rigour of treatment of 14-year-old minors introduced by the Penal Code, resulting from Article 10 § 2a PC.

The most important changes presented by way of example, introduced under the Act of 7 July 2022, indicate how drastically the punitive nature of the Penal Code has increased. These changes are so extensive and profound that they significantly modify the previously constructed axiology of the Penal Code and the adopted philosophy of punishment, and at the same time they find not the slightest justification in the reality related to the state of crime. The current direction of development of criminal law, based on the paradigm of rationalism in criminal law, has undoubtedly been stopped and even reversed. Apart from radically tightening criminal liability, the legislature did not introduce any new solutions that would ensure further progress in the development of criminal law and enable the modernisation of penal policy, while protecting human rights and freedoms against excessive and unjustified interference by state authorities. On the contrary, it introduced changes that may reverse the positive transformations in the practice of justice that began to emerge after the reform of the Penal Code in 2015.

It should be recalled that the solutions adopted by the Act of 7 July 2022 had been announced for a long time. Essentially, they duplicate the regulations contained in the Act of 13 June 2019,¹⁷ which, for procedural reasons, was found by the Constitutional Tribunal¹⁸ to be inconsistent with the Constitution of the Republic of Poland and did not enter into force. The provisions of that Act gave rise to numerous substantive reservations from experts and many institutions, including the Supreme

¹⁶ Act of 9 June 2022 on the Support and Social Rehabilitation of Minors (Journal of Laws of 2024, item 978, as amended).

¹⁷ Act of 13 June 2019 on the adoption of the Act – Penal Code and Certain Other Acts (Sejm print No. 3451, Sejm of the 8th term).

¹⁸ Judgment of the Constitutional Tribunal of 14 July 2020, Kp 1/19, OTK ZU A/2020, item 36.

Court, the Commissioner for Human Rights, the Polish Bar Council, the National Council of Attorneys-at-Law, the Helsinki Foundation for Human Rights, as well as representatives of academic scholarship and legal practice.¹⁹ Although most of the comments remained valid in relation to the changes made in the Act of 7 July 2022, they were ignored in the legislative process. The influence of independent experts on creating criminal law and shaping the foundations of criminal policy, which requires specialist knowledge, was rejected. The alleged social expectations that the state should ensure citizens' safety became more important than scientific analyses of crime and punishment.

In the new political situation after the last parliamentary elections on 4 April 2024, the Criminal Law Codification Commission²⁰ was established and the possibility of rational reform of criminal law returned.

The draft Act of 14 June 2024, developed by the Criminal Law Codification Commission, amending the Act – Penal Code and Certain Other Acts,²¹ was 'essentially interventionist' in nature, and the proposed remedial amendment was made 'only to the extent necessary'.²² In the justification for the draft, the Codification Commission stated that the basic assumption of the amendment to criminal law was to lead to the 'modification or elimination of the most controversial regulations, violating the standard of rational law-making in accordance with the Constitution of the Republic of Poland', as well as 'the need to adapt the Penal Code to international agreements binding on Poland and European Union regulations'.²³ Therefore, after over 100 amendments to the Penal Code, the Codification Commission proposed another amendment which, although it provides for very important changes, is an amendment to the previous amendment and does not have the more ambitious intention of reforming criminal law. At the same time, further changes to the provisions of the Penal Code are announced, which will be implemented 'in the short and medium term'.²⁴ However, it seems that Polish criminal law requires thorough changes, not merely point-by-point ones, essentially restoring the legal status before the amendment to the Penal Code in 2022. It should be considered necessary to undertake work on the preparation of a new Penal Code in the near future.

¹⁹ More than 20 legal opinions by experts, including a legal opinion signed by over 150 academics and the opinion of the Commissioner for Human Rights, were published at: <https://bip.brpo.gov.pl/pl/content/zmiany-w-prawie-karnym-2019-opinie-ekspertow-i-RPO> (accessed: 10 July 2019).

²⁰ Regulation of the Council of Ministers of 5 March 2024 amending the regulation on the establishment, organisation and mode of operation of the Criminal Law Codification Commission (Journal of Laws of 2024, item 348).

²¹ See <https://www.gov.pl/web/sprawiedliwosc/projekty-aktow-prawnych> (accessed: 4 August 2025).

²² *Uzasadnienie projektu ustawy sanacyjnej w zakresie prawa karnego*, p. 2; <https://www.gov.pl/web/sprawiedliwosc/projekty-aktow-prawnych> (accessed: 14 April 2026).

²³ *Ibidem*, pp. 2 and 7.

²⁴ P. Rojek-Socha, 'Prof. Wróbel: komisyjny projekt pilnych zmian w prawie karnym na dniach u ministra', *Prawo.pl*, 23 May 2024; <https://www.prawo.pl/prawnicy-sady/zmiany-w-kodeksie-karnym-wyroczen-wykonawczym-postepowania-karnego-prof-wlodzimierz-wrobel,527076.html> (accessed: 20 August 2025).

In the draft bill, the Criminal Law Codification Commission proposed the following changes to the Penal Code:

1. Repeal of Article 10 § 2a PC, introducing the possibility of criminal liability for a 14-year-old minor, and restoration of the original wording of Article 10 § 2 PC and Article 10 § 3 PC regarding the imposition of punishment on a minor.
2. Repeal of Article 33 § 1a and § 2a PC and Article 34 § 1aa PC, increasing the lower limits of statutory threats of fines and restriction of liberty, together with the introduction of an appropriate amendment to Article 37a PC.
3. Lowering from 30 years to 25 years the upper generic limit of so-called term imprisonment imposed under the so-called ordinary sentencing range (Article 37 PC) and, as a result, modification of, among other provisions, Article 38 § 3 PC.
4. Modification of the content of Article 37a PC and a return to the wording of the provision specified in the Act of 20 February 2015, under which non-custodial penalties supplement the statutory threat for an offence punishable by imprisonment not exceeding eight years.
5. Elimination from Article 42 § 2 and § 3 PC, introduced by the Act of 7 July 2022, of one of the grounds for imposing a driving ban in the form of drinking alcohol or taking a narcotic drug after committing an offence under Article 173, 174 or 177 PC and before the perpetrator undergoes a test by an authorised authority to determine the alcohol or drug content in the body.
6. Introduction of optionality instead of obligatory ordering of forfeiture of a motor vehicle (Article 44b § 1 PC) and a synthetic approach to the provision of Article 44b § 2 PC, as well as the introduction of the possibility of awarding compensatory damages to the State Treasury if the award of forfeiture or its equivalent would be disproportionate to the gravity of the act (Article 44b § 3 PC).
7. Return to the original approach and system of general directives of judicial sentencing (Article 53 PC), along with the shift of the principle of guilt from the content of Article 53 § 1 PC to a separate editorial unit, i.e. Article 53 § 1a PC, as well as the abandonment of the statutory catalogue of aggravating and mitigating circumstances.
8. Return to the original principles specifying the consequences of the concurrence of the grounds for the extraordinary aggravation of the penalty and the grounds for extraordinary mitigation of the penalty (changes in the provisions of Article 57 PC).
9. Extension of the principle of *ultima ratio* of imprisonment to all cases in which not only imprisonment, but also a fine or restriction of liberty, may be imposed for a committed prohibited act (Article 58 § 1 PC); introduction of a new rule in Article 58 § 1a PC, allowing life imprisonment to be imposed only where exceptional circumstances exist, as well as in Article 58 § 1b PC, allowing a sentence of imprisonment exceeding 15 years to be imposed only where exceptional circumstances exist, provided that the offence is not punishable by life imprisonment.
10. Return to the original solution of Article 60 § 3 PC and introduction of adjusting changes in Article 60 § 6–7a PC, regulating extraordinary mitigation of the penalty as a result of the proposed changes to Article 37a PC.

11. Abandonment of the introduced new grounds for the extraordinary aggravation of the penalty, i.e. return to the original wording of Article 64 § 1 and § 2 PC and repeal of Article 64a PC regarding a specific form of special recidivism and Article 73 § 2 PC related to that solution.
12. Return to the previous regulation of conditional release of a convict from serving the remainder of a prison sentence and elimination of the possibility of imposing a ban on conditional release in the event of life imprisonment (Articles 77–80 PC), with certain modifications, including, among other things, those related to the repeal of Article 64a PC, as well as lowering the formal minimum period of serving a sentence in the case of a person sentenced to life imprisonment from 30 years' imprisonment to 25 years (Article 78 § 3 PC).
13. Return to the original wording of Article 85a PC regarding directives on the imposition of the total penalty and modification of the model for the imposition of the total penalty (Article 86 PC and Article 87 § 1 PC).
14. Modification of the content of the provision of Article 102 § 1 PC and repeal of Article 102 § 2 PC, regarding the extension of the limitation period, as well as Article 107 § 3 PC regarding the expungement of a conviction carrying a life sentence.
15. Repeal of Article 115 § 9a PC regarding particularly brazen theft and the corresponding Article 278 § 3a PC.
16. Return, in principle, to the system of statutory threats prior to the amendment of the Penal Code by the Act of 7 July 2022, and modification of the content of some provisions of the special part of the Penal Code, e.g. Article 165a § 1 PC, and Articles 178 and 178a PC.

The changes proposed by the Criminal Law Codification Commission should be considered appropriate, and their introduction urgent. They aim primarily to eliminate those regulations that have been widely criticised and which introduced an unnecessary and unjustified increase in criminal liability, or were inconsistent with the Constitution of the Republic of Poland or international law, and led to a limitation of judicial discretion in determining the penalty.

Based on the draft prepared by the Criminal Law Codification Commission, the final version of the draft was developed at the Ministry of Justice, which, as a draft Act amending the Act – Penal Code, the Act – Code of Criminal Procedure and Certain Other Acts of 28 October 2024 (UD 153),²⁵ was adopted by the Council of Ministers on 15 July 2025.

The government's draft amendment to the Penal Code is limited to proposals for changes to the most controversial regulations, which are contrary to constitutional norms and violate the standards of rational law-making in accordance with the Constitution of the Republic of Poland, also in the context of the need to restore the principles of the rule of law. The recitals for the legislative initiative indicate that the proposed amendment is interventionist in nature and that its implementation

²⁵ Project number UD 153; <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-karny-ustawy--kodeks-postepowania-karnego-oraz-niektorych-innych-ustaw2> (accessed: 20 August 2025).

under an urgent procedure was considered necessary.²⁶ The idea of amending some regulations of the Penal Code adopted in the government draft was essentially consistent with the basic objective of amending the Penal Code indicated in the draft of the Criminal Law Codification Commission, as the remedial nature of the changes was also emphasised.

The general feature of the proposed solutions in the government draft is the acceptance of the direction of normative changes included in the Codification Commission's draft. However, not all solutions proposed by the Codification Commission received government support.

First of all, the Codification Commission's proposal to lower the upper generic limit of so-called term imprisonment from the current 30 years to 25 years (Article 37 PC) was rejected and, consequently, the proposed amendment to Article 38 § 2 PC setting the maximum of an exceptionally aggravated prison sentence at 25 years was omitted. This resulted in the proposal to change the upper thresholds of the statutory threat for individual crimes not being taken into account. The government did not share the position of the Codification Commission on the need to return to the sanctions system in the form preceding the amendments introduced by the Act of 7 July 2022. However, in several provisions, the government adopted the Codification Commission's proposals regarding modifications to statutory threats, i.e. in Article 190 § 1 PC, Article 270a § 2, Article 271a § 2, Article 277a § 1 and § 2, and Article 305 § 1 PC.

The government draft also omitted the Codification Commission's proposal to repeal Article 10 § 2a PC, which introduced the possibility of criminal liability of a minor from the age of 14 for the crime specified in Article 148 § 2 or § 3 PC, provided that additional conditions are also met. This decision was met with a negative opinion from the Commissioner for Human Rights.²⁷

The Codification Commission's proposal to change the provision of Article 42 § 2 and § 3 PC was also not supported by the government, repealing the new condition for imposing the penal measure of a driving ban in the form of drinking alcohol or taking a narcotic drug after committing an offence under Article 173, 174 or 177 PC, and before the perpetrator undergoes an examination to determine the alcohol or drug content in the body. The modification of the regulation contained in Article 44b PC, regarding the forfeiture of a motor vehicle, was also omitted.

The Codification Commission's proposal to repeal Article 64a PC, which introduced into the Penal Code, under the Act of 7 July 2022, a new specific form of special recidivism related to sexual offences with increased criminal liability, was also rejected.

Moreover, the repeal of Article 115 § 9a PC, which established the legal definition of particularly brazen theft, and of the crime under Article 278 § 3a PC in the form of particularly brazen theft, was omitted. In the remaining scope, the proposed changes presented by the Codification Commission were transferred to the government's draft amendment to the Penal Code.

²⁶ *Ibidem*, Purpose and reasons for the planned solutions.

²⁷ *Ibidem*, Comments of the Commissioner for Human Rights on the draft amendments to criminal law.

It should be emphasised that the modifications to the current legal status proposed in the version of the government draft developed on the basis of the draft presented by the Codification Commission include the most significant changes and should be considered the most urgent, although their scope is small. They are mainly related to changes that eliminate unjustified restrictions on the court's decision-making freedom in the area of sentencing and to changes that rationally shape the directives of judicial sentencing. This creates hope that the possibility of rationalising the practice of justice will return, although it is not certain whether 'fixing' criminal law, even in such a narrow scope, will end on an optimistic note.

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Cite as:

Melezini M. (2026), 'Intervention' Draft Amendment to the Penal Code in the Context of Changes Made to Criminal Law Pursuant to the Act of 7 July 2022 (Selected Problems), *Ius Novum* (Vol. 20) 2, 1–14. DOI 10.2478/in-2026-0013

CRIMINAL LIABILITY FOR ACCEPTING A COMMISSION TO COMMIT MURDER

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DOI 10.2478/in-2026-0014

ABSTRACT

This article examines issues of criminal liability arising from the acceptance of a commission to commit murder, as provided for in Article 148a § 1 of the Polish Penal Code. The newly introduced offence has been justified as a means of strengthening the protection of human life at a stage preceding conduct that directly endangers it. However, the interpretation of its statutory elements gives rise to serious doubts as to the justification for its operation within the Polish legal order. The purpose of this study is to identify the principal deficiencies of the offence and to assess whether its incorporation into the Penal Code was justified. The analysis addresses, in particular, the omission of criminalisation in cases where the acceptance occurs without remuneration, the potential tension with the principle *cogitationis poenam nemo patitur*, and the difficulty of distinguishing remunerated acceptance of a commission to commit murder from preparation to commit murder. The conclusions support the view that the criminalisation of accepting a commission to commit murder should be reconsidered and, ultimately, repealed.

Keywords: murder, acceptance of a commission to commit murder, intent, criminalisation, preparation

INTRODUCTION

The amendment of 7 July 2022¹ introduced significant changes to the Polish Penal Code,² substantially reshaping the chapter on offences against life and health. These modifications were not limited to increasing the severity of the penalties applicable

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¹ Act of 7 July 2022 amending the Act – Penal Code and Certain Other Acts (Journal of Laws 2022, item 2600, as amended).

² Act of 6 June 1997 – Penal Code (consolidated text: Journal of Laws 2024, item 17, as amended, hereinafter referred to as the ‘Penal Code’ or ‘PC’).



to murder in its basic form and in its aggravated variants. The legislature also introduced provisions criminalising conduct that poses a threat to life at an early and markedly remote preliminary stage of criminal activity. In this context, Article 148 § 5 PC was added, providing for criminal liability for preparation to commit murder. At the same time, Article 148a³ PC was introduced, criminalising the acceptance of a commission to kill a human being in exchange for a pecuniary or personal benefit granted or promised (hereinafter: ‘accepting a commission to commit murder’). In pursuing a comprehensive reinforcement of criminal-law protection afforded to the highest-ranking legal interests, namely life and health, the legislature extended criminalisation both of preparation for murder and of conduct significantly preceding the commission of the offence.

This article provides a detailed analysis of the remunerated acceptance of a commission to commit murder, a novel solution in the Polish legal order. Notably, the proposal to introduce a new offence consisting in the acceptance of a commission to kill a human being in exchange for a pecuniary or personal benefit granted or promised had already appeared in the draft amendment to the Penal Code of 23 November 2006.⁴ At that time, the introduction of a provision identical in wording was proposed, with the notable difference that the explanatory memorandum explicitly indicated that the purpose of criminalising such conduct was to support efforts to combat organised crime. In particular, it was argued that the provision was intended to

‘counteract the mechanisms underlying the proliferation of a specialised form of criminality oriented towards the commission of offences carried out under such commissions, by creating, through the criminalisation of conduct of a *sui generis* preparatory character, a valuable mechanism of preventive intervention in this area’.⁵

A further attempt to incorporate this offence into the Penal Code was made in 2019.⁶ However, the amendment was subsequently declared unconstitutional by the Constitutional Tribunal.⁷

³ See Article 148a PC:

‘§ 1. Whoever accepts a commission to kill a human being in exchange for a pecuniary or personal benefit granted or promised shall be subject to imprisonment for a term of 2 to 15 years.

§ 2. A person shall not be liable to punishment for the offence specified in § 1 if, prior to the initiation of criminal proceedings, he or she discloses to an authority competent to prosecute offences the person or persons who commissioned the killing and the essential circumstances of the act committed.’

⁴ See R. Kokot, ‘Przestępstwo przyjęcia zlecenia zabójstwa (art. 148a § 1 k.k.) w ujęciu nowelizacji Kodeksu karnego z dnia 13 czerwca 2019 r.’, *Przegląd Prawa i Administracji*, 2020, Vol. CXXII, p. 276; K. Kwieciń, ‘Przestępstwo przyjęcia zlecenia zabójstwa (art. 148a § 1 k.k.) – “myślbrodnia” czy wypełnienie luki prawnej?’, *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*, 2024, No. 4, pp. 64–65.

⁵ *Uzasadnienie projektu nowelizacji kodeksu karnego*, 23 November 2006, Sejm print No. 1756, pp. 71–72.

⁶ *Projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, 25 January 2019; <https://legislacja.rcl.gov.pl/docs//2/12320403/12565615/12565616/dokument378690.pdf> (accessed: 2 March 2025).

⁷ Judgment of the Constitutional Tribunal of 14 July 2020, case no. Kp 1/19.

The interpretation of the statutory elements of the offence involving remunerated acceptance of a commission to commit murder gives rise to legitimate doubts as to the justification for its continued place in the Polish legal order. In light of these concerns, it appears warranted to examine the criminal-law foundations underlying the inclusion of this offence in the Polish legal order. Particular attention must be devoted to the potential infringement of the principle *cogitationis poenam nemo patitur*, to delineating the boundary between acceptance of a commission to commit murder and preparation for murder, and to the axiologically questionable exclusion of criminal liability in cases of non-remunerated or otherwise non-equivalent acceptance of such a commission.

CHARACTERISTICS OF THE STATUTORY ELEMENTS

The debate concerning the justification for criminalising this particular type of prohibited act may reveal fundamental shortcomings in the adopted legislative solution. In order to articulate a clear position on this issue, the following analysis must begin with an examination of the statutory elements of the offence, thereby providing a structured and substantive introduction to the problem under consideration.

The generic legal interest protected by the provision is human life from birth until death. Formally, the provision is located within the chapter on offences against life and health, which indicates that life is the principal legally protected interest. According to M. Budyn-Kulik, however, the individual legal interest protected in this case is public order, which is infringed by conduct contrary to legal norms, social norms, and the principles governing social coexistence. She also emphasises the difficulty of determining which of the protected interests should be regarded as primary and which as secondary. The principal legally protected interest remains that which corresponds to the generic legal interest. It should therefore be identified as human life and health. Nevertheless, in the view expressed by the author, the provision has been improperly located within the structure of the Penal Code and, consequently, ought to be situated among offences against public order.⁸ A situation may arise in which an individual undertakes to kill a person who has not yet been born, or even conceived. This would therefore be a case in which the commission to deprive a person of life is accepted in advance. The temporal distance inherent in such an arrangement significantly attenuates any immediate threat to the legal interest of human life. In this scenario, the potential endangerment of life remains abstract and remote, whereas public order is unquestionably infringed. In conclusion, this position is fully justified.

It is also worth noting that the statutory requirement that acceptance of a commission to commit murder must occur in exchange for a pecuniary or personal benefit further renders protection of the legal interest in human life contingent

⁸ M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el., 2024, commentary on Article 148a, thesis 2.

upon the existence of such a benefit. This raises the question of which legal interest is, in reality, being protected by the provision. If, for example, a hypothetical 'philanthropic' killer were to accept the commission to commit murder without receiving or even being promised any pecuniary or personal benefit, the statutory elements of the offence would not be fulfilled. Consequently, criminal liability could not be attributed. As has rightly been observed, such normative differentiation gives rise to serious axiological concerns. The degree of danger posed to the legal interest at stake, namely human life, remains unchanged irrespective of whether acceptance of the commission to commit murder is accompanied by remuneration or any form of equivalence.⁹

The offence is a common offence of general applicability. Although it might appear at first glance that criminal liability would attach exclusively to the so-called 'commissioned perpetrator', in reality it may also be incurred by a non-professional perpetrator who undertakes to commit the killing under the commission in exchange for a pecuniary or personal benefit granted or promised.

Turning to the objective element of the offence, particular attention must be devoted to the conduct element defined as accepting a commission to kill a human being. The normative structure of the offence of remunerated acceptance of a commission to commit murder presupposes a specific type of bilateral arrangement between two parties. One party commissions the killing and, at the same time, provides or promises a pecuniary or personal benefit, while the other party either accepts or refuses the commission.¹⁰ The manifestation of readiness to carry out the killing under the accepted commission may take various forms, including oral or written declarations, as well as conduct implying acceptance.¹¹ The term 'commission' is defined as 'an instruction to perform a task' or as 'an agreement whereby a person or institution undertakes to perform certain work'.¹² Acceptance must be voluntary; accordingly, no relationship of dependence is required between the person commissioning the killing and the person accepting the commission.¹³

Importantly, in every case acceptance of the commission must be directly correlated with a pecuniary or personal benefit, whether granted or merely promised. As rightly

⁹ On this issue, see K. Wiak, 'Przyjęcie zlecenia zabójstwa', *Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego*, 2024, Vol. 19, No. 21, p. 343.

¹⁰ V. Konarska-Wrzosek, in: Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., Konarska-Wrzosek V. (eds), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, p. 859. It should be noted that more than one person may act on the side of the party commissioning the killing.

¹¹ *Ibidem*.

¹² *Słownik języka polskiego PWN*; <https://sjp.pwn.pl/slownik/zlecenie.html> (accessed: 2 March 2024). The use of the term 'zlecenie' (a term corresponding in civil law to a mandate commission) may, at first glance, lead to its erroneous interpretation from the perspective of civil law. It should be emphasised that the essence of the legal relationship regulated in the Civil Code differs fundamentally from the prohibited act defined in Article 148a § 1 PC; see R. Kokot, 'Przestępstwo przyjęcia zlecenia...', *op. cit.*, pp. 278–279.

¹³ M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks karny...*, *op. cit.*, commentary on Article 148a, thesis 4. It is worth adding, however, that where such a relationship exists and the person commissioning the killing exploits the dependence of the person accepting the commission, the issue of that party's criminal liability would be shaped in such a way that the person commissioning the killing could be held liable as an ordering perpetrator.

observed in the literature, situations in which both types of benefit occur cumulatively¹⁴ should not be excluded. Pursuant to the statutory definition set out in Article 115 § 4 PC, a pecuniary or personal benefit is understood as a benefit 'for oneself or for another person'. A pecuniary benefit encompasses any benefit of an economic nature, intended to satisfy material needs. It may consist not only in an increase in assets but also in a reduction of liabilities, the avoidance or diminution of loss, or the elimination or avoidance of financial burdens.¹⁵ The breadth of this concept permits a wide interpretation. A personal benefit, by contrast, refers to non-pecuniary advantages and may include any non-material gain that enhances the recipient's psychological or physical well-being.¹⁶ As noted in the literature:

'The distinction between a pecuniary and a personal benefit is based on the criterion of the nature of the need satisfied. If a given advantage primarily fulfils a non-material need, it constitutes a personal benefit.'¹⁷

A promise of a benefit, in turn, should be understood as nothing more than an assurance given by the person commissioning the killing that the person accepting the commission will obtain a specific advantage.¹⁸ It embodies a justified expectation that the promised benefit will be conferred at a later point in time. Accordingly, in every case there must be a direct nexus between acceptance of the commission to commit murder and the benefit in question. The benefit must be directly linked to that acceptance and connected exclusively with the commission itself, rather than constituting an independent or unrelated advantage.

Acceptance of a commission to commit murder may occur exclusively through an act; it appears logically sound to exclude omission in this context, since the very existence of the offence presupposes that the perpetrator must 'accept' the commission. It cannot be maintained that tacit acceptance of the commission, clearly inferred by the person commissioning the killing, would amount to conduct in the form of an omission. Even where acceptance is expressed implicitly, it nonetheless involves a manifestation of will directed outward and therefore assumes the character of an act. Accordingly, any acceptance of a commission accompanied by a pecuniary or personal benefit, or by a promise thereof, must be classified as active conduct¹⁹ rather than as a failure to act.

Acceptance of a commission to commit murder represents an example of an offence of abstract endangerment of a legal interest. Such an offence does not require the creation of a concrete or direct danger to the protected legal interest, namely human

¹⁴ R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., pp. 280–281.

¹⁵ T. Oczkowski, in: Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., Konarska-Wrzosek V. (eds), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, commentary on Article 115, p. 681; see also order of the Supreme Court of 30 May 2017, case no. II KK 156/17, LEX No. 2298294; judgment of the Supreme Court of 16 January 2009, case no. IV KK 269/08, OSNwSK 2009, No. 1, item 173.

¹⁶ R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 280.

¹⁷ Judgment of the Court of Appeal in Lublin of 17 April 2007, case no. II AKa 81/07, LEX No. 314605.

¹⁸ R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 280.

¹⁹ See rightly, *ibidem*, p. 273.

life. The provision merely specifies a particular mode of conduct on the part of the perpetrator. It is not necessary to establish that the perpetrator has actually caused any real or specific risk²⁰ to the protected interest. In the course of doctrinal debate, it has also been emphasised that the construction of offences based on abstract endangerment does not extend so far as to permit unlawfulness to be grounded solely in the formation of an intention to infringe the legal interest protected by a given provision.²¹

Turning to the subjective elements of the offence, it may be stated unequivocally that it is an intentional offence under Polish criminal law.²² In the literature, however, there is no consensus as to whether only direct intent is conceivable, or whether conditional intent may also suffice. M. Budyn-Kulik excludes the possibility of conditional intent on the part of the perpetrator, arguing that 'in their psychological attitude toward the act there is no room for uncertainty as whether, by making a particular decision, they are committing an offence, which is characteristic of conditional intent'.²³ V. Konarska-Wrzosek, by contrast, observes that the offence may also be committed with a *quasi*-conditional intent, in a situation where the perpetrator acts with direct intent solely with respect to acceptance of the commission to commit murder, while acting with conditional intent with regard to obtaining a specific benefit.²⁴ R. Kokot adopts the position that the perpetrator may act either with direct intent, when they 'want' to accept the commission to commit murder, or with conditional intent, when they 'reconciles themselves' to its acceptance and thereby accept the conditions presented by the person commissioning the killing. He further maintains that the intentional structure in this context is dichotomous. One may therefore distinguish intent with respect to the deprivation of human life and intent with respect to obtaining a benefit or a promise thereof. Accordingly, two configurations are conceivable. In the first, the perpetrator accepts the commission to commit murder and 'wants' the benefit or its promise, while merely 'reconciling themselves' to the killing of a human being, which constitutes a *sine qua non* condition for obtaining the benefit. In the second, the perpetrator 'wants' the death of the victim while merely 'reconciling themselves' to the receipt of certain benefits or their promise, which, as the author describes, provide only an 'added value'.²⁵

²⁰ Ibidem, p. 284. The author advances the thesis that the placement of this provision appears inappropriate and that it would be more suitably located among offences concerning endangerment.

²¹ On this issue, see J. Giezek, D. Gruszecka, K. Lipiński, *Opinia na temat ustawy z dnia 7 lipca 2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, Warszawa, 2022, p. 72.

²² A. Błachnio, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, commentary on Article 148a, p. 842; R. Kokot, 'Komentarz do art. 148a', in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2025, Legalis, thesis 8; K. Wiak, 'Komentarz do art. 148a', in: Grześkowiak A., Wiak K. (eds.), *Kodeks karny. Komentarz*, 8th ed., Warszawa, 2024, Legalis, margin number 8; M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks karny...*, op. cit.

²³ M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks karny...*, op. cit.; see also M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Komentarz do artykułów 117–221*, Vol. I, 5th ed., Warszawa, 2023, Legalis, margin number 13; J. Karnat, in: Gadecki B. (ed.), *Kodeks karny. Art. 1–316. Komentarz* Warszawa, 2023, Legalis, margin number 4.

²⁴ V. Konarska-Wrzosek, in: Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., Konarska-Wrzosek V. (eds), *Kodeks karny...*, op. cit., commentary on Article 148a, p. 858.

²⁵ R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 281.

Though it may be accepted that a dichotomous conception of intent is possible with regard both to the acceptance of the commission to commit murder and to the obtaining of a benefit, it appears that acceptance of the commission itself may be accompanied only by direct intent, whereas conditional intent could relate solely to the perpetrator's acquisition of the benefit.

Furthermore, the exclusivity of direct intent is supported by the fact that acceptance of a commission represents a stage preceding preparation for murder, which itself requires the perpetrator to act with direct intent, more precisely, with direct intent of a specific character.²⁶ This would suggest that the same form of intent²⁷ is required of the perpetrator who accepts a commission to commit murder. Another issue worth considering is whether, within the framework of Article 148a § 1 PC, one could speak of intent of a specific character. Although the provision does not expressly state that the perpetrator must act for a particular purpose, the requirement of a link between the person commissioning the killing and the accepting party in the form of a pecuniary or personal benefit, or a promise thereof, might arguably indicate a certain purposive element on the part of the potential perpetrator.²⁸ However, it appears that no element has been expressly distinguished in this provision that would indicate a specific purpose guiding the perpetrator's conduct, in contrast to the offence of preparation to commit murder.²⁹ In addition, as rightly noted by R. Kokot, the regulation concerning the acceptance of a commission presents a case of an 'intention to form an intention' to commit the crime of murder. Such an intention, when stimulated by a benefit or the promise thereof,³⁰ independently fulfils the statutory elements of the offence.

STATUTORY CLAUSE OF NON-PUNISHABILITY

Article 148a § 2 PC introduces a statutory clause of non-punishability. Pursuant to this provision, a perpetrator who has accepted a commission to commit murder is not punishable if, prior to the initiation of criminal proceedings, the perpetrator discloses to an authority competent to prosecute offences the identity of the person or persons commissioning the killing, as well as the material circumstances of the offence. Article 148a § 2, following the model of other provisions incorporating the institution of active repentance, was motivated by considerations of criminal policy.³¹ The explanatory memorandum indicates that the clause was introduced in view of the specific nature of the offence, which entails a temporally extended threat

²⁶ K. Kwiecień, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 69.

²⁷ J. Karnat, 'Komentarz do art. 148a', in: Gadecki B. (ed.), *Kodeks karny. Art. 1–316. Komentarz*, Warszawa, 2023, margin number 4.

²⁸ On this issue, see K. Kwiecień, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 69.

²⁹ A. Barczak-Oplustil, M. Małecki, S. Tarapata, M. Iwański, *Populistyczna nowelizacja prawa karnego. Ustawa z dnia 7.07.2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762)*, Kraków, 19 July 2022; <https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego/> (accessed: 13 April 2026), pp. 30–31.

³⁰ R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 281.

³¹ *Ibidem*, p. 289.

to the protected legal interest, and with the aim of encouraging the perpetrator to refrain from undertaking acts bringing them closer to the completion of the killing contemplated under the accepted commission.³²

Unlike the institution of active repentance provided for in Article 17 § 1 PC, the regulation introduced in Article 148a § 2 does not require the perpetrator to act voluntarily when deciding to abandon their previously formed intent. Particular emphasis was placed in the explanatory memorandum on the fact that this solution

‘is intended to motivate the perpetrator to refrain from pursuing the intent to commit murder, irrespective of the circumstances that may have prompted such a decision, since, given the importance of the protected legal interest, preventing its violation is of paramount importance’.³³

As a consequence, even involuntary conduct on the part of a person who has accepted a commission to commit murder does not deprive them of the possibility of benefiting from the clause of non-punishability set out in Article 148a § 2 PC. In light of the prolonged nature of the perpetrator’s conduct and the temporally extended threat to the protected legal interest, as highlighted by the drafters, it is legitimate to question whether privileging the perpetrator by dispensing with the requirement of voluntariness is justified. Arguably, the less restrictive conditions of this form of active repentance are counterbalanced by the requirement, expressly formulated in the provision, to disclose the identity of the person commissioning the killing and other material circumstances of the offence. It was further noted that

‘Article 17 of the Penal Code applies to all offences, including those of a low degree of social harmfulness, and therefore does not provide for the aforementioned conditions, whereas Article 148a § 2 applies exclusively to an intentional offence against the most valuable personal legal interest – life – and it is therefore necessary to prevent its violation through the commissioning of a killing by another person, a purpose served by the disclosure of the person commissioning the killing and other material circumstances of the offence.’³⁴

RATIO LEGIS OF THE STATUTORY DEFINITION OF THE OFFENCE OF ACCEPTING A COMMISSION TO COMMIT MURDER

The introduction of a separate statutory offence of accepting a commission to commit murder was intended to significantly reinforce the protection of human life. In the explanatory memorandum to the amendment of 7 July 2022, it was stated that the absence of such a provision should be regarded as a legal gap, particularly in light of the high degree of social harmfulness³⁵ attributed to this conduct. The drafters further emphasised that

³² *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, 22 February 2022, p. 60.

³³ *Ibidem*, p. 60–61.

³⁴ *Ibidem*.

³⁵ *Ibidem*, p. 58.

'The proposal to criminalise this conduct serves to supplement the punishability of preparation to commit murder; the comparable degree of social harmfulness of accepting a commission to commit murder justifies the adoption of an analogous statutory penalty of two to fifteen years' imprisonment.'³⁶

Thus, the creation of this offence formed part of a broader legislative tendency aimed at strengthening the protection of human life.

It was also stated that 'the social harmfulness of this act does not lie in the decision to commit murder as such, but in a certain agreement concluded with another person in this respect'.³⁷ This agreement is intended to be clearly distinguished from preparation, since the person commissioning the killing does not intend to commit the murder in the form of co-perpetration. Accordingly, the 'agreement' in question must be explicitly separated from the agreement referred to in Article 16 § 1 PC. The explanatory memorandum further pointed to the necessity of including acceptance of a commission within the catalogue of prohibited acts in view of the 'introduction of punishability for entering into an agreement for the purpose of committing an offence'. The newly defined offence was thus presented as merely a complement to the criminal-law protection of life, correlated with the introduction of punishability for preparation to commit murder.³⁸ The need to reinforce the protection of life in this context, however, appears highly questionable: first, in light of the remote nature of the threat involved, and second, because the provision penalises only remunerated acceptance of a commission, leaving unpaid cases outside the scope of criminal liability.

The introduction of criminal liability for acceptance of a commission to commit murder was intended to prevent a potential danger to the legal interest of human life. It appears, however, that the legislative intervention in this instance is markedly remote from any actual threat, which at this stage remains purely abstract. It is rightly argued that such an extension may infringe the principle of proportionality, according to which it is necessary in each case to demonstrate the need for criminalisation within a given scope (Article 31(3) of the Constitution of the Republic of Poland).³⁹

At this point, it is appropriate to reflect upon the justification for criminalising the acceptance of a commission to commit murder. J. Kulesza observes that

'It is impermissible to criminalise conduct that bears some connection to behaviour of a highly socially dangerous character, yet whose link to the potential violation or endangerment of a legal interest appears excessively remote.'⁴⁰

³⁶ Ibidem; attention should also be drawn to the sanction, which has been formulated identically both in the case of preparation for murder and in the case of accepting a commission to commit murder. Given that accepting such a commission represents a stage preceding preparation, the sanction would appear, in this instance, to warrant a more lenient form.

³⁷ Ibidem, p. 59.

³⁸ *Uzasadnienie projektu ustawy...*, op. cit., p. 59.

³⁹ K. Wiak, 'Przyjęcie zlecenia...', op. cit., p. 341.

⁴⁰ J. Kulesza, 'Zarys teorii kryminalizacji', *Prokuratura i Prawo*, 2014, No. 11–12, p. 105.

In light of this, it may be concluded that the introduction of criminal liability for accepting a commission to commit murder at such an early stage appears premature. One may also concur with the view expressed by M. Małecki that

‘Shifting the criminal-law response to the remote foreground of protection of a legal interest entails various risks from the perspective of the principles governing a state based on the rule of law.’⁴¹

RELATIONSHIP BETWEEN THE ACCEPTANCE OF A COMMISSION AND PREPARATION TO COMMIT MURDER

Acceptance of a commission to commit murder, as a newly defined offence intended to protect life at a very early, remote pre-executory stage, is designed to establish the foundations for safeguarding human life before actions genuinely threatening it are undertaken. The manner in which this offence has been structured indicates that it does not fulfil the conditions required for classifying such conduct as preparatory acts in the form of entering into an agreement with a view to the joint perpetration of an offence.⁴² The legislature expressly determined that

‘The acceptance of a commission to commit murder does not fall within the legal framework of preparation to commit murder, as it does not amount to an agreement to commit a prohibited act within the meaning of Article 16 § 1 PC (since such an agreement does not presuppose that the person commissioning the killing will act as a direct perpetrator).’⁴³

Evidently, a clear distinction is drawn between accepting a commission to commit murder and preparing for its commission. This is further confirmed by one of the previously mentioned objectives underlying the introduction of criminal liability for remunerated acceptance of such a commission, namely the supplementation of the punishability of preparation to commit murder.

It may be observed that, within the adopted structure of the stages of an offence, the legislature has created a phase preceding preparation, intended to extend beyond the non-punishable realm of mere thought, yet without leading to conduct that could be classified as preparation.

Consideration must, however, be given to whether this assumption fully justifies the conclusion that acceptance of a commission to commit murder does not fall within the boundaries of preparation. The reasoning advanced in the explanatory memorandum refers only to preparation in its personal form, while disregarding the broader range of acts that may fall within the preparatory phase. The definitional scope of preparation, as set out in Article 16 § 1 PC, is limited to the most typical

⁴¹ M. Małecki, *Przygotowanie do przestępstwa. Analiza dogmatyczna*, Warszawa, 2016, pp. 16–17, cited in D. Bek, ‘Karalność przygotowania do zabójstwa’, *Krytyka Prawa. Niezależne studia nad prawem*, 2020, Vol. 12, No. 4, p. 36.

⁴² V. Konarska-Wrzosek, in: Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., Konarska-Wrzosek V. (eds), *Kodeks karny...*, op. cit., p. 858.

⁴³ *Uzasadnienie projektu ustawy...*, op. cit., pp. 58–59.

preparatory forms, which permits a degree of interpretative flexibility.⁴⁴ It must be acknowledged that acceptance of a commission to commit murder may be accompanied by discussions of the criminal plan or the acquisition of detailed information about the intended victim. The perpetrator may undertake acts designed to enable or facilitate the planned killing, for example, by accepting a pecuniary benefit intended to cover part of the anticipated costs associated with carrying out the commission. Such conduct may already be classified as preparation to commit murder.

Thus, it may be argued that, in many cases, acceptance of a commission will be accompanied by acts which, in substance, correspond to preparation and may accordingly be classified as preparation to commit murder. In certain instances, however, the conduct of the person accepting the commission will not fulfil the statutory elements of preparation as defined in Article 148 § 5 PC. There is no doubt that acceptance may occur tacitly; where this is combined with the absence of any acts aimed at creating conditions for undertaking conduct directly leading to the commission of the offence, the perpetrator will not enter the phase of punishable preparation and will merely remain at the level of passive acceptance of the proposal. This assumption gives rise to a further fundamental difficulty and a serious objection to the existing regulation of remunerated acceptance of a commission to commit murder in Polish law. The question must therefore be asked whether tacit acceptance of a commission to commit murder amounts merely to an unexpressed intention and, consequently, whether its criminalisation infringes the principle *cogitationis poenam nemo patitur*.⁴⁵

The boundary between the newly defined offence of accepting a commission to commit murder and preparation to commit murder proves difficult to delineate. One may readily envisage a range of behaviours that already fall within the scope of preparation. *A contrario*, there will also be situations in which the conduct of the person accepting the commission does not correspond to preparation within the meaning of Article 16 § 1 PC. In such cases, however, one is confronted with the issue of imposing criminal liability for the mere thought formed by the individual.⁴⁶

A distinction must therefore be drawn between two situations. In the first, the person accepting the commission simultaneously undertakes acts that already amount to preparation to commit murder within the meaning of Article 148 § 5 PC. In the second, the person expresses consent to the commission, yet this is not accompanied by any activity on their part – nothing that would bring them closer to the actual realisation of the intended killing.⁴⁷ It may be noted that acceptance of the

⁴⁴ See D. Bek, 'Karałość przygotowania...', op. cit., p. 44.

⁴⁵ On this issue, see *ibidem*, pp. 44–45; A. Barczak-Oplustil, W. Górowski, M. Iwański, M. Małecki, W. Zontek, S. Tarapata, W. Wróbel, *Opinia do uchwały Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 r. w sprawie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, uchwalonej przez Sejm Rzeczypospolitej Polskiej na 81. posiedzeniu w dniu 16 maja 2019 r.*, 9 June 2019, thesis 36, pp. 61–62; https://kipk.pl/wp-content/uploads/2021/08/opinia2_nowelizacja2019.pdf (accessed: 13 April 2026).

⁴⁶ A. Barczak-Oplustil, W. Górowski, M. Iwański, M. Małecki, W. Zontek, S. Tarapata, W. Wróbel, *Opinia do uchwały...*, op. cit., thesis 36, pp. 61–62; on this subject, see also D. Bek, 'Karałość przygotowania...', op. cit., pp. 44–45.

⁴⁷ See A. Barczak-Oplustil, M. Małecki, S. Tarapata, M. Iwański, *Populistyczna nowelizacja...*, op. cit., pp. 28–31.

commission, where followed at a later stage by preparation to commit murder, would give rise to an apparent concurrence of offences. By entering into the subsequent, externally manifested phase, the perpetrator fulfils a further form of the offence. The acceptance of the commission would thus constitute an antecedent act that is consumed by the later preparatory conduct, which absorbs the elements of the offence defined in Article 148a § 1 PC.⁴⁸ In such a configuration, criminal liability would ultimately attach to conduct that represents only a potential endangerment, the remoteness of which appears particularly pronounced.

EVALUATION OF THE REGULATION CONCERNING THE ACCEPTANCE OF A COMMISSION TO COMMIT MURDER

An analysis of the statutory elements leads to the conclusion that, in the case of accepting a commission to commit murder, the protected legal interest assumes a relative character. Criminal liability attaches only to a person who accepts the commission in exchange for a pecuniary or personal benefit, or the promise of such a benefit. Cases in which a potential perpetrator accepts a proposal to commit murder without receiving, or being promised, any benefit remain outside the scope of criminal-law evaluation. This provides a significant argument when assessing the legitimacy of maintaining this offence within the Polish legal order, particularly in light of the legislature's declared objective of protecting the most valuable legal interest – human life – at a remote preliminary stage. Although it may be acknowledged that such conduct will most often be accompanied by remuneration, it does not appear justified to adopt a dualistic approach in situations where the same legal interest may be endangered in each case. The legislative rationale of reinforcing the protection of life therefore appears unconvincing. It should also be noted that the placement of this offence within the chapter on offences against life and health gives rise to further doubts.

A fundamental objection concerns the potential infringement of the prohibition against punishing mere thoughts.⁴⁹ A number of authors, expressing their concerns with respect to the offence under discussion, have emphasised that the provision penalises the thought present in the perpetrator's mind – namely, the very intention to commit murder.⁵⁰ It must be recalled that an unexpressed thought⁵¹ as such does not constitute an act within the meaning of criminal law. In the explanatory memorandum to the amendment, it was stated that

⁴⁸ See R. Kokot, 'Przestępstwo przyjęcia zlecenia...', op. cit., p. 287; R. Kokot, 'Komentarz do art. 148a', in: Stefański R.A., op. cit.

⁴⁹ See M. Florczak-Wątor, A. Grabowski (eds), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa Komentarz*, Kraków, 2021, pp. 1113–1119.

⁵⁰ In the course of the debate, the acceptance of a commission to commit murder began to be described as a 'thought crime', see J. Giezek, D. Gruszecka, K. Lipiński, *Opinia na temat ustawy...*, op. cit., pp. 72–73.

⁵¹ J. Giezek, 'Formy stadialne popełnienia czynu zabronionego w polskim prawie karnym', *Annales Universitatis Mariae Curie-Skłodowska*, 2013, Vol. LX, No. 2, p. 42.

'The introduction of criminalisation of the acceptance of a commission to commit murder cannot be equated with punishability for the intent to commit murder, which the bill does not provide for. The acceptance of a commission to commit murder brings about a change in the external world, controlled by the will of the individual, and thus fulfils the definition of an act as understood in criminal law. That change consists in the person accepting the commission informing the person commissioning the killing thereof, thereby manifesting readiness to carry out the killing, which is necessary to fulfil the statutory elements of this offence.'⁵²

However, it is difficult to infer the precise nature of the act from the wording of the provision as drafted. Situations may arise in which the commission is accepted passively, without the perpetrator clearly externalising approval of the proposal. The provision does not specify the conditions necessary for recognising conduct as amounting to acceptance of a commission; as previously noted, acceptance may occur implicitly. If, therefore, the person accepting the commission does not do so explicitly and does not undertake any acts that could be classified as preparation to commit murder, they would nonetheless incur criminal liability solely for the intention formed. In such circumstances, what appears to be punishable is the very readiness to carry out the commissioned killing – more precisely, the formation of intent to commit that act in exchange for a specific benefit or the promise thereof. Therefore, the conclusion that the principle *cogitationis poenam nemo patitur* is infringed seems justified.

In each case, a distinction is thus necessary between a situation in which the perpetrator explicitly accepts the commission to commit murder, simultaneously obtaining a benefit or the promise thereof, and one in which the person accepting the commission does so implicitly, without externalising readiness to carry out the commissioned killing. It is rightly observed that this offence will often be accompanied by negotiations or by the perpetrator's obtaining specific information about the potential victim. One may therefore accept that an unequivocal acceptance of the commission, typically combined with additional activity on the part of the person accepting it, will constitute an act within the meaning of criminal law, that is, externally manifested conduct controlled by the will of the individual. In such a case, however, taking into account those additional activities – such as gathering information, presenting a plan of action, or receiving payment to cover the necessary costs – the conduct may already be classified as preparation to commit murder within the meaning of Article 148 § 5 PC. It seems that only exceptionally would the mere acceptance of the commission, clearly and externally communicated to the person commissioning the killing, occur in isolation. Finally, with regard to tacit acceptance that is not communicated in any manner, it must be acknowledged that, in such circumstances, liability is effectively imposed for the thought formed.

Given that, in the majority of cases, acceptance of a commission will be accompanied by acts that correspond in scope to preparation, the provision appears redundant in so far as preparation to commit murder has likewise been rendered punishable.

⁵² *Uzasadnienie projektu ustawy...*, op. cit., p. 59.

Furthermore, once the statutory elements of accepting a commission to commit murder are fulfilled, the offence is complete. This, in turn, raises the question of an even further extension of criminal-law intervention, since within the system of stages of an offence one might also envisage liability for an attempt to accept a commission to commit murder. It is therefore necessary to consider when liability for attempt would arise.⁵³ In such a case, criminal responsibility would attach to a person who, with the intent to accept the commission, directly proceeds towards its acceptance, which ultimately does not occur. Attempt could encompass all acts preceding acceptance of the commission that are centred on negotiations concerning specific conditions, including, *inter alia*, the pecuniary or personal benefit offered or expected, or the promise thereof. However, identifying the initial moment of attempt proves problematic. Completion of the offence would occur at the moment of unequivocal acceptance of the commission. Attempt would therefore arise in any situation in which the person commissioning the killing and the prospective perpetrator engage in discussions before the latter definitively agrees to accept the commission. It would not appear necessary for the parties ultimately to reach an understanding. Thus, where the person accepting the commission refuses to undertake the killing due to dissatisfaction with the remuneration offered, an attempt to accept a commission to commit murder would nevertheless have occurred. Any negotiations conducted prior to acceptance of the lethal proposal would represent a stage directly preceding its completion. It must also be acknowledged that attempt would arise where a 'prospective perpetrator', having obtained information that a person is prepared to commission a killing, signals readiness to accept the proposal.⁵⁴

CONCLUSION

The legitimacy of criminalising the acceptance of a commission to commit murder appears doubtful for several reasons. It may be stated that, under Article 148a § 1 PC, what is punishable is the communication of readiness to carry out a killing, and therefore the very decision to deprive a person of life in exchange for a pecuniary or personal benefit granted, or the promise of receiving such a benefit. Thus, what is ultimately penalised is merely the intention to commit murder.⁵⁵

The offence of accepting a commission to commit murder in fact represents a stage preceding preparation, which, according to the legislative design, was intended to complement the system by ensuring full criminal-law protection of the legal interest of human life. It appears that, by introducing a new offence consisting in the acceptance of a commission, the legislature has distinguished an additional

⁵³ On this issue, see K. Wiak, 'Przyjęcie zlecenia zabójstwa...', *op. cit.*, pp. 340–341; R. Kokot, 'Przestępstwo przyjęcia zlecenia...', *op. cit.*, pp. 285–286; J. Giezek, D. Gruszecka and K. Lipiński, *Opinia na temat ustawy...*, *op. cit.*, Warszawa, 2022, p. 73.

⁵⁴ See rightly R. Kokot, 'Przestępstwo przyjęcia zlecenia...', *op. cit.*, p. 273.

⁵⁵ *Ibidem*, p. 277; A. Tomczyk, 'Kierunki zmian Kodeksu karnego na tle 25 lat jego obowiązywania', *Studia Prawnoustrojowe*, 2024, No. 64, p. 312.

stage in the progression of the offence, one situated prior to preparation: a preparatory phase.

The reason for the prohibition to encompass only those commissions accompanied by remuneration or some form of equivalence remains unclear. This leads to a paradoxical situation in which, if the perpetrator receives no gratification or even promise thereof, their conduct does not fulfil the statutory elements of the offence defined in Article 148a § 1 PC. Although it may be assumed that acceptance of such a commission will typically be motivated by some form of benefit, it does not appear justified that the legal interest of human life should, at this stage, be subject to such differentiation. This creates difficulties both in determining the protected legal interest – which in this context becomes relativised – and in assessing the perpetrator's intent. The perpetrator is not required to act for the purpose of obtaining a pecuniary or personal benefit, yet this element must nonetheless be reflected in their mental state, since in the absence of remuneration or its promise no criminal liability arises.

It is not easy to identify unequivocally the principal protected legal interest. In light of the aforementioned circumstances – including cases in which the potential victim has not yet been born – one may be compelled to conclude that public order should be regarded as the primary protected interest. This conclusion is further supported by the fact that the threat to human life at the stage of accepting a commission to commit murder is, in reality, excessively remote.

The introduction of the regulation under discussion was intended to fill a legislative gap. However, it does not appear that this objective has been achieved, or that there is a genuine need to criminalise conduct at a stage significantly preceding interference with the legal interest in the form of human life. Thus, it should be stated that the analysis of the aspects presented allows one to conclude that the idea of penalising the acceptance of a commission to commit murder in the Polish legal order should be abandoned.

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Cite as:

Jarocka M. (2026), *Criminal Liability for Accepting a Commission to Commit Murder*, *Ius Novum* (Vol. 20) 2, 15–30. DOI 10.2478/in-2026-0014

ATTORNEY OF A PERSON WHO IS NOT A PARTY TO PREPARATORY PROCEEDINGS

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DOI 10.2478/in-2026-0015

ABSTRACT

The subject of this study is an analysis of the current issue of refusing to allow the attorney of a person who is not a party to participate in preparatory proceedings on the basis of the evaluative and unclear grounds set out in Article 87 § 3 of the Code of Criminal Procedure, combined with the lack of any possibility of appealing to the court against the prosecutor's decision refusing permission in this respect, which does not meet constitutional and international standards. *De lege ferenda*, it is proposed that the cited provision be amended, which will eliminate the above violations.

Keywords: attorney, person not being a party, preparatory proceedings, complaint, interest in the proceedings

In preparatory proceedings, a suspect may act through an authorised defence counsel of their choice or court-appointed defence counsel. However, a party other than the accused may appoint an attorney (Article 87 § 1 of the Code of Criminal Procedure, hereinafter also referred to as the 'CCP').¹ Similarly, the legislature has assumed that a person who is not a party to the proceedings may also appoint an attorney. Nevertheless, in this latter case, the legislature has introduced an additional condition, namely that their interests in the ongoing proceedings so require (Article 87 § 2 CCP). *A contrario*, the court, and in preparatory proceedings the prosecutor, may refuse to

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¹ The provisions of Article 87 §§ 1–3 CCP also apply to parties to the proceedings other than the accused, as well as to the judicial stage of the proceedings. However, given the subject of this publication, attention will be focused primarily on the application of the aforementioned provision at the preparatory stage and on persons who are not parties to the preparatory proceedings.



admit an attorney of a person who is not a party to the proceedings to participate in the proceedings if they determine that the protection of that person's interests does not require it (Article 87 § 3 CCP).

A person who is not a party to the proceedings, under Article 88 § 1 CCP, may be represented by an advocate (*adwokat*) or legal adviser (*radca prawny*).² As is rightly emphasised in the literature, the legislature has not provided for mandatory power of attorney.³ However, there are discrepancies in the doctrine as to whether a person who is not a party to the proceedings may request the appointment of an attorney *ex officio* (court-appointed). On the one hand, it is argued that the right of an indigent person to legal aid is not available to a person who, in the pending proceedings, does not have the status of a party to the proceedings.⁴ On the other hand, it is pointed out that both an authorised party and another person may request the appointment of an attorney, since Article 88 § 1 CCP, which refers to the appropriate application of Article 78 § 1 CCP, does not differentiate between the entities submitting such a request. This means that any entity authorised to appoint an attorney may submit such a request, and, in the author's opinion, this view should be fully endorsed.⁵

The group of non-parties who may appoint an attorney in preparatory proceedings undoubtedly includes a detained person, the person providing property bail, the person who, during the preparatory proceedings, has the right to lodge a complaint (appeal) against a decision, order, or action violating their rights, a witness, including one questioned pursuant to Article 183 CCP, as well as an anonymous witness or crown witness (state witness), or a suspected person.⁶ This is an illustrative list, not encompassing all cases covered by Article 87 § 3 CCP, as discussed in more detail below.

However, the above-mentioned illustrative group of non-parties who may appoint an attorney in preparatory proceedings already indicates that the role of

² The provisions of Article 77, Article 78, Article 78a, Article 81 §§ 1a–2, Article 81a §§ 1–3, Article 83, Article 84, Article 86 § 2, and the provisions issued pursuant to Article 81a § 4 CCP apply to attorneys, as appropriate. In matters not regulated by the provisions of the Code of Criminal Procedure, pursuant to Article 89 CCP, the provisions applicable to civil proceedings apply accordingly.

³ Cf. R.A. Stefański, 'Pełnomocnik w procesie karnym', *Prokuratura i Prawo*, 2007, No. 2, pp. 52–53; see also, e.g. J. Zagrodnik, M. Burdzik, in: Głogowska S., Karaźniewicz J., Klejnowska M., Majda N., Palka I., Sychta K., Żyła K., Zagrodnik J., Burdzik M. (eds), *Kodeks postępowania karnego. Komentarz*, Warszawa, LEX/el., 2024, Article 87.

⁴ Such as K. Eichstaedt, in: Świecki D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, Warszawa, 2025, Article 87; E. Bieńkowska, 'Pokrzywdzony w postępowaniu karnym po zmianach z dnia 11 marca 2016 r.', *Prokuratura i Prawo*, 2016, No. 10, pp. 6–26.

⁵ R.A. Stefański, 'Pełnomocnik...', op. cit., pp. 52–53, and at the same time, as the cited author points out, the president's decision regarding the granting or refusal to grant an *ex officio* attorney to a person who is not a party does not determine the conditions of Article 87 § 2 CCP, i.e. whether the interests of the person who is not a party require it, as this matter is reserved for the prosecutor and the court deciding whether or not to admit such a person's attorney to participate in the proceedings.

Regarding the institution of an *ex officio* attorney in criminal proceedings, see also the Supreme Court's ruling of 16 November 2000, I KZP 32/00, *Orzecznictwo Sądu Najwyższego – Izba Karna i Wojskowa*, 2000, No. 11–12, item 98.

⁶ Cf. more broadly, R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, Warszawa, LEX/el., 2017, Article 87.

an attorney for such persons can be of considerable importance from the perspective of protecting their rights in preparatory proceedings. An attorney may represent the interests of persons who may be, or already are, within the sphere of interest of law enforcement authorities. As emphasised in the literature, granting a specific person rights in criminal proceedings should, in itself, provide them with the opportunity to benefit from professional assistance, such as that of an attorney, which makes the exercise of those rights effective, and their involvement in the mechanisms of ongoing criminal proceedings requires the creation of optimal conditions for them to perform their role, as defined by the provisions of criminal procedural law, without fear for their interests and their protection.⁷ In this regard, an attorney plays a crucial role during the questioning, as a witness, of a person who is not a party to the proceedings. The attorney should ensure compliance with Article 171 § 4, 4a, and 5 CCP, i.e. the prohibition on asking leading questions, interfering with protected secrets (e.g. professional secrecy), or the use of prohibited methods of questioning. To this end, the attorney may, for example, request rectification of the record (protocol) or submit statements for inclusion in the record (protocol). Importantly, a person deprived of the assistance of an attorney may be unable to exercise their rights, especially where legal knowledge is required⁸ to exercise them, including the assessment of rights under Article 183 § 1 CCP, which provides that a witness may decline to answer a question if answering it could expose them or their closest person to liability for a criminal offence or a fiscal criminal offence. There is doubt as to whether the attorney of a non-party may ask them questions during questioning. In the author's opinion, the answer to this question should be in the affirmative⁹ in light of the literal wording of Article 171 § 2 CCP,¹⁰ which does not limit the ability to ask questions to attorneys of the parties, as Article 370 CCP does,¹¹ especially since, as the literature on the subject rightly emphasises, there is no normative justification for the view that Article 171 § 2 CCP must be read in conjunction with Article 370 CCP.¹² The sum of the above rights of the attorney for a person who is not a party to criminal proceedings, which determines that attorney's significant role in the criminal process, means that ensuring the presence of such

⁷ Such as J. Zagrodnik M. Burdzik, in: *Kodeks postępowania...*, op. cit., Article 87, and the doctrine cited therein.

⁸ Cf. R.A. Stefański, in: Stefański R.A., Zabłocki S. (eds), *Kodeks postępowania...*, op. cit., Article 87.

⁹ See, in this regard, the view of L.K. Paprzycki, who indicates that in preparatory proceedings, such a right is granted to persons authorised to participate in a procedural act and, of course, to the person conducting that act – L.K. Paprzycki, in: Grajewski J., Steinborn S., Paprzycki L.K. (eds), *Komentarz aktualizowany do art. 1–424 Kodeksu postępowania karnego*, Warszawa, 2015, Article 171.

¹⁰ Under this provision, in addition to the authority conducting the questioning, the right to ask questions is vested in the parties, defence counsel, attorneys, and experts.

¹¹ During court proceedings, the person being questioned, at the request of the presiding judge, may ask questions in the following order: public prosecutor, auxiliary prosecutor, attorney of the auxiliary prosecutor, private prosecutor, attorney of the private prosecutor, expert, defence attorney, accused, and members of the adjudicating panel.

¹² R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296*, Warszawa, LEX/el., 2019, Article 171.

an attorney is perceived as one manifestation of giving effect to the constitutional principle of a democratic state governed by the rule of law.¹³

Meanwhile, the conditions for appointing an attorney for a person who is not a party to criminal proceedings are imprecise and thus discretionary, as they refer to the undefined notion of the 'interest' of the person who is not a party to the ongoing proceedings.

It should be emphasised that the concept of 'interest', which underlies the right of a person who is not a party to criminal proceedings to appoint an attorney, has not been statutorily defined. Such a definition cannot be found either in Article 115 of the Penal Code or in the provisions of the Code of Criminal Procedure, despite the latter using the concept of 'interest' in several provisions. For example, Article 2 § 1(3) CCP refers to the purposes of criminal proceedings, specifying that the legally protected interests of the injured party must be taken into account while simultaneously respecting their dignity, while Article 76a § CCP states that, at the request of an accused under 18 years of age, their legal representative or the person in whose care the accused remains may be present during the session or trial in which the accused participates. If the accused does not have a legal representative or a person in whose care they remain, or if the presiding judge considers that the participation of these persons may lead to a violation of the rights or interests of the accused, is unnecessary in view of their welfare, prevents the conduct of the session or trial, or significantly hinders it, the accused may designate another adult person. If the accused has not designated such a person, or if the presiding judge considers that that person's presence may lead to a violation of the rights or interests of the accused, is unnecessary in view of their welfare, prevents the conduct of the session or trial, or significantly hinders it, the presiding judge shall appoint a family assistant referred to in Article 12 of the Act of 9 June 2011 on Family Support and the Foster Care System (Journal of Laws of 2024, items 177, 742, 743, 858 and 1572); Article 85 § 1 CCP, according to which a defence lawyer may defend several accused if their interests are not in conflict; or Article 96 § 1 CCP, according to which parties and non-parties, if they demonstrate a legal interest in the outcome, have the right to participate in the session when the law so provides, unless their participation is mandatory.

There is also no judicial case law that would give content to the specified, vague criteria of Article 87 § 3 CCP, on which procedural authorities could base their decisions regarding the appointment of an attorney by a person who is not a party to criminal proceedings.

However, it should be pointed out, drawing on the holdings developed in judgments in administrative or civil law, although they may also have substantial relevance to this institution in criminal procedure, that this interest cannot be

¹³ M. Piech, 'Odmowa dopuszczenia do udziału w postępowaniu pełnomocnika osoby niebędącej stroną', in: Hofmański P. (ed.), *Kluczowe problemy procesu karnego*, Warszawa, 2011, pp. 323–332.

abstract; it must be real, individual, and direct.¹⁴ It must have a close connection with the individual and also with the specific criminal proceedings.¹⁵

It should also be emphasised that this interest is more pronounced in the case of persons whose procedural position may change dramatically during the course of the proceedings, from the status of witness to that of suspect. An indication of such a situation may be the questioning of a witness during preparatory proceedings under Article 183 CCP. Undoubtedly, this interest becomes concrete at the moment of detention, that is, at the moment of deprivation of liberty. It should also be attributed to persons whose rights were directly violated or threatened during preparatory proceedings, for example, a person whose items were seized or on whom disciplinary penalties were imposed during the preparatory proceedings.

Finally, this interest may be more apparent in the case of persons who hold a special position in criminal proceedings due to their particular vulnerability during the preparatory proceedings. This refers to anonymous witnesses and crown witnesses, or witnesses who do not speak Polish and are unfamiliar with Polish law.¹⁶ Therefore, there is a group of persons outside the circle of parties to the proceedings whose interests in the preparatory proceedings are evident under Article 87 § 3 CCP. However, it may also happen that this interest is not *prima facie* discernible; it may be known only to the witness and not to the prosecutor, and the question should be asked whether, *a priori*, it is appropriate to refuse admission of the attorney of such a person who is not a party to the proceedings to a procedural act. It is also possible that a witness may have grounds to believe, in a specific case, that they may find themselves within the prosecutor's sphere of interest in a completely different role, namely as a suspect. Thus, they request admission of an attorney to the proceedings, whose task is to protect their interests as a witness during such questioning, even though they are not being heard under Article 183 CCP. We should also ask ourselves whether such an interest may arise for purely psychological reasons, in a situation where a witness is unable to cope emotionally with being summoned to the prosecutor's office and having to testify in the case. Such examples could be multiplied, depending on the specific circumstances.

To summarise this part of the argument, the view presented in the literature should be endorsed that there are, in essence, no objective criteria by which a prosecutor¹⁷ should be guided in depriving a person who is not a party to the proceedings of the opportunity to protect their interests through an attorney. This is especially so since this 'interest' may not be known to the prosecutor, but only to the person who is not a party and their attorney, as, for example, procedural tactics

¹⁴ Resolution of the Supreme Administrative Court of 22 October 2021, II GSK 900/21, LEX No. 3251800; see also, for example, K. Gajda-Roszczyńska, 'Udział podmiotów innych niż materialnie uprawnione jako stron w procesie cywilnym a kryterium interesu prawnego – zagadnienia wybrane', *Polski Proces Cywilny*, 2015, No. 3.

¹⁵ See J. Lisińska, 'Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym', *Palestra*, 2014, No. 7–8.

¹⁶ *Ibidem*.

¹⁷ And in court proceedings, the court.

may prevent its disclosure, and therefore the prosecutor makes a decision under Article 87 § 3 CCP while, *de facto*, not knowing all the circumstances of the case.¹⁸

Thus, Article 87 § 3 CCP leaves procedural authorities excessive discretion in this respect, while

'Refusal to admit an attorney on the basis of the cited provision should be limited to obvious situations in which it is clear that the involvement of the persons listed by way of example in the course of the criminal trial does not entail any threat to their interests.'¹⁹

At the same time, if the prosecutor refuses to admit an attorney for such a person to participate in the preparatory proceedings,²⁰ the prosecutor issues an order to that effect, which is not subject to appeal to the court, but only to the prosecutor's immediate superior pursuant to Article 302 §§ 1 and 3 CCP.²¹

In this situation, in the author's opinion, the exclusion of judicial review of the prosecutor's rulings refusing to admit an attorney for a person who is not a party to the preparatory proceedings may appear inconsistent with Article 45(1) in conjunction with Article 77(2) of the Constitution of the Republic of Poland, because it closes off the judicial path in the event of the prosecutor issuing a negative decision, and, as indicated above, this decision is based on evaluative and imprecise grounds, referring to an undefined 'interest in the ongoing proceedings'.²²

For years, successive Commissioners for Human Rights (Ombudsmen)²³ have been calling for amendments to the legislation so as to grant the right to challenge such decisions before a court, in their statements of 2014, 2018,²⁴ 2020, and 2024. Taking into account the previous case law of the Constitutional Tribunal, they have pointed out that a prosecutor's refusal to allow the attorney of a person who is not a party to participate in preparatory proceedings falls within the scope of the concept of a case under Article 45(1) of the Constitution of the Republic of Poland, and also interferes with constitutionally protected rights, and, in this state of affairs, the prohibition on closing off the judicial path in the event of the prosecutor issuing a decision under Article 87 § 3 CCP should apply, pursuant to Article 77 (2) of the

¹⁸ R.A. Stefański, S. Zabłocki, *Kodeks postępowania...*, op. cit., Article 171. See also M. Piech, *Odmowa dopuszczenia...*, op. cit., pp. 323–332; K. Eichstaedt, *Kodeks postępowania...*, op. cit., Article 87.

¹⁹ J. Zagrodnik, M. Burdzik, in: *Kodeks postępowania...*, op. cit., Article 87, and the doctrine cited therein.

²⁰ However, the admission of an attorney does not require any positive decision – see more broadly R.A. Stefański, S. Zabłocki, *Kodeks postępowania...*, op. cit., Article 171.

²¹ It should be emphasised that, in judicial proceedings, the court issues a decision on this matter which is not subject to any appeal.

²² See more broadly M. Kolendowska-Matejczuk, *Zaskarżalność rozstrzygnięć incydentalnych uregulowanych w Kodeksie postępowania karnego w świetle standardów konstytucyjnych. Rozważania systemowe*, Warszawa, 2018, pp. 430 et seq.

²³ The draft statements of the Commissioner for Human Rights dated 15 September 2014 and 12 October 2018 were prepared by the author of this publication.

²⁴ https://bip.brpo.gov.pl/sites/default/files/Do_MS_ws_odmowy_dopuszczenia_pelnomocnika_osoby_niebedacej_strona.pdf; <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20pe%C5%82nomocnika%20osoby%20nie%20b%C4%99d%C4%85cej%20stron%C4%85%20post%C4%99powania.pdf> (accessed: 20 March 2025).

Constitution of the Republic of Poland, especially since this decision is issued on the basis of evaluative grounds.²⁵ Additionally, the Commissioner pointed out that Article 87 § 3 CCP may simultaneously violate the provisions of Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (hereinafter referred to as 'Directive 2013/48/EU'), and the supplementary Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (hereinafter referred to as 'Directive (EU) 2016/1919'), to the extent that it applies to persons who, as witnesses, were not initially suspects or accused persons, but acquired that procedural role during questioning by the police or another law enforcement authority, which should therefore also mean constitutional protection due to the content of Article 41 and Article 42(2) of the Constitution of the Republic of Poland. According to the directives, the right of access to a lawyer should also apply to persons other than suspects or accused persons, and the appropriate remedy in the event of a violation of their rights should be a complaint to a court.²⁶

To date, this postulate has not been taken into account, despite the positive opinion of the Codification Commission of 12 December 2014, which supported the position of the Commissioner for Human Rights in this regard. As indicated by the Minister of Justice in a letter addressed to the Commissioner for Human Rights dated 13 May 2015, the amendment to Article 87 § 3 CCP was to be considered in the course of work on a subsequent amendment to the Code of Criminal Procedure. Over the years, the Commissioner for Human Rights has emphasised that a solution should therefore be proposed as set out in the aforementioned opinion of the Criminal Law Codification Commission of 2014, which serves as a model based on the appeal against refusal to initiate and discontinuation of preparatory proceedings, involving lodging the appeal with the immediately superior prosecutor, with the obligation to forward that remedy directly to the court if the appeal is not upheld. This is a solution that accelerates incidental proceedings, while at the same time still allowing the prosecutor to remedy a defective decision, without the need to initiate judicial proceedings.²⁷

The Supreme Bar Council (*Naczelna Rada Adwokacka*) has also recently proposed an amendment to Article 87 § 3 CCP, guaranteeing non-parties to criminal

²⁵ It should be emphasised that this issue became the subject of proceedings before the Constitutional Tribunal in the form of a constitutional complaint under case number SK 44/15, but the Constitutional Tribunal discontinued the case for formal reasons. For the record, it should be noted that the Council of Ministers and the Prosecutor General submitted written statements regarding the constitutionality of Article 87 § 3 CCP, while the Sejm of the Republic of Poland discontinued of the proceedings – see more extensively at <https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=SK%2044/15> (accessed: 20 March 2025).

²⁶ <https://bip.brpo.gov.pl/pl/content/rpo-odwolanie-sad-odmowa-ustanowienia-pelnomocnika-osoby-niebedacej-strona-ms-odpowiedz> (accessed: 20 March 2025).

²⁷ DL-III-072-9/15/1.

proceedings – including witnesses and injured parties – the right to appoint an attorney without the need to obtain the consent of the procedural authorities. The Supreme Bar Council's arguments are therefore broadly consistent with those of the Commissioner for Human Rights, but the proposed solution to the problem presented is slightly different. The Supreme Bar Council's draft provides for an amendment to Article 87 § 2 CCP to read: 'A person who is not a party may appoint an attorney. The attorney's failure to appear at the time scheduled for a procedural act shall not prevent it from being conducted', and for the repeal of Article 87 § 3.²⁸ As the Supreme Bar Council pointed out, this amendment would guarantee a person who is not a party to the proceedings a genuine right to legal aid without the need for an arbitrary decision by the procedural authorities, by eliminating a provision that leaves significant discretion to those authorities and may lead to restrictions on the right to legal aid. The proposed amendment would remove interpretative uncertainties and eliminate the possibility of arbitrarily limiting access to an attorney, which, in turn, would lead to the full implementation of Article 47 of the Charter of Fundamental Rights of the European Union, which states that everyone has the right to legal advice and to the assistance of a representative in criminal proceedings, as well as ensuring that the provisions of the Code of Criminal Procedure are consistent with Directive 2013/48/EU and Directive (EU) 2016/1919. These changes would better protect the rights of persons who may become suspects or accused persons during the proceedings but who initially appear only as witnesses. Failure to provide them with legal assistance may lead to a situation in which their procedural status suddenly changes, leaving them inadequately prepared to defend their rights. Adopting the proposed provisions would strengthen the right to legal assistance for persons who are not parties to criminal proceedings, raise the standard of fair criminal proceedings, enable the full exercise of the right to defence, eliminate arbitrariness on the part of procedural authorities in matters concerning the admission of an attorney, and ensure the compliance of Polish law with EU standards. At the same time, the Supreme Bar Council indicated that the proposed change would not entail additional costs for the state budget.²⁹

In the author's opinion, however, the Supreme Bar Council's draft should be assessed negatively. Referring to the change proposed by the Supreme Bar Council, it should be noted, first, that proposals in this regard have already been advanced in the literature on the subject³⁰ and, in principle, at least as regards the argument that the current solution is inconsistent with the Constitution and international standards, they do not raise any objections. However, the Supreme Bar Council's justification regarding the absence of additional costs for the state budget if the proposed change is implemented cannot be accepted. If it is accepted, as noted

²⁸ Resolution of the Supreme Bar Council No. 623/2025 of 20 March 2025 on the submission of a petition in the public interest to amend Article 87 CCP.

²⁹ <https://www.adwokatura.pl/z-zycia-nra/nra-skierowala-projekt-zmiany-kodeksu-postepowania-karnego-w-sprawie-prawa-do-ustanowienia-pelnomocnika-dla-osob-niebedacych-stronami/> (accessed: 20 March 2025).

³⁰ M. Piech, 'Odmowa dopuszczenia...', *op. cit.*, pp. 323–332. Alternatively, the author postulates the possibility of appealing against a court decision refusing to admit an attorney at the stage of court proceedings.

above, that the provisions of Article 78 CCP apply accordingly to the appointment of an attorney under Article 87 CCP, the costs associated with appointing court-appointed attorneys for persons other than parties to the proceedings could significantly burden the state budget, which, in turn, could pose a significant obstacle to adopting the solutions proposed by the Supreme Bar Council.

Furthermore, the author believes that it is necessary to consider whether eliminating any grounds for admitting attorneys for persons who are not parties to the proceedings, on the assumption that Article 78 CCP applies to them, will not affect the length of the proceedings, while at the same time agreeing with the view that limitations on constitutionally guaranteed rights cannot be justified by the need to 'reassure judges and prosecutors against the fear of an invasion by attorneys'.³¹ However, it is not difficult to imagine a situation in which, for example at the stage of preparatory proceedings, several dozen witnesses file motions for the appointment of *ex officio* attorneys, which could consequently even paralyse the proceedings. Therefore, the amendment proposed by the Supreme Bar Council could be adopted, supplemented by the assumption that Article 78 CCP does not apply in this situation. The proposed wording of Article 87 § 2 CCP could read: 'A person who is not a party may appoint a representative. The failure of the representative to appear on the date of a procedural act does not constitute an obstacle to its performance. Article 78 CCP shall not apply to the representative appointed under this provision', while simultaneously repealing § 3 of Article 87 CCP. Still, eliminating the possibility of appointing an *ex officio* attorney for persons who cannot afford to appoint an attorney of their own choice could, in turn, lead to a valid claim of a violation of the constitutionally guaranteed right to equal treatment, since some persons could afford such an attorney while others, although in the same or a similar procedural situation, could not. What is more, unlimited access by attorneys to the criminal process may undermine the interests of the investigation or inquiry for another reason. Preparatory proceedings are, by their very nature, covered by confidentiality, and, for the sake of the investigation or inquiry, access at this initial stage of the criminal process to certain information is severely limited or even excluded. Therefore, allowing an attorney to participate in a specific procedural activity may simultaneously constitute disclosure of information from the preparatory proceedings to that attorney. The very scope of the questions put to a witness may already reveal information from the investigation or inquiry. It cannot be ruled out that the same attorney will represent several witnesses in the case or simultaneously defend a suspect. Therefore, mechanisms must exist to prevent the institution discussed in this publication from being used in a manner that violates the principles and objectives of preparatory proceedings.

In summary, it should be noted that:

1. There are no clear criteria for admitting an attorney of a person who is not a party to criminal proceedings, as Article 87 § 3 CCP provides vague and evaluative criteria that are not defined in either the Criminal Code or the Code of Criminal Procedure.

³¹ Cf. R.A. Stefański, S. Zabłocki, in: *Kodeks postępowania...*, op. cit., Article 171. See also S. Waltoś, *Proces karny. Zarys systemu*, Warszawa, 1998, p. 193.

2. These criteria are determined by the prosecutor, who in practice applies the solution provided for Article 87 § 3 CCP in preparatory proceedings.
3. Decisions issued on the basis of Article 87 § 3 CCP are not subject to appeal to the court.
4. These decisions affect the constitutionally protected rights of persons under the jurisdiction of law enforcement authorities.
5. Unlimited access of attorneys for a person who is not a party to preparatory proceedings may violate the legally protected interests of the proceedings at this stage of the criminal process.
6. *De lege ferenda*, it would be appropriate to support the proposal put forward by the Commissioner for Human Rights and the Criminal Law Codification Commission to grant a right of appeal against refusal to admit an attorney for a person who is not a party to criminal proceedings, consisting in submitting the appeal to the directly superior prosecutor, with an obligation to forward that measure directly to the court if the appeal is dismissed.
7. The proposed solution will expedite incidental proceedings while still enabling the prosecutor to rectify a defective decision without the need to initiate court proceedings, and at the same time it meets constitutional and international standards, while allowing the 'interest' criterion under Article 87 CCP to be given content through judicial interpretation.

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Cite as:

Kolendowska-Matejczuk M. (2026), *Attorney of a Person Who Is Not a Party to Preparatory Proceedings*, *Ius Novum* (Vol. 20) 2, 31–41. DOI 10.2478/in-2026-0015

PEGASUS SOFTWARE AND FAIR CRIMINAL PROCEEDINGS

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DOI 10.2478/in-2026-0016

ABSTRACT

The study discusses the functionalities of programmes created to provide special services with the possibility of taking control of mobile devices. By presenting cases of the use of such systems for political purposes and by describing a situation in which incriminating material was fabricated through the use of such systems, the author argues that there is a need for increased judicial oversight of the secret services' activities and for a change in the approach taken by criminal trial authorities to material secured in terminal devices. In view of the possibilities offered by spyware, such material may serve as the basis for findings unfavourable to the accused only after external interference has been excluded, which is all the more difficult because the activities of the secret services are covered by secrecy. The aim of this article is to initiate a discussion on the use of material obtained from the memory of mobile devices in criminal proceedings and to consider the direction in which changes to the law should be undertaken in order to reduce the related threats to fair proceedings.

Keywords: spyware, evidence, surveillance, secret service

In July 2021, representatives of Forbidden Stories, together with 17 media outlets from around the world and with technical support from Amnesty International, conducted an extensive journalistic investigation which found that countries such as Saudi Arabia, Armenia, Azerbaijan, Bahrain, Hungary, India, Kazakhstan, Mexico, Morocco, Poland, Rwanda, Togo and the United Arab Emirates (UAE) had acquired software called 'Pegasus' from NSO Group, which was intended to combat the most serious crimes, especially terrorism. However, human rights defenders and those in opposition to state authorities became targets of surveillance using that

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software. In October 2018, a critic of the Saudi royal family, Jamal Khashoggi, was killed, having been subjected to 'Pegasus' surveillance in the months leading up to his death. More than a thousand phone numbers in Azerbaijan were infected with 'Pegasus'. Journalists, among others, were among those who had been subjected to surveillance. In Armenia, this software was used against journalists as well as human rights defenders. The Hungarian government used it against journalists, opposition politicians, lawyers, university lecturers, prosecutors and social activists. In Greece, around three hundred people were spied on in this manner, including members of the European Parliament and journalists. In Spain, the Prime Minister, the Minister of Defence, the Minister of the Interior and other high-ranking officials, as well as members of the local government of Catalonia, persons belonging to the movement fighting for the independence of Catalonia and members of the European Parliament, lawyers, academics, as well as representatives of civil society, were all subjected to surveillance. Morocco and Rwanda used 'Pegasus' to subject, among others, the President of France, the Prime Minister, the Minister of Defence and the Minister of the Interior of Spain, the Prime Minister of Belgium, the former President of the European Commission, and the former Prime Minister of Italy to surveillance.¹ The Polish secret services used 'Pegasus' against, among others, Senator Krzysztof Brejza during the period when he headed the opposition party's 2019 election staff, Judge Beata Morawiec, who headed the Themis Association of Judges, which criticised the actions of the Ministry of Justice, Prosecutor Ewa Wrzosek, who openly criticised undemocratic changes in the Polish judiciary, as well as advocate Roman Giertych, who opposed the actions of the Minister of Justice.

The purpose and use of the aforementioned software became the subject of the election campaign for the Polish Sejm and Senate in 2023. This was further fostered by a report produced by the Commission of Inquiry on 'Pegasus' appointed by the European Parliament, adopted by recommendation on 15 June 2023. It emphasised that the surveillance carried out with this tool does not meet the requirements outlined in the case law of the ECtHR and the CJEU and therefore remains contrary to the principles provided for in Article 2 of the Treaty on European Union and the fundamental rights enshrined in Article 7 (right to respect for privacy), Article 8 (protection of personal data), Article 11 (right to freedom of expression), Article 17 (right to property), Article 21 (principle of non-discrimination) and Article 47 (right to an effective judicial remedy) of the Charter of Fundamental Rights of the European Union.²

Following the seizure of power by the former opposition, the Sejm of the Republic of Poland appointed a Commission of Inquiry to investigate the legality, correctness and expediency of operational and exploratory activities undertaken, *inter alia*, with the use of 'Pegasus' software, by members of the Council of Ministers, the special services, the police, the fiscal and customs control authorities, the authorities responsible for the prosecution of crimes and the prosecutor's office in the period from 16 November 2015 to 20 November 2023. The work of this body

¹ M. Matusiak-Fraćczak, 'Konwencyjne standardy legalnej inwigilacji a zastosowanie systemu Pegasus w Polsce', *Europejski Przegląd Sądowy*, 2023, No. 12, pp. 26–28.

² *Ibidem*, p. 28.

revealed to the public a considerable amount of information on the functioning of the special services, access to which was restricted due to the content of Article 24(1) of the CBA Act, Article 20a(1) of the Police Act, Article 35(1) of the Internal Security Agency Act, Article 9c(1) of the Border Guard Act, Article 131(1) of the National Fiscal Administration Act and Article 40(1) of the Military Police and Military Order Authorities Act. The jurisprudence shaped against this background has consistently taken the position that all information the disclosure of which would hinder the services in the performance of their tasks, including the performance of operational and exploratory activities, regardless of whether it relates to specific proceedings, is subject to protection under the principles governing classified information.³ Knowledge of the characteristics of the tools of operational work would create a risk of disclosure of the techniques used to carry out operations and, as a consequence, of depriving those services of any real possibility of performing their statutory tasks and, consequently, of dismantling the service.⁴ Ignorance on the part of persons breaking the law has, in this case, a preventive character, hindering criminal activities, and it remains in the interest of the Republic of Poland that an individual's right of access to public information be limited in this respect.⁵

On the subject of 'Pegasus' itself, a report presented by NSO Group was indeed known, but it dated back to 2016.⁶ Information on the capabilities of later versions of this software was only made available to the public through the session of the aforementioned parliamentary committee. Witness Jerzy Kosiński, who attended the presentation on behalf of the Polish authorities in 2019, testified that, during the presentation, the 'Pegasus' system proved to be an IT tool with complex functionality that allowed control of a mobile device to be taken over in a manner that did not signal to the owner that control had been lost.⁷ During the demonstration, participants were given the ability to make calls through the seized devices and talk through them; they also performed tests involving switching on the microphone and listening to the surroundings, as well as obtaining direct access to the cameras, which they could activate at any time and use to take pictures. As the phone was taken over completely, it was possible to use all its functionalities and the tools

³ Judgment of the Supreme Administrative Court of 2 February 2018, I OSK 668/16, LEX no. 2475548; see S. Hoc, P. Szustakiewicz, *Ustawa o Centralnym Biurze Antykorupcyjnym. Komentarz*, Warszawa, 2023, commentary to Article 24.

⁴ P. Opitek, 'Kontrola operacyjna urzędzenia końcowego', *Prokuratura i Prawo*, 2023, No. 4, pp. 60–61.

⁵ Judgment of the Supreme Administrative Court of 18 August 2015, I OSK 1679/14, Legalis no. 1361796.

⁶ A. Barczak-Oplustil, M. Małecki, S. Tarapata, A. Behan, W. Zontek, *Dopuszczalność nabycia i używania w ramach kontroli operacyjnej określonego typu programów komputerowych (casus Pegasus)*, 15 February 2022, pp. 7–9; <https://kipk.pl/wp-content/uploads/2022/02/ekspertyzapegasus.pdf> (accessed: 10 May 2024).

⁷ *Pełny zapis przebiegu posiedzenia Komisji Śledczej do zbadania legalności, prawidłowości oraz celowości czynności operacyjno-rozpoznawczych podejmowanych m.in. z wykorzystaniem oprogramowania PEGASUS przez członków rady ministrów, służby specjalne, policję, organy kontroli skarbowej oraz celnoskarbowej, organy powołane do ścigania przestępstw i prokuraturę w okresie od dnia 16 listopada 2015 r. do dnia 20 listopada 2023 r. (nr 4) z dnia 15 marca 2024 r.*, Kancelaria Sejmu, Biuro Komisji Sejmowych, p. 7; <https://orka.sejm.gov.pl/zapisy10.nsf/0/F2D9E8013C0D37E5C1258AEE002C1F7F/%24File/0002610.pdf> (accessed: 26 April 2024).

installed on it to impersonate its owner, for example, to act in his name on social networks, instant messaging services, banking systems, etc.⁸ In addition, the system operator was able to modify the content stored in the device's memory, for example, by changing the content of the text messages stored there.⁹ A characteristic feature of 'Pegasus' was that it was difficult to detect because, unlike other such systems, it did not permanently write itself to the storage medium, but installed itself in the operating memory.¹⁰ Its use therefore left very few traces of infection,¹¹ so that even an expert would have difficulty distinguishing which of the data stored on the device had been introduced by the system operator and which came from the actual user of the device.¹²

The above information reinforces reservations concerning covert surveillance, which has in any event long been controversial.¹³ This is because activities of this type interfere very strongly with fundamental human rights, such as the right to respect for private life guaranteed by constitutional provisions (Article 49 of the Constitution of the Republic of Poland), as well as international provisions (Article 8 of the ECHR and Article 17 of the ICCPR). In the course of covert surveillance, such constitutional interests as family life, property, secrecy of correspondence or, more broadly, secrecy of communication, inviolability of the home, informational autonomy, and bodily integrity are often violated. These are therefore regarded as very 'aggressive' tools.¹⁴

On the other hand, however, without their use, the effectiveness of law enforcement agencies or authorities established to protect the law would be significantly reduced. Thus, there is a conflict between the need to ensure many freedoms and human rights and the need to interfere with some of them to a certain extent in order effectively to prosecute crimes, protect public safety or ensure legal order.¹⁵ However, it is difficult to imagine any state giving up tools allowing electronic surveillance, as such instruments are a response to the direction in which modern crime is developing, especially terrorism and crime related to the functioning of organised crime groups and corruption.¹⁶ The European Court of Human Rights, in a judgment of 25 May 2021, ruled that the Swedish service's use of electromagnetic signals intelligence, and therefore the interception and analysis of the content of communications carried out by millions of citizens, remained lawful.

⁸ Ibidem, p. 50.

⁹ Ibidem, p. 13.

¹⁰ Ibidem, p. 12.

¹¹ Ibidem, pp. 49–50.

¹² Ibidem, p. 35.

¹³ Cf. A. Taracha, *Czynności operacyjno-rozpoznawcze. Aspekty kryminalistyczne i prawnowodowe*, Lublin, 2006, p. 346.

¹⁴ Decision of the Supreme Court of 26 April 2007, I KZP 6/07, *OSNKW*, 2007, No. 5, item 37.

¹⁵ See P. Czarnecki, 'Czynności operacyjno-rozpoznawcze a postępowanie karne', *Palestra*, 2014, No. 7–8; <https://palestra.pl/pl/czasopismo/wydanie/7-8-2014/artykul/czynnosci-operacyjno-rozpoznawcze-a-postepowanie-karne> (accessed: 22 February 2025).

¹⁶ T. Łodziana, 'Kontrola operacyjna oraz użycie systemu Pegasus w Polsce – polemika', *Palestra*, 2022, No. 9, p. 63; <https://palestra.pl/pl/czasopismo/wydanie/9-2022/artykul/kontrola-operacyjna-oraz-uzycie-systemu-pegasus-w-polsce-polemika> (accessed: 25 April 2024).

The UK's *Investigatory Powers Act* provided for similar solutions. In France, the state services took over the EncroChat messenger and carried out large-scale interception of messages from tens of thousands of phones. In Germany, on the other hand, legislation gives the services the right to use software to break through the security of phones and computers and to read the contents of devices used by people who have not been officially charged but are only suspected of having committed a crime. Such tools are called 'Staatstrojaner', or 'state trojans', and are used for a wider range of crimes than terrorism alone.¹⁷

The possibilities offered by modern spy systems to their users necessitate a revision of previous views. In the current situation, it is no longer so much a matter of ethical resistance related to the deceitful nature of surveillance,¹⁸ but rather of the real danger of fabricating materials which are then used by authorities enjoying the protection stemming from the constitutional presumption of the legality of their actions. The flagship example here is the case of Senator Brejza, who was subjected to surveillance with 'Pegasus' as many as 33 times and had approximately 1 gigabyte of data uploaded to his phone, that is to say, the content of his phone was altered by the addition of new content.¹⁹

At this point, it should be emphasised that the term 'Pegasus' is the proper name of a specific system. It is not the only software of this type. The Polish National Public Prosecutor's Office also had, in parallel, software called 'Hermes', which was officially intended for the advanced collection and analysis of data from internet sources, but not all its functionalities have yet been examined.²⁰ Many countries have implemented various similar methods of operational work. A specialised spying system for Interpol was offered by a German company.²¹ The US Drug Enforcement Administration uses, among others, the 'Graphite' system developed by Paragon, which is able to break through the security of modern smartphones and bypass the encryption of messengers such as WhatsApp and Signal, while also extracting data from the cloud.²² The Italian secret service, in turn, used the spyware 'Hermit' in 2019.²³ Since the eponymous 'Pegasus', owing to its previously unknown functionalities, became a turning point both in the discussion of methods of information extraction by state authorities and in the procedural use of material from mobile telecommunications devices designed to connect directly or indirectly

¹⁷ P. Opitek, 'Poważnie kontrolować można nie tylko terrorystów', *Rzeczpospolita*, 20 January 2022; <https://www.rp.pl/opinie-prawne/art19306701-pawel-opitek-powaznie-kontrolowac-mozna-nie-tylko-terrorystow> (accessed: 25 April 2024).

¹⁸ R. Skowron, 'Kontrola operacyjna a ochrona praw jednostki', *Studenckie Konferencje Naukowe*, 2014, No. 4, p. 136.

¹⁹ M. Matusiak-Frącczak, 'Konwencyjne standardy...', op. cit., p. 28.

²⁰ <https://www.gov.pl/web/pr-rzeszow/komunikat-z-dnia-21-czerwca-2024r>. (accessed: 25 June 2024).

²¹ *Pełny zapis przebiegu posiedzenia Komisji Śledczej...*, op. cit., p. 14.

²² M. Fraser, 'Nie skończyć jak NSO Group. Tak producenci spyware zabiegają o przychyłność USA', *CyberDefence24*, 2 June 2023; <https://cyberdefence24.pl/biznes-i-finanse/nie-skonczyz-jak-nso-group-tak-producenci-spyware-zabiegaja-o-przychylnosc-usa> (accessed: 6 December 2024).

²³ *CyberDefence24*, 'Rządowa inwigilacja to nie tylko Pegasus. Spyware Hermit atakuje na Androidzie', 17 June 2022; <https://cyberdefence24.pl/cyberbezpieczenstwo/rzadowa-inwigilacja-to-nie-tylko-pegasus-spyware-hermit-atakuje-na-androidzie> (accessed: 6 December 2024).

to network terminations,²⁴ this term will hereinafter be used as an example of a spyware system offering the possibility of hard-to-detect interference with data stored on the terminal device.

It is significant that in Poland secret surveillance is used on a very large scale and shows an increasing trend. While in 2011 the courts granted authorisation for the interception and recording of conversations, or for operational control, in 4,863 cases,²⁵ in 2022 the number of such authorisations reached as many as 9,781. At the same time, the exact number of programmes enabling control of terminal devices in the possession of the Polish services remains unknown. However, between 2017 and 2022, three of those services used 'Pegasus' for the operational control of terminal devices in respect of 578 individuals. In 2017, this concerned 6 persons; in 2018, 100 persons; in 2019, 140 persons; in 2020, 161 persons; in 2021, 162 persons; and in 2022, 9 persons.²⁶ It is worth noting at this point that in 2017 the services applied over 9,800 times for permission for operational control, and the courts refused such applications in only 9 cases.²⁷ The Supreme Chamber of Control, having examined the period from 1 January 2017 to 31 March 2023, concluded that the current system of supervision, coordination and control of the activities of the special services in Poland is ineffective and does not correspond to the standards in force in democratic states governed by the rule of law and, in particular, does not ensure effective supervision over the implementation of the tasks of the services and does not guarantee that, in the course of their implementation, the applicable laws will be observed and civil rights and liberties will be respected.²⁸

Objections to the use of spyware for the purpose of acquiring evidence intended for use in criminal proceedings are, to a large extent, related precisely to the problem of insufficient judicial oversight over covert surveillance carried out by the special services. Indeed, while in 2013 Polish solutions in this regard were considered very restrictive compared with those of other European countries,²⁹ in the following years the standards of guarantee, and consequently the requirements for this type of activity, increased significantly. In a judgment of 4 May 2000, the European Court of Human Rights emphasised that covert surveillance systems must contain legal (procedural) guarantees applicable to the oversight of the activities of the

²⁴ See Article 2(43) of the Act of 16 July 2004 – Telecommunications Law, Journal of Laws 2024, item 34.

²⁵ Source: official website of the Public Prosecutor's Office, www.pg.gov.pl (accessed: 7 September 2012).

²⁶ M. Kowalewski, 'Sąd Najwyższy zgodził się na stosowanie Pegasus', *Salon24*, 24 April 2024; <https://www.salon24.pl/newsroom/1374074,sad-najwyzszy-zgodzil-sie-na-stosowanie-pegasusa> (accessed: 4 June 2024).

²⁷ P. Rojek-Socha, 'Kontrola operacyjna – sądy weryfikują to co służby chcą?', *Prawo.pl*, 19 July 2018; <https://www.prawo.pl/prawnicy-sady/jak-sady-weryfikuja-wnioski-o-kontrolę-operacyjną,263148.html> (accessed: 22 February 2025).

²⁸ J. Ojczyk, 'Służby podsłuchują nas bez kontroli, bo pozwala na to prawo. Potwierdził to europejski trybunał', *Business Insider*, 28 May 2024; <https://businessinsider.com.pl/prawo/europejski-trybunał-praw-człowieka-wyda-wyrok-w-sprawie-inwigilacji-w-polsce/3b3e4kh> (accessed: 4 June 2024).

²⁹ J. Mała, 'Kontrola operacyjna i podsłuch – ocena na tle praktycznego stosowania', *Przełęcz Bezpieczeństwa Wewnętrznego*, 2011, No. 4, p. 58.

relevant services. According to the Court, the oversight procedures must adhere as closely as possible to the values of a democratic society, and in particular to the principle of the rule of law. This, in turn, presupposes that interference by the executive authorities with individual rights should be subject to effective oversight.³⁰ In the cases of *Pietrzak and Bychawska-Siniarska et al. v. Poland*, the European Court of Human Rights noted the lack of sufficient legal guarantees of protection against arbitrariness and abuse in the sphere of operational control, data storage and access to communication data.³¹ Every state, and therefore its authorities, must act on the basis of and within the limits of the law, and may not take arbitrary action. Any interference by the state, and thus also electronic interference, with the guarantees of individual rights must be based on the principle of proportionality.³²

The Polish Constitutional Court has also taken the position that the legislator, in the light of Article 2 of the Constitution, has a constitutional obligation to define the prerequisites for interference in the sphere of privacy as precisely as possible, so as to limit the scope of the discretion left to bodies applying the law, and at the same time is obliged to create appropriate mechanisms for the oversight of acts of public authorities affecting this sphere. When it comes to the restriction of the constitutional freedoms and rights of a human being and a citizen, legislation must be characterised by due precision and clarity. This injunction is functionally related to the principles of legal certainty and security, and to the protection of confidence in the state and the law.³³ In another judgment, the Court stated that an important criterion for assessing the admissibility of equipping a public authority with the power to carry out operational and control activities is the assessment of the functionality of specific activities from the perspective of the tasks carried out by a given authority and the absence of any possibility of the effective performance of those tasks without specific powers in the sphere of operational and control activities. In both these cases, the obligation to demonstrate such expediency and necessity rests with the legislator.³⁴ On the other hand, in the justification of the judgment of 20 April 2004, the Court indicated that, in the light of the Constitution, the services responsible for security and public order cannot be regarded as having autonomy in the sphere of operational activities. It is therefore not possible, by invoking the requirement of the effectiveness of operational activity, to exclude it from any oversight. Therefore, this activity is not excluded from the limitations which the Constitution imposes on all authorities encroaching upon the sphere of the individual's fundamental rights and freedoms, especially as, by undertaking operational and exploratory activities, police authorities encroach secretly upon the sphere of civil rights and freedoms, as required by the purpose of those activities.

³⁰ *Rotaru v. Romania*, Case No. 28341/95.

³¹ Judgment of 28 May 2024, Chamber (Section I), application nos. 72038/17 and 25237/18.

³² See ECtHR judgment of 7 February 2017 in *Irfan Guzel v. Turkey*, application no. 35285/08, para. 86; ECtHR judgment of 12 January 2016 in *Szabo and Vissy v. Hungary*, application no. 37138/14, paras. 70–72; ECtHR judgment of 4 December 2015 in *Zakharov v. Russia*, application no. 47143/06, para. 260.

³³ Judgment of the Constitutional Court of 20 June 2005, K 4/04, OTK-A 2005, No. 6, item 64.

³⁴ Judgment of the Constitutional Court of 17 June 2008, K 8/04, OTK-A 2008, No. 5, item 81.

Such specificity of the said activities requires them to be subjected to a well-thought-out system of oversight: effective and not merely a facade, while certain activities should be applied only to the extent necessary for the realisation of constitutional goals and in a manner characterised by the least possible degree of intrusion for citizens and by the application of specific procedures. Otherwise, the democratic state governed by the rule of law would effectively become a police state.³⁵ In accordance with this view, the Court of Appeal in Wrocław, in its judgment of 11 May 2023, expressed the opinion that where the court deciding on the accused's criminal liability has no possibility of verifying whether the operational control was lawfully ordered, the evidence obtained as a result must be assessed in the light of the primacy of the norm expressed in Article 5 § 2 of the Code of Criminal Procedure (CCP). Acceptance of a different position would mean that judicial oversight over operational and exploratory activities is in fact illusory and merely a facade, while officers of the competent services conduct these activities and at the same time themselves decide whether they are legal, and whether the materials obtained as a result thereof may be used in the trial.³⁶ What is more, under the current state of the law, a person under surveillance has no knowledge of the operational activities conducted against them, owing simply to the lack of access to relevant documents or data sets. Unless an indictment is brought against them, that person does not acquire such knowledge even after the completion of the operational activities, and is thus subjected to arbitrary action by the authorities over which they have no influence. Even if they were to acquire such knowledge, they cannot demand an effective review of the legality and reliability of the operational activities carried out, which violates the individual's right to information under Article 51(3) of the Constitution of the Republic of Poland and, consequently, precludes the possibility of lodging a complaint with the court pursuant to Article 78 of the Constitution of the Republic of Poland.³⁷

In the light of the above-mentioned judgments and the current legal regulation, it remains particularly pertinent that, despite the exceptionally far-reaching capabilities of the 'Pegasus' system, the court, when considering an application for permission to conduct operational control, does not obtain knowledge of the technical aspects of the planned undertakings and thus, unless it conducts additional explanatory proceedings, will not know what tools the special services intend to use to carry out the requested control. Having possibly given its consent, it also does not have at its disposal any instruments for the ongoing supervision of the course of the control conducted, which at this stage is left to the exclusive discretion of the special services. In such a context, the systemic legal principle of legality, stemming

³⁵ Judgment of the Constitutional Court of 20 April 2004, K 45/02, OTK-A 2004, No. 4, item 30.

³⁶ Judgment of the Court of Appeal in Wrocław of 11 May 2023, II AKa 480/21, LEX no. 3652572.

³⁷ R. Rynkun-Werner, 'Kontrola operacyjna bez kontroli – kilka refleksji na kanwie postanowienia Trybunału Konstytucyjnego z 28.06.2022 r. (SK 60/21)', *Palestra*, 2023, No. 4; <https://palestra.pl/pl/czasopismo/wydanie/4-2023/artukul/kontrola-operacyjna-bez-kontroli-kilka-refleksji-na-kanwie-postanowienia-trybunalu-konstytucyjnego-z-28.06.2022-r.-sk-60-21> (accessed: 22 February 2025).

from Article 7 of the Constitution of the Republic of Poland, assumes particular significance, imposing certain obligations both on public authorities applying the law and on those enacting it, on the basis of the relevant competence, procedural and substantive provisions. The point, however, is that Article 7 of the Constitution also forms the basis for the legal presumption that actions taken by state authorities comply with the law.³⁸ And although this presumption is rebuttable, the party advancing the thesis of an infringement of the law by a sovereign act of public authorities is, as a rule, obliged to demonstrate that the given action went beyond the framework provided by law,³⁹ which, in view of the secret nature of the actions of the secret services, will in most cases be an impossible task.

The functionality of 'Pegasus', which allows the modification of data stored on the terminal device or even the implantation of data into the device's memory, that is to say, interference by the system operator with the content of the data stored on the terminal device, in the absence of effective judicial oversight of the course of surveillance, necessitates a change in the approach to all material originating from terminal devices, and in particular to the possibility of its use as evidence in a criminal trial. When securing a data carrier, as a general rule, a binary copy is first made, after connecting a suitable write blocker to prevent overwriting and modification of the secured data, from which a checksum is calculated in order to ensure that the data analysed by the expert is the same as the data on the secured carrier and that no change in the data occurs as a result of the analysis undertaken. However, such action is irrelevant if the data on the device is changed before the copy is made. A situation in which software is installed on the device (the 'Pegasus' agent), giving its user the ability to modify the data stored there before the device is officially secured for the purposes of the investigation, affects the assessment of the reliability of the material contained therein.⁴⁰ The ability to edit data stored on the device, initiate calls, exchange messages or send messages, or use the phone owner's social media accounts results in data from the mobile device appearing to have limited procedural usefulness. Even if one considers that this does not yet disqualify such evidence, it certainly undermines the conclusion that until now has generally been taken for granted, namely that the information secured from the terminal device was created by its user or by the persons with whom he or she exchanged it. Now, whenever this data is challenged, there must be justified doubt as to by whom the secured material was introduced into the terminal device.⁴¹ It is

³⁸ See resolution of a panel of seven judges of the Supreme Court of 9 October 2007, III CZP 46/07, or judgment of the Supreme Court of 20 May 2011, IV CSK 563/10, in relation to administrative decisions; decision of the Supreme Court of 11 April 2014, I CSK 324/13, in relation to court records; judgment of the Supreme Administrative Court of 10 October 2013, I OSK 1573/13, in relation to the validity of court decisions; or judgment of the Supreme Court of 8 January 2014, IV KK 183/13, and judgment of the NSA of 13 September 2013, II FSK 2644/11, in relation to the independent refusal of public authorities to apply the applicable law.

³⁹ M. Zubik, W. Sokolewicz, in: Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa, 2016, Article 7.

⁴⁰ A. Barczak-Oplustil, M. Małecki, S. Tarapata, A. Behan, W. Zontek, *Dopuszczalność...*, op. cit., p. 46.

⁴¹ Cf. D. Drajewicz, 'Dowodowe wykorzystanie wyników kontroli operacyjnej w postępowaniu karnym', *Prokuratura i Prawo*, 2010, No. 7–8, p. 177, and the footnotes cited therein.

difficult to imagine that this will not affect trial practice, which has often accepted information from the memory of smartphones and similar devices as the primary source of information about the circumstances of an incident. Meanwhile, in the current situation, such material can only remain the basis for the conclusion that specific content found its way onto the terminal device, while the assumption that it was introduced by the user of that device requires the authorities to carry out separate procedural findings that categorically exclude the possibility that this occurred through third parties.

Pursuant to Article 2 § 2 CCP, the basis for all decisions in a criminal trial should be true factual findings. In view of the directive contained in Article 5 § 2 CCP, making material from terminal devices the basis for findings unfavourable to the accused therefore requires an examination of whether there has been any external interference with the data contained therein. This means that, in order not to violate the criteria of a fair trial, in the event of any objections to the authorship of the secured data, the trial authorities are faced with the necessity, at the very least, of admitting evidence in the form of an expert opinion from an IT specialist in any proceedings in which a conviction would be based on material from the terminal device. Regardless of the expert findings, however, it must be borne in mind that the 2019 version of the 'Pegasus' software left very few traces of infection. It may be assumed, with confidence bordering on certainty, that it has undergone further development since then and that the instruments used to examine the terminal device may fail to detect its latest versions.⁴² This circumstance provides a weighty argument for the need for trial authorities to exercise great caution as to the reliability of data from terminal devices, up to and including deprecating it as a source of trial findings, because of the real risk of arbitrariness and abuse.

In summary, advances in covert information-acquisition methods, exemplified by the titular 'Pegasus', have given rise to legitimate concerns about the reliability of evidence obtained from devices vulnerable to attacks carried out by such systems. State authorities have thus, on the one hand, gained very effective surveillance tools that allow for the effective identification of criminal environments and the targeting of preventive actions and possible trial activities, but, on the other hand, as a consequence of technological development in a manner that gives the system operator the possibility of interfering with the content of the data stored on the device, reservations have arisen concerning the trial use of data from terminal devices. This does not reflect negatively on the spyware itself, but rather on its use contrary to the purpose intended by its creators. Indeed, the system was developed as a tool for active intelligence work and was intended for the operational collection of information, regardless of the aspect of its subsequent evidential use.⁴³

In the absence of a legal framework ensuring full judicial supervision over the course of operational control, a situation in which there is no possibility of determining unequivocally who – that is to say, whether it was the subject of surveillance or the

⁴² A. Barczak-Oplustil, M. Małecki, S. Tarapata, A. Behan, W. Zontek, *Dopuszczalność...*, op. cit., p. 45.

⁴³ *Pełny zapis przebiegu posiedzenia Komisji Śledczej...*, op. cit., p. 46.

operator of the spying system – placed, modified or removed specific content from the device, must lead to the conclusion that the use of such material as a source of findings unfavourable to the accused would mean that the criminal trial, assessed as a whole, could not be considered fair in the light of Article 45 of the Constitution of the Republic of Poland and Article 6(1) of the ECHR.⁴⁴ *De lege ferenda*, it should be postulated that solutions in the area of operational and exploratory activities should take into account national and European safeguard standards and ensure effective, ongoing judicial supervision over the course of their implementation by state services, along with a mechanism for eliminating unlawfully collected data.

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⁴⁴ M. Matusiak-Frącczak, 'Kontrola operacyjna oraz użycie systemu Pegasus w Polsce', *Palestra*, 2022, No. 7–8, pp. 19–20.

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Cite as:

Kościelniak-Marszał M. (2026), *Pegasus Software and Fair Criminal Proceedings*, *Ius Novum* (Vol. 20) 2, 42–53. DOI 10.2478/in-2026-0016

CRIMINAL LIABILITY OF JUVENILES IN ANCIENT ROME

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DOI 10.2478/in-2026-0017

ABSTRACT

In 2022, the Act on the Support and Rehabilitation of Juveniles was enacted. It introduced new age limits determining the responsibility of minors for criminal acts. In the ongoing public debate on these regulations, legal-historical arguments have been lacking. The aim of this article is to present the principles of criminal responsibility in Roman law, with particular focus on juveniles. The research was carried out on preserved source material using the dogmatic method, which presupposes a logical-linguistic analysis of the source text, taking into account the principles of interpretation, and the historical-legal method, which serves to show the genesis and development of the institution in question. The analyses carried out show that, in Roman law, the perpetrator's awareness and understanding of the act committed were of greater importance for criminal responsibility than merely having automatically crossed a particular age threshold. The considerations presented are not only significant for the history of law, but also constitute a – hitherto neglected – voice in the discussion on the criminal responsibility of minors in contemporary Polish law.

Keywords: criminal responsibility, age, Roman law, juvenile

PRELIMINARY REMARKS

On 9 June 2022, the legislature adopted the Act on the Support and Rehabilitation of Juveniles (Journal of Laws 2022, item 1700), which replaced the previously applicable Act of 26 October 1982 on Proceedings in Juvenile Matters (Journal of Laws of 2018, item 969, and of 2022, item 1700). One of the many changes brought

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about by this Act was the introduction of new rules on juvenile liability, including the establishment of new age limits from which a juvenile may be held liable.

Under the provisions of the Act on the Support and Rehabilitation of Juveniles, the status of a juvenile is held by three different age groups of children and adolescents. In terms of demoralisation proceedings, the status of a juvenile is held by persons who display some manifestation of demoralisation after reaching the age of 10 and before reaching the age of majority. In the field of proceedings concerning a criminal act, the status of a juvenile is held by persons who have committed such an act between the ages of 13 and 17. In the field of the execution of educational measures, a therapeutic measure or a correctional measure, the status of a juvenile is held by persons in respect of whom the court has ordered such a measure, but no longer than until the day corresponding to the date of their 21st birthday, unless otherwise provided by law.¹

Almost concurrently with the introduction of the new law regulating the responsibility of minors, on 7 July 2022, the Act amending the Penal Code and Certain Other Acts was passed (Journal of Laws of 13 December 2022, item 2600), by virtue of which the content of Article 10 of the Penal Code, providing for the age limits of criminal responsibility, was amended.

The rule that a person who commits an offence after reaching the age of 17 is liable under the terms of the Criminal Code has remained unchanged. However, the catalogue of offences for which a minor is criminally liable after reaching the age of 15 has been expanded. Thus, such a juvenile may be held liable under the principles set out in the Criminal Code if the circumstances of the case and the degree of development of the perpetrator, his or her personal characteristics and conditions support this, and, in particular, if the previously applied educational or corrective measures have proved ineffective, where he or she has committed a criminal act defined in Article 134, Article 148 § 1, 2 or 3, Article 156 § 1 or 3, Article 163 § 1 or 3, Article 166, Article 173 § 1 or 3, Article 197 § 1, 3, 4 or 5, Article 223 § 2, Article 252 § 1 or 2 and Article 280 of the Penal Code. A novelty has been the addition of a rule according to which a minor who, after reaching the age of 14 and before reaching the age of 15, commits a criminal act referred to in Article 148 § 2 or 3 of the Code of Criminal Procedure, may be held liable according to the rules set out in that Code if the circumstances of the case and the degree of development of the perpetrator, his or her personal characteristics and conditions support this, and there is a justified assumption that the application of educational or corrective measures is not capable of ensuring the rehabilitation of the minor. In addition, the rule on sentencing juvenile offenders has been modified, assuming that, where a juvenile has committed one of the most serious offences from the above catalogue, the sentence imposed may not exceed two thirds of the upper limit of the statutory penalty provided for the offence attributed to the offender, which is not punishable by life imprisonment. However, the court may apply extraordinary mitigation of punishment. The principle according to which, in relation to an offender who has

¹ V. Konarska-Wrzosek, 'Komentarz do art. 1', in: Górecki P., Kobes P., Konarska-Wrzosek V. (eds), *Wspieranie i resocjalizacja nieletnich. Komentarz*, Warszawa, LEX/el., 2023, Article 1, comment 1.

committed a misdemeanour after reaching the age of 17 but before reaching the age of 18, the court shall apply educational, therapeutic or correctional measures provided for minors instead of punishment, if the circumstances of the case and the degree of development of the offender, his or her characteristics and personal conditions support it, remains unchanged.

Even before the above-mentioned provisions came into force, there was a heated discussion at the draft law stage about the age limits to be applied to juvenile responsibility. Various ideas were put forward, and it was proposed that juvenile criminal responsibility be made dependent on different age limits.² Unfortunately, this discussion lacked historical-legal arguments. The circumstance that the history of law is a carrier of experience gained by predecessors who had to solve the same or similar problems was overlooked. Referring to historical arguments is not about copying previous solutions, because such an approach is obviously impossible, but about reaching for and benefiting from this experience. W. Uruszczak rightly pointed this out when he wrote that

‘When revealing the past in the sphere of law, [the history of law] does so not out of idle curiosity, but always with the intention of passing on to contemporary and future generations the actual historical experience in the sphere of law and the consequences of its application in a specific place and time’.³

Leaving aside the legal-historical arguments, it seems as though the fact that the issue of juvenile responsibility has preoccupied lawyers for as long as the concept of a criminal act has existed, i.e. in fact since time immemorial, has been ignored. Nor has this issue been alien to Polish law.⁴

The attention of this study focuses on the principles of criminal responsibility in Roman law. The ancient Romans, like modern jurists, were concerned with the issue of a person’s age and the imputability of responsibility for criminal acts. In the current discussion on the optimal model of juvenile criminal responsibility, their voice must also be taken into account. This is particularly so because Roman jurists did not see the law in systemic terms, but viewed it casuistically. Therefore, in the ongoing discussion, it is essential to understand the thought process and argumentation that Roman jurists adopted for their legal solutions.

² For example: *Opinia Rzecznika Praw Obywatelskich do projektu ustawy o wspieraniu i resocjalizacji nieletnich (projekt z 20.07.2021 r.)*, No. KMP.022.1.2021.RK; *Opinia Biura Analiz Dokumentacji i Korespondencji Kancelarii Senatu do ustawy o wspieraniu i resocjalizacji nieletnich (druk senacki nr 741)*, No. OE-408; *Opinia Naczelnej Rady Adwokackiej do projektu ustawy o wspieraniu i resocjalizacji nieletnich*, No. NRA.145-U.1.2021.

³ A. Zakrzewski, ‘Czemu ma obecnie służyć historia prawa, co jej grozi?’, *Miscellanea Historico-Iuridica*, 2011, Vol. X, p. 36, and cited therein: W. Uruszczak, ‘Tradycja w historii prawa’, *Zagadnienia Naukoznawstwa*, 2002, Vol. XXXVIII, No. 3 (153), p. 429.

⁴ The analyses carried out show that particular approaches and legal solutions evolved; however, sometimes newly introduced legal acts contained references to those previously in force. For example, the Criminal Code of 1932 provided for the criminal liability of a minor who, after the age of 13 but before the age of 17, committed a criminal act with discernment, cf. E. Jurgielewicz-Delegacz, ‘Ewolucja odpowiedzialności nieletnich na przestrzeni lat’, *Studia Prawnoustrojowe*, 2019, No. 4, p. 185.

The aim of the present article is to examine how criminal responsibility was shaped in Roman law and what arguments determined the adoption of a certain age as the limit for incurring such responsibility. It is necessary to examine up to what age there could be no criminal responsibility, at what age such responsibility was conditional, and from when it was borne in full. In this way, or at least it is to be hoped, a Roman voice, of whose authority no one needs to be convinced, will be heard in the discussion of current legal solutions concerning the criminal responsibility of minors.

PRINCIPLES OF CRIMINAL LIABILITY IN ROMAN LAW

In Roman law, unlawful acts were generally divided into private (*delicta*), and public (*criminal*) acts.⁵ Torts were seen as violations of the interests, most often property and personal interests, of private persons, and these cases were cognisable through the civil route, while criminal offences were regarded as acts dangerous to the order of the state and were cognisable through the criminal process. Over time, the Roman theory of torts led to their eventual systematisation and division into civil-law torts: *furtum* (theft), *rapina* (robbery), *damnum iniuria datum* (unlawful infliction of damage), *iniuria* (insult) and praetorian law torts: *dolus* (deceit), *metus* (unlawful threat), and *fraus creditorum* (acting to the detriment of creditors).⁶

The rules of Roman tort liability – in principle – also applied to criminal liability.⁷ The basis for the attribution of this liability was the demonstration of the offender's intention. As reported by K. Amielańczyk,⁸ in the case of liability for *crimina, voluntas*, i.e. precisely the intention to commit a criminal act, still identified with the archaic *sciens dolo malo*, that is, the perpetrator's fully conscious action as to both fact and law, was of significance. This shows that, in Roman law, the condition for a minor's responsibility was his or her understanding of the nature of the act committed. The research carried out shows that, in the extant source material on

⁵ On the distinction between private-law torts and public-law offences, cf. C. Cascione, 'Roman Delicts and Criminal Law: Theory and Practice', in: McGinn T.A. (ed.), *Obligations in Roman Law: Past, Present, and Future*, Ann Arbor, 2012, pp. 267–296; G. Longo, *Delictum e crimen*, Milano, 1976, p. 180; E. Albertario, *Delictum e crimen nel diritto romano-classico e nella legislazione giustiniana*, Milano, 1924, p. 74; F. Lucrezi, G. Mancini, *Crimina e delicta nel tardo antico. Atti del Seminario di Studi. Teramo, 19–20 gennaio 2001*, Milano, 2003, pp. 17 et seq. See also K. Amielańczyk, 'Vis – pomiędzy prawem rzymskich deliktów prywatnych a rzymskim prawem karnym publicznym', in: Słapek D., Łuc I. (eds), *Przemoc w świecie starożytnym: źródła, struktura, interpretacje*, Lublin, 2017, pp. 283–298. More recently, also historically, on the example of German law, cf. P. Hellwege, P. Wittig, 'Delictual and Criminal Liability in Germany', in: Dyson M. (ed.), *Comparing Tort and Crime: Learning from across and within Legal Systems*, Cambridge, 2015, pp. 123–172.

⁶ On tort theory in Roman law, cf. B.W. Frier, *A Casebook on the Roman Law of Delict*, Oxford, 1989, p. 267; P. Birks, *The Roman Law of Obligations*, Oxford, 2014, pp. 158–258.

⁷ M. Kuryłowicz, 'Odpowiedzialność "nieletnich" za czyny bezprawne w prawie rzymskim', in: Bojarski T. (ed.), *Postępowanie z nieletnimi*, Lublin, 1988, p. 13. See also G. Longo, *Delictum...*, op. cit., p. 175; J.A.C. Thomas, 'Delictual and Criminal Liability of the Young in Roman Law', in: Société Jean Bodin pour l'histoire comparative des institutions (ed.), *L'enfant. Recueils de la Société Jean Bodin pour l'histoire comparative des institutions*, Vol. XXXVIII, 1977, pp. 25–26.

⁸ K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin, 2006, p. 134.

crimina responsibility, there was a preponderance of texts which used age categories, namely *infantes*, *impuberes* and *puberes*, defining children, immature persons and mature persons, rather than specific age limits.⁹ These categories were initially not assigned strict age limits, and it was only in Justinian law, that is, from the sixth century AD, that specific numerical values were introduced, corresponding to the style of contemporary legislators. It was then accepted that children (*infantes*) were defined as persons up to the age of 7, immature (*impuberes*) as persons from 7 to 12 in the case of girls and to 14 in the case of boys, and mature (*puberes*), as those who had exceeded these limits.¹⁰

CRIMINAL LIABILITY OF CHILDREN (INFANTES) UNDER 7 YEARS OF AGE

Starting with the first of the basic age categories, that is, children (*infantes*), in view of the requirement of *voluntas* as a basis for liability for *crimina*, they were excluded from such liability.¹¹ This was mentioned by Modestinus in his commentary on the *lex Cornelia de sicariis et veneficis*, the law of Cornelius Sulla against knifemen and poisoners of 81 BC:¹²

D. 48, 8, 12, Modestinus libro octavo regularum; *Infans vel furiosus si hominem occiderint, lege Cornelia non tenentur, cum alterum innocentia consilii tuetur, alterum fati infelicitas excusat.*

In the above opinion, the jurist expressed the view that children and the mentally ill were not criminally responsible for killing a human being under the law in question.¹³ In the case of children, *innocentia consilii*, that is, innocence of intention, or thought, was in their favour. Modestinus therefore drew attention to the impossibility of attributing deliberate intention to children because of the insufficient capacity at that age to understand the legal meaning of their actions.¹⁴ It is also worth noting that, in criminal law, the jurist referred to the rule, also developed in civil law, of treating children on an equal footing with the mentally ill, precisely because of their shared lack of capacity to understand the meaning of an act, whether tortious or prohibited, and legal actions (G. 3, 109; D. 44, 7, 1, 12–13; I. 3, 19, 10). This is also the view, in both tort and criminal liability of children, that has been endorsed in the literature.¹⁵

⁹ Cf. W. Rein, *Das Criminalrecht der Römer von Romulus bis auf Justinian. Ein Hilfsbuch zur Erklärung der Classiker und der Rechtsquellen*, Leipzig, 1844, pp. 206–208.

¹⁰ W.J. Kosior, *Kategorie i granice wieku oraz ich znaczenie w rzymskim prawie prywatnym*, Rzeszów, 2022, pp. 77–124.

¹¹ J. Hillner, *Prison, Punishment and Penance in Late Antiquity*, Cambridge, 2015, p. 59.

¹² Cf. K. Amielańczyk, *Lex Cornelia de sicariis et veneficis: Ustawa Korneliusza Sulli przeciwko nożownikom i trucicielom 81 r. p.n.e.*, Lublin, 2011, p. 222.

¹³ A. Burdese, 'Sulla capacità intellettuale degli *impuberes* in diritto classico', *Archivio Giuridico*, 1956, Vol. 150, p. 27.

¹⁴ M. Kuryłowicz, 'Odpowiedzialność "nieletnich" ...', op. cit., p. 11.

¹⁵ B. Perrin, 'La responsabilité délictuelle de l'impubère en droit romain classique', *Annales Universitatis Saraviensis*, 1954, No. 3, p. 244; J.M.T. Labuschagne, 'Strafregtelike aanspreeklikheid van kinders', *Journal of South African Law*, 1978, pp. 251 et seq.; A. Diaz Bialek, 'La imputabilidad

CRIMINAL LIABILITY OF IMMATURE PERSONS (IMPUBERES)
AGED 7 TO 12 AND 14 YEARS

In the case of criminal liability of immature persons (*impuberes*), the same rules applied in practice as in the case of torts, with the difference that the individual existence of awareness of the act committed was no longer considered as often. In tort, immature persons were not treated uniformly, but in each case it had to be examined whether there was *capacitas*, that is, the capacity to understand the meaning of the tort, on their part. Hence, Roman legal practice made a division of immature persons into those *infantiae proximi*, who, although they had emerged from childhood, were still close to it and thus not liable for wrongful acts, and those *pubertati proximi*, who had not yet reached formal maturity but were very close to it in age. For tort liability of the latter, what mattered was whether they were aware of their actions and consequences at the time of the act, that is, whether they were *doli / iniuriae / culpa / capax*; if they were, then they were liable, whereas when it was proven that they did not have this awareness, they were exempted from such liability.¹⁶ In the case of criminal law, on the other hand, we can identify sources that point to the general exclusion of the responsibility of immature persons and to the recognition that, as a rule, they lacked discernment and awareness of the offence they were committing, as well as sources which, however, required an individual assessment of each case and an examination of such awareness.¹⁷

In archaic law, immature persons were not liable for offences for which the main penalty was provided:¹⁸

Tab. 8, 9; *Frugem quidem aratro quaesitam noctu pavisse ac secuisse puberi XII tabulis capital erat, suspensumque Cereri necari iubebant , impubem praetoris arbitratu verberari noxiamve duplionemve decerni.*

The passage quoted from the Law of the Twelve Tables refers to the offence of destroying agricultural crops, which in those days, when the early Roman economy was based on agriculture, was punishable by the highest possible penalty, namely death. In the case presented here, the act consisted in cutting down crops or grazing cattle in a cultivated field under cover of darkness. When the perpetrator was a mature person, the punishment was death by hanging. However, when the act was committed by an immature person, he could be sentenced, at the praetor's discretion, to flogging or could be held liable for damages.¹⁹ An analysis of the

penal en el derecho romano', *Revista de la Sociedad Argentina de Derecho Romano*, 1954, Vol. 1, pp. 13–30.

¹⁶ On the tort liability of immature persons in Roman law, cf. W.J. Kosior, *Kategorie i granice...*, op. cit., pp. 346–356.

¹⁷ On the evolution of views on the criminal responsibility of immature persons, taking into account Roman solutions, cf. T. Crofts, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law*, Aldershot, 2002, pp. 93 et seq.

¹⁸ R. Świrgoń-Skok, 'Wiek a wymiar kary w rzymskim prawie karnym', *Annales Universitatis Mariae Curie-Skłodowska, sectio G*, 2024, Vol. 71, No. 3, pp. 110 et seq.

¹⁹ M. Zabłocka, J. Zabłocki, *Ustawa XII Tablic. Tekst. Tłumaczenie. Objaśnienia*, Warszawa, 2003, pp. 54–55.

text in question shows that an immature person could not be sentenced to the main punishment, i.e. he could not be held fully responsible for his act, but neither did he remain completely unpunished, since the law provided for the sanctions described in relation to him.²⁰ Their nature, especially the punishment of flogging, rather points to their educative and preventive purpose, which makes it possible to note that already in archaic law the necessity of taking into account the position of immature persons, who may not have been aware of the significance of their acts, was recognised.²¹ It was therefore left to the discretion of the praetor to assess each case in which the offender was immature.

The issue in question was described more extensively in classical law by Ulpianus:

D. 21, 1, 23, 2, Ulpianus libro primo ad edictum aedilium curulium; *Excipitur etiam ille, qui capitalem fraudem admisit. Capitalem fraudem admittere est tale aliquid delinquere, propter quod capite puniendus sit: veteres enim fraudem pro poena ponere solebant. Capitalem fraudem admisisse accipiemus dolo malo et per nequitiam: ceterum si quis errore, si quis casu fecerit, cessabit edictum. Unde Pomponius ait neque impuberem neque furiosum capitalem fraudem videri admisisse.*

In the quoted opinion, the jurist explained what an offence punishable by the main sanction was and what that sanction consisted of. He added that it involved the death penalty, which was imposed for certain crimes when they were committed with malice aforethought and out of wickedness (*dolo malo et per nequitiam*). He also pointed out that previously, a given crime was defined by reference to the penalty prescribed for it. In the last sentence of his opinion, the jurist referred to Pomponius' view, according to which immature persons and the mentally ill could not commit an offence punishable by a major penalty. The text thus drew attention to the intention to commit the crime, and yet intention is nothing more than the mental attitude of the perpetrator towards the act, linked to awareness of the act. By citing the opinion of Pomponius, the incapacity of immature persons to act with intent was highlighted, since, according to the assumption, there was a lack of discernment on their part as to the crime being committed. In addition, it is also noteworthy that Pomponius practically put an equal sign between immature persons and the mentally ill when it came to criminal responsibility, yet this approach was characteristic when talking about the culpability of a child. Equating immature persons with the mentally ill, and at the same time with children, could indicate that the question of intention and awareness of the meaning of the act was approached more rigorously in the case of crimes than in the case of torts.²² Namely, it would indicate that immature age was

²⁰ J.E. Gaughan, *Murder Was Not a Crime: Homicide and Power in the Roman Republic*, Austin, 2010, pp. 62–64.

²¹ Cf. M.F. Cursi, 'La formazione delle obbligazioni "ex delicto"', *Revue internationale des droits de l'antiquité*, 2011, No. 58, p. 144.

²² Y. Rivière, 'La délinquance juvénile dans l'Empire romain', in: Bardet J.-P., Luc J.-N., Robin-Romero I., Rollet C. (eds), *Lorsque l'enfant grandit: entre dépendance et autonomie*, Paris, 2003, p. 854.

considered in criminal cases as a circumstance that, in principle, already excluded the perpetrator's responsibility.²³

Paulus wrote in a similar way about the criminal responsibility of immature persons:

D. 48, 10, 22, pr., Paulus libro singulari ad senatus consultum Libonianum; *Impuberem in hoc edictum incidere dicendum non est, quoniam falsi crimine vix possit teneri, cum dolus malus in eam aetatem non cadit.*

In this case, a jurist commenting on a resolution of the *senatus consultum Libonianum* of 46 BC, which, among other things, criminalised the offence of will forgery, pointed out that immature persons were not liable under this act, since at their age bad intention (*dolus malus*) did not occur.²⁴

Ulpianus wrote equally categorically about the exclusion of criminal liability of immature persons when discussing the crime of desecration of a tomb:²⁵

D. 47, 12, 3, 1, Ulpianus libro 25 ad edictum praetoris; *Prima verba ostendunt eum demum ex hoc plecti, qui dolo malo violavit. Si igitur dolus absit, cessabit eiusdem. Personae igitur doli non capaces, ut admodum impuberes, item omnes, qui non animo violandi accedunt, excusati sunt.*

In describing the offence of malicious desecration of a grave, the jurist held that those who were unable to understand that the act was prohibited, or malicious, were not criminally liable, and it was immature persons who were given as an example here. As if by definition, he acknowledged that immature persons lacked such awareness.

An analogous consideration of the criminal liability of immature persons is found in imperial legislation dedicated to the offence of coin counterfeiting:

CTh. 9, 21, 4, 1, Idem a. Helpidio; *Viduas autem ac pupillos speciali dignos indulgentia credidimus, ut viduae nec in proximo constitutae domo sua vel possessione careant, si nulla apud ipsas tan gravis conscientiae noxa resideat, pupilli vero etiam si conscii fuerint, nullum sustineant detrimentum, quia aetas eorum, si tamen fuerint impuberes, quid videat ignorat.*

In the above-mentioned constitution of Emperor Constantine of 321, the consideration concerned the criminal failure to report the commission of the crime of coin forgery. It specified that immature persons who became aware of the counterfeiting of coins did not incur such liability, because their age meant that they were unable to understand what they had seen. In this case, it was once again indicated that immature persons were not aware of the significance of the crime, and hence were excluded from criminal liability.²⁶ This imperial decree was subsequently incorporated into the Justinian Code (C. 9, 24, 1, 6).

²³ J. Hillner, *Prison, Punishment...*, op. cit., pp. 59–60.

²⁴ B. Albanese, 'Sul senatoconsulto Liboniano', *Annali del Seminario Giuridico di Palermo*, 1976, Vol. 36, pp. 288 et seq.

²⁵ Cf. M. Jońca, *Przestępstwo znieważenia grobu w rzymskim prawie karnym*, Lublin, 2013, p. 466; K. Mokrzevska, 'Profanacja grobu w prawie rzymskim', in: Braniewicz O., Kowalczyk P. (eds), *Aspekty społeczno-prawne rozwoju antycznego Rzymu*, Toruń, 2014, pp. 43–53.

²⁶ O.F. Robinson, *The Criminal Law of Ancient Rome*, Baltimore, 1995, p. 88.

An analysis of the source material presented above shows that immature age, in principle, already constituted a circumstance excluding the criminal liability of the offender. In particular, in the case of *crimina*, it was no longer necessary to consider so frequently whether the immature person was *pubertati proximus* and possibly *doli capax*; rather, immature persons were generally considered not yet capable of discernment, which excluded them from criminal responsibility. This was also the position taken by M. Kuryłowicz.²⁷ A slightly different opinion was presented by K. Amielańczyk,²⁸ who stated that there was no full consensus among jurists as to the age limit of criminal responsibility for particular *crimina*, which makes legitimate the view that *leges iudiciorum publicorum*, or even the general *lex Iulia iudiciorum publicorum*, did not contain a provision indicating such an age, and that the subjection of a perpetrator who committed a criminal act to judgment was decided in each case, taking into account the individual mental development of the defendant.

However, the principle according to which immature persons were not criminally liable because of their age was not absolute, as pointed out in the Digest:

D. 50, 17, 108, Paulus libro quarto ad edictum; *Fere in omnibus poenalibus iudiciis et aetati et imprudentiae succurritur.*

In the quoted text, Paulus expressed the view that in almost all criminal cases, age and inadvertence spoke in favour of the offenders, which literally came to their aid (*succurritur*). It is significant that the jurist himself stressed that this applied to almost (*fere*) all cases, which already indicates that there were exceptions to this rule.²⁹ Such exceptions included liability for *crimen maiestatis*, i.e. crimes against the majesty of the state.³⁰

One such exception, which needs to be discussed at greater length, arose for an offence regulated under the *senatus consultum Silanianum* of 10 AD, that is, a resolution providing for collective liability for all slaves who, at the time their master was murdered, were staying with him in the same house or in his immediate vicinity and did not attempt to rescue him at the risk of their own lives.³¹ In principle, slaves were sentenced to death under this resolution subject, however, to an exception for immature slaves:

²⁷ M. Kuryłowicz, 'Odpowiedzialność "nieletnich" ...', op. cit., pp. 13–14.

²⁸ K. Amielańczyk, *Rzymskie prawo karne...*, op. cit., p. 135. See also J. Misztal-Konecka, *Incestum w prawie rzymskim*, Lublin, 2007, p. 98.

²⁹ M. Kuryłowicz, 'Odpowiedzialność "nieletnich" ...', op. cit., p. 14; A.M. Rabello, 'The Responsibility of Minors in Jewish Criminal Law (Biblical and Talmudic Period and Notes of Comparison with Roman Law)', *Acta Juridica*, 1977, pp. 309 et seq.

³⁰ On Roman legislation on *crimen maiestatis*, see P. Kołodko, *Ustawodawstwo rzymskie w sprawach karnych. Od ustawy XII tablic do dyktatury Sulli*, Białystok, 2012, pp. 187–219.

³¹ K. Amielańczyk, 'Głos cesarza Hadriana w sprawie s.c. *Silanianum*', *Zeszyty Prawnicze*, 2006, Vol. 6, No. 1, p. 11. See also F. Benedek, *A Senatus Consultum Silanianum*, Budapest, 1963, pp. 5 et seq.; F. D'Ippolito, 'Una presunta disposizione del S.C. *Silanianum*', in: Guarino A., *Syntelesia Arangio-Ruiz*, Vol. II, Napoli, 1964, pp. 717 et seq. A different year of this resolution is indicated by L. Hermann, who states that it was passed in 57 AD, cf. L. Hermann, 'La genèse du *senatus consultum Silanianum*', *Revue internationale des droits de l'antiquité*, 1952, Vol. 1, p. 495. However, this position has been criticised by E. Volterra – cf. M. Zablocka, 'Polityka dynastii julijsko-klaudyjskiej wobec wyzwoleni i wyzwoleńców', *Prawo Kanoniczne*, 1984, Vol. 27, No. 1–2, p. 234, footnote 42.

D. 29, 5, 1, 32, Ulpianus libro 50 ad edictum; *Impubes serous vel ancilla nondum viripotens non in eadem causa erunt: aetas enim excusationem meretur.*

In the passage quoted above, Ulpianus, commenting on the principles of criminal responsibility under this resolution, pointed out that an immature slave and a female slave who was still incapable of having offspring, and therefore immature, were in a different situation, since their young age was a circumstance justifying their omission.³² Such slaves were not sentenced to death, nor were they subject to torture during interrogation related to the crime.³³ The above passage, as it were, fits in with the general tendency described earlier to exclude the criminal responsibility of immature persons simply because of their age. However, such privileged treatment was not absolute, as we learn from the following opinion by Maecianus:

D. 29, 5, 14, Maecianus libro 11 de publicis iudiciis; *Excipiuntur senatus consulto Silianiano impuberes serui. Trebius autem Germanus legatus etiam de impubere sumi iussit supplicium et tamen non sine ratione: nam is puer nec multum a puberi aetate aberat et ad pedes domini cubuerat cum occideretur nec postea caedem eius prodiderat. Ut enim opem ferre eum non potuisse constabat, ita silentium praestitisse etiam postea certum erat, et his dumtaxat impuberibus senatus consulto parci credebatur, qui tantum sub eodem tecto fuissent: qui vero ministri vel participes caedis fuissent et eius aetatis, quamquam nondum puberis, ut rei intellectum capere possent, his non magis in caede domini quam in ulla alia causa parci oportere.*

The jurist pointed out in his opening words that the *senatus consultum Silianianum* was not applied to immature slaves.³⁴ He thus confirmed that they were protected from collective liability resulting from the application of this resolution by their age.³⁵ However, he followed this statement by citing an example where the *legatus* Trebius Germanus³⁶ decided to impose the death penalty on an immature boy on the basis of this *senatus consultum*. He went on to add that this boy was of an age close to maturity, since he was not far short of it, and, moreover, at the time his master was killed, he was asleep at his feet and did not move to help him; moreover, after the event, he remained silent.³⁷ The text also states that those slaves who assisted or participated in the murder of their master were liable on the basis of the resolution in question, even when they were still immature but could grasp the meaning of the act.³⁸ The interpretation of this text says a great deal about the rules of criminal responsibility

³² Cf. O.F. Robinson, 'Slaves and the Criminal Law', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1981, Vol. 98, No. 1, p. 234.

³³ A. Berger, *Jugendschutz und Jugend-Besserung. Material und Abhandlungen, vorwiegend strafrechtlichen Charakters unter weitgehender Berücksichtigung des Auslandes und der Geschichte*, 2 Teile, Leipzig, 1897, p. 12. See also E. Loska, 'Kilka uwag na temat zeznań niewolników w procesie karnym', *Zeszyty Naukowe KUL*, 2017, Vol. 60, No. 3, pp. 449–463.

³⁴ Cf. F. D'Ippolito, 'Una presunta...', op. cit., p. 719.

³⁵ E. Loska, 'Obowiązek niewolników obrony swojego właściciela', *Zeszyty Prawnicze*, 2004, Vol. 4, No. 1, p. 47.

³⁶ Cf. A.R. Birley, 'A New Governor of Britain (20 August 127): L. Trebius Germanus', *Zeitschrift für Papyrologie und Epigraphik*, 1999, Vol. 124, pp. 243–248.

³⁷ Cf. A. Lebigre, *Quelques aspects de la responsabilité pénale en droit romain classique*, Paris, 1967, p. 52.

³⁸ R.A. Bauman, *Crime and Punishment in Ancient Rome*, London, New York, 1996, p. 116.

for immature persons. Thus, at the beginning, the general rule was cited that the resolution of the *s.c. Silanianum* did not cover immature persons, while further on an exception to this rule is indicated, whereby a boy who had not yet reached formal maturity was nevertheless sentenced to death. Maecianus, relying on this state of facts, seems to have approved of this decision, because he meticulously explained it with reference to the law of the time. Namely, he considered that this boy was close to the age of maturity and did not react in any way when his master was literally killed in his presence; moreover, he did not inform anyone about it afterwards. The jurist seems to have treated such behaviour as a form of aiding and abetting by omission, as he considered that immature persons who were not far from maturity were liable if they assisted or participated in the murder of their master. He also specified that remaining close to maturity meant that such persons could have been aware of the significance of the crime.³⁹ In this case, therefore, the jurist saw the criminal liability of immature persons on analogous principles to those that applied to tort liability, that is, two conditions had to be met for it to arise. The first was proximity of age to formal maturity and the second was awareness of the meaning of the act.⁴⁰

At this point it must be underlined, following M. Kuryłowicz,⁴¹ that the above-described case of sentencing an immature boy to death must have been a high-profile and exceptional case, since Maecianus even cited the name of the Roman official who ordered the execution. Thus, although the slave in question, being immature, was generally excluded from criminal responsibility and indeed could not have prevented the murder, in the situation described, he was nevertheless regarded as a conscious participant in the crime. In his opinion, the jurist made an attempt to generalise the prerequisites for the criminal liability of immature persons, stating that not only in the case under discussion, but in other cases as well, immature persons should be liable for the crimes committed if they were accessories or accomplices and, at the same time, their age, although immature, indicated their ability to understand the meaning of the act. It was therefore in such situations that it was permissible to deviate from the general rules excluding immature persons from criminal responsibility.⁴²

The fact that the age of immaturity did not completely absolve one from criminal responsibility may also be indicated by the following constitution of 294:

C. 9, 16, 5, Imperatores Diocletianus, Maximianus; *Si quis te reum Corneliae legis de sicariis fecerit, innocentia purgari crimen, non adulta aetate defendi convenit.*

Above, we find the content of the imperial command that, if a particular person was accused on the basis of the *lex Cornelia de sicariis*, he should have undertaken to defend himself and prove his innocence, and not justify his behaviour on the grounds that he had not yet reached the age of adulthood. The term *adulta aetate*

³⁹ A. Burdese, 'Sulla capacità intellettuale...', op. cit., p. 31.

⁴⁰ Cf. T. Mommsen, *Römisches Strafrecht*, Leipzig, 1899, p. 76; S. Solazzi, 'Qui infanti proximi sunt', *Labeo*, 1955, No. 1, p. 17.

⁴¹ M. Kuryłowicz, 'Odpowiedzialność "nieletnich"...', op. cit., p. 15.

⁴² *Ibidem*, pp. 15–16; see also A. Burdese, 'Sulla capacità intellettuale...', op. cit., p. 39.

used in the text is equivalent to maturity (*pubertas*).⁴³ Hence, it must be assumed that the above passage referred to immature persons. Its interpretation shows that immature persons were subject to criminal liability for acts criminalised by the *lex Cornelia de sicariis* and should not hide behind their immaturity, but were obliged to undertake their defence on general principles.

Summarising the analysis carried out concerning the criminal liability of immature persons, it may be noted that, somewhat differently from tort liability, age generally protected against incurring such liability. However, this rule was not absolute, as exceptions to it were provided for, where the immature offender bore full criminal responsibility if he was close to the age of maturity and if he could understand the meaning of the act committed.

CRIMINAL LIABILITY OF ADULTS (PUBERES) OVER 12 AND 14 YEARS OF AGE

Turning at this point to the issue relating to the criminal responsibility of *puberes*, it should be noted that this was no longer in doubt, and this was the case from archaic law onwards. As indicated in the previously quoted passages from the Law of the Twelve Tables (Tab. 8, 9; Tab. 8, 14), *puberes* were responsible for the crimes described therein and incurred the highest possible penalty, that is, the death penalty. Even in later law, this principle did not change. Moreover, even mature persons under the age of 25, who enjoyed special protection under private law, could not invoke their age in criminal law.⁴⁴ Above all, they were precluded from making use of the institution of *restitutio in integrum* (i.e. restoration) under criminal law in order to protect themselves from liability:

D. 4, 4, 37, 1, Tryphoninus libro tertio disputationum; (...) *minor annis viginti quinque non meretur in integrum restitutionem* (...).

The above opinion was expressed by Tryphoninus when discussing the law on punishment for the crime of adultery. He indicated that mature persons under 25 years of age could not invoke the benefit of restoration if they had committed this offence.⁴⁵

In general, *puberes minores XXV annis* could not justify their age if they committed a crime, as the following passages also indicate:

Paul. 1, 9, 1; *Minor viginti et quinque annorum si aliquod flagitium admiserit, quod ad publicam coercionem spectet, ob hoc in integrum restitui non potest.*

Interpr. Paul. sent. 1, 9, 1; *Minores aetate, si crimina graviora commiserint, per aetatem se non poterunt excusare.*

⁴³ W.J. Kosior, *Kategorie i granice wieku...*, op. cit., p. 115.

⁴⁴ A. Laingui, *La responsabilité pénale dans l'ancien droit: XVIe-XVIIIe siècle*, Paris, 1970, p. 231.

⁴⁵ B. Perrin, 'La responsabilité pénale du mineur de vingt-cinq ans en droit romain', in: Chevallier R. (ed.), *Mélanges d'archéologie et d'histoire offerts à André Piganiol*, Vol. 3, Paris, 1966, pp. 1455 et seq.

These texts show quite unambiguously that mature persons under the age of 25, if they committed a more serious crime, that is, one for which there was a public-law penalty, could not justify themselves by reference to their age.⁴⁶

Analogous provisions can be found in imperial legislation:

C. 2, 34, 1, Imperatores Severus, Antoninus; *In criminibus quidem aetatis suffragio minores non iuvantur (...)*.

The content of the constitution of 200 stipulated that *minores*, i.e. mature persons who had not yet attained the age of 25, could not rely on their age in the case of offences as a circumstance that would exclude their criminal responsibility. This view was based on the fact that, in principle, formally mature persons (*puberes*) were liable, and therefore the question of whether the offender was a mature person under or over 25 was not relevant in criminal law.

However, despite such clear indications, the analysis of the source material carried out led to the discovery of a text that described an offence for which only those who had already reached the age of 25 could be held responsible:

C. 6, 35, 6, Imperator Alexander Severus; *Minoribus quinque et viginti annis heredibus non obesse crimen inultae mortis placuit*.

The quoted passage from the Imperial Constitution of 229 refers to the act referred to as *crimen inultae mortis*, the crime of failing to avenge death.⁴⁷ In the era of the Severan dynasty, indirectly based on the solutions adopted in the *senatus consultum Silanianum*, criminal responsibility was envisaged for heirs whose father had been murdered and who, contrary to their honourable duty, failed to avenge his death.⁴⁸ The consequence of such behaviour was the unworthiness of such heirs to inherit and the forfeiture of the inheritance to the state treasury.⁴⁹ As indicated in the text above, those under the age of 25 could not be prosecuted for this offence. However, there is no information on the reasons for this exclusion from liability. In my opinion, this may be considered through the prism of the sanction provided for this offence. Indeed, for failing to avenge the father's death, the heirs were typically liable by losing their right to the inheritance. Thus, the consequences were governed exclusively by private law and, more specifically, by the law of succession. Since this sanction was of a private-law nature, it may have been considered that the general view of the vulnerability of persons under 25 should apply in such a case, as it was on the basis of *ius privatum* that persons of this age enjoyed special protection and

⁴⁶ Cf. G. Cervencia, 'Note in tema di responsabilità penale del "minor XXV annis"', *Sodalitas. Scritti in onore di A. Guarino*, 1984, Vol. 6, pp. 2739 et seq.

⁴⁷ Cf. A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia, 1953, p. 516, s.v. 'inulta mors'.

⁴⁸ E. Flaig, *Ritualisierte Politik: Zeichen, Gesten und Herrschaft im Alten Rom*, Göttingen, 2004, p. 149.

⁴⁹ W.V. Harris, 'The Roman Version', in: Faris S.B., Lundeen L.E. (eds), *Ten Years of the Agnes Kirsopp Lake Michels Lectures at Bryn Mawr College*, Bryn Mawr, 2006, pp. 56–57. See also D. 29, 5, 9 and D. 37, 14, 23, pr.

assistance from the magistracy. With this position, we would also have to assume that *crimen inultae mortis* was a mixed act. On the one hand, it was a criminal-law offence, as indicated by the term *crimen*, while on the other hand, the sanctions had effects only under private law.

At this point, it is also worth mentioning an offence for which, in principle, only formally mature persons could be held responsible, as indicated by the sources:

D. 48, 5, 37 (36), Papinianus libro tertio quaestionum; *Si minor annis adulterium commiserit, lege Iulia tenetur, quoniam tale crimen post pubertatem incipit.*

It was pointed out above that if a minor committed the crime of adultery, then he should have been liable, since under the *lex Iulia de adulteriis coërcendis* such a crime could be committed after maturity.⁵⁰ The use of the phrase *minor annis* suggests that Papinianus was faced with the task of answering the question whether persons under 25 years of age were capable of incurring liability under this law (*minores annis / aetate* defined persons of that age). Not only did the jurist answer in the affirmative, but he also emphasised that criminal liability was incurred by formally mature persons.

The following text also confirms that the subject of the crime of adultery could only be a mature person:

D. 48, 5, 39 (38), 4, Papinianus libro 36 quaestionum; (...) *cum alias adulterii crimen, quod pubertate delinquitur (...).*

In the passage quoted above, we again read that *adulterium* could generally only be committed by persons of mature age.⁵¹ Interpreting, therefore, *a contrario*, the two opinions of Papinianus presented above, we come to the conclusion that immature persons were incapable of committing this offence.⁵² This criminal act, when committed by a person before maturity, was not punishable.⁵³

However, there was an exception to this rule, which was introduced more than two hundred years after the enactment of the *lex Iulia de adulteriis coërcendis*. Namely, the law itself was adopted on the initiative of Octavian Augustus in 17 or 18 BC and protected marriage (*iustum matrimonium*) from unacceptable sexual behaviour. In the case of women, an *iniusta nupta* could be the subject of an offence according to the Julian law, provided that she had reached the age of 12, which was precisely due to the principle that immature persons were not criminally liable under this act.⁵⁴ The association of responsibility for *adulterium* with the age limit of 12 years was due to the restrictive approach to the age of marriage for women. If a girl married below this age, she did not carry the title of *legitima uxor* and was not recognised

⁵⁰ Cf. O.F. Robinson, *The Criminal Law of Ancient Rome*, Baltimore, 1995, pp. 58 et seq.

⁵¹ Cf. S. Puliatti, 'D. 48.5.39 (26 quaest.) e la problematica dell'incesto nell'elaborazione dottrinale di Papiniano', *Studi Parmensi*, 1997, No. 43, pp. 153 et seq.

⁵² See also D. Stolarek, *Adultera w świetle lex Iulia de adulteriis coërcendis*, Lublin, 2012, p. 78.

⁵³ *Ibidem*, p. 115.

⁵⁴ D. Stolarek, 'Ustawa julijska o karaniu za cudzołóstwa – 5 tytuł 48 księgi Digestów. Tekst – tłumaczenie – komentarz', *Zeszyty Prawnicze*, 2014, Vol. 14, No. 4, p. 217.

as a wife.⁵⁵ Thus, from the enactment of this law, only women who had reached the age of 12, that is, who were formally mature and thus capable of marriage, could be held criminally liable under it. This state of affairs changed in the second century AD, when an exception was made to the principle of non-responsibility of immature persons, as evidenced by the following texts:

D. 48, 5, 14 (13), 8, Ulpianus libro secundo de adulteriis; *Si minor duodecim annis in domum deducta adulterium commiserit, mox apud eum aetatem excesserit coeperitque esse uxor, non poterit iure viri accusari ex eo adulterio, quod ante aetatem nupta commisit, sed vel quasi sponsa poterit accusari ex rescripto divi Severi, quod supra relatatum est.*

The passage indicates that a girl who had not yet reached the age of 12, but who nevertheless married and was introduced into her husband's house and then committed infidelity, could not be held responsible for her act under the *lex Iulia de adulteriis coërcendis*, because she was not considered a wife in the eyes of the law and thus could not violate the institution of marriage.⁵⁶ However, in the last sentence of this text, it is mentioned that such a girl could be prosecuted under the rules applicable to fiancées on the basis of a rescript of Emperor Septimius Severus. The content and scope of this rescript are specified in the following text:

D. 48, 5, 14 (13), 3, Ulpianus libro secundo de adulteriis; *Divi Severus et Antoninus rescripserunt etiam in sponsa hoc idem vindicandum, quia neque matrimonium qualecunque nec spem matrimonii violare permittitur.*

As Ulpianus explained, the act in question was actually issued by the emperors Septimius Severus and his son Caracalla. On its basis, it was considered that a bride was to be treated in the same way as a wife committing *adulterium*, since the purpose of the Julian law was not only to protect the institution of marriage, but also the hope of its future conclusion. As a consequence of this, an immature girl given in marriage could be accused of adultery according to the imperial rescript as if she were a fiancée (*quasi sponsa*).⁵⁷ The rescript issued by the aforementioned emperors did not refer directly to adultery committed by an immature girl who had been introduced into her husband's house, but generally to brides who committed adultery.⁵⁸ A girl under 12 years of age who was married to a man and introduced into his house was not considered a wife, but at most jurists allowed for the existence of a fiancée bond between such a girl and a man, provided that the betrothal had been made. Hence, the aforementioned rescript provided for such girls to be liable under the rules applicable to fiancées.

⁵⁵ See also T.A.J. McGinn, 'Concubinage and the *Lex Iulia* on Adultery', *Transactions of the American Philological Association*, 1991, Vol. 121, p. 349.

⁵⁶ Cf. T. Mommsen, *Römisches Strafrecht...*, op. cit., p. 697.

⁵⁷ The term *quasi sponsa* indicates that the girl described by these words was more than just a bride, since she was introduced into her husband's house (*deductio in domum mariti*), cf. G. Rizzelli, *Lex Iulia de adulteriis: studi sulla disciplina di adulterium, lenocinium, stuprum*, Lecce, 1997, p. 201. On *deductio* in Roman law, see Z. Benincasa, "'Deductio in domum mariti'" a zawarcie "iustum matrimonium", *Zeszyty Prawnicze*, 2013, Vol. 13, No. 2, pp. 7 et seq.

⁵⁸ D. Stolarek, 'Ustawa julijska...', op. cit., p. 222.

An analysis of these cited texts shows that *the lex Iulia de adulteriis coërcendis*, from its enactment in 17 or 18 BC, provided for criminal liability only for mature persons (*puberes*). This situation changed between 198 and 211 AD, that is, during the joint reigns of the emperors Septimius Severus and Caracalla, when they extended liability to girls under 12 years of age by a rescript they issued.⁵⁹ As D. Stolarek rightly pointed out,⁶⁰ the rescript in question should be regarded as a departure from the accepted principle, as there are no source references indicating a general lowering of the age of criminal responsibility in the case of *adulterium*.

Returning to the considerations devoted to the criminal responsibility of mature persons, it must be added that, despite the fundamental view that they were fully responsible for their actions, their age could still be taken into account when determining their punishment.⁶¹ Such a view is found, for example, in Tryphoninus commenting on the law on punishment for the crime of adultery:

D. 4, 4, 37, 1, Tryphoninus libro tertio disputationum; (...) *minor annis viginti quinque non meretur in integrum restitutionem, utique atrocioribus, nisi quatenus interdum miseratio aetatis ad mediocrem poenam iudicem produxerit. Sed ut ad legis Iuliae de adulteriis coërcendis praecepta veniamus, utique nulla deprecatio adulterii poenae est, si se minor annis adulterum fateatur.*

In his introduction, the jurist recalled that, for this offence, mature persons, even if they were under the age of 25, could not benefit from restitution to the previous state, but could only hope that the judge would take their age into account when determining their sentence.⁶² However, when a minor admitted to having committed the alleged crime of adultery, there could be no pardon or mitigation of punishment. B. Łapicki⁶³ pointed here to the term *miseratio aetatis*, used in the sense of pity, which played the role of a legislative motive and justified the mitigation of punishment for persons under 25 years of age.

Similar conclusions can be drawn from the analysis of the following texts:

D. 48, 13, 7 (6), Ulpianus libro septimo de officio proconsulis; *Sacrilegii poenam debet proconsul pro qualitate personae proque rei condicione et temporis et aetatis et sexus vel severius vel clementius statuere. (...).*

In the above case, Ulpianus indicated that, when imposing the penalty for sacrilege, it had to be measured taking into account the status of the offender, the circumstances and time of the offence and the age or sex of the offender. Thus, the jurist acknowledged that age was relevant to the penalty.⁶⁴

Analogous conclusions may be drawn from Callistratus' opinion:

⁵⁹ L.E. Caldwell, *Roman Girlhood and the Fashioning of Femininity*, Cambridge, 2015, p. 121.

⁶⁰ D. Stolarek, *Adultera w świetle...*, op. cit., p. 114, footnote 34.

⁶¹ See T. Mommsen, *Römisches Strafrecht...*, op. cit., p. 1042.

⁶² J.A.C. Thomas, 'Delictal and Criminal Liability...', op. cit., p. 31.

⁶³ B. Łapicki, *O spadkobiercach ideologii rzymskiej: okres chrystianizacji Cesarstwa Rzymskiego*, Łódź, 1962, p. 281.

⁶⁴ Cf. W. Krenkel, *Naturalia non turpia: Sex and Gender in Ancient Greece and Rome*, Hildesheim, 2006, p. 522.

D. 47, 21, 2, Callistratus libro tertio de cognitionibus; *Divus Hadrianus in haec verba rescripsit: 'Quin pessimum factum sit eorum, qui terminos finium causa positos propulerunt, dubitari non potest. De poena tamen modus ex condicione personae et mente facientis magis statui potest: nam si splendidiore personae sunt, quae convincuntur, non dubie occupandorum alienorum finium causa id admiserunt, et possunt in tempus, ut cuiusque patiatur aetas, relegari, id est si iuvenior, in longius, si senior, recisius. (...).*

Here, the jurist cited Emperor Hadrian's rescript on the offence of removing boundary marks (*terminus motus*),⁶⁵ according to which the punishment for this act should have been imposed according to the status of the offender and intention. He went on to add that when the penalty of banishment was imposed, its length should depend on the age of the offender, namely a younger offender should have been banished for a longer period and an older offender for a shorter period.⁶⁶ As K. Amielańczyk pointed out,⁶⁷ when punishing this crime, the age of the offender, for humanitarian reasons, was a mitigating circumstance. This principle was later reiterated in the body of Mosaic and Roman law.⁶⁸

CONCLUSION

The research carried out on the surviving source material shows that, in Roman law, the issue of age and criminal responsibility was a frequent subject of discussion among jurists and in various regulations.

The basic and primary condition for being held criminally liable was to show that the perpetrator acted with the intent to commit a criminal act, which meant that he was aware of both the factual sphere, that is, the actions he undertook, and the legal sphere, that is, the unlawfulness of his conduct. In other words, he must have been aware of the nature of his act and its consequences.

This is why Roman law initially did not introduce rigid age limits, the crossing of which would absolutely entail criminal responsibility. In this view, responsibility was linked to three phases of a person's life: childhood, immaturity and maturity. *Infantes*, that is, children, were not criminally responsible. Immature persons (*impuberes*) were generally not subject to such liability either, but in exceptional situations where they were *pubertati proximi*, that is, closer to maturity, they were liable on general principles, just like mature persons. Finally, those included in the *puberes* group, that is, the mature, bore criminal responsibility to the full extent.

It was not until the sixth century AD that the categories mentioned were combined with specific age limits, which clearly translated into the principle of

⁶⁵ On the protection of boundary signs in ancient Rome, cf. R. Świrgoń-Skok, 'Crimen termini moti. Ochrona znaków granicznych w państwie rzymskim', in: Dębiński A., Kowalski H., Kuryłowicz M. (eds), *Salus rei publicae suprema lex. Ochrona interesów państwa w prawie karnym starożytnej Grecji i Rzymu*, Lublin, 2007, pp. 325–337.

⁶⁶ M. Vinci, *Fines regere. Il regolamento dei confini dall'età arcaica a Giustiniano*, Milano, 2004, p. 54.

⁶⁷ K. Amielańczyk, *Rzymskie prawo karne...*, op. cit., p. 128.

⁶⁸ Cf. Coll. 13, 3, 2.

criminal responsibility. Thus, persons up to the age of 7 were considered to be exempt from criminal responsibility as children. Immature persons were included between the ages of 7 and 12 for girls and 14 for boys. Generally, persons of this age were not criminally liable, except that if they were close to the age of maturity and could comprehend the meaning of their act, they were then liable under normal conditions. Women over the age of 12 and men over the age of 14 were considered mature and were liable to the full extent of the law.

Relating the considerations carried out to the ground of Polish law and the ongoing discussion on the age for holding a minor responsible for criminal acts, the guiding idea of Roman jurists should be stressed. Criminal responsibility should not automatically be determined by a specific age, but by *voluntas*, that is, the perpetrator's general understanding of the meaning of the act and his or her awareness of its nature and illegality. Roman law first relied on this principle for several centuries, from the eighth century BC to the sixth century AD, and it was only after gaining such experience that it was decided to assign specific age limits to vague categories. Therefore, following the example of Roman law, it should be postulated that legal reforms relating to the age limits of criminal responsibility and discussions on them should be based on the experience of judicial practice, which, after all, is based on the resolution of specific cases and is closest in character to Roman casuistry, and that the limits of juvenile responsibility should then be established.

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Cite as:

Kosior W.J. (2026), *Criminal Liability of Juveniles in Ancient Rome*, *Ius Novum* (Vol. 20) 2, 54–73. DOI 10.2478/in-2026-0017

COMPLAINT ABOUT INACTION REGARDING FAILURE TO ADOPT THE MUNICIPAL GENERAL PLAN

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DOI 10.2478/in-2026-0018

ABSTRACT

This study, based on a formal-dogmatic approach and doctrinal interpretation of legal texts, aims to clarify doubts related to the 2023 reform of spatial planning and development in Poland, arising from the new legal institution introduced as part of this reform: the municipal general plan. Specifically, the text analyses the admissibility of judicial review of these spatial planning acts, and in particular the possibility of effectively initiating proceedings before an administrative court in a case arising from a complaint concerning the inaction of a municipal body in failing to adopt a municipal general plan, as well as the admissibility of a public-law claim concerning the municipality's inclusion of optional elements in the general plan, particularly the development supplementation area, which is crucial to the issuance of decisions on development conditions. This analysis is expectation that these issues will soon arise in the adjudicatory practice of administrative courts. Therefore, it is worth considering now the issue of judicial review of municipal general plans, which must be adopted in each municipality by 30 June 2026.

Keywords: municipal general plan, development supplementation area, legislative recognition, legislative inaction, administrative judiciary

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INTRODUCTION – HISTORICAL CONTEXT AND RESEARCH OBJECTIVES

Although spatial planning and development have a well-established history in Poland,¹ modern regulations in this area, more closely aligned with the requirements of a democratic state governed by the rule of law, were developed only after the political transformation. The key normative acts were the Spatial Planning and Development Act of 7 July 1994² and its successor, the Spatial Planning and Development Act of 27 March 2003.³ The latter Act was recently significantly amended after 20 years in force; given the nature of the changes introduced, it seems justified to speak of a reform of the spatial planning and development system in Poland.

It is significant that, from the moment of its adoption, the Act of 27 March 2003 was subject to clear – sometimes quite radical – criticism. Among the various criticisms levelled against this normative act, it was pointed out that it reflects the interests of lobbyists from the architectural community, focuses on the preparation of very detailed planning acts covering small parts of municipalities, marginalises or completely ignores other elements included in modern spatial planning (e.g. nature conservation, environmental protection, climate protection, noise prevention), eliminates development plans covering the entire municipality (or complexes thereof), is limited, like the 1994 Act, to procedural issues, does not specify sustainable development as the basis for all planning activities, treats spatial order in terms of a local phenomenon, does not contain provisions allowing for the effective counteraction of dispersed development and road construction, etc. Finally, the Act does not address the issue of training staff for spatial management.⁴ In conclusion, the competent author of these accusations bitterly stated that ‘as a result of systemic changes and the evolution of development regulations, spatial planning in the present European sense of the term ceased to exist in Poland’, and that after the breakthrough in 1989 ‘There was no adaptation of this system to the conditions of the new political order, drawing on the experience and practice of the Member States of the European Union; instead, it underwent progressive dismantling.’⁵

Spatial development studies, intended to serve as long-term instruments, were amended on an *ad hoc* basis, often in individual cases. Consequently, they lost their value as fundamental and at the same time long-term planning documents. The extinguishing, under the Act of 27 March 2003, of spatial development plans adopted before 1995 was a mistake. The costly and complex procedure for adopting new plans led to a situation in which only approximately one-third of Poland’s territory was covered by them. Municipal authorities began to replace them with zoning decisions, which became the *de facto* primary instruments for spatial management. The result

¹ See: A. Ostojki, ‘Rola norm prawnych w ewolucji planowania i zagospodarowania przestrzennego’, *Przegląd Prawa i Administracji*, 2011, Vol. LXXXV, pp. 12–18.

² Journal of Laws of 1994, No. 89, item 415.

³ Journal of Laws of 2003, No. 80, item 717, as amended.

⁴ A. Jędraszko, *Zagospodarowanie przestrzenne w Polsce – drogi i bezdroża regulacji ustawowych*, Warszawa, 2005, pp. 439–456.

⁵ *Ibidem*, p. 460.

was the destruction of space and the 'sprawl' of settlement units along existing roads.⁶ Generally speaking, the planning system in Poland has unfortunately been marked by repeated, yet generally unsuccessful, attempts at reform.⁷

Hence, the urgent need for profound changes to the existing legal framework. By virtue of the amendment of 7 July 2023, alongside modifications to the existing legal norms, entirely new regulations and, in some cases, even new legal institutions were introduced. One of these is the municipal general plan, which the legislature has classified among the fundamental instruments of spatial planning.⁸ The general plan is essentially regulated by a block of provisions in Chapter 2 of the Act ('Spatial Planning in the Municipality'), encompassing Articles 13a–13m of the Spatial Planning and Development Act.

The legislative materials explaining the rationale for these changes indicated that its establishment as a new planning instrument was a response to the need to increase the municipality's planning authority in shaping spatial policy.⁹ The lawmaker explained that the act – a mandatory planning document covering the entire municipality – is an act of local law, replacing the study of the conditions and directions of spatial development of the municipality, against which the compliance of local spatial development plans and decisions on development and land-use conditions will be assessed.¹⁰

The purpose of this article is to identify the legal issues that will arise in the area in which general plans are adopted and to attempt to suggest procedures for overcoming them from the perspective of the administrative courts, which exercise control over, among other things, the standard-setting activities of local government units. The specific objective is to answer the question whether a complaint against the legislative inaction of municipal authorities is permissible before the provincial administrative court in a situation where the deadline set by the legislature has passed and the municipality has not adopted a general plan. The answer to this question seems crucial from the perspective of, on the one hand, the implementation of citizens' right to a fair trial, and, on the other, the definition of the limits of the principle of local government autonomy.

⁶ Najwyższa Izba Kontroli, *Informacja o wynikach kontroli. Planowanie i zagospodarowanie przestrzenne w Polsce na przykładzie wybranych miast*, Warszawa, 2023, pp. 10–16; D. Kafar, 'Wprowadzenie', in: Daniel P., Kafar D., Pawlik K. (eds), *Systemowe zmiany w planowaniu przestrzennym*, Warszawa, 2023, pp. XV–XVII.

⁷ M. Błaszke, A. Brzezińska-Rawa, M. Ciesielski, M. Feltynowski, A. Fogel, J. Goździewicz-Biechońska, A. Kukulska-Kozieł, M. Leszczyński, M.J. Nowak, K. Rokicka-Murszewska, P. Śleszyński, A.A. Tomczak, R. Warsza, 'Nowelizacja planowania przestrzennego. Czy ciąg dalszy "dróg i bezdroży regulacji ustawowych"?', *Samorząd Terytorialny*, 2024, No. 1–2, p. 8.

⁸ See Article 2 (22) of the Act of 27 March 2003 on Spatial Planning and Development, Journal of Laws of 2025, item 527 and 680; hereinafter referred to as the 'SPDA' or the 'Spatial Planning and Development Act'.

⁹ *Uzasadnienie rządowego projektu ustawy o zmianie ustawy o planowaniu i zagospodarowaniu przestrzennym oraz niektórych innych ustaw*, print No. 3097, p. 13.

¹⁰ *Ibidem*, p. 2.

LEGAL AUTHORISATION TO ENACT LOCAL LAW AND LEGISLATIVE INACTION

The Spatial Planning and Development Act lacks a legal definition of a general plan, but the legislature – in addition to the aforementioned classification of the plan among the fundamental spatial planning acts (it was mentioned here *ab initio*, as the first one) – specifies, *inter alia*, the substantive (structural) elements of the general plan and, importantly, provides that it constitutes an act of local law.¹¹ The admissibility of challenging inaction in the adoption of a general plan by a municipality therefore fits into the broader issue of combating legislative inaction by local government bodies. The problem is complex because, despite the general rule that the Polish legislature ‘(...) has expressly abandoned the review of legislative inaction by administrative courts over local government bodies and local government administration bodies’,¹² in practice, situations occur in which the jurisdiction of administrative courts also extends to the normative inaction of local government bodies.

This central legal issue – crucial to achieving the research objectives – requires further clarification. The starting point should be the general observation that the enactment of local legal acts by local government bodies (or local government administration bodies) may be optional or mandatory. In the first of these cases, we are dealing with discretionary law-making activities of the public administration. These take the form of a statutory competence norm that provides the relevant administrative body with normative discretion – optional competence – encompassing two more specific elements: (a) discretion relating to the ability to issue a specific normative act; and (b) discretion relating to the timing of its issuance.¹³

A competence norm can be constructed in such a way that the legislature authorises a body to adopt an act of local law, which, however, is not mandatory; most often – though not always – the legislature then expressly indicates that the body ‘may issue’ (or ‘establish’, ‘specify’, ‘adopt’, etc.) a specific act of local law. The authorised body either issues such an act or fails to do so. In the second of the normatively permitted situations, the body cannot be accused of legislative inaction. An example of optional action is the adoption of a local spatial development plan. An interpretation of the competence norms of the applicable Spatial Planning and Development Act leads to the conclusion that the adoption of a local plan has been left to the discretion of the competent body within the framework of so-called legislative discretion. Pursuant to Article 14(7) SPDA, a local plan is mandatory if required by separate regulations. Therefore, the principle is that its adoption is optional, subject to the exception of an obligation to adopt a local plan. In other words, the municipality’s planning competence is not combined here with a specific obligation to act, meaning that the municipal body may issue an act of local law or refrain from doing so, and

¹¹ Art. 13a(7) SPDA.

¹² M. Stahl, ‘Zagadnienia proceduralne sądowej kontroli aktów prawa miejscowego’, *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2013, No. 3, p. 72.

¹³ M. Jędrzejczak, *Władza dyskrecyjna organów administracji publicznej*, Warszawa, 2021, pp. 261–262.

either course of action is lawful.¹⁴ It should be noted that, in this case, the body's refraining from issuing an act of local law constitutes a normatively described and, consequently, lawful omission, consistent with the competence model. The issuance of an act of local law under legislative discretion should be preceded by the authority's deliberation, essentially taking the form of

'an informal procedure in which it assesses the advisability and need for introducing a new legal regulation. The public administration authority should thoroughly analyse the factual and legal circumstances. An analysis of the factual circumstances, that is, the entirety of existing social relations, should answer the question whether current social relations require regulation by a generally applicable act. In turn, an analysis of the legal circumstances should enable an answer to the question whether the current legal system is complete and coherent'.¹⁵

Depending on the outcome of this deliberation, the authority will either issue an act of local law or – legally speaking – refrain from issuing it.

The normative discretion associated with the timing of the act's issuance means that the competent authority has been endowed with discretionary powers, the essence of which is the ability to choose when a given act will be issued and when it will enter into force, thereby becoming binding on its addressees. The discretion discussed here applies to both optional and mandatory statutory authorisations.¹⁶ In the latter case, this is problematic because the administrative body

'must absolutely issue the normative act which it has been authorised to issue. At the same time, it exercises discretionary power to set the deadline for its issuance, which leads to a situation in which there are serious difficulties in determining when the legislative obligation becomes effective and when it may be enforced'.¹⁷

Irrespective of the above dilemmas, the body – if it has been provided by the legislature with discretion regarding the date of issue of the act or the establishment of a *caesura* for its binding force – should conduct a thought process analogous to the one presented earlier. The result of such an evaluative assessment will be a decision based on legislative discretion regarding the date of enactment or entry into force of the local law, which should take into account the task-related norms – formulated in the competence norm or elsewhere in the Act – and the effects that such a normative act will have.

In addition to the normative recognition of lawmaking, provisions of substantive and systemic administrative law may impose an obligation to issue an act of local law or an obligation to issue such an act with due regard to the statutory deadlines for its issuance or entry into force.

If the local legislature has been obliged by the legislature to issue a specific act of local law, then its issuance should be considered formally necessary. This is

¹⁴ See M. Oleś, *Fakultatywne działania administracji publicznej*, Warszawa, 2018, pp. 352–354.

¹⁵ P. Król, 'Uznanie w tworzeniu prawa administracyjnego', in: Ziemiński K., Jędrzejczak M. (eds), *Dyskrecjonalność w prawie administracyjnym*, Poznań, 2015, p. 34.

¹⁶ See M. Jędrzejczak, *Władza dyskrecjonalna...*, op. cit., pp. 265–266.

¹⁷ *Ibidem*, p. 266.

a situation in which the local legislature acts pursuant to a statutory order, which may also lay down a deadline for issuing the act (it is assumed that this is not a substantive time limit, so failure to comply with it does not result in the loss of normative competence). The legislature may also provide for a sanction in the event of a failure to comply with that order.¹⁸ Such a sanction could be, for example, the issuance by the voivode, acting as a supervisory authority, of a substitute order (e.g. regarding the adoption of a local spatial development plan or its amendment for the area affected by the municipality's inaction, to the extent necessary for the location of a public-purpose investment – Article 13k(2) and (3) in conjunction with Article 67c(5) SPDA). A distinction should be made between the formal necessity thus formed and a situation in which the authority issues an act because it is necessary for the functioning of the authority. It seems, however, that this necessity should also cover cases in which the issuance of an act is necessary to ensure the completeness of the legal system or to implement statutory tasks.¹⁹

The provisions of the Spatial Planning and Development Act can serve as an illustration of the formal necessity of issuing an act of local law. Specifically, according to Article 14(7) of this Act, a local spatial development plan is mandatory if required by separate regulations. Such provisions include Article 38b of the Act of 28 July 2005 on Spa Treatment, Spa Resorts and Spa Protection Areas, and on Spa Municipalities, according to which a municipality that, pursuant to a decision of the minister responsible for health, obtains confirmation of the possibility of conducting spa treatment within its area, must prepare and adopt a local spatial development plan for Zone 'A' of spa protection, under the terms specified in separate regulations, within two years of the date of receipt of that decision. Other examples include Article 5(1) of the Act of 10 June 1994 on the Development of State Treasury Real Estate Taken Over from the Armed Forces of the Russian Federation,²⁰ and Article 5(1) of the Act of 7 May 1999 on the Protection of the Sites of Former Nazi Extermination Camps.²¹ Both cited regulations require the adoption of local spatial development plans (for real estate taken over from the Armed Forces of the Russian Federation and for the area of the Holocaust Memorial and its protective zone, respectively), although they do not specify time limits for their adoption.

The existence in the legal system of a formal requirement to issue an act of local law, which at the normative level manifests itself in a statutory order to adopt the act (sometimes additionally subject to a deadline for its issuance), raises the question of the enforceability of this obligation when the competent authority fails to exercise its competence to issue an act of local law. It should be noted immediately that not only legal doctrine, as discussed earlier, but also the legislature itself excludes the admissibility of appealing legislative inaction by local government bodies to an administrative court under the provisions of the Law on Proceedings before Administrative Courts. This is because the provisions of that Act do not create grounds for filing an appeal against legislative inaction, a position confirmed by the case law of

¹⁸ D. Dąbek, *Prawo miejscowe*, Warszawa, 2020, p. 120.

¹⁹ *Ibidem*, p. 121.

²⁰ Journal of Laws of 1994, No. 79, item 363.

²¹ Journal of Laws of 2015, item 2120.

the administrative courts. According to administrative courts, there is no doubt that the inaction of a public administration body may be challenged only to the extent that it is permissible, under Article 3 § 2(1)–(4a) LPAC,²² to appeal against decisions, rulings, and other acts or actions within the scope of public administration concerning powers or obligations arising from provisions of law, adopted in administrative proceedings and in the proceedings specified in Parts IV, V and VI of the Tax Ordinance,²³ to which the provisions of the Code of Administrative Procedure²⁴ and the Tax Ordinance apply.²⁵ In other words, for an authority's inaction to be actionable, its competences would have to include the issuance of: an administrative decision, a ruling in administrative proceedings that is subject to appeal or that concludes the proceedings, as well as a ruling resolving the case on the merits, a ruling issued in enforcement and security proceedings that is subject to appeal, or acts or activities in the field of administration other than those specified in Article 3 § 2(1)–(3) LPAC. The provisions of the LPAC regulating the scope of control over the activities of public administration by administrative courts do not allow for the possibility of adjudicating on complaints concerning inaction in the adoption of acts of local law by local government units and local government administration bodies, referred to in Article 3 § 2(5) LPAC. Inaction and excessive length of proceedings, referred to in Article 3 § 2(8) and (9) LPAC, therefore do not apply to all actions of administrative bodies, but only to those acts and activities listed by the legislature in Article 3 § 2(1)–(4a) LPAC. This means that a complaint concerning inaction can be effectively lodged only in a situation concerning the body competent to issue or undertake the given acts or activities in the procedural forms described above. Therefore, Article 3 § 2 (8) LPAC cannot constitute grounds for filing a complaint against a body's legislative inaction regarding the issuance of an act of local law with the content and subject matter specified by the complainant. Article 3 § 2 (8) LPAC does not refer to the provisions of Article 3 § 2 (5) and (6) LPAC, which pertain to appeals against acts of local law and other acts of local government bodies.²⁶

The Spatial Planning and Development Act, in its currently applicable wording, also does not contain any provisions operating as specific rules that could constitute grounds for a complaint against inaction in the adoption of a general plan by a municipality. At the same time, however, an authority that fails to issue an act of local law – including a general plan – fails to comply with the statutory requirement to issue it, provided, of course, that such a requirement exists within the framework of formal necessity. This

²² Act of 30 August 2002 – Law on Proceedings before Administrative Courts; consolidated text, Journal of Laws of 2024, item 935, hereinafter referred to as the 'LPAC'.

²³ Act of 29 August 1997 – Tax Ordinance; consolidated text, Journal of Laws of 2023, item 2383, hereinafter referred to as the 'Tax Ordinance'.

²⁴ Act of 14 June 1960 – Code of Administrative Procedure; consolidated text, Journal of Laws of 2024, item 572, hereinafter referred to as the 'CAP'.

²⁵ See for example: judgment of the Regional Administrative Court in Wrocław of 31 December 2024, ref. no. IV SAB/Wr 280/24, resolution of the Regional Administrative Court in Poznań of 24 November 2022, ref. no. IV SAB/Po 161/22, resolution of the Regional Administrative Court in Warszawa of 8 February 2024, ref. no. I SAB/Wa 298/23.

²⁶ Judgments of the Supreme Administrative Court of 25 March 2025, ref. no. II OSK 537/24, resolution of the Supreme Administrative Court of 12 December 2012, ref. no. II GSK 1828/24.

may have negative consequences for the legal interests of the (potential) addressees of local regulations. Therefore, taking into account the constitutional right of access to a court, one should strive to identify regulations that, in the event of a municipality failing to adopt a general plan, will enable the protection of the legal interests of entities affected by the state of legislative passivity of local government bodies.

GROUND FOR A COMPLAINT CONCERNING INACTION CONSISTING IN FAILURE TO ADOPT THE GENERAL MUNICIPAL PLAN

As a preliminary hypothesis, it may be assumed that Article 101a(1) of the Act of 8 March 1990 on Municipal Self-Government may constitute the normative basis in a case where a municipality fails to issue an act of local law in the form of a general plan.²⁷ However, this preliminary assumption requires verification in order to confirm or disprove it in the context of the conditions that must be met for a complaint filed under this procedure to be admissible and subsequently effective – that is, to be considered by an administrative court and, where necessary, to achieve the desired result.

According to Article 101a(1) of the Act on Municipal Self-Government, the provisions of Article 101 of the Act (i.e. regulations concerning the possibility of appealing to an administrative court against a resolution or order by anyone whose legal interest or entitlement has been violated by a resolution or order adopted by a municipal body in a matter within the scope of public administration) apply accordingly when a municipal body fails to perform actions required by law or when the legal or factual actions taken violate the rights of third parties. Even a cursory analysis of the cited provision indicates that it cannot constitute grounds for filing a complaint in every case. This is dictated by the fact that, for a complaint filed under Article 101a of the Act on Municipal Self-Government to be upheld, there must be a legal norm requiring the municipal body to perform specific actions. Therefore, there must be a statutory obligation for the body to undertake the required actions, so that failure to do so can be considered inaction.²⁸

This implies, *a contrario*, that a complaint to an administrative court will be unfounded in a situation where the authority has only the power, and not the obligation, to take the relevant act or action. In other words, this will be the case when – with respect to local law – it acts within the framework of its legislative discretion, and not when the provision explicitly mandates the adoption of local law. Importantly, however, the Supreme Administrative Court takes the view that both case law²⁹ and legal doctrine³⁰

²⁷ Consolidated text, Journal of Laws of 2024, item 1940.

²⁸ For example, judgment of the Supreme Administrative Court of 5 March 2020, ref. no. II OSK 1131/18, resolution of the Regional Administrative Court in Wrocław of 1 August 2023, ref. no. II SAB/Wr 209/23.

²⁹ Judgments of the Supreme Administrative Court of: 29 January 2013, ref. no. II OSK 59/13; 19 September 2013, ref. no. II OSK 1591/13; 12 March 2020, ref. no. II OSK 3979/19.

³⁰ P. Mijał, 'Skarga na bezczynność organu samorządu terytorialnego w wydaniu aktu prawa miejscowego', *Samorząd Terytorialny*, 2008, No. 5, pp. 1–12.

uniformly assume that 'actions mandated by law', referred to in Article 101a(1) of the Act on Municipal Self-Government, include resolutions of municipal bodies, provided that the obligation to undertake them arises from provisions of law.³¹

At this point, bearing the above in mind, it is necessary to determine whether the legislature mandates the adoption of general plans. The grammatical and literal interpretation of the provisions of the Spatial Planning and Development Act yields unambiguous results here. The legislature, pursuant to Article 13a(1) SPDA, by classifying the general plan as an act of local law (Article 13a(7) SPDA), imperatively stipulates that 'for the area of the commune (...), the commune council shall adopt the general plan of the commune (...)'. This is therefore a competence norm of a binding nature, leaving no leeway in the creation of the local regulation under consideration – the general plan of the commune. In this norm, the legislature decided not to include a deadline for the adoption of general plans. However, such a deadline can readily be inferred from the act amending the SPDA, namely Article 65(1) of the Act of 7 July 2023 amending the Spatial Planning and Development Act and Certain Other Acts.³² Under this provision, municipal studies of conditions and directions of spatial development remain in force until the date on which the general plan for a given municipality enters into force, but no later than 31 December 2025, and the current regulations apply to them. If it is known that general plans are ultimately intended to replace condition studies, then the deadline for adopting general plans is 31 December 2025, which in turn is the deadline for the validity of the studies. For the sake of clarity, it should be noted that, under Article 4(2) of the Act of 4 April 2025 amending the Spatial Planning and Development Act and Certain Other Acts,³³ this deadline has been extended to 30 June 2026. Overall, however, the statement that the legislature established a time-bound obligation to adopt general plans should not be controversial.

Additionally, for a complaint to an administrative court filed under Article 101a(1) of the Act on Municipal Self-Government to be effective, it must also be demonstrated that the administrative authority's failure to perform legally mandated actions negatively affects the complainant's substantive rights, meaning that there is a causal link between the municipal authority's inaction in fulfilling this obligation and the infringement of the complainant's legal interest or entitlement.³⁴ Simply put, the point is to prove that, as a result of legislative inaction, someone's legal interest or entitlement has been infringed. The legal interest referred to in Article 101(1) of the Act on Municipal Self-Government, and to which Article 101a(1) of the Act on Municipal Self-Government refers, must be assessed from a substantive-law perspective and requires the establishment of a connection between the complainant's individual rights and obligations and the challenged act (or the challenged inaction in issuing that act).³⁵

³¹ Judgment of the Supreme Administrative Court of 9 February 2023, ref. no. III OSK 6815/21.

³² Journal of Laws of 2023, item 1688.

³³ Journal of Laws of 2025, item 527.

³⁴ Judgment of the Supreme Administrative Court of 5 July 2022, ref. no. II OSK 2723/210.

³⁵ See resolution of the Regional Administrative Court in Olsztyn of 16 November 2022, ref. no. II SA/Ol 765/22, resolution of the Regional Administrative Court in Gorzów Wlkp. of 30 March 2023, ref. no. II SA/Go 83/23, resolution of the Regional Administrative Court in Poznań of 4 April 2023, ref. no. IV SAB/Po 37/23.

It should be emphasised that the assessment of a planning act's infringement of a legal interest does not have to be limited to the provisions of the Spatial Planning and Development Act, as planning resolutions may also encompass rights or obligations within the scope of commercial law, real-estate management, or civil law.³⁶ Therefore, an infringement of a legal interest can be seen, for example, in the absence of a general plan making planning within the municipality impossible and, consequently, the issuance of individual administrative acts based on the general plan, which in turn affects the value of the property, the possibility of trading in such property, etc. It may be argued that this viewpoint could be challenged on the basis that an interest understood in this way is not, in fact, a legal interest, as we are talking about future and potential events, not current and real ones (whereas a legal interest – as we know – should be, among other things, current and real). On the other hand, the owner of a property not covered by such a plan may argue that the failure to adopt a general plan violates their legal interest insofar as it prevents or limits the disposal of their property. The Supreme Administrative Court's judgment of 4 November 2010, ref. no. II OSK 1065/10, seems interesting in this regard. It concerned the city council's inaction regarding the adoption of a local development plan for a health resort municipality. The adjudicating panel indicated in its ruling that the source of the complainant's legal interest was the provisions of substantive law concerning ownership rights, including the right to possess, use, and dispose of property. Due to the municipality's legislative inaction, the complainant was deprived of the ability to dispose of the properties of which she was the owner or co-owner, and therefore the failure to adopt a local development plan for the health resort area prevented the sale of her plot. There are no obstacles to applying these observations to general plans of municipalities.

ADMINISTRATIVE COURT RULING UPHOLDING A COMPLAINT CONCERNING LAW-MAKING INACTIVITY FILED UNDER ARTICLE 101A(1) OF THE ACT ON MUNICIPAL SELF-GOVERNMENT

However, it should be taken into account that an administrative court, when ruling on a complaint under Article 101a(1) of the Act on Municipal Self-Government, cannot – due to the lack of relevant legal regulation – set a deadline for the local government unit to issue a normative act, including a general plan.³⁷ Furthermore, it does not appear that a ruling on this type of inaction would activate the provision of Article 101a(2) of the Act on Municipal Self-Government, according to which, in cases referred to in Article 101a(1), the administrative court may order the supervisory authority to perform the necessary actions on behalf of the complainant, at the expense and risk of the municipality.

³⁶ Resolution of the Supreme Administrative Court of 22 September 2020, ref. no. II OSK 1781/20.

³⁷ See M. Wincenciak, 'Zwalczanie bezczynności organów jednostek samorządu terytorialnego w sferze stanowienia aktów normatywnych', in: Dolnicki B. (ed.), *Partycypacja społeczna w samorządzie terytorialnym*, Warszawa, 2014, p. 537.

First of all, an administrative court,

‘when ruling on a complaint under Article 101a of the Act on Municipal Self-Government, may order the supervisory authority to perform necessary actions on behalf of the complainant at the municipality’s expense and risk, but is not obliged to do so. The optional nature of this power stems from the fact that the court will not always be able to ‘isolate’ the complainant’s case’.³⁸

A prime example of a situation in which such ‘isolation’ is impossible is the general plan, which will be adopted for the municipality’s area, not for individual, specifically designated properties.

Furthermore, in the context discussed in this study, justified doubts arise from the administrative court’s entrusting – or, in fact, ordering – a supervisory authority to act not only on behalf of another authority, but also at its expense and risk. Such action leads to excessive interference with the autonomy of local government. An administrative court cannot, after all, create the content of an act of local law, in this case a general plan, because granting it such authority would violate the model of judicial review of administration and the constitutional principle of the separation of powers. Ordering a supervisory authority to ‘independently’ adopt a given act instead of the competent municipal body should be interpreted in a similar manner.³⁹

As a result, the claim that the norm in Article 101a(2) of the Act on Municipal Self-Government is always engaged when a provincial administrative court rules on the inaction of a local government body, including legislative inaction, is not supported by the interpretation of Article 101a of the Act on Municipal Self-Government. However, even if this rather controversial assumption were to be accepted,

‘It does not lead to a transfer of the law-making competences of the municipal body to the government administration body, because this competence still belongs to the municipal body. Furthermore, since a complaint (...) is intended to constitute one of the forms of guaranteeing the implementation of the rule of law, any doubts as to the admissibility of legal recourse under Article 101a of the Act on Municipal Self-Government should be interpreted in favour of protecting individual rights and the right to a fair trial.’⁴⁰

ADMISSIBILITY OF A COMPLAINT CONCERNING THE FAILURE TO INCLUDE A DEVELOPMENT SUPPLEMENTATION AREA IN THE GENERAL PLAN

It is necessary to determine whether a municipality’s failure to include certain elements of the plan in the general plan is subject to appeal to an administrative court.

This doubt is justified, since pursuant to Article 13a(4)(1) of the Spatial Planning and Development Act, the general plan specifies: (a) planning zones; and (b) municipal

³⁸ Z. Niewiadomski, ‘Art. 101a’, in: Hauser R., Niewiadomski Z. (eds), *Ustawa o samorządzie gminnym. Komentarz z odniesieniami do ustaw o samorządzie powiatowym i samorządzie województwa*, Warszawa, 2011, p. 822.

³⁹ See D. Dąbek, *Prawo...*, op. cit., pp. 328–331.

⁴⁰ A. Sidorowska-Ciesielska, ‘Art. 101a’, in: Gajewski S., Jakubowski A. (eds), *Ustawy samorządowe. Komentarz*, Warszawa, 2018, Legalis.

urban standards, while pursuant to Article 13a(4)(2) of the Spatial Planning and Development Act, the general plan may specify: (a) development supplementation areas; and (b) downtown development areas. It is significant that the issuance of a development decision will be possible only if all the legally defined conditions are met, one of which is that the land be located within a development supplementation area (Article 61(1)(1a) SPDA). The conclusion is as follows: under current law, in order to obtain a development decision in the future, a municipality should first adopt a general plan, simultaneously specifying the areas to be developed. However, if a municipality adopts a general plan without this component, development decisions cannot be issued within the area covered by the plan. This could result in public-law claims for the inclusion in the plan of areas to be developed.

The wording of Article 13a(4) SPDA allows for the conclusion that the content of the general plan consists of the mandatory elements specified in point 1 of this provision and the optional elements indicated in point 2. This is clearly confirmed by the way in which the legislature authorised the municipality to regulate the structural elements of the plan: on the one hand, by using a categorical phrase ('the general plan specifies' – point 1), and on the other hand, a non-categorical phrase ('the general plan may specify' – point 2). If so, then the development supplementation area is a possible, but not necessary, content element of the general plan, as its inclusion in the planning act takes place under conditions of the exercise of optional competence. This view is endorsed in the literature, which indicates that

'There is no need to designate development areas in the general municipal plan, because it will be up to the municipality to decide whether it wishes to designate such areas where decisions on development conditions will be issued. The municipality may decide that the local spatial development plan will cover the entire area of the municipality, and for this reason, defining the development area will be unnecessary.'⁴¹

This idea seems rational, because by dividing the elements of the general plan into mandatory and optional, the legislature aimed to give these spatial planning acts a concise form, unlike overly extensive studies of the conditions and directions of spatial development.⁴²

As a result, a municipality's inclusion in a general plan of the elements specified in Article 13a(4)(2) SPDA, including development supplementation areas, constitutes an optional action by the local government unit; the municipality may act or refrain from doing so. Therefore, there is no possibility of effectively filing complaints against the inaction of municipal authorities that choose not to designate such areas in general plans.⁴³ Thus, the failure to designate a development supplementation area in the

⁴¹ A. Maziarz, 'Plan ogólny gminy w znowelizowanych przepisach ustawy o zagospodarowaniu i planowaniu przestrzennym', *Przegląd Ustawodawstwa Gospodarczego*, 2024, No. 5, p. 28. See also K. Szlachetko, 'Plan ogólny – nowe (?) narzędzie legislacji planistycznej', in: Bąkowski T. (ed.), *Legislacja planistyczna*, Gdańsk, 2024, p. 110.

⁴² K. Pawlik, 'Plan ogólny jako nowy akt planowania przestrzennego i podstawa planów miejscowych oraz realizacji inwestycji', in: Daniel P., Kafar D., Pawlik K. (eds), *Systemowe zmiany w planowaniu przestrzennym*, Warszawa, 2023, p. 59.

⁴³ M. Nowak, 'Plan ogólny – nowy instrument w planowaniu przestrzennym', *Nieruchomości*, 2023, No. 11, p. 4.

general plan cannot constitute an independent, effective objection to the general plan,⁴⁴ and such action by the municipality is not subject to appeal to an administrative court. This is because it is a deliberate and intentional action by the local legislature (municipality), which does not constitute law-making inaction within the meaning of this text.

CONCLUSIONS

According to the analysis, it would be appropriate to support the admissibility of a complaint to the provincial administrative court if, despite the expiry of the deadline set by the legislature, the municipality fails to adopt a general plan. It appears – and this analysis aims to confirm this hypothesis – that the basis for such a complaint could be Article 101a(1) of the Act on Municipal Self-Government. *De lege ferenda*, however, an explicit declaration by the legislature permitting this type of legal remedy would be desirable. If so, a relevant provision should be included in the Spatial Planning and Development Act, which would clearly contribute to ending speculation about the admissibility of complaints concerning the legislative inaction of local government bodies in this regard. Currently, the inadmissibility of such complaints is the rule, while their substantive review by administrative courts is treated as exceptional. In the opinion of the author of this text, the proposed change in normative status will ensure the right to a fair trial, but at the same time an administrative court ruling issued in such a case will not constitute undue interference with the autonomy of local government bodies. It is impossible, however, to agree with the view that entities whose properties will be covered by the provisions of the general plan will have a public-law claim to the inclusion of specific elements in the plan, including, in particular, the development supplementation area. Given that the development supplementation area, the determination of which in the general plan determines the admissibility of issuing decisions on development conditions, is an optional element of the general plan, a complaint to the administrative court concerning the failure to include this element will not be legally effective.

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⁴⁴ M. Nowak, J. Dziedzic-Bukowska, *Planowanie i zagospodarowanie przestrzenne – analiza najnowszych zmian*, Warszawa, 2024, p. 16.

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Cite as:

Chmielewski J. (2026), *Complaint about Inaction Regarding Failure to Adopt the Municipal General Plan*, *Ius Novum* (Vol. 20) 2, 74–87. DOI 10.2478/in-2026-0018

ORDER TO CARRY OUT WORKS OR CONSTRUCTION WORKS ON AN IMMOVABLE MONUMENT

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DOI 10.2478/in-2026-0019

ABSTRACT

The state's guardianship over immovable monuments entered in the register of monuments is reflected in the possibility of issuing a decision under Article 49(1) of the Act on the Protection of Monuments and the Care of Monuments. This decision allows conservation authorities to order conservation work or construction work where there is a threat of destruction of or significant damage to a monument. Although it is assumed that such a decision may be issued regardless of the state of preservation of the monument, and therefore also in respect of destroyed monuments, discrepancies have arisen in the case law regarding the application of this provision, particularly in situations where the poor technical condition of the monument was caused by the owner's neglect and the inaction of the conservation authority. This study analyses Article 49 of the Act, focusing on its protective function and its application in conservation practice. It aims to identify the circumstances in which conservation authorities may order conservation work or construction work, define the scope of obligations imposed on owners of immovable monuments, and assess divergences in administrative court case law, particularly regarding significantly deteriorated immovable monuments.

Keywords: immovable monument, conservation supervision, order to carry out restoration work or construction work

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INTRODUCTION

Immovable monuments are subject to special protection by the state. This is manifested in the imposition on the owners of historic buildings of an obligation to maintain them in the best possible condition and to prevent their destruction or loss of historic value. Yet, these obligations are not always properly fulfilled, as many monuments are in poor technical condition. For this reason, in Article 49 of the Act on the Protection of Monuments and the Care of Monuments, the legislator¹ provided for the possibility for the conservation authorities to issue a decision ordering the carrying out of conservation works or construction works in the event of a threat of destruction of or significant damage to the monument. Thus, it may be said that the legislator has introduced a provision aimed at securing, or even saving, historic buildings from destruction in the event of the owner's passivity. However, as this provision cannot impose an obligation to reconstruct or renovate such an object, it cannot serve as a means of improving the condition of a historic building.² Still it may order the carrying out of such works as will at least preserve the existing *status quo* of the monument and secure the possibility of restoring its state of splendour in the future.

While the purpose of Article 49 of the Act, which is to protect a monument against its destruction or significant damage, undoubtedly gives effect to the principle of monument protection and does not raise any doubts, the application of this provision in practice already gives rise to discrepancies. In the case law, one can encounter the view that this provision applies even in a situation where the monument is destroyed and is not even suitable for reconstruction,³ as well as views that limit the application of this provision by excluding from its scope those situations in which there have been many years of negligence on the part of the owner of the monument, as well as on the part of the conservation authorities.⁴

The aim of the article is to analyse Article 49 of the Act in the context of its protective function and the practice of its application by conservation authorities. In particular, the aim is to determine in which situations it is permissible to issue a decision ordering conservation or construction works, as well as to determine the limits and scope of the obligations that may be imposed on the owner of an immovable monument on the basis of this provision. The article also aims to assess the discrepancies in the case law of the administrative courts, especially with regard to the possibility of applying Article 49 of the Act to significantly destroyed immovable monuments, and to indicate the criteria that conservation authorities should follow in the event of a possible waiver of the issuing of an injunctive decision.

¹ The Act of 23 July 2003 on the Protection of Monuments and the Care of Monuments (consolidated text, Journal of Laws of 2024, item 1292, as amended), hereinafter referred to as 'the Act'.

² J. Sługocki, *Opieka nad zabytkiem nieruchomym. Problemy administracyjnoprawne*, Warszawa, 2017, pp. 79 et seq.

³ Judgment of the Supreme Administrative Court of 16 May 2023, II OSK 1662/20, LEX No. 3588799.

⁴ Judgment of the Supreme Administrative Court of 21 June 2023, II OSK 2273/20, LEX No. 3588385.

The article employs the formal-dogmatic method, which was used to analyse Article 49 of the Act and its place in the legal system, taking into account the principles of monument protection and legal constructs appropriate to the administrative forms of action of conservation authorities. An analysis of the case law of the administrative courts was also carried out, which made it possible to identify and assess interpretative discrepancies concerning the scope and limits of the application of Article 49 of the Act, as well as to determine the interpretation adopted in the practice of applying the law.

LEGAL FORM OF THE ORDER TO CARRY OUT WORKS OR CONSTRUCTION WORKS

An order to carry out restoration or construction works takes the form of an administrative decision. This decision is discretionary, which means that the conservation authority cannot make an arbitrary decision, not only without conducting evidentiary proceedings, but also without referring to all the circumstances that may have an impact on the case.⁵ It is worth emphasising that discretionary decisions require consideration of all the facts of the case and the choice of a decision within the limits set by the applicable provisions of law and the general principles of administrative proceedings. Discretionary decisions are subject to judicial review in terms of the presence of features of arbitrariness, which occurs when an authority omits evidence relevant to the decision or assesses that material contrary to logic or common experience.⁶ A decision issued on the basis of Article 49(1) of the Act constitutes a severe interference with a given entity's right of ownership. It may result in the addressee being burdened with the obligation to carry out advanced and financially burdensome conservation or construction works. For this reason, such a decision should be justified in detail.⁷

In Article 49(1) of the Act, the legislator indicated that the conservation authority is to specify in the decision the time limit for carrying out conservation works or construction works. By specifying that an element of the decision in question is the indication of the time limit for the completion of the works, the legislator makes the setting of that time limit a duty of the authority. This is also necessary in light of the possibility of substitute performance of the ordered works.⁸ It should be noted that execution of the decision in question does not exempt the addressee from the obligation to obtain a building permit or to give notice, in cases specified by the provisions of construction law.⁹

⁵ Judgment of the Provincial Administrative Court in Warsaw of 24 October 2012, II SA/Wa 1210/12, LEX No. 1241554.

⁶ Judgment of the Provincial Administrative Court in Warsaw of 20 September 2017, VII SA/Wa 2451/16, LEX No. 2380130.

⁷ Judgment of the Provincial Administrative Court in Warsaw of 11 January 2024, VII SA/Wa 1877/23, LEX No. 3735567.

⁸ M. Cherka, P. Antoniak, F.M. Elżanowski, K.A. Wąsowski, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, Warszawa, 2010, commentary to Article 49.

⁹ K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Warszawa, 2007, pp. 176 et seq.

The legislator did not specify in this provision the period for carrying out the ordered works. Such a solution is correct, as the time limit should depend on the scope of the obligations imposed. In addition, the performance of some obligations may be associated with the need to obtain a building permit or to submit a notification, which should be taken into account when setting that time limit. On the other hand, that time limit cannot be excessively extended, as this could lead to a lack of effectiveness in counteracting the threat to a given monument.¹⁰ Nor may such a time limit, for objective reasons, render the imposed obligations impossible to perform,¹¹ e.g. by ordering technically complex works to be carried out within a relatively short period of time or by ordering works to be carried out during the winter period when, due to the technological process, they cannot be carried out at that time. It is also possible to specify different time limits for the ordered works. Some of the ordered works may be urgent in nature, and therefore their implementation should take place relatively quickly. An example may be obligations related to roof repair before the winter period, in order to protect the building from precipitation causing dampness in the walls or ceilings. Other works that are not of such an urgent nature may be carried out at a later date.

In conclusion, it should be stated that, when setting a time limit for the performance of obligations, the authority must strike a balance between technological considerations related to the carrying out of restoration or construction works and the urgent need to protect the historic building. Hence, it is justified to state that the time limit set should allow for the actual implementation of the ordered works. However, the exceptional nature of the application of Article 49(1) of the Act leads to the conclusion that, in setting that time limit, the ordered works should not be postponed if their performance within a specific, relatively short period of time is objectively possible. The conservation authority should also consider which of the ordered works should be carried out urgently, precisely because of the immediate threat of destruction of or significant damage to the monument.

GROUNDS FOR ISSUING AN ORDER TO CARRY OUT WORKS OR CONSTRUCTION WORKS

Article 49(1) of the Act indicates that the prerequisite for issuing a decision ordering conservation or construction works is a threat of destruction of or significant damage to the monument. It is worth noting that such orders may be issued both following periodic inspections into the state of preservation of immovable monuments entered in the register of monuments and on an *ad hoc* basis, when the conservation authority receives information that an immovable monument is in poor technical condition, for example as a result of fire or flooding affecting a historic building.

¹⁰ Judgment of the Provincial Administrative Court in Warsaw of 20 June 2023, VII SA/Wa 2674/22, LEX No. 3580696.

¹¹ Judgment of the Provincial Administrative Court in Warsaw of 18 July 2012, I SA/Wa 2352/11, LEX No. 1270933.

This provision applies to all monuments entered in the register of monuments, regardless of their state of preservation. Consequently, an order to carry out conservation works or construction works may also be issued in relation to a monument that has already been destroyed. Moreover, Article 49(1) of the Act also applies where the destruction of the monument is highly advanced. In the case law, one can encounter the view that 'the general emergency technical condition of the tenement house',¹² even where a historic building is not suitable for reconstruction, since this may lead to its destruction, cannot constitute a prerequisite for the conservation authority to refrain from applying this provision.¹³ In such a case, the Act is intended to prevent further devastation of the monument and the irreversible loss of its scientific, artistic or historical values.¹⁴ Therefore, the provision in question covers any monument entered in the register of monuments, irrespective of its state of preservation. Only the conduct of proceedings and a finding that the building has lost the characteristics of a monument, resulting in its deletion from the register of monuments, excludes the application of Article 49(1) of the Act.¹⁵ At the same time, this means that, in proceedings for the issuing of a decision on the basis of Article 49(1) of the Act, the legitimacy of the inclusion of the object in the register of monuments cannot be questioned, as a different procedure is provided for that purpose.

It is worth emphasising, however, that a view has become established in the case law that such an order cannot be issued in relation to monuments that have already been destroyed, where that state of affairs results from many years of negligence on the part of both the owner of the monument and the conservation authorities.¹⁶ It follows from this view that Article 49(1) of the Act applies in cases of genuine supervision over monuments by the conservation authorities and cannot serve as a remedy for the inactivity of such an authority lasting for many years. The entry of an immovable monument in the register of monuments is associated with an obligation on the part of the conservation authorities to exercise conservation supervision. These authorities are vested with various legal instruments aimed at the protection of monuments, such as the institution of post-inspection recommendations under Article 40(1) of the Act. Accordingly, it may be stated that this view implies that the legislator introduced a negative prerequisite for the application of Article 49(1) of the Act, specifically in relation to destroyed monuments, namely the lack of prior action by the conservation authorities aimed at counteracting the poor condition of the monument. However, such a position is unjustified. It does not follow from the wording of Article 49(1) of the Act that it may be applied only where other instruments available to the conservation authorities have proved

¹² Judgment of the Provincial Administrative Court in Warsaw of 26 April 2024, VII SA/Wa 189/24, LEX No. 3765058.

¹³ Judgment of the Provincial Administrative Court in Warsaw of 24 May 2023, VIII SA/Wa 853/22, LEX No. 3767335.

¹⁴ Judgment of the Supreme Administrative Court of 15 November 2023, II OSK 1458/22, LEX No. 3707465.

¹⁵ Judgment of the Supreme Administrative Court of 10 November 2022, II OSK 1723/21, LEX No. 3434311.

¹⁶ Judgment of the Supreme Administrative Court of 21 June 2023, II OSK 2273/20, LEX No. 3588385.

ineffective. Nor is this provision the most severe measure threatening the owner of the monument in the event of his or her passivity in the face of action already taken by the conservation authorities. Its application depends solely on the threat of destruction of or significant damage to the monument. Thus, it cannot be inferred from this provision that many years of negligence on the part of the owner and the conservation authorities constitute a negative prerequisite for issuing a decision ordering the carrying out of specific works. In essence, this would undermine the purpose of the Act, namely the protection of monuments. Conservation authorities are obliged to protect monuments entered in the register of monuments, regardless of their state of preservation. Since the purpose of Article 49(1) of the Act is in a sense to safeguard a monument, such protection should be afforded even despite many years of passivity resulting in the deterioration of the monument's condition. Thus, no justification for a lack of action in the field of monument protection can be derived from the provisions of the Act on the ground of the inaction of the owner of the monument or the conservation authorities.

A decision ordering conservation or construction works may be issued regardless of whether the carrying out of such works is cost-effective or even technically justified.¹⁷ The need to incur high financial outlays, or the technical complexity and duration of the works, are not reasons that may justify waiving the issuance of the decision in question. It follows that, the prerequisite for issuing this decision cannot be the financial situation of its addressee which does not allow him to implement it.¹⁸ Preserving the historic value of historic buildings is the legislator's priority, which may often entail considerable difficulties in carrying out such works.

The main prerequisite for issuing a decision ordering conservation or construction works is their necessity in order to remove the state of threat of destruction or significant damage to the monument. At this point, it worth considering what the legislator meant by the word 'necessity'. It appears possible to issue a decision under Article 49(1) of the Act in situations where the condition of the historic building has been neglected and the only way to protect it is to impose appropriate obligations by the conservation authority. Therefore, it should be considered that this provision should be applied as a measure of last resort, when other instruments provided for by the Act have proved ineffective. However, the decision in question cannot be issued solely on the basis of the conservation authority's recognition of such a need,¹⁹ without establishing that these works are in fact 'necessary' to remove the state of threat of destruction or significant damage to the monument. In the case law, one may even encounter the view that the obligations imposed on the basis of the provision in question are aimed at saving the endangered object.²⁰ Consequently,

¹⁷ Judgment of the Supreme Administrative Court of 9 January 2024, II OSK 694/21, LEX No. 3692266.

¹⁸ W. Lis, 'Wykonanie zastępcze jako środek ochrony bezpieczeństwa obywateli i zabytków nieruchomości przed zniszczeniem', *Santander Art and Culture Law Review*, 2024, Vol. 10, No. 1, p. 72.

¹⁹ R. Gołat, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, Kraków, 2004, commentary to Article 49.

²⁰ Judgment of the Provincial Administrative Court in Warsaw of 11 January 2019, VII SA/Wa 1108/18, LEX No. 3074457.

this provision applies in the absence of such actions as would at least protect the historic building from destruction.

The wording of Article 49(1) of the Act, and in particular the phrase 'due to the threat' used therein, indicates that the condition of the historic building must point to a real threat of destruction or significant damage to that monument. Of course, this threat must be established by the conservation authority during the evidentiary proceedings and cannot be merely hypothetical. This means that the poor technical condition of a historic building must in fact create such a threat.

SCOPE OF WORKS OR CONSTRUCTION WORKS THAT MAY BE ORDERED

Article 49(1) of the Act specifies that the order may include the carrying out of restoration works and construction works. The term 'construction works' should be understood in accordance with the provisions of construction law as including construction, as well as works consisting in the reconstruction, assembly, renovation or demolition of a building structure.²¹ Conservation works should be understood as activities aimed at exposing the artistic and aesthetic values of the monument, including, if necessary, the supplementation or restoration of parts of it, and the documentation of these activities.²² The use of these terms by the legislator means that the intensity of the ordered works has not been limited, although they must fall within the scope specified by the above-mentioned legal definitions.²³ It follows that the conservation authority may not, on the basis of Article 49(1) of the Act on the Protection of Monuments and the Care of Monuments, order conservation studies or expert opinions to be carried out.²⁴ Thus, these may be works of relatively low intensity, as well as works interfering with the substance of the monument, for example the renovation or reconstruction of a historic building. The intensity of the works ordered by the conservation authority will depend only on the state of preservation of the building and, therefore, on what works should be carried out in order to prevent the destruction of or significant damage to the historic building. Hence, it should be stated that the conservation authority may order only the carrying out of works or construction works that are necessary to eliminate the above-mentioned threats.²⁵ However, the scope of the obligations imposed cannot in fact be aimed at reconstructing the monument.²⁶

²¹ Article 3(7) of the Act of 7 July 1994, Construction Law (consolidated text, Journal of Laws of 2024, item 725, as amended).

²² Article 3(7) of the Act.

²³ M. Cherka, P. Antoniak, F.M. Elżanowski, K.A. Wąsowski, *Ustawa o ochronie zabytków...*, op. cit., Article 49.

²⁴ D.R. Kijowski, A. Miruć, A. Budnik (eds), *Racjonalny ustawodawca. Racjonalna administracja: Pamięci Profesora Eugeniusza Smoktunowicza*, Białystok, 2016, p. 236.

²⁵ Judgment of the Provincial Administrative Court in Warsaw of 25 January 2019, VII SA/Wa 1147/18, LEX No. 3074470.

²⁶ Judgment of the Provincial Administrative Court in Warsaw of 11 January 2024, VII SA/Wa 1877/23, LEX No. 3735567.

An order under Article 49(1) of the Act cannot in fact lead to the restoration of a historic building in whole or in part.²⁷ The protection of monuments effected by this provision may thus consist in ordering at least the maintenance of the *status quo* of the technical condition of the building at the time of its entry in the register of monuments, if there is a danger of destruction or significant damage to the historic object. If, after being entered in the register, the condition of the building has been improved, that is to say, conservation or restoration works have been carried out on it, then, of course, orders under Article 49(1) of the Act will be aimed at preventing the deterioration of that condition for example through damage to or destruction of the monument. It cannot be ruled out that the monument was entered in the register in a poor technical condition. If that condition causes a danger of destruction or significant damage to the object, it is irrelevant that orders under Article 49(1) of the Act will lead not only to an improvement in that condition, but also to an improvement in its technical condition as compared with that existing before its entry in the register. The purpose of the Act is to protect monuments and not to allow their condition to deteriorate, regardless of when the monument was entered in the register of monuments.

It should also be added that the ordered conservation or construction works may not only lead in a sense to the restoration of certain elements of the historic building, but may also lead to their modification. Thus, it is possible, for example, to order the reinforcement of the foundations or of the roof structure. It is also possible that a given element of the object will have to be completely restored precisely in order to protect that object from destruction or significant damage. What is more, a complete restoration of the roof structure, for example, may entail the need to replace the existing roofing if it is damaged as well. It may also turn out that the reapplication of the same covering is no longer permissible, as would be the case where the roof is covered with asbestos-containing products.²⁸ In such a case, the ordered works will require the use of roofing of the kind that was historically used.²⁹

An order to carry out works under Article 49(1) of the Act may not be imposed without prior determination of the current technical condition of the historic building. This means that it is the duty of the conservation authority to conduct evidentiary proceedings and determine the technical condition of the historic building and which of its values may be endangered. The evidence collected may consist not only of the findings made during the inspection referred to in Article 38 of the Act, but also of all kinds of opinions and expert reports concerning the immovable monument, even if they were prepared for the purposes of other proceedings. These findings may be compared, for example, with the registration card of the monument and, on that basis, it may be determined whether the above-mentioned threat exists. Hence, there must be a relationship between the condition of the monument, as determined by the

²⁷ Judgment of the Provincial Administrative Court in Warsaw of 11 March 2020, VII SA/Wa 2403/19, LEX No. 3072267.

²⁸ A. Ginter, A. Michalak, *Ochrona zabytków. Komentarz*, 2nd ed., Warszawa, 2024, commentary to Article 49.

²⁹ Judgment of the Supreme Administrative Court of 10 November 2022, II OSK 1723/21, LEX No. 3434311.

conservation authority and indicating a threat of its destruction or significant damage, and the ordered works or construction works that are to eliminate such a condition. This means that the order to carry out works or construction works may cover only such works or construction works as are necessary to eliminate the risks identified by the authority.³⁰ It should be stated that this provision is, in a sense, 'protective' in nature, as its purpose is to remove the identified technical problems threatening the destruction of or damage to the historic building, so that it may be possible to renovate or rebuild it in the future. This provision therefore protects the *status quo* of the technical condition of the monument against the risk of its deterioration, and the scope of the obligations imposed may also be defined as works or construction works that are intended to 'save' the historic building from destruction.

In Article 6 of the Act, the legislator indicated that immovable monuments are subject to protection and care, regardless of their state of preservation. On that basis, the principal rule of the Act is the protection of monuments against destruction, which means that issues related to technical difficulties or the significant financial outlay required for the ordered works or construction works are not taken into account when applying Article 49(1) of the Act. In the case law, one may encounter the view that orders under Article 49(1) of the Act may be issued even if the historic building is not suitable for reconstruction.³¹ Such an interpretation appears to be correct, as this provision cannot serve to undermine the value of a given immovable monument and thus to question the legitimacy of its entry in the register of monuments. Consequently, the impossibility of reconstructing a monument may constitute a basis for deleting it from the register of monuments, though, in proceedings conducted under Article 13 of the Act, it cannot exclude the possibility of issuing orders referred to in Article 49(1) of the Act. It follows that as long as the building remains in the register of monuments, the conservation authorities are obliged to prevent its destruction. Even if there is no technical possibility of repairing a given historic building, it is the duty of the conservation authorities to protect the historic substance against complete destruction.³² After all, it cannot be ruled out that a properly secured immovable monument, despite its destruction and the lack of technical possibilities for reconstruction, may be rebuilt in the future, when new techniques and methods for the reconstruction of such objects emerge.

It should be noted that the decision referred to in Article 49(1) of the Act concerns works or construction works on a monument. This means that these obligations may include both carrying out works or construction works on the historic building itself, for example replacing the roof sheathing or strengthening the ceilings, and carrying out construction works in its surroundings, if there is a threat in those surroundings to such a building. Accordingly, this decision may include such works as securing a slope sliding towards the historic building or rebuilding the drainage

³⁰ Judgment of the Provincial Administrative Court in Warsaw of 6 December 2018, VII SA/Wa 1101/18, LEX No. 2627222.

³¹ Judgment of the Supreme Administrative Court of 16 May 2023, II OSK 1662/20, LEX No. 3588799.

³² Judgment of the Provincial Administrative Court in Warsaw of 25 May 2023, VII SA/Wa 439/23, LEX No. 3602321.

system in order to protect the building from flooding by groundwater. In addition, installations connected to it may pose a threat to a historic building. Thus, the restoration of the sewage³³ or energy system could be covered by such a decision.

The application of Article 49(1) of the Act is irrespective of whether the owner or user of the object has caused the deterioration of its technical condition. The purpose of this provision is to protect a historic building, not to impose a sanction for having caused that deterioration. Such sanctions are provided for by other provisions of the Act, for example Article 108, which defines the prohibited act of destroying or damaging a monument, the primary protected interest being the preservation of the monument in an undeteriorated condition.³⁴

ADDRESSEES OF THE ORDER TO CARRY OUT WORKS OR CONSTRUCTION WORKS

In Article 49(1) of the Act, the legislator has defined very broadly the circle of addressees to whom a decision ordering conservation or construction works may be directed. Accordingly, the addressees of such a decision are not limited solely to the owner or perpetual usufructuary of an immovable monument entered in the register, but rather encompass a relatively broad category, including natural persons or organisational units holding a legal title to use the monument arising from the right of ownership, perpetual usufruct, permanent management, a limited right *in rem*, or a contractual relationship.

The broad category of potential addressees of the decision in question, as formulated by the legislator, indicates that the owner or perpetual usufructuary of a monument will not always be regarded as the entity responsible for fulfilling obligations imposed under Article 49(1) of the Act. The legislator's intention was therefore to impose obligations on those entities which actually use historic buildings and hold an appropriate legal title to do so. The case law of the administrative courts indicates that obligations arising from this provision may not be imposed on a person who has a legal title to a monument where they do not have the right to use it. In the court's view, when determining the addressee, it is necessary first to establish which entity is using the monument and then whether that entity has one of the above-mentioned legal titles in respect of the monument.³⁵ On the other hand, it is emphasised that the conservation authority is not obliged to investigate the existence of agreements on the basis of which the legal title to use the historic building was transferred. This provision cannot be interpreted in such a way as to

³³ Judgment of the Provincial Administrative Court in Warsaw of 21 November 2007, I SA/Wa 881/07, LEX No. 463729.

³⁴ M. Kulik, A. Szczekala, 'Odpowiedzialność karna za przestępstwo zniszczenia lub uszkodzenia zabytku', in: Gardocka T. (ed.), *Prawne aspekty ochrony zabytków*, Toruń, 2010, p. 12; B. Gadecki, 'Kontrowersje wokół odpowiedzialności za zniszczenie lub uszkodzenie dobra o szczególnym znaczeniu dla kultury', *Ius Novum*, 2013, No. 4, p. 20.

³⁵ Judgment of the Supreme Administrative Court of 9 May 2012, II OSK 245/11; <http://orzeczenia.nsa.gov.pl> (accessed: 30 April 2026).

indicate an order of entities on which the conservation authority should successively impose an order to carry out works.³⁶ Since the purpose of Article 49(1) of the Act is to safeguard a monument, the owner is, in principle, the entity obliged to take such action.³⁷ To assume that the conservation authority may impose the obligation to carry out works only on the entity to which the monument has been entrusted for use could lead to a situation in which it is, in practice, impossible to carry out such works, in the event of the deliberate conclusion and termination of contracts with successive entities authorised to use the object. In such a situation, the owner of the monument could even evade conservation obligations by 'substituting', as potential addressees of a decision under Article 49(1) of the Act on the Protection of Monuments and the Care of Monuments, ever different entities holding an appropriate legal title. In the practice of applying Article 49(1) of the Act, it has been assumed that an order to carry out works may be addressed both to the owner of a monument and to another entity where that entity is entitled to a legal title to use the monument.³⁸ Therefore, the possibility of concurrent addressees to whom an order to carry out works may be addressed has been accepted.

Housing associations may also be among the possible addressees of a decision issued pursuant to Article 49(1) of the Act, if the obligations imposed relate to the common property.³⁹ In accordance with Article 3(1) of the Act on Ownership of Premises,⁴⁰ in the event of the separation of ownership of premises, the premises owner is entitled to a share in the common property as a right connected with the premises ownership. This means that the housing association is obliged to maintain the historic building in an undeteriorated condition and may therefore be the addressee of obligations arising under the provisions of the Act.⁴¹

A practical problem may arise in determining the addressees of the decision where the object is co-owned in fractional parts. Although, in such a situation, the decision in question should be addressed to all co-owners, in practice it may be impossible to identify all the co-owners of a given object. The same will apply if, for example, it is impossible to establish the place of residence of one of the co-owners. In such cases, it is justified to address the decision to at least one of the co-owners of the object, which will enable the actual implementation of the ordered works or construction works.

In conclusion, it should be noted that, since the case law has accepted that Article 49(1) of the Act should be interpreted in a manner that ensures the rapid

³⁶ Judgment of the Provincial Administrative Court in Warsaw of 13 March 2015, VII SA/Wa 2155/14, LEX No. 1817456.

³⁷ Judgment of the Provincial Administrative Court in Warsaw of 5 April 2018, VII SA/Wa 1439/17, LEX No. 2494932.

³⁸ *Ibidem*.

³⁹ Judgment of the Provincial Administrative Court in Warsaw of 26 November 2021, VII SA/Wa 2071/21, LEX No. 3275427.

⁴⁰ Act of 24 June 1994 on Ownership of Premises (consolidated text: Journal of Laws of 2021, item 1048).

⁴¹ Judgment of the Provincial Administrative Court in Warsaw of 22 January 2014, VII SA/Wa 476/13; judgment of the Provincial Administrative Court in Warsaw of 21 September 2016, VII SA/Wa 2474/15.

and effective protection of the value of the monument,⁴² the determination of the addressee of the decision in question should likewise make it possible to achieve that objective. For that reason, the order to carry out works should be addressed primarily to the entity that will be capable of complying with it. In many cases, this will be the owner or perpetual usufructuary of the historic building, in particular where the authority encounters difficulties in determining which entity has been granted the legal title to use the building.

SUBSTITUTE ENFORCEMENT OF A DECISION ORDERING THE EXECUTION OF WORKS OR CONSTRUCTION WORKS

Substitute enforcement of a decision issued pursuant to Article 49(1) of the Act may take place in two situations. First, where the addressee of such a decision remains passive and fails to commence the ordered works, and, secondly, where those works are not carried out within the time limit indicated in the decision. The occurrence of either of the above situations will be associated with the initiation of administrative enforcement proceedings and, consequently, with the possibility of applying an enforcement measure in the form of substitute enforcement regulated in Section III of Chapter 3 of the Act on Enforcement Proceedings in Administration.⁴³ It is worth noting that Article 49(1) of the Act does not require the obliged party to be provided with a statement of the costs of substitute performance, including a demand to pay a specified amount within a specified period in order to cover the costs of substitute performance of the obligations imposed. The costs of substitute performance are determined in separate administrative proceedings.⁴⁴

Once substitute performance has been completed, it will be possible to initiate proceedings to determine and secure the State Treasury's receivables. According to Article 49(3) of the Act, in the case of substitute performance of conservation works or construction works on an immovable monument, the voivodeship conservator of monuments issues a decision specifying the amount of the State Treasury's receivables in respect of the substitute performance of those works or construction works, their scope, and the due date of that receivable. Pursuant to Article 49(4) of the Act, that receivable is subject to security by means of a compulsory mortgage on the property, at the request of the voivodeship conservator of monuments, based on the above-mentioned decision. If the property does not have a land and mortgage register, the security may be effected by submitting an application and the decision to the collection of documents. A certain oversight on the part of the legislator is the failure to specify in these provisions the addressee of such a decision. Thus, it appears that the decision determining the amount of the State Treasury's receivables in respect of

⁴² Judgment of the Provincial Administrative Court in Warsaw of 29 January 2021, VII SA/Wa 1169/20, LEX No. 3156931.

⁴³ Act of 17 June 1966 on Enforcement Proceedings in Administration (consolidated text, Journal of Laws of 2026, item 268, as amended).

⁴⁴ Judgment of the Provincial Administrative Court in Warsaw of 12 November 2021, VII SA/Wa 930/21, LEX No. 3309548.

substitute enforcement should be directed to the addressee of the decision issued on the basis of Article 49(1) of the Act. A further oversight on the part of the legislator is the failure to indicate in these provisions that this decision should specify the due date of that receivable.⁴⁵

Furthermore, Article 49(6) of the Act, provides for the possibility of remission, in whole or in part, or payment by instalments of the State Treasury's receivables arising from substitute performance. This competence is vested in the voivode who, in consultation with the General Conservator of Monuments, may issue a decision to that effect. At the same time, this provision is also discretionary, as the legislator made such a decision conditional on a finding that the receivable is irrecoverable or that its recovery would cause significant harm to the debtor's financial situation.

SUMMARY

The protection of monuments is one of the most important tasks of the state in the field of preserving cultural heritage. In order to make this a reality, conservation authorities should be equipped with appropriate legal instruments enabling them to exert authoritative influence over the owners of monuments in situations where these objects are in poor technical condition. One such instrument is undoubtedly a decision ordering the carrying out of works or construction works issued on the basis of Article 49(1) of the Act.

When assessing the scope of the obligations that may be imposed by the conservation authorities, it should be pointed out that they may lead only to saving the monument from destruction or significant damage. Therefore, this provision constitutes, in a sense, a form of protection of the current condition of the monument, which may include only such works as will protect the object from destruction or significant damage. It seems, however, that this provision should cover not only the restoration and construction works indicated therein, but also works of relatively low intensity, for example drying ceilings, securing window openings or obtaining expert opinions. The position according to which such obligations cannot be imposed in relation to a destroyed monument, where that state of affairs is the result of the inaction both of its owner and of the conservation authorities' failure to exercise proper supervision, is completely unjustified. In Article 49(1) of the Act, the legislator did not introduce any negative prerequisites for the application of this provision. Long-term inaction on the part of public administration bodies cannot be a reason to waive the protection of historic buildings. Since the purpose of the Act on the Protection of Monuments and the Care of Monuments is to protect monuments, that task should be carried out in respect of every historic object, including monuments entered in the register of monuments.

⁴⁵ *Ibidem*.

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Cite as:

Maziarz A. (2026), *Order to Carry Out Works or Construction Works on an Immovable Monument*, *Ius Novum* (Vol. 20) 2, 88–101. DOI 10.2478/in-2026-0019

CRITERION OF SIGNIFICANT CONTRIBUTION TO THE DEVELOPMENT OF A SPECIFIC DISCIPLINE IN HABILITATION PROCEEDINGS*

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DOI 10.2478/in-2026-0020

ABSTRACT

This article is an original research paper concerning the interpretation of one of the prerequisites for conferring the academic degree of habilitated doctor in Poland, i.e. the prerequisite of making a significant contribution to the development of a specific scientific discipline. Starting from the statement of ambiguity of the provision formulating this prerequisite, the author indicates possible ways of understanding that provision, and then determines which interpretation, in the light of recognised methods of legal interpretation, should be regarded as appropriate. The aim of the research is to prove the main thesis that the aforementioned prerequisite, contrary to widespread practice, should be understood as meaning that the contribution to the development of the discipline must be made by the habilitation candidate's entire body of work, and not by the main work alone. In this respect, the author's findings are original in nature, as this view, although already presented to a limited extent in the literature, has not been substantiated in detail to date. The results of the research conducted may be of significant importance for the functioning of the system of scientific promotions in Poland, as they have the potential to modify the current practice of reviewers and bodies participating in habilitation proceedings.

Keywords: habilitation, review, body of work, habilitation proceedings, contribution to the development of the discipline

* The publication was prepared in connection with the implementation of scientific activity No. 2023/07/X/HS5/00825, financed from the funds of the National Science Centre, Poland.

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1.

The grounds for awarding the postdoctoral degree (*doktor habilitowany*) are among the most important elements of the academic¹ promotion system in Poland. They define the conditions which, when fulfilled, attest to the attainment of a recognised position within the academic community and allow the holder to perform many prestigious functions in higher education² and, in exceptional cases, even outside it.³ Their proper regulation is therefore crucial for the proper functioning of Polish science. Any shortcomings in this area may negatively affect its condition, especially by unjustifiably hindering the careers of some researchers.

Although, by its very nature, the issue of the grounds for awarding academic degrees may be of interest to the entire academic community in Poland, it is primarily a subject of research within the discipline of legal sciences. This is due to the fact that these grounds are legal norms and are applied in proceedings which are, in essence, administrative proceedings. For this reason, they are analysed in detail primarily in legal literature, although the results of this research are used in promotion proceedings regardless of the field and scientific discipline.⁴

The issue of the grounds for awarding academic degrees has already been the subject of interest among representatives of legal doctrine, including after the entry into force of the LHES, which introduced significant modifications in this area. This also applies to the prerequisite regulated in Article 219(1)(2) LHES, i.e. having in one's body of work scientific or artistic achievements that constitute a significant contribution to the development of a specific discipline. However, a review of the literature indicates that not all relevant issues concerning this prerequisite have been analysed in sufficient detail to date. This concerns in particular to the issue of the number of scientific achievements required to obtain the degree of and the extent

¹ The postdoctoral degree is not only an academic degree, but also an artistic one. For the sake of simplicity, however, further comments will refer exclusively to academic promotions, which should, nevertheless, also be understood to include promotions in the arts. This will also allow for the necessary consideration of issues specific to the latter.

² However, it should be noted that the Act of 20 July 2018 – Law on Higher Education and Science (consolidated text: Journal of Laws of 2023, item 742, as amended; hereinafter referred to as the 'LHES') – compared to previous regulations – significantly limited the benefits of holding the postdoctoral degree. First of all, it is no longer necessary for employment as a university professor (formerly associate professor). Nonetheless, it is still generally required for employment as a professor at an institute in scientific units of the Polish Academy of Sciences, for the role of supervisor or reviewer in doctoral proceedings, and for the role of reviewer or other member of a habilitation committee, as well as for membership of the Council for Scientific Excellence, hereinafter referred to as the 'CSE'. Furthermore, in practice, habilitation often proves to be necessary for employment as a professor and for entrusting the most important organisational functions at a university.

³ The postdoctoral degree in legal sciences allows one to hold even the most prominent legal positions without having to complete a traineeship and pass a professional examination, or have relevant practical experience. This allows one to conclude that, in legal sciences, the degree in question is not only academic in nature, but *de facto* also professional.

⁴ See, for example, the review by E. Roszkowska of 24 January 2023, prepared in the proceedings for the award of the postdoctoral degree in the discipline of automation, electronics and electrical engineering to M. Czubenko, whose final conclusion was the result of applying the interpretation of the provisions proposed in the legal literature cited in that review.

to which the requirement of a significant contribution to the development of the discipline applies to them.⁵ This issue has very important practical implications, as the final outcome of the habilitation procedure may in many cases depend on the correct interpretation of the indicated part of Article 219(1)(2) LHES.

In view of the above, the subject of this article is a dogmatic analysis of Article 219(1)(2) LHES to the extent necessary to define the framework for applying the criterion of significant contribution to the development of a specific discipline in habilitation proceedings. The main objective of this study is to prove the thesis that, contrary to widespread practice and some views presented in doctrine, the aforementioned criterion should currently be applied not merely to a single ('main') work or series, but jointly to all achievements presented. For this reason, other issues related to the awarding of the postdoctoral degree, including those directly related to the content of Article 219(1)(2) LHES, will remain outside the scope of detailed consideration.⁶

2.

The current prerequisites for awarding the postdoctoral degree are regulated primarily in Article 219(1) LHES. According to this provision, they include: holding the academic degree of doctor, having scientific or artistic achievements in one's body of work that constitute a significant contribution to the development of a specific discipline, as well as demonstrating significant scientific or artistic activity carried out in more than one university, scientific institution or cultural institution. There has been controversy in legal doctrine as to whether this list should be extended, at least in some cases, to include a separate prerequisite of a positive assessment of the habilitation colloquium.⁷ Apart from this one exception, there are no grounds for seeking other conditions for awarding the postdoctoral degree. Nor does it seem reasonable to interpret Article 219(1) LHES creatively in a way that would allow for the discovery therein, as it were, of additional prerequisites not explicitly expressed by the legislator.⁸

Among the conditions listed in Article 219(1) LHES, particular attention should be paid to the requirement to make a significant contribution to the development of a specific scientific discipline. Already *prima facie*, it seems that this requirement is the most important in practice, as it best reflects the essence of habilitation.

⁵ This problem has been given particular attention essentially only in M. Gurdek, 'Liczba osiągnięć naukowych albo artystycznych, stanowiących znaczny wkład w rozwój określonej dyscypliny, konieczna do wykazania we wniosku habilitacyjnym', *Roczniki Administracji i Prawa*, 2022, Vol. XXII, No. 2, pp. 153 et seq. Nonetheless, the solution proposed therein seems unsatisfactory, as will be demonstrated later in this study.

⁶ The subject of reflection will therefore not be, in particular, issues already sufficiently addressed in doctrine, such as the understanding of expressions such as 'a series of thematically related articles' or 'a significant contribution to the development of a particular discipline'.

⁷ This view is presented in M. Radajewski, 'Nadawanie stopnia doktora habilitowanego w świetle Prawa o szkolnictwie wyższym i nauce', *Studia Prawno-Ekonomiczne*, 2020, Vol. 114, p. 91. It was, however, criticised in P. Pokorny, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2023, Legalis, commentary on Article 221, point VI.3.

⁸ We sometimes encounter this practice in real life, e.g. when reviewers do not evaluate the habilitation candidate's body of work from the point of view of statutory criteria, but rather on the basis of the generally understood criteria of scientific 'maturity' or 'independence'.

However, it has been formulated in a way that may raise serious interpretative doubts. The provision in question reads as follows:

‘The postdoctoral degree shall be awarded to a person who (...) has in their body of work scientific or artistic achievements constituting a significant contribution to the development of a specific discipline, including at least (...)’.

Then, in points (a)–(c), the legislator lists specific types of scientific achievements: a scientific monograph, a series of thematically related articles, or a realised original design, construction, technological or artistic achievement, at least one of which must be included in the habilitation portfolio. Nonetheless, this wording of Article 219(1)(2) LHES does not allow one to determine unambiguously how many scientific achievements must be presented in the habilitation procedure and, above all, whether a ‘significant contribution to the development of the discipline’ must be made independently by the main work alone, listed in Article 219(1)(2)(a)–(c) LHES, or also by at least one other achievement, or perhaps by all achievements combined.

The above interpretative dilemma may hypothetically be resolved in four basic ways, which can be summarised in the following statements:

- (1) To meet the criterion referred to in Article 219(1)(2) LHES, it is sufficient to present one scientific achievement, provided that it meets the conditions described in points (a)–(c) and makes a significant contribution to the development of the discipline.
- (2) In order to meet the criterion referred to in Article 219(1)(2) LHES, it is necessary to present at least two scientific achievements, including one referred to in points (a)–(c), and it is this achievement that must independently make a significant contribution to the development of the discipline.
- (3) In order to meet the criterion referred to in Article 219(1)(2) LHES, it is necessary to present at least two scientific achievements, including one referred to in points (a)–(c), with each of them separately making a significant contribution to the development of the discipline.
- (4) In order to meet the criterion referred to in Article 219(1)(2) LHES, it is necessary to present at least two scientific achievements, including at least one referred to in points (a)–(c), whereby they must contribute significantly to the development of the discipline jointly, and not necessarily independently.

3.

The first hypothesis, which essentially rests on the claim that the basic criterion for awarding the postdoctoral degree is making a significant contribution to the development of a given discipline through one main scientific achievement, although in practice it seems to be particularly popular among reviewers,⁹ has the

⁹ The doctrine clearly supports this view; see for example: M. Pyter, in: Balicka A., Pyter M., Zięba B. (eds), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2020, Legalis, commentary on Article 219(1); D.P. Kała, ‘Szczegółowe przesłanki nadania stopnia doktora habilitowanego’, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2022, Vol. 84, No. 3, pp. 41–43, and P. Grzebyk, ‘Warunki uzyskania stopnia doktora habilitowanego w dyscyplinie nauk prawnych’,

weakest basis in the text of the statute itself. Article 219(1)(2) LHES clearly refers to scientific 'achievements' in the plural. Proponents of this position usually refer to purposive interpretation, assuming that a literal interpretation would be too rigorous in this case.¹⁰ Yet, this argument is easily refuted. This is because a literal interpretation of the phrase 'scientific achievements' does not necessarily require each of these achievements to be of a qualified nature, i.e. to take the form of one of the achievements referred to in Article 219(1)(2)(a)–(c) LHES, or to contribute independently and substantially to the development of a specific discipline. Given this assumption, it does not seem that linguistic interpretation of the phrase in question would produce unreasonable or even unsatisfactory results, and therefore that it would be justified to give priority to purposive interpretation in this case.

Supporters of this position also refer to legal solutions regulating the previous prerequisites for awarding the postdoctoral degree, i.e. the provisions of Article 16 of the Act of 14 March 2003 on Academic Degrees and Titles and on Degrees and Titles in the Field of Art,¹¹ as amended on 18 March 2011.¹² Paragraph 1 of this provision stipulated that the basis for awarding the degree could be having scientific achievements obtained after receiving the degree of doctor, constituting a significant contribution by the author to the development of a specific discipline, while paragraph 2 clearly indicated that the achievement referred to in paragraph 1 could only be: a work published in its entirety or in substantial part, or a series of thematically related publications, a realised original design, construction, technological or artistic achievement, or part of a collective work. Due to the ambiguous wording of the indicated provision, with paragraph 1 referring to 'achievements' in the plural and paragraph 2 referring to 'achievement' in the singular, there was doubt as to whether a significant contribution to the development of the discipline had to be made by the main work itself as such or whether the habilitation candidate had to demonstrate at least two qualified achievements referred to in Article 16(2) AAD, i.e. two postdoctoral monographs, for example.¹³ In practice, mainly due to purposive interpretation, the first of the above options was adopted.

The above findings indicate that, with regard to the understanding of the prerequisite of having achievements that constitute a significant contribution to the development of a specific discipline, there is insufficient analogy between the current and previous regulations. In particular, Article 219(1)(2) LHES does not contain

Państwo i Prawo, 2022, No. 5, p. 74. However, only in the latter case was a broader argument presented in its favour. In the case of the second of the above-mentioned publications, there is a certain inconsistency – its author consistently refers to a single achievement constituting a significant contribution to the development of the discipline, but this does not prevent him from approvingly referring to the view that: 'the "significance of the contribution" should be assessed in terms of the quantity and quality of the body of work' (p. 41). If this qualified achievement must independently constitute a significant contribution to the development of the discipline, the quantity and quality of the remaining body of work should not be relevant when assessing the criterion in question.

¹⁰ See P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 74.

¹¹ Consolidated text: Journal of Laws of 2017, item 1789; hereinafter referred to as the 'AAD'.

¹² Journal of Laws No. 84, item 455. See. P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 74.

¹³ See K. Ślebza, 'Jednotematyczny cykl publikacji jako przesłanka nadawania stopnia doktora habilitowanego nauk prawnych', *Państwo i Prawo*, 2013, No. 7, pp. 32–33.

the inconsistency characteristic of Article 16 AAD in the number used for the noun 'achievement', which was the basis for giving priority to purposive interpretation with regard to the latter provision. In this context, it is worth adding that during the work on the LHES, the interpretative problems related to Article 16 AAD must have been known, which is indirectly confirmed by the different and, this time, consistent wording of Article 219(1)(2) LHES. It does not seem reasonable, therefore, to interpret both of these provisions on the basis of the same assumptions. It should also be assumed that if the legislator had intended to maintain the previous normative *status quo* in this regard, it would at most have removed the previous ambiguity from the relevant provision. However, Article 219(1)(2) LHES was in practice drafted anew, leaving only the basic terms used in Article 16 AAD, such as 'achievements' and 'significant contribution to the development of a specific discipline'.

Indirectly, the removal in the current law of the requirement that achievements which are to contribute significantly to the development of the discipline must be obtained after the award of the degree of doctor also argues against drawing analogies between the above-mentioned provisions. This modification, made by the legislator with full awareness,¹⁴ seems to interfere significantly with the purpose of the prerequisite in question, and therefore must also affect the functional interpretation of the provision formulating that prerequisite. Whereas under the previous legal regime the emphasis could be placed on one particular achievement obtained after the doctorate, now – anticipating further considerations – the legislator seems rather to require a broad view of the habilitation candidate's overall achievements. Thus, the purposive interpretation of Article 219(1)(2) LHES, instead of confirming the need to interpret this provision analogously to Article 16 AAD, seems rather to provide additional arguments against such an analogy.¹⁵

4.

The second of the hypotheses presented above is essentially an attempt to reconcile the first hypothesis with the unambiguous wording of the statute, which in Article 219(1)(2) LHES uses the term 'achievements' in the plural. It therefore amounts to recognising that, under the criterion described in this provision, the habilitation candidate submits at least two scientific achievements for evaluation, including one qualified ('main') achievement, and it is this achievement that must independently meet the condition of making a significant contribution to the development of the discipline. Although this position is *prima facie* free from the most significant flaw of the first hypothesis, namely an unjustified departure from literal interpretation, it should also be considered unconvincing. In essence, it is *de facto* equivalent to the first hypothesis. It is difficult to imagine that a candidate for the postdoctoral degree would

¹⁴ See the explanatory memorandum to the draft Act – Law on Higher Education, Sejm print No. 2446, p. 50, Sejm of the 8th term.

¹⁵ It is worth adding here that it remains uncertain whether the practice of applying Article 16(1) and (2) AAD after 2011, referred to by supporters of the hypothesis in question, was correct and accurately reflected the intentions of the legislator, as will be discussed in more detail later in this paper.

have no scientific achievement other than the main work itself.¹⁶ It also does not seem that such a quantitatively modest body of work, even in extraordinary circumstances, would allow one to conclude that the criterion of demonstrating significant scientific activity by the habilitation candidate has been met. The hypothesis in question would therefore imply that the requirement to have scientific ‘achievements’, rather than an ‘achievement’, would be a superfluous requirement. It seems, moreover, that if the thesis in question were true, the legislator would have constructed Article 219(1)(2) LHES differently, i.e. by moving the phrase ‘constituting a significant contribution to the development of a specific discipline’ to the end of the provision, to a separate line, after the list in points (a)–(c), so that this requirement would clearly refer only to qualified achievements. Only such a solution would allow one to assume that the quoted phrase refers to the listed points and only to them.¹⁷ This is confirmed by the fact that the legislator used the plural form not only in relation to the noun ‘achievements’ but also in relation to the adjective ‘constituting’, which determines that the legislator applies the criterion of a significant contribution to the development of the discipline to more than one achievement.

5.

As already indicated, the third interpretation of Article 219(1)(2) LHES can be reduced to the hypothesis that, in order for the habilitation procedure to be successfully completed, the candidate for the degree must present at least two scientific achievements, including one qualified achievement, each of which must separately meet the criterion of a significant contribution to the development of a specific discipline. Importantly, this position has been clearly expressed in the literature on the subject.¹⁸

¹⁶ In principle, this is even impossible, because Article 186(1)(3) LHES stipulates that the prerequisite for obtaining a doctoral degree, the holding of which is a condition for obtaining habilitation, is the publication of at least one scientific article or monograph, or the authorship of an artistic work of significant importance. Hypothetically, a situation in which a habilitation candidate has only one achievement in their body of work could occur only if the aforementioned monograph or artistic work also qualified as a doctoral dissertation and was then presented in the habilitation procedure as an achievement referred to in Article 219(1)(2)(a)–(c) LHES. Such a situation seems unlikely in practice and is rightly considered unacceptable by some representatives of doctrine – see Ł. Kierznowski, *Stopnie naukowe i stopnie w zakresie sztuki. Komentarz*, Warszawa, 2021, p. 132.

¹⁷ Cf. G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa, 2016, pp. 378–379.

¹⁸ See, for example, M. Gurdek, ‘Liczba osiągnięć...’, op. cit., pp. 153 et seq. According to this author, some other representatives of doctrine are also likely to support this interpretation, pp. 157–159. This observation seems to be justified at least in relation to K. Ślebzak, ‘Komentarz do art. 219 ustawy – Prawo o szkolnictwie wyższym i nauce’, in: Baran K.W. (ed.), *Akademickie prawo zatrudnienia. Komentarz*, Warszawa, 2020, LEX. Although the author does not indicate this explicitly, when discussing the requirement to have achievements other than those referred to in Article 219(1)(2)(a)–(c) LHES, he refers to them separately as a criterion of significant contribution to the development of the discipline: ‘In cases where the scientific level of a doctoral dissertation can be considered a significant contribution to the development of a given scientific discipline, it may also be assessed in the procedure for awarding the postdoctoral degree. Nevertheless, it should be emphasised that a doctoral dissertation alone cannot be the basis for awarding the postdoctoral degree, as Article 219(1)(2) LHES refers to scientific (artistic) “achievements”. Therefore, in addition to the doctoral dissertation, there must also be other

According to the proponents of this view, there are a number of arguments in its favour. The first of these is said to be the literal interpretation of Article 219(1)(2) LHES.¹⁹ Undoubtedly, it must be agreed that this provision refers to 'achievements' that constitute a significant contribution to the development of a specific discipline, and therefore that there must be more than one such achievement. However, in no case does literal interpretation alone allow one to conclude that the aforementioned criterion of influence on the development of science must be met by them separately, rather than jointly. The legislator did not use any linguistic construction in the provision in question that would clearly resolve this doubt. Therefore, while resort to literal interpretation allows one to reject the hypothesis that having one scientific achievement in one's body of work is sufficient, the correctness of the analysed position requires reference to other types of interpretation that will allow one to determine how – separately or jointly – the achievements submitted for evaluation should contribute significantly to the development of a specific discipline.

Some authors argue that historical interpretation also supports the validity of this thesis. It would indicate a close connection between Article 219(1)(2) LHES and the previously applicable Article 16(1) and (2) AAD, in the wording discussed above after the 2011 amendment. This connection should be seen, as it were, in contrast to the previously applicable regulations, in particular the original wording of Article 16 AAD, which provided that the prerequisites for admission to the habilitation procedure were, in addition to holding the degree of doctor, obtaining substantial scientific or artistic achievements and presenting a habilitation thesis. In accordance with the then Article 17(1) and (2) AAD, such a thesis could be a work or a series of publications on a single topic that made a significant contribution to the development of a specific discipline.²⁰ It followed unequivocally from the content of this provision that the indicated contribution prerequisite had to be met independently through one main scientific achievement, while other elements of the candidate's body of work were not assessed in this respect at all. There can therefore be no doubt that the conditions for awarding the postdoctoral degree provided for in the amended text of the AAD and in the LHES are different. Even so, this does not mean that the legislator, by extending the application of the criterion of influence on the development of the discipline to scientific achievements other than the equivalent of the former habilitation thesis, decided that it should now be applied to at least two achievements assessed as it were separately from each other. Such a measure would in fact mean a radical tightening, a kind of doubling, of the requirements necessary to obtain the postdoctoral degree compared to the original content of Article 16 AAD. However, this does not seem to have been its intention. This is not indicated by the course of work on the 2011 amendment to the AAD or on the LHES. On the contrary, the explanatory memorandum to the draft of the first of these acts indicated that the amendment to Article 16 AAD was intended to 'focus on the assessment of the candidate's scientific

achievements that demonstrate a significant contribution to the development of a specific discipline. Theoretically, these may also be publications included in the doctoral procedure (...), but they must additionally meet the criterion of a significant contribution' (LEX version, point 2).

¹⁹ See M. Gurdek, 'Liczba osiągnięć...', *op. cit.*, pp. 156–157.

²⁰ *Ibidem*, pp. 159–165.

achievements' and to depart from 'the obligation to present a habilitation thesis in its current form'.²¹ It is therefore justified to claim that the modification of the conditions for awarding the postdoctoral degree in 2011 was not intended to tighten them significantly, but to ensure that the proceedings examine the impact of the habilitation candidate's entire body of work on the development of the discipline, that is, 'achievements' in the plural, rather than just a single habilitation thesis.²² In this context, the current wording of Article 219(1)(2) LHES should be seen rather as a continuation of this postulate, while at the same time eliminating the shortcomings of Article 16(1) and (2) of the AAD discussed above. This leads to the conclusion that historical interpretation does not provide sufficient arguments for accepting the thesis in question; on the contrary, it allows the current regulations to be regarded as the result of an evolution towards a more comprehensive assessment of the entire scientific activity of candidates for the degree, rather than only its individual, 'point' manifestations, as was previously the case.

Supporters of the analysed view also cite the normative context in which the regulations governing habilitation currently operate. They point out, among other things, that obtaining habilitation is currently in principle not an essential stage in the career of a researcher, which allows for greater emphasis on the role of persons holding a postdoctoral degree in staff development, i.e. participating with a decisive voice in proceedings for awarding academic degrees. This, in turn, would correspond to an increase in the requirements imposed on them, so that only persons with very high scientific qualifications could act as reviewers and supervisors.²³ However, this argument also raises serious doubts. The right to perform important functions in promotion proceedings was a privilege of persons holding a postdoctoral degree regulated also in the previously applicable laws. The legislator provided that qualifications in this area were to be certified by demonstrating a significant contribution to the development of the discipline. This solution was based on the valid assumption that a person who has themselves made a significant contribution to the development of science has, at least at a minimum level, the competence to supervise and evaluate the scientific work of others. From this point of view, it does not seem relevant whether a given scientist made this contribution once or twice, which would *de facto* amount to a requirement to have

²¹ Draft Act amending the Law on Higher Education, the Act on Academic Degrees and Titles, and Degrees and Titles in the Field of Art, and amending Certain Other Acts, Sejm print No. 3391, Sejm of the 6th term, p. 9.

²² Although, as already mentioned, this has not been confirmed in practice, it seems that, on the basis of the amended Article 16(1) and (2) AAD, it was necessary to examine the impact of all the achievements submitted for evaluation on the development of the discipline. This resulted from the fact that Article 16(2), defining the achievement referred to in paragraph 1, was not formulated categorically, i.e. in a way that excluded achievements other than those described therein; the legislator used the phrase 'may constitute' rather than 'must constitute' or 'may only constitute'. The interpretation that would best harmonise paragraphs 1 and 2 of the provision being analysed would therefore involve assessing all achievements from the point of view of their impact on the development of the discipline; this would avoid the need to depart from the literal interpretation of paragraph 1, which referred to 'achievements (...) constituting a significant contribution', with the proviso that there must be at least one achievement referred to in paragraph 2, equivalent to a habilitation thesis.

²³ See M. Gurdek, 'Liczba osiągnięć...', *op. cit.*, pp. 165–167.

at least two achievements in one's body of work, each of which independently made such a contribution. This allows one to assume that, even under the current law, there are no grounds for claiming that the criterion of contribution to the development of the discipline must be met as it were multiple times. It should also be remembered that the legislator does not limit the rights of persons who obtained the postdoctoral degree under previously applicable regulations in this respect. This further confirms that it is not possible to infer a tightening of the criteria for obtaining the academic postdoctoral degree from the mere fact that its formal significance is currently reduced primarily to the possibility of performing key functions in promotion proceedings. On the contrary, it allows one to assume that, from this point of view, these criteria have undergone at most insignificant modifications, which should also affect the interpretation of the currently applicable regulations.

The last argument that is said to support the hypothesis under discussion is the legislator's use, also in other provisions of the LHES governing habilitation proceedings, i.e. in Article 220(2)(2) and Article 221(8) LHES, of the term 'scientific achievements' in the plural.²⁴ Although this observation is correct and, as such, may serve to reject the thesis that only one (main) scientific achievement should be assessed in the course of these proceedings, it certainly does not determine whether the achievements presented by the habilitation candidate must meet the criterion of significant impact individually or collectively.

6.

The above considerations indicate that also the view that the condition for obtaining the postdoctoral degree is to have at least two achievements, including one qualified achievement, in one's body of work, with each achievement separately contributing significantly to the development of a specific discipline, is not sufficiently justified. The arguments in favour of this view are partly misplaced and, in the remaining scope, at least inconclusive. In this context, particular attention should therefore be paid to the fourth of the above-mentioned hypotheses, the essence of which is that the condition for obtaining habilitation, referred to in Article 219(1)(2) LHES, should be understood as meaning that it is sufficient to present at least two scientific achievements, including at least one referred to in points (a)–(c), provided that they contribute significantly to the development of the discipline jointly, and not necessarily independently. It should be emphasised that this view is also presented in doctrine,²⁵ although it has not yet been justified in greater detail, especially in

²⁴ Ibidem, pp. 167–168.

²⁵ See, for example, P. Pokorný, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie...*, op. cit., Legalis, commentary on Article 219, point II.2. In the context of the criterion in question, these authors refer to the body of work that is subject to assessment and must meet certain quantitative and qualitative conditions. This interpretation seems to be confirmed also in Ł. Kierznowski, *Stopnie naukowe...*, op. cit., p. 226. The author points out that: 'However, it is not the quantity but the quality of achievements that is of key importance here, because regardless of their number, they must constitute a "significant contribution to the development of a specific discipline". It is not impossible to fulfil this prerequisite even with a small number of very significant achievements (...)' . The overall assessment of the body of work, rather than individual achievements, is also discussed in M. Radajewski, 'Nadawanie stopnia...', op. cit., pp. 85–88.

the context of interpretative doubts arising from the ambiguous wording of the above-mentioned provision.

In order to prove the validity of the thesis in question, it should first be clearly emphasised that, with regard to the criterion laid down in Article 219(1)(2) LHES, the assessment of achievements, at least two, is provided for, rather than the assessment of a single qualified scientific achievement. This is supported by the arguments already mentioned above, i.e. both the literal interpretation of the provision in question and its context, which consists of other regulations that also refer to 'achievements' in the plural. It is also worth noting that in Article 219(1) LHES, unlike under the AAD, the legislator did not provide that the basis for awarding the postdoctoral degree could consist solely of achievements obtained after the award of the doctoral degree. Thus, achievements obtained at every stage of the habilitation candidate's academic career are subject to assessment in terms of meeting the criterion of a significant contribution to the development of the discipline. For this change to make rational sense, it must be assumed that the 'achievements' referred to in Article 219(1) LHES are all scientific achievements, and not only the qualified achievements listed in Article 219(1)(2)(a)–(c) LHES. It would be difficult to expect habilitation candidates to obtain their main habilitation achievements before obtaining their doctorate, and even if this could happen in exceptional cases, there is no reason to believe that the amendment in question was made solely because of them.

Having demonstrated that the condition for awarding the postdoctoral degree referred to in Article 219(1)(2) LHES includes the assessment of not one but at least two scientific achievements, it is necessary to determine whether they can meet the criterion of significant contribution jointly or only independently. This is what distinguishes the hypothesis in question from the previous one. Since this dilemma cannot be resolved on the basis of linguistic analysis alone, due to the ambiguity of the wording of the provision in question, it is necessary, in accordance with generally accepted rules of legal interpretation, to resort to historical and purposive interpretation.

In the context of the first of the above-mentioned types of interpretation, it should be recalled that a key change in the criterion in question took place in 2011. It was then that the legislator abandoned the prerequisite of demonstrating a significant impact on the development of science through the habilitation thesis itself, in favour of demonstrating such an impact through 'scientific achievements'. This change, as already mentioned, was made deliberately and was intended by the authors of this solution to lead to a broader assessment of elements of the habilitation candidate's body of work other than the habilitation thesis alone, which was perceived, as it were, as separate from the rest. This effect was essentially not achieved due to the poor legislative quality of the amended Article 16(1) and (2) AAD. The ambiguity of the terms used therein and their mutual relations led in practice to the maintenance of the existing method of evaluating habilitation candidates and, *de facto*, to the continued treatment of the main scientific achievement as a habilitation thesis, which had to make a significant contribution to the development of a specific discipline on its own.

Against this background, it seems that the current statutory regulation should not be treated as an endorsement of established practice, which in fact significantly undermines the attempt to reform the criteria for awarding the postdoctoral degree

in 2011, but on the contrary – as an affirmation of the validity of this reform and its improvement by removing the ambiguities in the statutory provisions that have existed to date. There are, nevertheless, no grounds for claiming that the legislator's current objective is to further modify the prerequisites for habilitation significantly by creating a requirement to present *de facto* two equivalents of the former habilitation thesis, at least in terms of their contribution to the development of the discipline. Such a far-reaching tightening of the criteria would have to either result *explicite* from the content of the provisions or at least find clear confirmation in the work on the law, within the framework of which such an objective would have been clearly articulated. However, nothing of this kind took place.

Nonetheless, apart from historical interpretation, this hypothesis is supported primarily by functional interpretation of Article 219(1)(2) LHES. The purpose of this provision is to emphasise clearly that the postdoctoral degree may be awarded only to a person who has made a significant contribution to science, namely to the development of a specific discipline. This is evidence of such a person's high standing in the scientific community and of the noticeable impact of their thinking on the research of others. From this point of view, it seems irrelevant in what form, i.e. by what means or forms of participation in scientific discourse, such a contribution was achieved. It would be difficult to justify the view that the described effect could differ significantly depending on whether it was achieved through a specific publication, or a series of publications, or through an entire, extensive body of work. There are therefore no grounds for claiming that the legislator, by making the award of the postdoctoral degree conditional on a significant contribution to the development of the discipline, simultaneously recognised that persons who have made such a contribution through their entire body of work, rather than through two independently assessed scientific achievements, do not deserve this degree. From this point of view, it seems that the formulation of additional conditions for the habilitation candidate's body of work, other than that it makes a significant contribution to the development of the discipline, especially with regard to its structure, may be based only on an explicit statutory provision. Under the current regulations, the only condition of this kind is the requirement the body of work include one qualified achievement, i.e. one that meets the criteria described in Article 219(1)(2)(a)–(c) LHES. There are therefore no grounds for claiming that a habilitation candidate is required to submit for assessment at least two scientific achievements contributing to the development of the discipline independently of each other.

Purposive interpretation also contradicts the thesis that, in order to obtain the postdoctoral degree, it is necessary to make a significant contribution to the development of the discipline twice, 'doubly', which is a necessary implication of the view that it is necessary to have at least two achievements in one's body of work that independently meet this criterion. From the perspective of the habilitation procedure objectives, a candidate for the degree need not to demonstrate twice the ability to obtain an achievement making a significant contribution to science. Since it is precisely this contribution that is decisive, it should not matter how many times it has been made. This is not justified by the important role entrusted to persons holding postdoctoral degree in the academic promotion of other persons; in order to act as a supervisor or reviewer in proceedings for the award of doctoral

or postdoctoral degree, it is entirely sufficient simply to demonstrate a significant contribution to the development of the discipline. An even broader impact on the advancement of science may be expected at most from persons with the academic title of professor, which is reflected in the content of Article 227(1)(1)(a) LHES, which requires candidates for this title to have outstanding scientific achievements.

It should be emphasised here that the interpretation according to which all of the habilitation candidate's achievements are assessed collectively in terms of their contribution to the development of the discipline is also supported by at least one systemic argument, resulting from the content of Article 224(2) LHES. This provision stipulates that the waiting period preventing the submission of a new application for habilitation proceedings may be shortened in the event of a significant increase in the body of work. If, in the course of such proceedings, only specific, usually only two, distinguished elements of the habilitation candidate's body of work were assessed, such a rule would not make much sense. Its purpose is undoubtedly to enable a person who has already begun to meet the requirements for obtaining the postdoctoral degree to apply for it without delay. This confirms that the legislator equates the conditions for awarding the aforementioned degree with a positive assessment not of specific scientific achievements considered separately, but of the body of work, understood as a whole.

At the same time, it does not seem that the content of Article 219(1)(2) LHES, which in a sense distinguishes between 'body of work' and 'scientific achievements (...) constituting a significant contribution to the development of a specific discipline', argues against the interpretation in question. The wording of this provision suggests that the latter form part of the former and, therefore, that only part of the body of work is subject to assessment in terms of its impact on the development of the discipline. This could lead to the conclusion that, from this point of view, only specific achievements, treated independently of one another, are subject to assessment. However, such a conclusion would be too hasty. First of all, it should be noted that it is not possible to have scientific achievements other than 'in one's body of work'; the principles of formal logic exclude the existence of achievements 'outside one's body of work'. The normative nature of this phrase can therefore consist solely in emphasising certain issues, which should be useful for reconstructing the norms resulting from the provision in which it is included. Undoubtedly, in the context of interpretative dilemmas related to Article 219(1)(2) LHES, the phrase 'in the body of work' additionally emphasises the need for a comprehensive assessment of achievements. It therefore seems that the legislator has thus indicated that it is the entire submitted body of work, i.e. the sum of achievements, and not achievements understood independently, that is subject to assessment in the habilitation procedure. The reference to the concept of 'body of work' also emphasises the continuity of the habilitation candidate's work and the entirety of their intellectual effort, which results from the fact that the accumulation of achievements is a long and laborious process. This also seems to emphasise that the assessment in the habilitation procedure – from the point of view of contribution to the development of a specific discipline – should cover the candidate's entire work to date, and not just selected aspects of it. It seems that the term 'body of work' also refers to the multifaceted nature of scientific work, which further emphasises the need to focus on the diversity of its manifestations. In the context of the interpretative dilemma under analysis, this

undoubtedly provides additional arguments for the need to carry out a comprehensive assessment of all the scientific achievements presented jointly.

It seems that the above findings are also confirmed by the aforementioned Article 224(2) LHES, in which the legislator explicitly makes ‘body of work’ – and not ‘achievements’ – a concept of key importance for initiating habilitation proceedings. It is also worth noting here the content of the aforementioned Article 227(1)(1)(a) LHES, which regulates the prerequisites for awarding the academic title of professor. One of these prerequisites – and the most important one – is having outstanding scientific or artistic achievements. Importantly, in this case, the legislator did not use the phrase ‘in the body of work’. Such different wording of Article 227(1)(1)(a) and Article 219(1)(2) LHES, in accordance with the principle of the rationality of the legislator, cannot be considered accidental. It must therefore be assumed that different norms are laid down in these two provisions. Therefore, while the academic title of professor may be awarded solely on the basis of an assessment of selected individual scientific achievements, each of which must independently meet a specific criterion, namely excellence, in the case of awarding the postdoctoral degree, the entire body of work is crucial, and therefore achievements are treated as a certain whole, characterised by diversity and representing the result of the entire career to date.

It should be emphasised here that the presented interpretation of Article 219(1)(2) LHES has been partially accepted in practice. This concerned in particular reviews prepared in proceedings in which the habilitation candidate’s main work itself raised certain controversies. As an example, one may refer to an excerpt from a review by L. Wilk, in which he points out:

‘Currently, Article 219(1)(2a) of the Law on Higher Education and Science stipulates that the postdoctoral degree is awarded to a person who “has in their body of work scientific achievements (...) which constitute a significant contribution to the development of a specific discipline, including at least one scientific monograph” published by a relevant publisher. This literally means that at least one item in the scientific body of work must be a monograph published by a relevant (renowned) publishing house, but it does not mean that this monograph should constitute a “significant contribution to the development of the discipline”, as all scientific achievements are assessed in this respect’.²⁶

This thesis was also confirmed by the position of the Academy of Young Scholars of the Polish Academy of Sciences (Akademia Młodych Uczonych PAN) of 15 July 2022 on the habilitation procedure.²⁷ In this document, addressed, among others, to the CSE, point IV clearly states that: ‘The CSE guidelines should indicate in an unambiguous manner that the entire body of work of the habilitation candidate is subject to evaluation, and not just one monograph or one series of articles.’ At the same time, it should already be emphasised here that the discussed interpretation

²⁶ L. Wilk, *Recenzja osiągnięć naukowych Pani Dr Magdaleny Ickiewicz-Sawickiej ubiegającej się o stopień doktora habilitowanego nauk prawnych*, Cieszyn, 2021; https://wpia.uwm.edu.pl/sites/default/files/u12/prof._l._wilk_rec._m._ickiewicz-sawickiej-skompresowany.pdf (accessed: 22 October 2024), pp. 3–4.

²⁷ Akademia Młodych Uczonych PAN, *Stanowisko Akademii Młodych Uczonych PAN ws. procedury habilitacyjnej*, Warszawa, 2022; https://amu.pan.pl/wp-content/uploads/2022/07/2022_AMU_stanowisko-ws-habilitacji.pdf (accessed: 22 October 2024).

of Article 219(1)(2) LHES has not yet been clearly confirmed in the case law of the CSE or administrative courts, as will be discussed further below.

It is also worth noting that practical arguments can be made against this thesis, concerning the risk of lowering the level of habilitation. Indeed, awarding the postdoctoral degree to a person whose main work does not independently make a significant contribution to the development of a given discipline may raise doubts. However, these do not seem to be decisive. Firstly, this is because within the habilitation procedure, assessment is made of the very fact that the achievement indicated by the habilitation candidate as the main one meets the criteria referred to in Article 219(1)(2)(a)–(c) LHES. This means that it is permissible within that procedure to examine whether, for example, a given book, even if published by a relevant publisher, meets the criteria of a ‘scientific monograph’ and, therefore, whether it qualifies as an original and creative presentation of a scientific issue.²⁸ Secondly, the assumption that, under the current regulations, the criterion of significant influence on the development of a discipline must be met by the entire body of work, and not just by a single work, allows for a more rigorous understanding, and one more consistent with its literal meaning, than has been adopted to date. This should largely eliminate the risks associated with the above interpretation of Article 219(1)(2) LHES.

Finally, it should be remembered that the mere allegation that a given interpretation will lead to adverse practical effects is an *argumentum ad consequentiam* and, as it is non-substantive, cannot be used in academic discussion.²⁹ It should be addressed to the legislator, not to the interpreter of the law. The role of the latter is solely to interpret the content of norms in a formally correct manner, even if this process leads to a result that is unsatisfactory from a practical point of view. Moreover, the interpreter should not even be expected to take such issues into account if they do not result from generally accepted rules of interpretation,³⁰ as only a reliable and objective reconstruction of legal norms can represent a starting point for a public debate on the possible harmfulness of the adopted solutions.

²⁸ See § 10(1)(1) of the Regulation of the Minister of Science and Higher Education of 22 February 2019 on the Evaluation of Scientific Activity (consolidated text: Journal of Laws of 2022, item 661). According to paragraph 2 of this provision, certain other book publications, such as translations of works significant for science or culture, as well as critical scholarly editions of source texts, may also be considered monographs.

²⁹ An argument of this type is admissible only in pragmatic discussions. In theoretical discourses, such as the determination of the content of a legal norm within the framework of legal dogmatics, it is currently rejected as a so-called informal fallacy – see D. Walton, ‘Historical Origins of *Argumentum ad Consequentiam*’, *Argumentation*, 1999, Vol. 13, No. 3, pp. 251–252, 259–260.

³⁰ *Argumentum ad consequentiam* should not be confused with purposive interpretation of provisions. Under such interpretation, it is possible to take into account the practical effects of a given interpretation, but only to the extent that it is relevant to the correctly reconstructed purpose of a given regulation. Applying this type of interpretation, a particular understanding of a given provision may therefore be rejected only if it is established that the effects of such an understanding would be contrary to the objective pursued by the legislator. This is not the case with the issue at hand. As has already been demonstrated, it appears that the purpose of the regulation in question was precisely to assess the entire body of work of the habilitation candidate. Any negative effects of such an approach do not therefore fall within the scope of purposive interpretation, but can at most be an argument in favour of amending the law and adopting a different objective by the legislator.

7.

The finding that the legislator requires candidates for the postdoctoral degree to have in their body of work at least two scientific achievements, including one qualified achievement, which, taken together – and not necessarily independently – make a significant contribution to the development of a given discipline, has very important implications for the practice of conducting habilitation proceedings. In this context, it should first be pointed out that, pursuant to Article 221(8) LHES, the task of reviewers in such proceedings is to assess whether the scientific achievements of the habilitation candidate meet the criteria set out in Article 219(1)(2) LHES and, therefore, whether, as a whole, they make a significant contribution to the development of science. The reviewer cannot therefore limit themselves to assessing the main achievement alone, in particular if the assessment is to be negative.³¹ They are obliged to evaluate the entire body of work presented by the habilitation candidate against the criterion of contribution to the development of a specific discipline. Reviews that do not meet this condition violate the law. This is particularly important in the context of Article 221(10) and (12) LHES, which determine that two negative reviews result in the need to refuse to award the degree.³² Any formal defects in them may therefore qualify as grounds for revoking the resolution refusing to award the degree and for repeating a significant part of the habilitation procedure.

The above comments should be applied accordingly to the resolution of the habilitation committee and to the decision concluding the proceedings. In each of these acts, an analysis should be made of the entire body of work presented by the habilitation candidate and an assessment should be made of whether it meets the statutory criteria. Failure to comply with this requirement, in particular by limiting the assessment to the main achievement, results in their defectiveness, having a significant impact on the outcome of the proceedings, which should result in their annulment in the course of review by a higher instance.

In this context, however, it cannot be overlooked that one will search in vain in the CSE's case law to date for traces of clear approval of the above interpretation of Article 219(1)(2) LHES. This is despite the fact that it has already examined cases in which the decision to refuse to award a degree resulted primarily from the fact that at least two negative reviews had been prepared during the proceedings, at least one of which was limited solely to a critical assessment of the main work and not of the entire body of work. In those cases, the CSE did not consider this to be a ground for revoking the resolution refusing to award the degree.³³ This means that it does not share the interpretation of Article 219(1)(2) LHES proposed in this article, although

³¹ In the case of a positive review, this conclusion is less categorical. It can be assumed that a statement that a given qualified achievement makes a significant contribution to the development of the discipline implies that the collection to which it belongs, and therefore the entire body of work, also possesses this value. This does not mean, however, that a reviewer who gives a positive assessment of the main work can freely omit the analysis of the candidate's other achievements, as the law requires them to assess 'scientific achievements' in the plural.

³² For legitimate doubts about this mechanism, see, for example, M. Bogusz, M. Miłosz, 'Konstrukcja związania negatywnymi recenzjami w nowym postępowaniu doktorskim i habilitacyjnym', *Państwo i Prawo*, 2022, No. 5, pp. 88 et seq.

³³ See, for example, CSE decision No. Z5.410.3.2022 of 26 September 2022.

it is unclear which of the other hypotheses explaining the normative meaning of this provision it approves in this case.³⁴ It is also worth noting that the issue in question has not yet been the subject of judicial statements by administrative courts.

8.

The above considerations allow one to formulate the most important final conclusions. The first of these consists in a critical assessment of the wording of Article 219(1)(2) LHES, which gives rise to serious interpretative disputes. This phenomenon is all the more problematic given that the previous statutory regulation concerning the prerequisites for awarding the postdoctoral degree was also characterised by a similar lack of precision. Yet, the legislator has once again ignored this problem, which is all the more incomprehensible as the provision in question was not transferred from the previously applicable act, but *de facto* created anew. It is also worth bearing in mind that precision in the drafting of provisions is particularly important in this matter, as it seems that only this allows for an effective departure from established academic practices that are contrary to the actual intentions of the legislator.

Despite the flawed wording of Article 219(1)(2) LHES, it has been demonstrated above that the rules and methods of interpretation commonly used in jurisprudence allow for the conclusion that this provision should be interpreted in such a way as to require that the entire body of work presented by the habilitation candidate be assessed in terms of its contribution to the development of science, and not only their main achievement. The current statutory solutions are therefore part of the process of changing the meaning of habilitation, which began in 2011 and whose important element is the departure from the concept of a narrowly understood habilitation thesis in favour of a comprehensive assessment of the habilitation candidate's scientific profile.

It is impossible not to notice that, in practice, the legislator's intention has not been fully realised. It seems that academic traditions continue to play a key role in this area, requiring that the criterion of contribution to the development of science focus almost exclusively on the main achievement of the candidate for the degree, with other elements of their body of work being included, at most, in the assessment of their generally understood scientific activity. This practice becomes particularly problematic when reviewers or other persons involved in the habilitation procedure raise objections to the habilitation candidate's main work. This may lead to an overly hasty refusal to award them the degree, contrary to the intentions of the legislator. In these circumstances, it is the attitude of the CSE in particular that deserves criticism, as, while having a significant influence on the activities of reviewers and habilitation entities, it seems not to perceive the problem in question. It remains to be hoped that this article will prompt renewed reflection on this issue and lead to a modification of the incorrect practice of those involved in habilitation proceedings.

³⁴ An analysis of the CSE's decision does not allow one to conclude that the interpretative problem discussed in this article was even clearly recognised by it. This may be due to the specific nature of the cases referred to this body, in which the indicated defect in the review does not occur very often. It is also unclear to what extent the habilitation candidates themselves draw attention to this problem in their appeals.

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Cite as:

Radajewski M. (2026), *Criterion of Significant Contribution to the Development of a Specific Discipline in Habilitation Proceedings*, *Ius Novum* (Vol. 20) 2, 102–119. DOI 10.2478/in-2026-0020

LEGAL PERSPECTIVE ON THE ASSESSMENT OF THE STATE OF CONSCIOUSNESS IN A PERSON SUFFERING FROM DEMENTIA OR ANOTHER DEMENTING DISORDER

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DOI 10.2478/in-2026-0021

ABSTRACT

Subject of research – The considerations undertaken in this study focus on the issue of assessing, from a legal perspective, the state of consciousness of a non-incapacitated adult suffering from dementia or other dementing disorders.

Main thesis – A diagnosis of dementia or other dementing disorders is insufficient to render a declaration of will made or a legal act performed invalid in every case. The model of supported decision-making, especially the institution of a registered power of attorney, which would produce effects only from the moment when at least two doctors (a neurologist and a psychiatrist) establish that the ill person is in a state precluding conscious decision-making, is a desirable and necessary solution in the Polish legal system. In view of the plans to abolish the institution of incapacitation, this solution would be an expression of the legislator's genuine concern for the protection of the rights of persons affected by dementing disorders.

Purpose of the research – The purpose of the considerations in this study is to indicate the heterogeneity of the legal provisions and the difficulties of interpretation in the area of the issues raised herein, as well as to attempt to answer the question of whether the legal regulations currently in force guarantee sufficient protection of the rights of a person suffering from dementia or another dementing disorder with regard to their right to self-determination.

Nature of the article – The article is a review. The cognitive value of the considerations made in the article, based on an analysis not only of legal doctrine, but also of medicine in the field of dementing disorders, may be of importance both for science and for practice, especially as regards the interpretation of the legal regulations currently in force.

Methods used – The study uses theoretical-legal and dogmatic-legal methods, based on an analysis of the substantive content and views of representatives of legal and medical doctrine,

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as well as on an extensive analysis of the body of jurisprudence. A problem-based analysis of the issue under study was carried out.

Conclusions – The issue addressed in this study is important not only legally but also socially. In view of the progressing demographic changes in Poland, the need to develop a comprehensive model for the protection of the rights of persons suffering from dementia or other dementing disorders is increasingly urgent in Polish law. Each dementing disorder has a significant impact on human consciousness. Within the framework of the right to self-determination, every person should be able to decide on their own affairs in the event of a deterioration in their health. The current gap in the law regarding the possibility of deciding that a third party will manage the affairs in the future of a patient who has only just been diagnosed with a dementing disorder may be filled by introducing into the legal system a registered power of attorney (also referred to in other countries as a ‘preventive’ or ‘guardianship’ power of attorney), the effectiveness of which will be triggered only after authorised doctors have established that the patient has lost awareness. In this way, under the Polish legal system, a person suffering from dementia or other dementing disorders will be genuinely guaranteed the right to self-determination, without doubts as to possible excessive state interference in the sphere of individual rights.

Keywords: lack of consciousness, dementia, dementing disorder, power of attorney, capacity to perform legal acts

INTRODUCTION

The right to self-determination, the right to decide on one’s personal life, and decision-making autonomy are among the fundamental human rights derived from human dignity. The freedom to make decisions and express one’s will, and the capacity to perform legal acts, as provided for by law, are expressions of their realisation. However, it is necessary for the decision-maker to have adequate discernment and an understanding of the consequences of the actions taken. In the case of dementing diseases, in which memory problems and impaired cognitive functions are inherent elements of the progressive disease process, it is particularly important to have legal arrangements in force that do not completely remove the capacity to perform legal acts, but provide for the possibility of supporting the person in the process of making the best possible decision for them. This also includes the possibility for the ill person to decide on their own affairs for the future. This issue is particularly important at present, when long-awaited changes are planned to be introduced into the Polish legal system, consisting in the replacement of total incapacitation with a model of supported decision-making.

In view of the progressing demographic changes in Poland, the need for comprehensive regulation of the legal situation of persons suffering from dementia is becoming increasingly urgent in Polish law. The number of people affected by dementing disorders is steadily increasing, and the need to develop a comprehensive model of protection is increasingly recognised in legal doctrine.¹ According to the

¹ B. Giesen, ‘Prawo cywilne wobec potrzeby ochrony osób z demencją – analiza z perspektywy prawa niemieckiego’, *Studia Prawno-Ekonomiczne*, 2019, Vol. CXIII, pp. 31–51.

Central Statistical Office, the number of older people in the Polish population is steadily increasing. As at the end of 2021, the number of people aged 60 and over was 9.7 million. According to the forecast of the Central Statistical Office, the population aged 60 and over in Poland is expected to increase to 10.8 million in 2030 and to reach 13.7 million in 2050. Older people will constitute approximately 40% of Poland's total population.² It therefore seems necessary to review the current legal regulations in the context of assessing the consequences that neurodegenerative diseases, inherently associated with age, have for a person's capacity to perform legal acts.

The considerations undertaken in this study focus on a non-incapacitated adult suffering from dementia, Alzheimer's disease or another dementing disorder, also referred to as dementing disorders or neurodegenerative diseases. The aim of the analysis undertaken is to attempt to answer the question of whether the legal regulations currently in force realistically protect these persons' right to self-determination, and to what extent the diagnosis of dementing disorders and the progressive disease determine the legal effects of declarations of will made and legal acts performed by that person within the framework of the capacity to perform legal acts. In the legal regulations currently in force, general terms are used, e.g. 'a state excluding the conscious making of a decision or expression of will' (Article 82 of the Civil Code, Article 945 § 1(1) of the Civil Code),³ 'incapacity to consciously give consent' (Article 32 of the Act on the Professions of Physician and Dentist,⁴ Article 39 of the Act on the Protection of Mental Health⁵), as well as the term repeatedly used in case law: 'lack of consciousness'. In turn, in Article 86 of the Law on Notaries, the legislator introduces a prohibition on a notary performing a notarial act if the notary has doubts as to whether a party to the notarial act has the capacity to perform legal acts.⁶ J. Pobocho rightly points out that the provisions of the Polish Civil Code, i.e. Article 82 CC and Article 945 CC, which define the invalidity of a declaration of will made by a person who, for any reason, was in a state excluding the conscious or free making of a decision and expression of will, not only do not define such concepts as 'conscious', 'free expression of will' or 'decision', but also do not provide for gradations of the capacity to perform legal acts, only for its possible exclusion.⁷ The above regulations may be related to an ill person deciding on legally significant matters, e.g. property matters, entrusting the management of their personal affairs to a third party, residence in a social welfare home, consent to a medical procedure, etc. Preventing that person from taking such

² Główny Urząd Statystyczny, *Analizy statystyczne. Sytuacja osób starszych w Polsce w 2021 r.*, Warszawa–Białystok, 2022, p. 10.

³ Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws of 2024, item 1061), hereinafter referred to as the 'CC'.

⁴ Act of 5 December 1996 on the Professions of Physician and Dentist (consolidated text, Journal of Laws of 2023, item 1516, as amended).

⁵ Act of 19 August 1994 on Mental Health Protection (consolidated text, Journal of Laws of 2024, item 917).

⁶ Act of 14 February 1991, Law on Notaries (consolidated text, Journal of Laws of 2024, item 1001).

⁷ J. Pobocho, 'Prawne aspekty otępienia', in: Leszek J. (ed.), *Choroby otępienne. Teoria i praktyka*, Wrocław, 2003, p. 513.

actions, in the opinion of third parties – for their own good – constitutes serious interference with human rights. However, the need to take action on behalf of that person when they lose awareness as a result of illness is also significant. It is therefore worth recognising the seriousness and importance of this issue, as well as the difficulty of balancing the legitimacy of possible court interference with human rights. This raises questions about the need to clarify in law such an important area of protection of individual rights. For, as the analysis of this issue from the medical point of view shows, the assessment of the state of awareness of an ill person is not simple or unambiguous, and there are no schemes that can be applied to individual diseases causing dementing disorders. Moreover, the diagnosis of a disease does not at the same time imply a state excluding consciousness. All the more so, in view of the general terms used in law, interpretative difficulties may arise in determining whether, in the case of a given non-incapacitated adult who has full capacity to perform legal acts but suffers from dementia or another dementing disorder, there has in fact been a limitation or complete abolition of decision-making competence at a given stage of the disease.

At the outset of these considerations, therefore, it should be stated that the mere confirmation of the occurrence of memory and consciousness disorders in connection with a diagnosed dementing disease is not sufficient to declare a declaration of will made or a legal act performed invalid. There is a need to introduce into the Polish legal system solutions that express the protection of the rights of persons suffering from dementia or other dementing disorders with regard to their exercise of the capacity to perform legal acts. The model of supported decision-making, and particularly the institution of a registered power of attorney, producing effects only from the moment when at least two doctors (a neurologist and a psychiatrist) confirm the lack of awareness on the part of the ill person, are desirable and necessary solutions in the Polish legal system. These are solutions which, in view of the plans to abolish the institution of incapacitation, will constitute an expression of the legislator's genuine concern for the protection of the rights of persons affected by dementing disorders.

DEMENTING DISORDERS

In order to properly assess the effects that dementing diseases may have from a legal perspective, it is necessary to analyse basic information about the course of these diseases. According to data compiled by the World Health Organisation (WHO), the number of people with dementia worldwide currently exceeds 50 million, with the incidence of new cases reaching almost 10 million per year. According to these data, the most common causes of dementia include neurodegenerative and cerebrovascular diseases. It is estimated that around 60–70% of all dementia cases develop in the course of Alzheimer's disease.⁸

⁸ A. Klich-Rączka, K. Piotrowicz, H. Kujawska-Danecka, P. Zagożdżon, M. Mossakowska, 'Zaburzenia funkcji poznawczych', in: Błędowski P., Grodzicki T., Mossakowska M., Zdrojewski T.

In turn, according to data published by Alzheimer's Disease International (ADI), the international federation of Alzheimer's associations, the number of people with dementia is projected to increase, doubling to 74.7 million cases in 2030 and rising to 131.5 million by 2050.⁹

The most common types of dementia occurring in older people are Alzheimer's disease and vascular dementia.¹⁰ Alzheimer's disease is a neurodegenerative disorder characterised by irreversible mental degradation.¹¹ The disease is also the most common cause of memory loss and loss of awareness. It was first described by the German neuropathologist Alois Alzheimer in 1906.¹² Alzheimer's disease accounts for 50–75% of all dementia cases.¹³ G. Opala, making an epidemiological prognosis in the light of demographic forecasts, emphasises that if the incidence of dementing diseases is inextricably linked to age, then an increase in older age groups in the population will inevitably lead to the spread of dementing syndromes. Solving the problems that this phenomenon will cause in society is certainly one of the challenges of the modern world, and it also clearly poses a significant challenge for the legal system.¹⁴ J. Rymaszewska and A. Kiejna point out that only in the last decade have several studies assessing the prevalence of dementing disorders in the population been conducted in Poland.¹⁵

Dementia is defined in the literature as a syndrome of symptoms in which cognitive impairments, observed across several domains, play a central role. These disorders cause difficulties in carrying out daily activities and limit the ability to work or interact with others.¹⁶ Dementing disorders, also known as dementia, cause, among other issues, problems in a person's cognitive functioning, which are of the greatest significance from the perspective of that person's ability to make decisions with legal consequences. Cognitive functions are, in other words, functions involving the correct reception of signals, selection, accumulation and storage of information (memory), as well as operations on that information, i.e. recognition,

(eds), *PolSenior 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem*, Gdańsk, 2021, p. 293.

⁹ Alzheimer Disease International (ADI), *World Alzheimer Report 2015: The Global Impact of Dementia. An Analysis of Prevalence, Incidence, Cost and Trends*, London, 2015; <https://www.alz.co.uk/research/WorldAlzheimerReport2015.pdf> (accessed: 1 August 2024).

¹⁰ R. Motyl, 'Otepienie – kryteria diagnostyczne', *Polski Przegląd Neurologiczny*, 2007, Vol. 3, No. 2, pp. 43–60.

¹¹ C. Żekanowski, A. Przyłuska-Fiszler, M. Barcikowska, 'Choroba Alzheimera: pomiędzy diagnostyką, ekonomią i etyką', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 37.

¹² R. Tanajewska, 'Nie pamiętam dokąd idę, ale wiem, że jestem – o zdolności do czynności prawnych osób z zaburzeniami pamięci i świadomości', *Pogranicze. Studia Społeczne*, 2016, Vol. XXVIII, pp. 149–161.

¹³ G. Opala, 'Epidemiologia otepień w perspektywie prognoz demograficznych', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 21.

¹⁴ *Ibidem*.

¹⁵ J. Rymaszewska, A. Kiejna, 'Przegląd badań nad występowaniem zaburzeń otepiennych w Polsce', in: Leszek J. (ed.), *Choroby otepienne. Teoria i praktyka*, Wrocław, 2003, p. 27.

¹⁶ R. Motyl, 'Otepienie...', op. cit., p. 44; A. Mosiołek, 'Metody badań funkcji poznawczych', *Psychiatria*, 2014, Vol. 11, No. 4, p. 215.

reasoning and abstract thinking.¹⁷ The function of human cognitive processes is to receive, process and store information. Brain damage due to disease leads to disorders of cognitive activity, as well as of emotional and control processes.¹⁸ The medical literature identifies four problem areas in the functioning of a person with dementing disorders, i.e. A – activities of daily living, B – behaviour, C – cognitive functions, and D – demands for care.¹⁹ The phase preceding the onset of dementia is the period of mild cognitive impairment. As the authors state, the patient is then anxious about changes in cognitive performance, but retains independence in daily functioning and is not diagnosed with dementia. Indeed, according to the DSM-IV diagnostic criteria for dementia of the Alzheimer's type, issued by the American Psychiatric Association (APA), one of the criteria is that the cognitive deficit does not occur concurrently with a disturbance of awareness.²⁰

The medical literature indicates that Alzheimer's disease (AD), which is a neurodegenerative process, is the greatest cause of dementing diseases of old age. T. Zyss states that the diagnostic criteria for Alzheimer's disease were developed by a working group of the National Institute of Neurological Disorders, Verbal Communication Disorders and Stroke and the Alzheimer's Disease and Related Disorders Association, and are known as the 'NINCDS-ADRDA criteria'.²¹ Depending on the occurrence of specific clinical symptoms, dementia is diagnosed as possible, probable or definite.²² A characteristic feature of this disease is the progression of cognitive deficits, especially memory.²³ According to K. Swakowska and A. Staniszevska, Alzheimer's disease is a degenerative brain disease caused by the deposition in the brain of pathological beta-amyloid protein, tau protein and alpha-synuclein, causing atrophy of neurons and their connections. As further neurons in areas of the brain atrophy, symptoms appear, including difficulties with planning, an inability to solve problems, difficulties with word retrieval, and behavioural disorders. From a legal perspective, it is very important to note that the AD disease process begins several decades before the clinical symptoms of dementia appear. Indeed, forms of vascular dementia (VD) are preceded by a pre-clinical period lasting many years. In AD, by contrast, there is a marked acceleration in the increase of cognitive disorders approximately three to four years before the diagnosis of dementia.²⁴

According to R. Motyl, dementia with Lewy bodies is probably the second most common cause of dementia after AD. It is a neurodegenerative disease in the course

¹⁷ J. Vetulani, J. Leszek, 'Neurochemia zaburzeń procesów poznawczych. Perspektywy terapeutyczne', in: Leszek J. (ed.), *Choroby otępienne. Teoria i praktyka*, Wrocław, 2003, p. 167.

¹⁸ S. Kotapka-Minc, 'Funkcje poznawcze i ich zaburzenia', in: Szczudlik A., Liberski P., Barcikowska M. (eds), *Otępienie*, Kraków, 2004, p. 15.

¹⁹ See P. Calabrese, M. Lutz, 'Diagnostyka i ocena przebiegu otępienia', in: Zyss T. (ed.), *Leczenie zespołów otępiennych*, Wrocław, 2005, p. 71.

²⁰ K. Swakowska, A. Staniszevska, 'Choroba Alzheimerera: klasyfikacja oraz kryteria rozpoznania choroby', *Journal of Education, Health and Sport*, 2021, Vol. 11, No. 7, pp. 22–29.

²¹ See P. Calabrese, M. Lutz, 'Diagnostyka i ocena...', op. cit., p. 51.

²² Ibidem, p. 52.

²³ K. Swakowska, A. Staniszevska, 'Choroba Alzheimerera...', op. cit., pp. 22–29.

²⁴ M. Bidzan, L. Bidzan, 'Objawy neurobehawioralne we wczesnych postaciach otępień typu Alzheimerera i naczyniopochodnych', *Psychiatria Polska*, 2014, Vol. 48, No. 2, p. 327.

of which pathological changes occur in the central nervous system, resulting in dementia. This type of dementia appears after the age of 75 and is accompanied by progressive psychopathological disorders. Importantly, memory impairment is not always present in the early stage of dementia.²⁵

The criteria for diagnosing dementia are based on the two most commonly used classification systems, i.e. ICD-10 (currently ICD-11), the International Classification of Diseases, and DSM-IV, the Diagnostic and Statistical Manual of Mental Disorders. Pasquale Calabrese and Martin Lutz note, however, that, in terms of dementia diagnosis, the differences between ICD-10 and DSM-IX are minor.²⁶ A tool used to carry out the initial assessment of the severity of dementia is the MMSE (Mini-Mental State Examination), which involves asking the examined person 30 questions and commands grouped into 11 categories, enabling the assessment of such functions as orientation in time, orientation in place, memorisation, attention and calculation, recall, naming, repetition, comprehension, reading, writing and drawing.²⁷ One point is awarded for each correct answer. According to B.A. Kaczmarek, scores below the 26-point cut off and above 23 points indicate a high risk of dementia; in the MMSE test, this range is associated with mild cognitive impairment. A score below 24 points indicates a very high probability of dementia.²⁸

The above makes it possible to take the position that, from a legal perspective, a document containing a diagnosis of a neurodegenerative disease does not at the same time serve as exclusive evidence of the existence of a state excluding that person's consciousness. It is a specific feature of dementing disorders that they may, to varying degrees, affect the patient's ability to make decisions at different stages of the disease. Assessing the competence of a patient suffering from dementia is a major challenge and depends on the severity of the disease symptoms. P. Zurzycka and T. Radzik consider that it must be related to the patient's current clinical situation and the prospect of disease progression.²⁹ It is also worth bearing in mind the fact pointed out by the Court of Appeal in Wrocław, which stated that, in states of senile dementia, patients may retain a so-called 'mental facade', whereby, in certain circumstances, the patient may maintain an appropriate attitude, and contact with them may appear to be proper. In short-term contact, this facade may mask the patient's true state, namely their lack of ability to assess reality properly and critically.³⁰

²⁵ R. Motyl, 'Otepienie...', op. cit., p. 44.

²⁶ P. Calabrese, M. Lutz, 'Diagnostyka i ocena...', op. cit., p. 51.

²⁷ B. Kaczmarek, 'Zastosowanie Krótkiej skali oceny stanu psychicznego w przesiewowej ocenie funkcjonowania poznawczego osób starszych. Ograniczenia tzw. korekty Mungasa w ocenie deficytów', *Neuropsychiatria i Neuropsychologia*, 2021, Vol. 16, No. 3-4, p. 176.

²⁸ *Ibidem*, p. 176.

²⁹ P. Zurzycka, T. Radzik, 'Autonomia decyzji pacjenta cierpiącego na zaburzenia otepienne – zarys problematyki', *Problemy Pielęgniarstwa*, 2015, Vol. 23, No. 2, p. 270.

³⁰ Judgment of the Court of Appeal in Wrocław of 28 May 2013, ref. no. I ACa 488/13, LEX No. 1369451.

STATE EXCLUDING CONSCIOUSNESS – INTERPRETATIONS IN LAW

Limitation or loss of awareness is an inherent element of progressive neurodegenerative disease. Bearing in mind that every non-incapacitated adult has the capacity to perform legal acts, this fact is not insignificant for the effectiveness of legal acts performed by a person with dementing disorders.³¹ Renata Tanajewska rightly poses the question: where is the boundary of memory and awareness of the human mind? The author points out that a person with memory and awareness disorders may, at the time of performing a legal act, have the will to perform it and, after it has been performed, declare that they do not remember the moment of its performance or did not consent to its performance. That person may confirm the conformity of the declaration of will with the legal act performed, but a third party may challenge the performance of the legal act.³²

The issue of the validity of a declaration of will made by a person who has lost awareness is governed by the provisions of civil law. As Article 82 CC provides:

‘A declaration of intent made by a person who, for any reason, is in a state which precludes the conscious or free making of a decision and declaring of intent is invalid. This applies in particular to mental illness, mental retardation or other, even temporary, mental disorder.’

When interpreting the above regulation, legal doctrine emphasises that the reasons for the exclusion of consciousness or freedom to make a decision and express one’s will are irrelevant, as the legislator indicates possible causes of loss of consciousness or freedom only by way of example.³³

Bearing in mind the content of the above regulation, it should be emphasised that the legislator lists four factors determining the effects of a legal act: the will of the parties, the law, the rules of social co-existence and established customs. A declaration of will is therefore an essential element of a legal act determining its effects. In legal doctrine, the common view is that ‘a declaration of will is only an act the purpose of which is to perform a legal act, i.e. a conventional act aimed at creating, changing or abolishing a civil-law relationship’.³⁴

It is worth adding that, from the perspective of persons suffering from dementia, the content of Article 60 CC is also important. According to that provision, subject to the exceptions provided for by law, the will of a person performing a legal act may be expressed by any behaviour of that person which reveals their will sufficiently. On this issue, the Supreme Court expressed its view in the statement of reasons for the judgment of 23 January 2003, stating that:

³¹ See A. Wilk, ‘Prawne aspekty podejmowania decyzji przez członków rodziny w zastępstwie za osobę, u której doszło do osłabienia umysłowego wywołanego wiekiem lub chorobą – zagadnienia wybrane’, *Wychowanie w Rodzinie*, 2023, Vol. 30, No. 4, pp. 49–77.

³² R. Tanajewska, ‘Nie pamiętam dokąd idę...’, *op. cit.*, pp. 149–161.

³³ K. Osajda (series ed.), W. Borysiak (vol. ed.), *Kodeks cywilny. Komentarz*, 32nd ed., Warszawa, 2024, Legalis.

³⁴ *Ibidem*.

'Whether a declaration of will is made in a given case depends not only on whether the will is expressed, but also on whether a given entity (its body) is aware of this and wants what it declares to be treated as its declaration of will, which is to produce specific effects in the sphere of civil-law relations.'³⁵

In turn, Article 56 CC provides that a legal act produces not only the effects expressed in it, but also those that result from the law, the rules of social co-existence and established customs. According to the Supreme Court, therefore, when assessing whether a declaration was made and what its content was, the decisive factor should be its external perception, and not the internal intention that actually guided the person making the declaration.³⁶ However, if one of the parties to a legal act makes a declaration of will in a state excluding the conscious or free making of a decision or expression of will, the consequence is the absolute invalidity of the act.³⁷ The legal act then does not produce the intended legal effects.³⁸ Declarations of will affected by a defect of this kind are not subject to convalidation or conversion; nor are the reasons for the exclusion of consciousness or freedom relevant. From the point of view of legal effects, the reasons for the exclusion of consciousness or freedom are also irrelevant.³⁹

It is therefore extremely important to correctly determine the state of a person with a dementing disorder at the time of making a declaration of will or performing a legal act. An example of such a situation is the need for a notary to assess whether, at the time of performing a legal act or making a declaration of will, the consciousness of a person suffering from a dementing disease is entirely excluded or merely limited due to the consequences of the disease. This issue has been the subject of case law, which points to the practical difficulties of assessing the state of awareness of an ill person by persons who are not medical professionals.

It is worth beginning the discussion on this topic by citing the view expressed by the Supreme Court in its decision of 30 April 1976. The Supreme Court explained that a state excluding consciousness is 'a lack of discernment, an inability to understand one's own behaviour and the behaviour of others, and a failure to realise the significance of the consequences of one's own conduct'.⁴⁰ Similarly, the Supreme Court indicated in a 1999 judgment that 'Mental dysfunction alone does not cause a loss of the capacity to perform legal acts or a loss of procedural capacity, although it

³⁵ Judgment of the Supreme Court of 23 January 2003, ref. no. III RN 6/02; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20RN%206-02.pdf> (accessed: 9 September 2024).

³⁶ Judgment of the Supreme Court of 7 May 2014, ref. no. II CSK 481/13; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20CSK%20481-13-1.pdf> (accessed: 20 August 2024).

³⁷ K. Osajda (series ed.), W. Borysiak (vol. ed.), *Kodeks cywilny. Komentarz*, 31st ed., Warszawa, 2023; Pietrzykowski K., in: Pietrzykowski K. (ed.), *Kodeks cywilny. Tom I. Komentarz. Art. 1-449¹⁰*, 8th ed., Warszawa, 2015, p. 381.

³⁸ J. Wajdzik, 'Brak świadomości albo swobody jako wada oświadczenia woli', *Edukacja Prawnicza*, 2011, No. 3, p. 19.

³⁹ Cf. P. Nazaruk, in: Ciszewski J. (ed.), *Kodeks cywilny. Komentarz*, 2nd ed., Warszawa, 2014, p. 189.

⁴⁰ Order of the Supreme Court of 30 April 1976, ref. no. III CRN 25/76, *OSP i KA*, 1977, No. 4, item 78.

may constitute a defect in the declaration of will.⁴¹ This understanding of the concept of a state excluding consciousness is also present in current decisions of the Supreme Court.⁴² The Court of Appeal in Szczecin, in its judgment of 28 March 2019, clearly emphasised that, for the application of Article 82 CC, it is necessary that the medical condition be the cause that led to the effect of excluding the possibility of consciously or freely making a decision or expressing one's will. It is not sufficient to show that the person making the declaration of will suffered from a given illness that could affect the psychological processes related to the understanding, or awareness, of the meaning and content of the declaration of will made. The Court rightly notes that:

'Not every impairment of the cognitive functions of the brain caused by Alzheimer's disease must indicate the occurrence of the prerequisites under Article 82 of the Civil Code. Only when the condition of the ill person is such that it cannot be assumed that they act with awareness of external circumstances, or when the nature of the act, the circumstances in which it is performed, its content or effects, is so complex or surprising for the ill person that they are unable to assess them consciously, should the existence of the defect in the declaration of will referred to in Article 82 of the Civil Code be established. The mere diagnosis of the illness, however, does not entitle one to formulate such a thesis.'⁴³

Moreover, as stated by the Court of Appeal in Białystok, the existence of a state excluding the consciousness of persons who are mentally ill or mentally deficient cannot be assumed, even when they are fully or partially incapacitated, as they may act with sufficient discernment at a given moment.⁴⁴

Interpretative doubts about the term 'state excluding consciousness' concern, among other issues, whether the legislator envisaged in Article 82 CC complete or partial exclusion of consciousness as a basis for recognising the possible validity of a declaration of will. Different views are expressed in this regard in case law. For example, the Supreme Court, in its judgment of 7 February 2006, declared that

'The state excluding conscious decision-making and expression of will cannot be understood literally, and therefore does not have to mean the complete elimination of consciousness and cessation of brain function.'⁴⁵

The Supreme Court further reiterated the view expressed in 1976 that, for a state excluding conscious decision-making to be deemed to have occurred, it is sufficient that there is a lack of discernment, an inability to understand one's own actions and the actions of others, and a failure to realise the significance and consequences of one's own conduct. In its decision of 14 June 2005, by contrast, the Supreme Court held that other disorders of mental functions must be of a magnitude that completely excludes

⁴¹ Judgment of the Supreme Court of 23 September 1999, ref. no. II UKN 131/99, *OSNP*, 2001, No. 7, item 77.

⁴² Judgment of the Supreme Court of 18 May 2016, ref. no. V CSK 578/15; <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/v%20csk%20578-15-1.pdf> (accessed: 9 September 2024).

⁴³ Judgment of the Court of Appeal in Szczecin of 28 March 2019, ref. no. I ACa 612/18; <https://www.saos.org.pl/judgments/376514> (accessed: 9 September 2024).

⁴⁴ Judgment of the Court of Appeal in Białystok of 15 October 2015, ref. no. I ACa 491/15, *Legalis* No. 1359130.

⁴⁵ Judgment of the Supreme Court of 7 February 2006, ref. no. IV CSK 7/05, *LEX* No. 180191.

conscious decision-making.⁴⁶ Divergence of views in this regard can also be observed in legal doctrine. Indeed, the view is expressed that, for the application of Article 82 CC, the law does not require the existence of a state excluding consciousness in general, that is, a state of unconsciousness, but rather a state excluding conscious decision-making and expression of will, and therefore excluding the ability to discern and to recognise the meaning of one's own actions and those of others. This state does not have to be permanent; it may exist only temporarily.⁴⁷ However, there is no shortage of positions according to which Article 82 CC provides for consequences only in the case of complete exclusion of consciousness, without the possibility of taking into account the so-called 'partial discernment' of the person making the declaration of will.⁴⁸ P. Nazaruk, in turn, points out that if the loss of consciousness occurs to a degree less than significant, the occurrence of a defect in the declaration should be examined in terms of whether the person making the declaration has discernment as to their action and undertakes that action in accordance with their will.⁴⁹ The problem indicated above results from the fact, pointed out by Z. Radwański, that the provisions of the Civil Code do not introduce gradation of the state of unconsciousness, and yet this state may occur with varying intensity.⁵⁰ One must agree with the author that the assessment of whether, at the moment of declaring their will, a given person acted with sufficient discernment falls within the competence of the court in pending judicial proceedings. Diagnosis of the illness, medical documentation, examination by an expert in psychiatry, psychology or a specific medical specialisation, and witness statements are certainly essential evidence in cases of this kind. As rightly emphasised by the Court of Appeal in Kraków, the state of consciousness of a given person at a given time is a factual determination made by the court on the basis of an assessment of the evidence, taking into account all the circumstances that may have influenced the declaration of will. A correctly established factual basis enables a legal assessment in terms of fulfilment of the prerequisites set out in Article 82 CC, which is the exclusive prerogative of the court.⁵¹

As has already been mentioned in this study, the diagnosis of a dementing disease alone does not constitute sufficient evidence to conclude that, in the given circumstances, the ill person was in a state excluding consciousness. A similar situation would arise in the case of a diagnosis of depression, which does not result in a chronic state of unconsciousness, as noted by the Court of Appeal in Gdańsk. According to the Court:

⁴⁶ Order of the Supreme Court of 14 June 2005, ref. no. V CK 691/04; <http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/V%20CK%20691-04-1.pdf> (accessed: 9 September 2024).

⁴⁷ See P. Machnikowski (ed.), *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC*, Vol. I, Warszawa, 2022, Legalis.

⁴⁸ Cf. J. Strzebińczyk, in: Gniewek E., Machnikowski P. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2011, p. 225; S. Rudnicki, in: Dmowski S., Rudnicki S. (eds), *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa, 2009, p. 401.

⁴⁹ P. Nazaruk, in: Ciszewski J. (ed.), *Kodeks cywilny...*, p. 193.

⁵⁰ Z. Radwański, in: Radwański Z. (ed.), *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, Warszawa, 2008, p. 385.

⁵¹ Judgment of the Court of Appeal in Kraków, I Civil Division, of 9 January 2020, ref. no. I ACA 1129/19, Legalis No. 2357672.

'A declaration made by a person in a state of depression is not automatically invalid as made in a state excluding the conscious or free making of a decision and expression of will. A state of depression is not tantamount to a permanent lack of awareness of the decisions made. In order to determine whether a declaration of will made by a person in a state of depression was effective, it is necessary to examine whether, at the time of making that declaration, that person was in a state enabling them to make a conscious and free decision and express their will'.⁵²

Case law has clearly indicated that a presumption of lack of awareness on the part of the person performing a legal act is inadmissible.⁵³ The Supreme Court emphasised that mental illness or another type of disorder does not automatically mean that a person who has made a declaration of will should be deemed to have made that declaration in a state excluding the conscious or free making of a decision and expression of will. It is necessary to establish whether, at the time of making the declaration, that person acted with sufficient discernment. This view was expressed by the Court of Appeal in Szczecin, in whose opinion:

'Not every impairment of the cognitive functions of the brain caused by Alzheimer's disease must indicate the occurrence of the prerequisites under Article 82 of the Civil Code. Only when the condition of the ill person is such that it cannot be assumed that they act with awareness of external circumstances, or when the nature of the act (the circumstances in which it is performed, its content or effects) is so complex or surprising for the ill person that they are unable to assess them consciously, should the existence of the defect in the declaration of will referred to in Article 82 of the Civil Code be established. The mere diagnosis of the illness, however, does not entitle one to formulate such a thesis.'⁵⁴

The Court of Appeal in Białystok, in turn, clearly emphasised that:

'Mental illness or another type of disorder does not automatically mean that a person who has made a declaration of will should be regarded as making that declaration in a state excluding the conscious or free making of a decision and expression of will. It is necessary to establish whether the person acted with sufficient discernment at the moment of making the declaration. This is because it is not excluded that, despite the mental illness or other disorder, the declaration was made by a person acting consciously and freely.'⁵⁵

The following analysis of several examples of court decisions concerning persons affected by dementing diseases provides grounds for concluding that it is often impossible for, e.g. a notary or members of the immediate family to determine whether a person is fully aware of the legal acts performed. As a result, declarations of will relating to asset management are accepted from an ill person and are then

⁵² Judgment of the Court of Appeal in Gdańsk of 9 March 2011, ref. no. I ACa 1506/10, *Legalis*.

⁵³ Order of the Supreme Court, Civil Chamber, of 29 July 2015, ref. no. II CSK 854/14, *Legalis* No. 1460727.

⁵⁴ Judgment of the Court of Appeal in Szczecin of 28 March 2019, ref. no. I ACa 612/18; <https://www.saos.org.pl/judgments/376514> (accessed: 30 April 2026).

⁵⁵ Judgment of the Court of Appeal in Białystok of 15 October 2015, ref. no. I ACa 491/15; [https://orzeczenia.bialystok.sa.gov.pl/content/\\$N/15050000000503_I_ACa_000491_2015_Uz_2015-10-15_002](https://orzeczenia.bialystok.sa.gov.pl/content/$N/15050000000503_I_ACa_000491_2015_Uz_2015-10-15_002) (accessed: 9 September 2024).

verified in court proceedings in terms of invalidity, precisely due to an erroneous assessment of the state of consciousness of a person diagnosed with a dementing disease. It is also worth noting that in some cases the decisive evidence is an expert opinion in the field of psychiatry, in other cases in the fields of psychology and psychiatry, while in still others the court bases its decision on the assessment of a three-person team of specialists in neurology, psychiatry and forensic medicine. It seems reasonable to postulate the harmonisation of this issue in law as well, since evidence from an expert examination of the ill person is crucial for the court in cases of this kind.

One example of such rulings is a case heard by the Court of Appeal in Warsaw concerning a determination that a donation agreement concluded in a notarial deed was null and void. In this case, the Regional Court found that, on the date on which the aforementioned agreement was concluded, the donor was in a state excluding conscious decision-making and expression of will.⁵⁶ According to an expert psychologist, the donor was in the second stage of senile dementia, moderate and bordering on the third stage. At this stage, there are periods of well-being and deterioration. In the opinion of the psychiatric experts, she may already have had profound dementia, and it was certainly of at least a moderate degree. This degree of dementia did not allow her to make decisions and express her will consciously and freely in complex matters, which included the abolition of co-ownership of the premises. The Court of Appeal in Warsaw, taking into account the evidence gathered by the Regional Court in the case, confirming that the mental state of that person, due to the existing dementing syndrome of at least moderate degree, did not allow her to make decisions and express her will consciously and freely, dismissed the appeal.

The Court of Appeal in Szczecin provides an additional example. In 2014, it heard a case concerning the claimant's request for a declaration of invalidity of a donation agreement under which his mother had donated a residential unit to her daughter and the claimant's sister. The claimant argued that, on the date on which the deed was drawn up, his mother was seriously ill and did not have the capacity to make conscious decisions, and that the defendant sought deliberately to deprive him of the share of his mother's inheritance due to him. The Regional Court in Koszalin held that the notarial donation agreement concluded in this case was invalid. A witness was present when the deed was drawn up and wrote the donor's full name next to her fingerprint. The donor, due to her severely shaking hands, was unable to sign on her own. The notary did not notice any irregularities in her behaviour. She was not informed that the donor was suffering from Alzheimer's disease. Already earlier, on the day of the claimant's wedding, which his mother attended, her behaviour clearly indicated a lack of awareness of what was happening and where she was. The claimant found out about the donation on the day of his mother's funeral. The court-appointed expert in psychiatry in this case established that, on 27 March 2008, the donor, D.A., lacked the capacity to make a conscious and free decision concerning the disposal of her property in the form of a notarial

⁵⁶ Judgment of the Court of Appeal in Warsaw of 26 September 2018, ref. no. VI ACa 613/17; <https://www.saos.org.pl/judgments/374025> (accessed: 21 August 2024).

agreement. She was diagnosed with a dementing syndrome. The Court came to the conclusion that, at the time of signing the disputed donation agreement in favour of the defendant, D.A. did not act with discernment under Article 82 CC. Indeed, she had no awareness of what she was doing, and her illness at that time absolutely excluded her freedom to decide to dispose of the property and to express her will in that respect. The Court of Appeal considered that a comprehensive expert opinion was necessary in this case; such an opinion was issued in the present case by the Department of Forensic Medicine in B. by a three-person panel consisting of specialists in neurology, psychiatry and forensic medicine, who reached an identical conclusion. The specialists found that D.A.'s state of health did not allow her, on 27 March 2008, to make a conscious and free decision on concluding, in the form of a notarial deed, a donation agreement concerning the residential unit owned by her. Consequently, the Court of Appeal dismissed the appeal.⁵⁷

In this case, it is possible to discern not only the unworthy conduct of family members, but also the incorrect determination of the facts by the notary, who, in the absence of knowledge of Alzheimer's disease, accepted from the donor the declaration necessary to donate the flat, despite the visible symptoms of the donor's lack of awareness. It may therefore be assumed that the notary's assessment of the donor's state of consciousness would have been based solely on the diagnosis of the disease, had it been disclosed, without an assessment of the person's actual state of consciousness, which would have been completely at odds with the considerations made in this study. In the context of the effects produced by dementing diseases, defects in declarations of will are of exceptional importance in the case of legal acts performed by elderly persons. As M. Nowocień rightly points out, a notary must exercise particular caution when performing notarial acts involving elderly persons. Their state of consciousness may be impaired not only due to age, but also due to illness or fatigue.⁵⁸

Another example is the case considered by the Court of Appeal in Wrocław, which, by judgment of 28 May 2013 in a case concerning the invalidation of a donation agreement, dismissed the defendant's appeal.⁵⁹ On 1 July 2004, S.W. drew up a will in the form of a notarial deed in which she appointed the claimant A.M., her sole guardian, to inherit her entire estate. In addition, S.W. disinherited all other statutory heirs because, as she indicated, they showed no interest in her and did not fulfil their family obligations towards her. After 2005, S.W.'s dementing disorders intensified, manifesting mainly in memory impairment. On 25 April 2007, at a notarial office, S.W. and the defendant Z.W. concluded a donation agreement in the form of a notarial deed. At the time of making the declaration of will concerning the donation on 25 April 2007, S.W. was in a state excluding the conscious making of a decision and expression of will. At that time, she was suffering from a mixed-type dementing

⁵⁷ Judgment of the Court of Appeal in Szczecin of 30 June 2014, ref. no. I ACa 448/12; <https://www.saos.org.pl/judgments/64445> (accessed: 21 August 2024).

⁵⁸ M. Nowocień, 'Nieświadomość jako przyczyna odmowy dokonania czynności notarialnej', *Monitor Prawniczy*, 2013, No. 24, p. 1300.

⁵⁹ Judgment of the Court of Appeal in Wrocław of 28 May 2013, ref. no. I ACa 488/13, LEX No. 1369451.

syndrome of significant severity and a chronically progressive course. She denied having made the aforementioned donation. The Court of First Instance held that the action for invalidation of the donation deserved to be upheld and was based on Article 82 CC. In this case too, the Court of First Instance took the view that the evidence gathered in the case showed convincingly that, at the time of the act performed before the notary, S.W. was in a state excluding the conscious and free making of a decision and expression of will due to her existing mixed-type dementia of significant severity and chronically progressive course.

MODELS OF SUPPORTED DECISION-MAKING INSTEAD OF TOTAL INCAPACITATION OF A PERSON WITH A DEMENTING DISORDER

Despite the fact that international human rights standards provide guarantees for respecting the dignity of a person regardless of their age, there is a lack of regulations sufficiently guaranteeing the protection of the rights of older persons.⁶⁰ In order to promote, protect and ensure the enjoyment of human rights and fundamental freedoms by older persons, the Recommendations of the Committee of Ministers of the Council of Europe to Member States on the Promotion of the Rights of Older Persons have been developed.⁶¹ According to the recommendation set out in point 12, older persons have the capacity to perform legal acts on an equal basis with others. As stated in point 13 of the Recommendation, older persons should be able to receive assistance in making decisions and exercising their legal capacity if they feel they need such assistance. This includes the possibility of appointing a third party to support them in making decisions.

From the perspective of the issue discussed in this study, the recommendation resulting from point 14 is particularly important, according to which Member States should, in their national legislation, give older persons the opportunity to regulate their affairs in the event that they are unable to express their instructions at a later stage. In addition, it follows from the recommendation in point 15 that Member States should provide an appropriate and effective system of safeguards to prevent abuse in every aspect related to the exercise of legal capacity.

Taking into account the above recommendations, it is worth asking whether the total incapacitation of an older person due to dementia or other dementing disorders is not an institution that goes too far and, contrary to its assumptions, does not serve the purpose of legal protection. It is also worth considering whether

⁶⁰ A. Tworkowska-Baraniuk, 'Realizacja idei praw człowieka wobec ludzi starych', in: Halicka M., Halicki J., Kramkowska E. (eds), *Starość. Poznać, przeżyć, zrozumieć*, Białystok, 2016, pp. 165–174.

⁶¹ Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons, adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers' Delegates; Annex to Recommendation CM/Rec(2014)2; <https://search.coe.int/cm?i=09125948801ddbe4> (accessed: 8 August 2024).

the institution of incapacitation truly fulfils its role in view of the legal, economic and social changes that have taken place over the past several years.

The institution of incapacitation, in view of the growing need to introduce changes, has rightly been criticised in legal doctrine for many years. Doubts have been raised as to the admissibility of applying this institution in a modern legal system. One must agree with the position of M. Balwicka-Szczyrba and A. Sylwestrzak that a fully incapacitated person completely loses independence in the legal sphere and becomes subject to interference by the legal guardian in the sphere of that person's integrity.⁶² Some authors explicitly ask whether the institution of incapacitation is still needed, since the consequences of depriving an incapacitated person of the capacity to perform legal acts, or even limiting that capacity, are not in a rational and proper proportion to the purpose which incapacitation is intended to serve.⁶³

The view is expressed that there are currently two competing approaches to treating persons who encounter difficulties in making decisions independently: substitute decision-making and supported decision-making. However, the authors emphasise that, over the years, criticism has grown according to which a substitute approach to decision-making in directing persons is contrary to fundamental freedoms and human rights. An alternative to guardianship solutions is the model of supported decision-making.⁶⁴ As M. Zima-Parjaszewska emphasises, there are many diverse forms of support provided for in the legal systems of other states which, while ensuring the protection of the legal interests of persons with intellectual disabilities, do not deprive them of the right to self-determination and to influence their own lives.⁶⁵

Alternative methods, in relation to total incapacitation, of assisting in the exercise of the capacity to perform legal acts were discussed as early as 2012 by M. Szeroczyńska. At that time, the author gave examples of solutions adopted by other countries, i.e. solutions requiring court intervention as well as out-of-court solutions based solely on the will of the principal, including the institution of an attorney introduced into the German legal system in 1999 (*Vollmacht*), the power of attorney in Swedish law, and solutions adopted in 2007 in England and Wales in the Mental Capacity Act, which regulates the principles of representation of incompetent persons, i.e. persons who do not have the actual capacity to make a specific decision or take action independently at the time when that decision should be made or that action should be taken. This Act provides for the possibility

⁶² M. Balwicka-Szczyrba, A. Sylwestrzak, 'Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz konwencji ONZ o prawach osób niepełnosprawnych', *Gdańskie Studia Prawnicze*, 2018, Vol. XL, p. 159.

⁶³ I. Markiewicz, J. Heitzman, A. Pilszyk, 'Ubezwłasnowolnienie – instytucja wciąż potrzebna?', *Psychiatria*, 2014, Vol. 11, No. 4, pp. 203–210.

⁶⁴ A. Drabarz, M. Kubalski, K. Kurowski, M. Szeroczyńska, M. Zima-Parjaszewska, *Asysta prawna jako element systemu wsparcia korzystania ze zdolności do czynności prawnych*, Warszawa, 2022, p. 11.

⁶⁵ Cf. M. Zima-Parjaszewska, *Ubezwłasnowolnienie w świetle konstytucji RP oraz konwencji o prawach osób z niepełnosprawnościami*, Warszawa, 2010, p. 15; https://ptpa.org.pl/wp-content/uploads/2024/10/ekspertyza_osi_-_ubezwlasnowolnienie.pdf (accessed: 8 August 2024).

of appointing a lasting power of attorney, who will make decisions on behalf of an incompetent person when that person loses the capacity to decide independently.⁶⁶

In view of the legitimacy, long signalled in Poland, of considering the abolition of or the introduction of changes to the institution of total incapacitation, work has recently been undertaken, following the example of other states, to introduce changes into Polish law. Activities in this area, although undertaken several times in the past, have so far failed to produce the desired solution. The latest Draft Act amending the Civil Code and Certain Other Acts (draft No. UD80) provides for solutions that represent a proposal to adapt Polish law to international standards for the protection of the rights of persons with disabilities.⁶⁷ This obligation arises from Article 12(3) of the Convention on the Rights of Persons with Disabilities,⁶⁸ which provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The proposed amendments also take into account the content of the Strategy for Persons with Disabilities, adopted on 16 February 2021 by the Council of Ministers, which envisages replacing incapacitation with a model of supported decision-making, consisting of enabling a person to make decisions on their own behalf to the greatest extent possible.⁶⁹ It is emphasised in doctrine that the concept of supported decision-making in the context of Article 12(3) of the Convention is based on the principle that all human beings are autonomous individuals who develop and retain the capacity to make decisions, even if they need support at a certain level. Models of supported decision-making are based on the assumption that an individual receives support from a trusted person, a network of persons or an entity in making personal, financial and legal decisions.⁷⁰

In the Draft Act amending the Civil Code and Certain Other Acts (draft No. UD80), one of the proposed solutions is a registered power of attorney, modelled on the preventive power of attorney functioning in many European countries, including in the German legal system.⁷¹ The introduction of such a solution into the Polish legal system should be assessed positively, although it is worth mentioning that work in

⁶⁶ M. Szeroczyńska, 'Ubezważnowolnienie i alternatywne formy pomocy w realizowaniu zdolności do czynności prawnych osób z niepełnosprawnością intelektualną, w regulacjach międzynarodowych oraz w prawie obcym, na przykładzie Estonii, Niemiec, Szwecji, Wielkiej Brytanii i Kanady (stanu Manitoba)', in: Kędziora K. (ed.), *Jeśli nie ubezwłasnowolnienie, to co? Prawne formy wsparcia osób z niepełnosprawnością intelektualną*, Warszawa, 2012, pp. 17–61.

⁶⁷ Draft Act amending the Civil Code and Certain Other Acts; <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-cywilny-oraz-niektorych-innych-ustaw4> (accessed: 8 August 2024).

⁶⁸ Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006.

⁶⁹ Uchwała nr 27 Rady Ministrów z dnia 16 lutego 2021 r. w sprawie przyjęcia dokumentu *Strategia na rzecz Osób z Niepełnosprawnościami 2021–2030 (Monitor Polski, 2021, item 218)*.

⁷⁰ A. Drabarz, M. Kubalski, K. Kurowski, M. Szeroczyńska, M. Zima-Parjaszewska, *Asysta prawna...*, op. cit., p. 11.

⁷¹ According to § 1896(2) BGB (German Civil Code): 'A guardian may only be appointed to the extent that this is necessary. A guardianship is unnecessary if the affairs of the adult can be dealt with by an attorney (...) just as well as by a guardian.' Powers of attorney are registered by the German Federal Chamber of Notaries (*Bundesnotarkammer*).

this respect had already been undertaken, unsuccessfully, in 2015.⁷² This solution allows a person to decide to grant a power of attorney in the event of possible impairment of their mental or physical abilities in the future, which is of particular importance from the perspective of persons with dementing disorders at an early stage of the disease. Importantly, granting a power of attorney would not result in the loss of the capacity to perform legal acts. The possibility of choosing a trusted person in the event of deterioration in the health of a person with a progressive dementing disorder would be an expression of care for that person's dignity and their right to self-determination, which certainly cannot be said of the currently applicable institution of total incapacitation and the appointment of a legal guardian by the court. Information on the prepared draft amendment to the provisions of the Civil Code also indicates a proposal to introduce the institution of a supporting curator and a representing curator, as well as legal assistance. These solutions are already in force in many European countries and are also expected in the Polish system. The legal situation of persons diagnosed with a dementing disease, but who still retain full consciousness, will thus be legally guaranteed the possibility of taking care of their own interests in accordance with their own will, also in the event of deterioration or complete loss of awareness.

SUMMARY

Neurodegenerative diseases cause a weakening of a person's mental condition. In medical terms, the disease processes affecting the state of awareness are progressive rather than sudden. With self-awareness and knowledge of successive stages of the disease, the patient may prepare, also in legal terms, for the stage at which loss or significant limitation of consciousness will occur.

This important issue, however, reveals a clash of values between the need for state interference in the rights of the individual for that person's own good and respect for the will of the individual. An analysis of the views expressed in doctrine and case law confirms the thesis that the mere diagnosis of a dementing disease is not sufficient to deprive an ill person of the possibility of exercising their capacity to perform legal acts. Nor is it sufficient to conclude that a declaration of will made or a legal act performed is inherently invalid. On the other hand, however, the fact that an adult is not incapacitated does not mean that they may exercise their capacity to perform legal acts to an unlimited extent, acting, in fact, against that person's best interests. It is worth clearly emphasising that, having regard to the right to self-determination, the right to decide on one's personal life, and decision-making autonomy, even a person affected by dementing disorders has the right to have their will respected. The essential issue remains only the legal ordering of that person's affairs, in accordance with their will expressed while still in a state of full consciousness. The decisive factor is not the will of family members or their interests, but the possibility of shaping the legal situation of an older person suffering, for

⁷² See A. Wilk, 'Prawne aspekty...', *op. cit.*, pp. 49–77.

example, from dementia in a manner that will be the best solution for that person. Any form of legal guarantee of respect for the will expressed in full consciousness therefore appears highly desirable.

There is no doubt that each of the dementing disorders, including senile dementia and Alzheimer's disease, significantly affects a person's consciousness. The legal regulations in force require that, in order for a declaration of will or a legal act to be deemed invalid, such consciousness must be excluded. The legal regulations currently in force in the Polish legal system do not contain definitions of consciousness, a state excluding consciousness, incapacity to give consent, etc., since the determination of these states should fall within the competence of doctors, who, relying exclusively on medical knowledge, determine the patient's state of awareness. At this point, it should be emphasised that the intention is not to criticise the current legislation in its entirety, but only to indicate the possibility of improving it. A certain legal vacuum regarding the decision that a third party will manage in the future the affairs of a patient who has only just been diagnosed with a dementing disease may be filled by a registered power of attorney, also referred to as a preventive power of attorney, the effectiveness of which will be triggered only after authorised doctors have established that the patient has lost awareness. The demographic processes that we are currently experiencing, and the steadily increasing number of older people in society, rightly necessitate the introduction of such solutions. Indeed, the issue of age-related disorders is becoming an increasingly common problem in contemporary society.

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Cite as:

Wilk A. (2026), *Legal Perspective on the Assessment of the State of Consciousness in a Person Suffering from Dementia or Another Dementing Disorder*, *Ius Novum* (Vol. 20) 2, 120–140. DOI 10.2478/in-2026-0021

PRACTICAL ASPECTS OF CROSS-BORDER ASSIGNMENT OF CLAIMS IN CASES CONCERNING COMPENSATION FOR DELAYED OR CANCELLED FLIGHTS

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DOI 10.2478/in-2026-0022

ABSTRACT

The article aims to answer the question of whether consumer protection regulations apply to the cross-border assignment of claims for compensation for delayed flights. As indicated, in accordance with recital 18 of Regulation No 1215/2012, in matters relating to insurance, consumer contracts and employment law, the weaker party should be protected by rules of jurisdiction that are more favourable to their interests than the general rules. The analysis carried out in this study, supported by numerous judicial decisions, confirmed the possibility of consumers assigning claims. However, in cases concerning claims against an air carrier under Regulation No 261/2004, the special jurisdiction rule provided for in Article 7(1)(b) second indent of Regulation No 1215/2012 applies.

Keywords: national jurisdiction, assignment of claims, consumer protection

INTRODUCTION

The analysis presented in this article concerns practical aspects of cross-border assignments of claims, including, in particular, the jurisdiction of courts in cases involving compensation for delayed or cancelled flights, where the purchaser of a compensation claim brings the action. Contract-based disputes are the most common type of cases concerning international air transport. To date,

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the issue of assignment of claims has not raised any significant concerns in the context of the general principles of national jurisdiction.

First of all, it should be pointed out that national jurisdiction in civil matters of an EU nature which concern a procedural claim relating to a contract is regulated in Article 7(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹ In accordance with this provision, a person domiciled in a Member State may be sued in another Member State in matters relating to a contract before the courts for the place of performance of the obligation in question (*forum executionis contractus*). Therefore, the concept of a contract determines the scope of application of this act of EU law in contract-related matters. It should also be noted that the rule laid down in Article 7(1) of Regulation No 1215/2012 serves a dual purpose. It determines both whether a court of a given Member State has international jurisdiction and which of the courts of that Member State has territorial jurisdiction to hear the case.² In this respect, the provisions of Regulation No 1215/2012 form an autonomous basis for determining the court's jurisdiction in relation to national procedural provisions.³ Regulation No 1215/2012 also applies to contracts for carriage by air in situations where a passenger claims compensation for a flight delay or denied boarding. However, in the case of such claims, the key issue is not so much the scope of the jurisdictional rule as its connecting factor. This raises questions about the impact of the assignment of a consumer claim on the ability of the assignee, i.e. the consumer, to rely on the grounds of jurisdiction provided for in Articles 17–19 of Regulation No 1215/2012. The basic connecting factor for determining general national jurisdiction is the defendant's domicile or registered office (*actor sequitur forum rei*).⁴ The jurisdiction of the courts of the Member State in which the defendant has its registered office or domicile, as a general rule, is reflected in Article 4 of Regulation No 1215/2012. This principle also requires 'that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably

¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1, as amended), the so-called Brussels I bis Regulation, hereinafter referred to as 'Regulation No 1215/2012' or the 'Brussels I bis Regulation'. Since 10 January 2015, the Brussels I bis Regulation has replaced Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter referred to as 'Regulation No 44/2001' or the 'Brussels I Regulation'.

² J. Płaziuk, 'Jurysdykcja krajowa dla rozpoznania roszczeń ze stosunków umownych (art. 7 rozporządzenia nr 1215/2012)', *Europejski Przegląd Sądowy*, 2020, No. 4, pp. 22–35.

³ K. Weitz, 'Autonomiczna wykładnia europejskiego prawa procesowego cywilnego – wprowadzenie i wyrok ETS z 10.03.1992 r. w sprawie C-214/89 Powell Duffryn plc przeciwko Wolfgang Petereit', *Europejski Przegląd Sądowy*, 2008, No. 7, p. 56; judgment of the Court of Justice of 23 April 2009, C-533/07, *Falco Privatstiftung and Thomas Rabitsch v Giseli Weller-Lindhorst*, EU:C:2009:257, paras 23–25.

⁴ B. Trocha, 'Czy potrzebna jest reforma łącznika miejsca zamieszkania w europejskim prawie procesowym cywilnym?', *Polski Proces Cywilny*, 2012, No. 4, p. 624.

to foresee before which courts, other than those of the State in which he is domiciled, he may be sued'.⁵

The main aim of this paper is to answer the question of whether cross-border assignments of claims are compatible with EU law, and what conditions must be met for an assignment to be considered valid both in the country of the assignee of the claim and in the country of the debtor. Do consumer protection regulations apply to cross-border assignments of claims concerning compensation for delayed flights? According to recital 18 of Regulation No 1215/2012, in matters relating to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.⁶

GENERAL ISSUES

The issue of an air carrier's liability for damages is primarily regulated by the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.⁷ The provisions of the Montreal Convention, since its approval by Council Decision of 5 April 2001 and its entry into force with respect to the EU on 28 June 2004, have been an integral part of the Community legal order.

The main aim of the Convention is to ensure the protection of consumer interests in international air transport and the need for fair compensation for damage suffered. The fundamental provision in this respect, Article 19 of the Montreal Convention, provides for a carrier's liability for damage occasioned by delay in carriage by air. In turn, Article 22(1) of the Montreal Convention defines the limits of the carrier's liability for flight delay, while Article 35 establishes the limitation period for claims.⁸

Under EU law, Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights⁹ is of particular importance. This Regulation introduces a system of standardised, lump-sum and immediate remedies, which allows for faster intervention than the one provided for by the

⁵ Judgment of the Court of Justice of 13 July 2006, C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*, ECR 2006 I-6827, ECLI:EU:C:2006:471. Judgments in the cases: *GIE Groupe Concorde and Others*, paragraph 24; *Besix*, para. 26; and *Opus*, para. 40.

⁶ Regulation (EU) No 1215/2012.

⁷ Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal on 28 May 1999; hereinafter referred to as the 'Montreal Convention'.

⁸ P. Kasprzyk, A. Konert, 'Przedawnienie roszczeń odszkodowawczych za overbooking, odwołanie i opóźnienie lotu', *Państwo i Prawo*, 2017, No. 6, pp. 55–72. See also: A. Gołąb, 'Między konwencją montrealską a rozporządzeniem Bruksela Ia – aspekty jurysdykcyjne odpowiedzialności przewoźnika za opóźnienie lotu', *Europejski Przegląd Sądowy*, 2022, No. 6, pp. 17–23.

⁹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1, as amended).

Montreal Convention.¹⁰ It should be emphasised that claims based on Article 7 of Regulation No 261/2004 are autonomous in nature under the Polish legal order.

However, not only the Montreal Convention but also Regulation No 261/2004 applies to contracts for carriage by air. This Regulation applies to all situations where a passenger claims compensation for the improper performance of an obligation under a contract for carriage by air consisting in a flight delay or denied boarding. Although the issue of an air carrier's liability primarily has its source in the Montreal Convention,¹¹ which also contains provisions relating to court jurisdiction, the application of its provisions is excluded to the extent that the matter is regulated differently by Regulation No 261/2004. At the same time, Regulation No 261/2004 does not contain provisions concerning the determination of court jurisdiction under international law, which, in turn, allows Article 7 of Regulation No 1215/2012 to apply in such situations.

Thus, in the Polish legal system, Regulation No 1215/2012 provides, the legal basis for determining the territorial jurisdiction of a court where passengers pursue claims for compensation for delayed or cancelled flights or denied boarding. The primary connecting factor in establishing jurisdiction is the defendant's domicile in a Member State. Therefore, the general jurisdiction applicable in every cross-border case is the possibility of bringing proceedings at the defendant's domicile or at the place of the air carrier's registered office. It should be pointed out that the above-mentioned Brussels I bis Regulation also allows proceedings to be brought at the place where the air transport service is performed or at the place of business of an air carrier's branch or other establishment.

Therefore, Regulation No 1215/2012 establishes domicile as the connecting factor determining court jurisdiction in general. For entities other than natural persons, domicile is replaced by the place where they have their statutory seat, central administration or principal place of business. However, if the subject of the proceedings is a contract or a claim arising from a contract, proceedings may be brought in a Member State other than that in which the defendant is domiciled or established, before the court of the place where the obligation was performed or should have been performed. In the case of the provision of services, the place of performance of the obligation is the place in the Member State where, under the contract, the services were provided or should have been provided.

Thus, the general rule governing court jurisdiction in European civil procedural law is that the court of the Member State in which the defendant is domiciled has jurisdiction (Article 2(1) of the Brussels I Regulation and Article 4(1) of the Brussels I bis Regulation – general jurisdiction). In accordance with Article 4 of Regulation No 1215/2012, a court has general national jurisdiction if the defendant is domiciled in the Member State of the court.¹² However, for certain categories of disputes, EU law provides that the courts of other Member States may also have additional jurisdiction, provided that they have a sufficiently close connection with

¹⁰ A. Konert, M. Sekuła-Leleno, 'Charakter prawny roszczenia o odszkodowanie wynikającego z rozporządzenia (WE) 261/2004', *Państwo i Prawo*, 2017, No. 3, p. 84.

¹¹ The Montreal Convention.

¹² B. Trocha, 'Czy potrzebna jest...', *op. cit.*, p. 624.

the case. These are cases of so-called special jurisdiction, based on connecting factors other than the defendant's domicile. One of the basic cases of special jurisdiction is jurisdiction in matters relating to contracts, currently regulated in Article 7(1) of the Brussels I bis Regulation.

In summary, the provisions of Regulation No 1215/2012,¹³ which do not provide for separate regulation for this type of case, apply to jurisdiction in cases concerning lump-sum compensation in the event of a delayed or cancelled flight. Therefore, the starting point will be the determination of national jurisdiction based on the defendant's place of residence, in accordance with Article 4(1) of that Regulation. On the other hand, Article 7 of the Regulation introduces the rule of special jurisdiction, which is optional in nature. In accordance with this provision, a person domiciled in a Member State may be sued in another Member State in matters relating to contracts before the courts for the place of performance of the obligation in question (point 1(a)), and, in the case of the provision of services, before the courts for the place in a Member State where, under the contract, the services were provided or should have been provided (point 1(b)). The wording of the provision clearly indicates that the legislature chose the place of performance of the obligation, the so-called *forum solutionis*, as the connecting factor determining jurisdiction in cases concerning contracts. Therefore, where grounds for special jurisdiction exist, the possibility of bringing an action under general jurisdiction, i.e. at the defendant's place of residence or registered office, is not excluded. Special national jurisdiction refers to a situation in which a defendant, although domiciled in the territory of one Member State, may be sued before a court of another Member State under a rule which establishes a connecting factor between the case and the territory of a Member State other than the defendant's domicile.¹⁴

RULING OF THE POLISH SUPREME COURT

The direct catalyst for these considerations was the Supreme Court's ruling of 22 January 2025, case no. III CZP 28/24, in which the Supreme Court was to answer legal questions referred by the Regional Court in Kraków. However, due to their flawed construction, the Supreme Court refused to do so. In this regard, the Supreme Court emphasised that legal questions 'are not intended to involve the Supreme Court in disputes arising in legal literature and case law, but to dispel serious doubts that the referring court has in a specific case'. Furthermore, it pointed out that, in a case concerning the resolution of a conflict between a statute and EU law, requiring an interpretation of that law, the Court of Justice of the European Union has exclusive jurisdiction. As explained in the Supreme Court's case law, in the event of a conflict between a statute and EU law, the resolution of which

¹³ Regulation (EU) No 1215/2012.

¹⁴ K. Weitz, *Jurysdykcja krajowa w postępowaniu cywilnym*, Warszawa, 2005, p. 170; T. Ereciński, in: Ereciński T., Ciszewski J., *Międzynarodowe postępowanie cywilne*, Warszawa, 2000, pp. 73–74.

requires the interpretation of that law, the Court of Justice of the European Union has exclusive jurisdiction. Therefore, the assumption of that competence by the Supreme Court, as the Court rightly emphasised in the reasoning for its position,

‘would not only constitute a violation of EU law but would also undermine the consistency of the interpretation of that law, guaranteed by preliminary ruling proceedings, and consequently undermine the uniformity of its application by the national courts of all Member States’.¹⁵

The Supreme Court’s position was eagerly awaited because it had not previously ruled on the jurisdiction of Polish courts in cases concerning compensation for a delayed or cancelled flight.

In the facts of the case, the District Court in Kraków, by its decision of 3 November 2023, dismissed the motion of Deutsche Lufthansa AG in Cologne to reject the statement of claim filed by Airhelp Germany GmbH in Berlin. The District Court indicated that the motion to reject the statement of claim did not merit consideration, as the court hearing the case had jurisdiction to hear it. In this case, the plaintiff claimed EUR 500 from the defendant as compensation for the passengers’ arrival at their destination with a delay of more than three hours. The defendant lodged an appeal against the above ruling, challenging it in its entirety and alleging an infringement of Article 1099 § 1 of the Code of Civil Procedure (CCP) by issuing a decision refusing to reject the statement of claim and finding that Polish courts had national jurisdiction, whereas the present case concerned a payment dispute between two companies incorporated under German commercial law, both of which were entrepreneurs, which, in the circumstances of the case, required the statement of claim to be rejected due to the lack of national jurisdiction of Polish courts; Article 7(1) of Regulation (EU) No 1215/2012, by erroneously assuming that the place most closely connected with the contract was the place of departure or arrival of the aircraft, and not the place where the undertaking has its registered office, whereas the parties were not bound by a contract of carriage and the plaintiff sought only the payment of compensation from the defendant, a claim which it had previously acquired, allegedly, from passengers bound by a contract of carriage with the defendant; and Article 4(1) in conjunction with Article 63(1)(a) of the Brussels I bis Regulation, by failing to apply those provisions and failing to recognise the lack of national jurisdiction of Polish courts, whereas there is no special basis for bringing an action against the defendant in a country other than that of its registered office in Germany.

When considering the appeals, the Court *ad quem* had doubts, expressed in the questions of law submitted to the Supreme Court, pointing to the need to interpret a provision of EU law, namely Article 7(1)(b) second indent of Regulation No 1215/2012, but, it should be emphasised, without referring to provisions of Polish law.

Taking into account the questions raised by the District Court, two issues should be considered:

¹⁵ See the order of the Supreme Court of 28 April 2010, III CZP 3/10, OSNC, 2010, No. 11, item 155.

Firstly, it is crucial to determine whether cases concerning a claim acquired under an assignment agreement concluded with a consumer by an entity established outside Poland, which asserts its claim against another entity also established in another EU country, are subject to Polish jurisdiction. Secondly, whether an entity established in an EU country other than Poland, on the basis of an assignment of claims made under Article 509 of the Civil Code with an original creditor who is a consumer, assumes the original creditor's rights concerning the choice of the competent court under Regulation No 1215/2012.

Before attempting to answer the above questions, it is worth analysing the most representative case law in this area.

REVIEW OF CJEU CASE LAW

Particular attention should be paid to the judgment of the Court of Justice of 3 February 2022, *C-20/21, JW and Others v LOT Polish Airlines*.¹⁶ In that judgment, referring to its previous case law, the Court of Justice emphasised that an action for compensation in respect of a flight delay, cancellation or denied boarding falls within the scope of the concept of 'matters relating to a contract' within the meaning of Article 7(1)(a) of Regulation No 1215/2012. The Court of Justice emphasised that, in the case of the provision of services in several Member States, 'the place of performance' should be understood as the place that demonstrates the closest connection between the contract and the court having jurisdiction, and such closest connection is generally demonstrated by the place of the main provision of services. The designation of that place should be derived from the contract.

According to the CJEU, in the case of a direct flight, as well as in the case of a connecting flight consisting of several flights covered by a single booking and operated by different air carriers, the place of departure and the place of arrival represent the places of the main provision of the services forming the subject matter of the contract for carriage by air. Consequently, the court having jurisdiction within the meaning of Article 7(1)(b) of Regulation No 1215/2012 to hear an action for damages based on that contract and Regulation No 261/2004 is, at the passenger's choice, the court within whose jurisdiction the place of departure is located or the court within whose jurisdiction the place of arrival of the aircraft is located, those places having been agreed in the contract.¹⁷

Another judgment of the Court of Justice that is important for the subject matter under discussion is that in case *C-204/08, Peter Rehder v Air Baltic Corporation*.¹⁸ The CJEU emphasised that, in the case of the provision of services in several Member States, the 'place of performance' should be understood as the place that demonstrates

¹⁶ Judgment of the CJEU of 3 February 2022, *C-20/21, JW and Others v LOT Polish Airlines*, ECLI:EU:C:2022:71.

¹⁷ P. Rejnowicz-Janowska, 'LOT wygrywa przed TSUE sprawę o właściwość sądu. Omówienie wyroku TS z dnia 3 lutego 2022 r., *C-20/21 (LOT Polish Airlines)*', LEX/el., 2022.

¹⁸ Judgment of the CJEU of 9 July 2009, *C-204/08, Peter Rehder v Air Baltic Corporation*, ECLI:EU:C:2009:439.

the closest connection between the contract and the court having jurisdiction, and such closest connection is generally demonstrated by the place of the main performance. The designation of that place should be derived from the contract.

According to the CJEU, in the case of a direct flight, as well as in the case of a connecting flight consisting of several flight segments covered by a single booking and operated by different air carriers, the place of departure and the place of arrival represent the places of the main provision of the services forming the subject matter of the contract for carriage by air. Consequently, the court having jurisdiction within the meaning of Article 7(1)(b) of Regulation No 1215/2012 to hear an action for damages based on the above-mentioned contract and on Regulation No 261/2004 is, at the passenger's choice, the court within whose jurisdiction the place of departure is located or the court within whose jurisdiction the place of arrival of the aircraft is located, those places having been agreed in the contract.¹⁹

Of key importance from the perspective of this study, passengers and courts adjudicating in cases concerning passenger rights under Regulation No 261/2004 is the judgment of the Court of Justice of 18 November 2020, C-519/19, *Ryanair DAC v DelayFix*.²⁰ The ruling of the CJEU concerned a dispute between a passenger and the air carrier Ryanair DAC, hereinafter referred to as 'Ryanair', from which the passenger purchased a ticket for a flight from Milan to Warsaw. Due to the cancellation of the flight, the passenger assigned a claim for compensation of EUR 250 to DelayFix, a company helping air passengers recover claims.

In the facts of the case, the company specialising in the recovery of air passengers' claims requested the District Court for the Capital City of Warsaw (Poland) to order the air carrier Ryanair, on the basis of Regulation No 261/2004, to pay compensation of EUR 250 for the cancellation of a flight between Milan (Italy) and Warsaw; the claim against the air carrier was assigned to that company by the passenger.

Ryanair raised a plea alleging that the Polish courts lacked jurisdiction on the grounds that its general terms and conditions of carriage, accepted by that passenger when he purchased his ticket online, conferred jurisdiction on the Irish courts. According to Ryanair, DelayFix, as the assignee of that passenger's claim, is bound by that term.

By an order of 15 February 2019, the District Court for the Capital City of Warsaw rejected that plea of lack of jurisdiction, considering, first, that the jurisdiction clause in the contract of carriage between that passenger and the airline was unfair within the meaning of Directive 93/13 and, secondly, that DelayFix, as the assignee of the passenger's claim following the cancellation of the flight, could not be bound by such a clause.

Ryanair brought an appeal against that order before the referring court. Ryanair contended that DelayFix could not benefit from the jurisdictional protection provided for consumer contracts, as the company was not a consumer.

¹⁹ P. Rejnowicz-Janowska, 'LOT wygrywa...', op. cit.

²⁰ Judgment of the CJEU of 18 November 2020, C-519/19, *Ryanair DAC v DelayFix*, ECLI:EU:C:2020:933.

Due to the doubts harboured by the referring court as to whether a professional party may rely on the favourable regime of consumer protection arising from Directive 93/13 in a situation where a consumer assigns his or her claim to that party, as well as doubts concerning the case law of the Court regarding the application of Regulation No 1215/2012 in respect of the legal regime governing jurisdiction clauses, the referring court decided to stay the proceedings and to refer questions to the CJEU for a preliminary ruling.

By the question referred, the CJEU sought to determine whether Article 25 of Regulation No 1215/2012, as well as Article 2(b), Article 3(1) and (2) and Article 6(1) of Directive 93/13 should be interpreted as meaning that an air carrier seeking to contest the jurisdiction of a court to hear an action for damages brought against it may rely, against a claim recovery agency to which the passenger has assigned his claim, on a jurisdiction clause contained in the contract of carriage between the air carrier and the passenger. The CJEU ruled that, in order to contest the jurisdiction of a court to hear an action for compensation brought against it, an air carrier may not rely, against a claim recovery agency, on a jurisdiction clause included in a contract concluded with a passenger. At the same time, the CJEU noted that an air carrier may rely on the jurisdiction clause only where, under the legislation of the Member State whose courts are designated in that clause, that claim recovery agency has succeeded to all the initial contracting party's rights and obligations, which is for the referring court to determine. The CJEU also emphasised that a clause conferring exclusive jurisdiction on the court having jurisdiction over the place where the air carrier is established, incorporated, without prior individual negotiation, in a contract concluded between a passenger and an air carrier, must be regarded as an unfair term within the meaning of Article 3(1) of Directive 93/13.

The above-mentioned judgment may limit the number of cases in which air carriers seek to avoid liability and the payment of compensation for delayed or cancelled flights when they are sued by entities that purchase from passengers claims held by them against air carriers. The ruling issued in this case may make it easier for courts to rule on the liability of an air carrier for the cancellation or delay of a flight.²¹

It follows from the above-cited rulings of the CJEU that, in cases concerning claims against air carriers arising from Regulation No 261/2004, it is uniformly accepted that the rule of special jurisdiction provided for in Article 7(1)(b) second indent of Regulation No 1215/2012 applies. Therefore, such claims cannot be considered in isolation from the contract of carriage concluded between the parties.

Another judgment of the CJEU that is worth mentioning in this context is that of 29 February 2024, C-11/23, *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*.²² Against the background of the situation considered there, the Court of Justice indicated that:

²¹ In this respect, it is also necessary to take into account judgment of the CJEU of 7 November 2019, C-213/18, *Adriano Guaitoli and Others v easyJet Airline Co. Ltd.*, ECLI:EU:C:2019:927.

²² Judgment of the CJEU of 29 February 2024, C-11/23, *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*, ECLI:EU:C:2024:194.

'In the event of cancellation of a flight, air passengers' right to compensation, referred to in Article 5(1)(c) of Regulation No 261/2004, and the operating air carrier's corresponding obligation to pay the compensation provided for in Article 7(1) thereof arise directly from that regulation. The right and the obligation cannot therefore be regarded as having their basis in any contract that might have been concluded between the air passenger and operating air carrier concerned or, *a fortiori*, in a wrongful failure by that air carrier to perform such a contract.'

However, in the further part of the reasoning, the Court clearly emphasised that the case law of the Court indicates that actions relating to the right to compensation under Regulation No 261/2004 are covered by the concept of 'matters relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001.²³ It was also pointed out that

'By that case law, relating to jurisdiction in civil and commercial matters, the Court sought to ensure uniform application of the concept of "matters relating to a contract" within the meaning of that provision, holding that, in order for a contract of carriage to be covered by that concept, it is irrelevant that that contract was concluded by the air passenger not directly with the operating air carrier concerned but with another service provider such as a travel agency.'²⁴

The above review of EU case law should be supplemented with statements of the Polish judiciary in this respect.

ANALYSIS OF POLISH CASE LAW

First of all, it should be pointed out that, in accordance with Article 1099 § 1 CCP, the court considers the lack of national jurisdiction *ex officio* at every stage of the case. If a lack of national jurisdiction is found, the court rejects the statement of claim or application, with the proviso that submission to the jurisdiction of Polish courts may also occur by entering an appearance on the merits of the case, provided that the defendant does not raise an objection based on the lack of national jurisdiction, and, where the parties have concluded an agreement excluding the jurisdiction of Polish courts, provided that the defendant does not raise an objection based on the lack of national jurisdiction (Article 1104 § 2 and Article 1105 § 6 CCP).

In accordance with the wording of Article 1105 § 1 CCP, the parties to a specified legal relationship may agree in writing to submit to the jurisdiction of foreign courts matters concerning property rights that have arisen or may arise from that relationship,

²³ See similar judgments: of 7 March 2018, *flightright and Others*, C-274/16, C-447/16 and C-448/16, ECLI:EU:C:2018:160, paras. 63–65; of 26 March 2020, *Primera Air Scandinavia*, C-215/18, ECLI:EU:C:2020:235, para. 49; as well as the order of the Court of Justice of 13 February 2020, C-606/19, ECLI:EU:C:2020:101.

²⁴ ECLI:EU:C:2024:194, para. 35. See also judgment of the CJEU of 7 March 2018, C-274/16, *flightright GmbH v Air Nostrum, Líneas Aéreas del Mediterráneo SA; Roland Becker v Hainan Airlines Co. Ltd; and Mohamed Barkan and Others v Air Nostrum, Líneas Aéreas del Mediterráneo SA*, ECLI:EU:C:2018:160; judgment of the CJEU of 26 March 2020, C-215/18, *Libuše Králová v Primera Air Scandinavia*, ECLI:EU:C:2020:235.

excluding the jurisdiction of Polish courts, provided that such an agreement is effective under the law applicable to it in the foreign country. Article 1105 § 2(3) CCP provides that an agreement excluding the jurisdiction of Polish courts may not concern matters that have arisen or may arise from contracts concluded by a consumer whose domicile or habitual residence is in the Republic of Poland.

Courts consider the lack of national jurisdiction *ex officio* at every stage of the case. If a lack of national jurisdiction is found, the court rejects the statement of claim or application, with the proviso that submission to the jurisdiction of Polish courts may also occur by entering an appearance on the merits of the case, provided that the defendant does not raise an objection based on the lack of national jurisdiction, and, where the parties have concluded an agreement excluding the jurisdiction of Polish courts, provided that the defendant does not raise an objection based on the lack of national jurisdiction.

First, it is necessary to indicate those cases (or the group of cases), in which the jurisdiction of the court is challenged due to the inclusion of a jurisdiction clause in the contract of carriage.

The starting point for considerations regarding national jurisdiction is the finding that the contract of carriage in question was concluded with a consumer, who then, by means of an agreement for the assignment of claims, transferred his claim to the plaintiff company. This circumstance is significant because a consumer, as the weaker party to a legal relationship concluded with an entrepreneur, is entitled to special protection under Article 385¹ et seq. of the Civil Code.

The unfair nature of a contractual provision is linked to the cumulative fulfilment of four conditions, namely the conclusion of a contract with a consumer, the lack of individual negotiation of its content, the shaping of the consumer's rights and obligations in a manner contrary to good practice and grossly infringing his or her interests, and the impossibility of classifying it as a provision formulated unambiguously and relating to the main obligations of the parties.

In such cases, following the case law of the CJEU,²⁵ common courts assume that

'A jurisdiction clause incorporated in a contract of carriage concluded between a passenger and an air carrier may not be invoked by the carrier against a debt collection agency to which the passenger has assigned his or her claim, unless, in accordance with the law of the country whose courts are designated in that clause, that debt collection agency has assumed all the rights and obligations of the original contracting party, which is a matter for the referring court to determine.'

They deem such a clause, which has not been individually agreed between the consumer and the trader and which confers exclusive jurisdiction on the court of the place where the air carrier has its registered office, to be an unfair contract term within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. As further explained by the District Court in Warsaw in its judgment of 16 October 2023, XVI C 561/22, LEX No. 3715246:

²⁵ In particular, the above-mentioned judgment of the CJEU of 18 November 2020, C-519/19, ECLI:EU:C:2020:933.

'Either the debt collection agency does not assume all the rights and obligations of the original contracting party and is therefore not bound by the jurisdiction clause, or the debt collection agency is bound by the jurisdiction clause, but such a clause should be examined from the perspective of EU consumer regulations. The validity of the jurisdiction clause should be examined in the light of the legislation of the country whose courts are indicated in the clause.'²⁶

It is emphasised that such a contractual provision limits the consumer's right to bring a claim by restricting the choice of jurisdiction. This creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. A consumer seeking to pursue claims against a carrier is forced to bring an action before a geographically distant court and in a foreign language, whereas a carrier seeking to pursue claims against a passenger may bring an action before the court having jurisdiction over the place of its registered office and in its own language. The pursuit of claims by a consumer against a carrier is more difficult than the pursuit of claims by a carrier against a consumer.²⁷

It is highlighted that a contractual clause excluding national jurisdiction does not bind the consumer unless it has been individually negotiated with them. Such a contractual provision restricts the consumer's right to bring a claim by limiting the choice of the court having jurisdiction to hear the dispute. This creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer, who, wishing to pursue claims against the carrier, is forced to bring an action before a geographically distant court and in a foreign language, whereas the carrier, wishing to pursue a claim against the consumer, may bring an action before the court having jurisdiction over the place of its registered office and in its own language. In such a situation, the pursuit of claims by the consumer is more difficult than the pursuit of claims by the trader.²⁸

Another group of cases concerns the issue of challenging court jurisdiction by raising a plea alleging that Polish courts lack jurisdiction. However, in this respect, the generally uniform position is also adopted that these cases fall within the jurisdiction of Polish courts. Therefore, it is assumed that a claim for compensation relating to a flight cancellation may be filed, at the choice of the party concerned, before the court within whose jurisdiction the place of departure is located or before the court within whose jurisdiction the place of arrival is located.²⁹ It is also pointed out that

²⁶ Judgment of the District Court in Warsaw of 16 October 2023, XVI C 561/22, LEX No. 3715246.

²⁷ Order of the Regional Court in Kraków of 23 November 2017, XII Gz 749/17, LEX No. 2441687.

²⁸ Judgment of the Regional Court in Warsaw of 14 January 2019, XXVII Ca 1830/18, LEX No. 2687882.

²⁹ Judgment of the District Court in Warsaw of 27 September 2019, I C 2801/19, LEX No. 3029979; judgment of the District Court in Warsaw of 19 June 2019, II C 2290/18, LEX No. 3128036.

'Acceptance of contractual provisions applied by the air carrier, forcing the consumer to pursue claims before foreign courts under foreign law, would in practice undermine the purpose of the regulations introduced.'³⁰

The analysis of the case law of the cited rulings of common courts leads to one further conclusion. It is noteworthy that courts do not always provide the legal basis for the jurisdiction of Polish courts; for the most part, this is Article 7(1) of Regulation No 1215/2012. However, in many judgments, it is difficult to find any basis at all. This applies especially to those judgments in which the court's jurisdiction is challenged due to the inclusion of a jurisdiction clause in the contract of carriage.

Particular attention should be paid to the judgment of the District Court in Warsaw of 18 October 2021, XVI C 1158/21, LEX No. 3572627. When considering the objection based on the lack of national jurisdiction, in the reasoning for its decision, the court referred to Article 18(1) of the Regulation, indicating that a consumer may bring an action against the other party to the contract before the court of the Member State in whose territory that party is domiciled or, regardless of that party's domicile, before the court of the place where the consumer is domiciled.³¹

JURISDICTION IN CASES RELATING TO CONSUMER CONTRACTS

At this point, the above analysis of the case law should be applied to the legal questions submitted to the Supreme Court. The ruling issued deserves closer discussion, if only because the implications of the view expressed in the reasoning reach a broader issue that is extremely important from the perspective of pursuing claims in cross-border cases. This applies in particular to the question regarding the impact of the assignment of a consumer claim on the assignee's ability to rely on the grounds of jurisdiction provided for in Articles 17–19 of Regulation No 1215/2012.

The analysis of the case law presented in this article also indicates the existence of the problem signalled in the second question submitted to the Supreme Court, concerning whether the acquirer of a claim under an assignment agreement concluded pursuant to Article 509 of the Civil Code (CC) with the original creditor, who is a consumer within the meaning of Article 22¹ CC, succeeds to the original creditor's rights regarding the choice of the court having jurisdiction under Article 7(1)(b) second indent of Regulation (EU) No 1215/2012 of the European Parliament and of the Council.

It is emphasised in the literature that the grounds for jurisdiction in matters relating to consumer contracts are almost unique in nature, which is justified by

³⁰ Judgment of the District Court in Gdańsk of 16 December 2021, I C 1113/20, LEX No. 3290361.

³¹ Judgment of the District Court in Warsaw of 18 October 2021, XVI C 1158/21, LEX No. 3572627.

the protection of the consumer as the weaker party to the dispute and, at the same time, requires a precise definition of the scope of application of these provisions.³²

With the above in mind, it should be noted that Article 17(3) of Regulation No 1215/2012 expressly states that it does not apply to contracts of carriage, with the exception of contracts providing, for an inclusive price, for a combination of travel and accommodation. Therefore, it does not apply to contracts of carriage concluded with a consumer.

It should be added that, in the judgment of the Court of Justice of 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*,³³ the Court also ruled that Article 18(1) of Regulation No 1215/2012 must be interpreted as meaning that it does not apply to proceedings brought by a consumer for the purpose of asserting, before the courts of the place where he is domiciled, not only his own claims but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in third countries.³⁴

In this respect, it should be noted, first and foremost, that the purchaser of a claim does not enter into the procedural position of the transferor in terms of court jurisdiction. As indicated above, Article 17(3) of Regulation No 1215/2012 excludes the application of special jurisdiction in the case of contracts of carriage concluded with consumers. Above all, however, this follows from Article 18(1) and (2) of Regulation No 1215/2012, which not only determines the jurisdiction of the court from the perspective of international law but also determines the territorial jurisdiction of the courts of a given Member State, namely the court of the consumer's domicile. Pursuant to the wording of Article 18(1) of Regulation No 1215/2012, a consumer may bring proceedings against the other party to a contract either before the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, before the courts for the place where the consumer is domiciled. It further provides, as explained in the judgment of the Court of Justice in case C-774/22, *JX v FTI Touristik GmbH*,³⁵ that

'The rule in favour of the consumer laid down in that provision applies "regardless of the domicile of the other party", whereby consumers are able to rely on that rule against undertakings domiciled not only in other Member States or in third States, but also in the same Member State as that of the consumer's domicile.'

³² A. Gołąb, 'Jurysdykcja krajowa w sprawie o naruszenie prawa konsumentów do ochrony danych osobowych. Glosa do wyroku TS z dnia 25 stycznia 2018 r., C-498/16', *Polski Proces Cywilny*, 2019, No. 3, pp. 388–404.

³³ Judgment of the CJEU of 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37.

³⁴ In accordance with the established case law of the Court of Justice of the European Union, the assignment of claims by the original creditor has no impact on the jurisdiction of Polish courts based on connecting factors, i.e. Article 7(1)(a) and (b) second indent of Regulation No 1215/2012; cf. judgment of the CJEU of 18 July 2013, C-147/12, *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV*, ECLI:EU:C:2013:490.

³⁵ Judgment of the CJEU of 29 July 2024, C-774/22, *JX v FTI Touristik GmbH*, ECLI:EU:C:2024:646.

Moreover, as noted, it is apparent from the wording of Article 18(1) that the rules adopted in this provision to determine jurisdiction where an action is brought by a consumer concern, first, 'the courts of the Member State in which that party is domiciled' and, secondly, 'the courts for the place where the consumer is domiciled'.³⁶

Therefore, there is no basis for assuming that the existence of jurisdiction under Article 7 of Regulation No 1215/2012 requires the conclusion of an additional agreement on the assignment of rights in respect of jurisdiction.³⁷ This jurisdiction exists not because of the particular status of a party, namely that of a consumer, but because of the subject matter of the dispute, which is a claim arising from the provision of air transport services, and it corresponds to the objective of proximity and a close connection between the contract and the court before which the case has been brought. In particular, the special jurisdiction rule provided for in Article 18 of Regulation No 1215/2012 is intended to guarantee that the weaker party wishing to sue the stronger party has the opportunity to do so before an easily accessible court of a Member State. Therefore, the contrary position observed in the case law should be regarded as incorrect, according to which:

'The plaintiff, having acquired a claim from the consumer under the assignment agreement concluded, has only substantive standing to demand satisfaction of the claim for compensation due to the assignor of the claim in connection with the flight delay. Due to the conclusion of the assignment agreement, the company did not acquire all the procedural rights to which the consumer is entitled, because the assignment concerned only the claim for compensation under the contract of carriage, and the plaintiff did not rely on the assignment of a claim under a jurisdiction agreement. Therefore, there was no basis for assuming that procedural rights connected with the status of a consumer party had been acquired'.³⁸

However, it should be noted that the issue of court jurisdiction in consumer-related matters will be important for the proper resolution of the case by the court in those cases in which the issue to be assessed is the possibility for the purchaser of a claim from an airline passenger who is a consumer to rely on the unfair nature of the jurisdiction clause incorporated in the contract of carriage.

Thus, there is no doubt that a claim for compensation may be assigned. It is accepted in case law that claims held by passengers of cancelled or delayed flights under Regulation No 261/2004 are not covered by a statutory prohibition on transfer, are not personal in nature and are not solely compensation for non-pecuniary damage, and therefore may be assigned, as held, *inter alia*, by the Regional Court in Warsaw in its judgment of 9 July 2019, XXVII Ca 2583/18, LEX No. 2721282.

The possibility of transferring claims by a consumer was also confirmed by the Supreme Court's resolution of 6 April 2018, III CZP 114/17, which emphasised that the fact that a claim arises from a contract involving a consumer and is related to unfair terms in that contract does not mean that it is non-transferable. It may be

³⁶ *Ibidem*.

³⁷ The Regional Court in its order of 23 May 2024, II Cz 477/24.

³⁸ See order of the Regional Court in Kraków of 8 July 2024, II Cz 26/24, LEX No. 3747600.

transferred by the consumer even to a person having the status of an entrepreneur. The Supreme Court further pointed out that such a claim may arise only for the benefit of the contracting party who is a consumer. However, once it has arisen, from the perspective of the other party, namely the trader who is the consumer's debtor, it is irrelevant whether the debtor pays the amount due to the consumer or to the person to whom the consumer has assigned the claim. The assignment of such a claim by a consumer does not threaten the debtor's interests. By entrusting a professional entity with the collection of a claim stemming from an unfair term, a consumer has a greater chance of enforcing it than if they acted independently against the trader whose unlawful practices they had previously fallen victim to.

It should be borne in mind that the analysis of the effects of a claim assignment under Article 509 CC does not determine whether the jurisdiction rule referred to in the second question of law will apply. As the Supreme Court aptly pointed out, jurisdiction is determined not by the substantive law governing a given legal relationship, but by Regulation No 1215/2012 itself. Therefore, the application of the jurisdiction rule under Article 7(1)(b) second indent of Regulation No 1215/2012 in given proceedings will be determined by whether the case concerns the 'provision of services', and whether it is a case of that type should be determined by interpretation under the provisions of that Regulation. As already indicated, the terms used in Regulation No 1215/2012 should be interpreted autonomously in order to achieve uniformity of its application in all Member States.³⁹

CONCLUSIONS

Cross-border assignments of claims in cases concerning compensation for delayed or cancelled flights are currently an important element of the practice of pursuing passenger claims under Regulation (EC) No 261/2004. In cases concerning compensation for delayed or cancelled flights in which the action is brought by the assignee of the claim, the correct determination of national jurisdiction and the territorial jurisdiction of the court is crucial.

The analysis carried out in this paper, supported by numerous judicial decisions, confirms the possibility of consumers transferring claims. On the other hand, in cases relating to claims against an air carrier based on Regulation No 261/2004, the rule of special jurisdiction provided for in Article 7(1)(b) second indent of Regulation No 1215/2012 applies. The effective pursuit of claims requires a coordinated approach combining EU law, national law and judicial practice.

Cross-border assignments of claims are, as a rule, consistent with EU law and permissible under EU law, but their structure must respect the applicable consumer protection standards in accordance with the EU and national law. EU law not only does not prohibit them but also creates a legal framework enabling them to function in international transactions. From a systemic perspective, they

³⁹ J. Płaziuk, 'Jurysdykcja krajowa...', *op. cit.*, pp. 22–35.

are indeed an element of the functioning of the internal market and an instrument strengthening the effectiveness of pursuing passenger rights in cases concerning compensation for delayed or cancelled flights.

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Cite as:

Sekuła-Leleno M. (2026), *Practical Aspects of Cross-Border Assignment of Claims in Cases Concerning Compensation for Delayed or Cancelled Flights*, *Ius Novum* (Vol. 20) 2, 141–157. DOI 10.2478/in-2026-0022

THE RIGHT OF AN EMPLOYEE TO A DAY OFF GRANTED IN CONNECTION WITH RELIGIOUS HOLIDAYS NOT REGULATED IN THE ACT ON PUBLIC HOLIDAYS

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DOI 10.2478/in-2026-0023

ABSTRACT

The article is devoted to issues relating to the right of employees belonging to churches and religious associations in Poland to be released from work in order to celebrate religious holidays other than those listed by the legislator in the Act on Public Holidays. The issue under consideration is also inextricably linked with respect for rights and freedoms and the prohibition of discrimination against every individual; therefore, the author also presents the most important regulations in this area. In undertaking a legal analysis of an employee's right to celebrate religious holidays observed in their faith, the author sought to determine the extent to which current legal solutions and case law safeguard against discrimination on religious and worldview grounds, and the extent to which they permit the restriction of these rights on account of the interests of others, including employers. The subject matter of the analysis is supplemented by views expressed in legal doctrine, decisions of the European Court of Human Rights, and the case law of the Court of Justice of the European Union.

Keywords: freedom, religion, discrimination, employer, employee, labour law, religious holidays

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INTRODUCTION

Poland's accession to the European Union in 2004 undoubtedly influenced the development of migration, globalisation and the internationalisation of businesses in the country. Access to the EU's single internal market enabled investors to expand trade routes into new foreign economies. The exchange of goods and services also took place in the opposite direction through the expansion of foreign entities into the Polish market. Thanks to relatively low production costs at that time, companies decided to relocate or open production facilities in Poland, which further contributed to the internationalisation of Polish enterprises at the beginning of the 21st century.¹ European economic integration would not have been possible on such a scale without the fundamental freedoms of the European Union's single internal market, guaranteed by the Treaty of Rome of 1957.² One of these, the principle of the free movement of persons, now regulated by Directive 2004/38/EC,³ guarantees every EU citizen the right to travel, reside, study, engage in economic activity and, above all, to work in another Member State. The opening up of the Polish economy has also contributed to greater diversity among employees. Labour migration, whilst highly beneficial, particularly in rapidly developing countries, presents employers with a number of challenges. One of the key issues arising within a multicultural workforce is discrimination. Such adverse treatment may result from certain personal characteristics, such as sex, age, race, nationality, disability, political beliefs, ethnic origin, sexual orientation, denomination or religion. Both Polish and EU legislation explicitly condemn such conduct and prohibit discrimination; however, the current changes taking place in the religious structure of Polish society also affect the employer-employee relationship, as membership of particular, often different, churches or religious associations may become a source of conflict in the workplace.

In addressing the issue of an employee's right to celebrate religious holidays observed in their faith, this article seeks to ascertain the extent to which current legal provisions and case law safeguard against discrimination on religious and worldview grounds, and the extent to which they permit the restriction of these rights for the benefit of others, including employers.

¹ M. Komor, 'Internacjonalizacja przedsiębiorstw na rynku wewnętrznym UE w kontekście koncepcji euromarketingowej – perspektywy i wyzwania', *Studia Ekonomiczne*, 2014, No. 194, p. 13.

² Treaty establishing the European Economic Community (EEC) (Journal of Laws of 2004, No. 90, item 864/2, as amended).

³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

THE PROHIBITION OF DISCRIMINATION IN INTERNATIONAL AND NATIONAL LAW

The principle of equality, which derives directly from Article 32 of the Constitution of the Republic of Poland,⁴ requires that all citizens be treated equally before the law and, at the same time, prohibits discrimination in the political, social or economic spheres, regardless of the ground on which it is based. This principle is reiterated in many other provisions of the Constitution; for example, Article 33 safeguards equality between women and men, Article 60 ensures equal access to public service, and Article 70(4) grants the right to equal access to education. Lower-level legal acts, such as the Civil Code (Article 1183),⁵ the Criminal Code (Article 119),⁶ the Act on the Promotion of Employment and Labour Market Institutions (Article 19c),⁷ and the Trade Unions Act (Article 3)⁸ also contain expressly formulated principles of equal treatment in various aspects of life. Procedural norms containing specific legal measures to ensure compliance with the prohibition of discrimination, however, are set out only in the Labour Code⁹ and the Equal Treatment Act.¹⁰

The aforementioned Act was introduced into our legal system primarily in order to implement the European Union's anti-discrimination directives,¹¹ which over the years have gained even greater importance in the struggle for equality among citizens. Article 2 of the Treaty on European Union (hereinafter referred to as 'TEU')¹² identifies the principle of non-discrimination as one of the core values shared by EU Member States, while Article 3(3) second subparagraph TEU states that combating social exclusion and discrimination as well as promoting justice and equality between women and men represents both an objective and an area of Union action. Similar values have been normatively enshrined in the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU'),¹³

⁴ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended), hereinafter referred to as 'the Constitution'.

⁵ Act of 23 April 1964 – Civil Code (Journal of Laws of 2023, item 1610, as amended).

⁶ Act of 6 June 1997 – Penal Code (Journal of Laws of 2024, item 17, as amended).

⁷ Act of 20 April 2004 on Employment Promotion and Labour Market Institutions (Journal of Laws of 2024, item 475).

⁸ Act of 23 May 1991 on Trade Unions (Journal of Laws of 2022, item 854).

⁹ Act of 26 June 1974 – Labour Code (Journal of Laws of 2023, item 1465).

¹⁰ Act of 3 December 2010 on the implementation of certain European Union provisions regarding equal treatment (Journal of Laws of 2023, item 970).

¹¹ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment for self-employed women and men, including in agriculture, and on the protection of self-employed women during pregnancy and maternity (OJ L 359, 19.12.1986, p. 56), repealed and replaced by Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in self-employed activities and repealing Council Directive 86/613/EEC (OJ L 180, 15.07.2010, p. 1); Council Directive 2000/43/EC; Council Directive 2000/78/EC; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37) and Directive 2006/54/EC.

¹² Treaty on European Union (OJ C 202, 7.6.2016, p. 13).

¹³ Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016, p. 47).

where Article 10 sets out an exhaustive list of various forms of adverse treatment that constitute prohibited practices. Further provisions, such as Article 18 TFEU, protect every individual against discrimination on grounds of nationality within the scope of application of the Treaties, whilst Article 19 TFEU, by conferring upon the Council the power to adopt the necessary measures to combat unequal treatment, protects persons exposed to adverse treatment on grounds of sex, race, ethnic origin, religion or worldview, disability, age or sexual orientation. At this point, it is also necessary to mention the Charter of Fundamental Rights of the European Union¹⁴ (hereinafter referred to as the 'Charter'), which is regarded as a source of protection against discrimination. Article 21 of the Charter lists the areas in which there is a risk of such stigmatisation. This list, however, is broader than that set out in Article 18 TFEU and, moreover, according to the literal wording of the provision, remains open-ended. Owing to the case law of the Court of Justice of the European Union (hereinafter referred to as 'CJEU'), an individual whose personal characteristics referred to in Article 21 of the Charter are infringed may, by relying on this provision, pursue claims for legal protection.¹⁵

THE RIGHT TO FREEDOM OF RELIGION

In accordance with Article 25(2) of the Constitution of the Republic of Poland:

'Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure freedom of expression within public life.'

This is also confirmed by Article 10 of the Act on Guarantees of Freedom of Conscience and Religion,¹⁶ pursuant to which Poland is a secular state, neutral in matters of religion and belief. Freedom to profess and practise a religion of one's choice is one of the fundamental human rights guaranteed by national legislation and international treaties. In Article 53 of the Constitution, the legislature guarantees every citizen freedom of conscience and religion, which should be understood as the freedom to choose one's denomination or religion and to manifest religious worship, whether individually or in groups, for example during rites, prayers or teaching. At the same time, under Article 35 of the Constitution, Polish citizens belonging to national and ethnic minorities have the right to preserve and develop their own language, preserve their customs and traditions, and develop their own culture. Furthermore, as a party to the International Covenant on Civil and Political Rights, Poland is obliged to implement its provisions, pursuant to which every person has the right to freedom of thought, conscience and religion, including the right to manifest their religion individually or in community with others, in public

¹⁴ Charter of Fundamental Rights of the European Union (OJ C 202, 7.6.2016, p. 389).

¹⁵ Judgment of the CJEU of 17 April 2018 in Case C-414/16, *Egenberger*, ECLI:EU:C:2018:257.

¹⁶ Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion (Journal of Laws of 2023, item 265).

or in private, through worship, participation in rites, practice and teaching. This right may be restricted only for the protection of public safety, order, health or public morals, or the fundamental rights and freedoms of others.¹⁷

RELIGIOUS DIVERSITY IN THE WORKPLACE

Although in Poland the vast majority of the population (almost 90%) declare affiliation to the Roman Catholic Church,¹⁸ the number of believers, mainly from the two largest Eastern Churches, the Orthodox and Greek Catholic Churches, has risen significantly in recent years (figures for 2023 indicate that this now amounts to more than half a million citizens).¹⁹ This may be influenced by the large number of immigrants, mainly from Ukraine, whose numbers have risen rapidly in Poland since 2022. The other churches registered in Poland, despite accounting for a small percentage of the total number of believers, still constitute a community of more than 300,000 people. The multi-faith nature of society is a constant challenge both at national level, which state authorities face, and in smaller communities such as workplaces. Employers hiring foreign nationals, in particular, should be mindful of possible differences in worldview among employees professing different religions, as this may affect relations within the workplace in various ways. Under Article 113 of the Labour Code, the legislature has prohibited any discrimination in the workplace, whether direct or indirect, including on grounds of religion, nationality, political beliefs, trade union membership, ethnic origin and denomination. In the Labour Code, the entirety of Chapter IIa is devoted to equal treatment in employment, which only demonstrates how significant this issue is.

It should be noted, however, that there are situations which the legislature itself has set out in Article 183b(4) of the Labour Code, thereby establishing an exhaustive list of circumstances in which differentiation between persons admitted to employment is permissible. This refers to persons employed by churches, religious associations, as well as organisations whose ethics are based on a specific religion, denomination or worldview, where the type or nature of the activities carried out by these entities means that adherence to certain values constitutes a genuine and determining occupational requirement imposed on the employee, proportionate to the achievement of the lawful aim of differentiating that person's situation. An apt example is the role of a 'church verger', that is, a person responsible for the care of a collegiate church and sacred objects in the Catholic Church. It therefore seems justified to make the employment of such a person dependent on their professed faith.²⁰ The position of the European Court of Human Rights in Strasbourg also

¹⁷ Article 18(1) and (3) of the International Covenant on Civil and Political Rights adopted on 16 December 1966 by the general Assembly resolution 2200A(XXI).

¹⁸ Główny Urząd Statystyczny, *Sytuacja demograficzna, społeczna i ekonomiczna ludności Polski w świetle wyników Narodowego Spisu Powszechnego Ludności i Mieszkań 2021*, Warszawa, 2023.

¹⁹ R. Bielak (ed.), *Mały Rocznik Statystyczny Polski 2023*, Warszawa, 2023, p. 117.

²⁰ M. Strzała, 'Gwarancje wolności religijnej w przepisach prawa pracy: zarys stanu prawnego *de lege lata* i postulaty *de lege ferenda*', *Internetowy Przegląd Prawniczy*, 2015, No. 4, p. 108.

confirms that freedom of religion must be respected in the workplace to the extent that this does not infringe the rights of other colleagues, and that the management of employees should also respect their other non-professional obligations arising from their religion.²¹ In practice, however, this may give rise to issues with regard to the proper organisation of working time, which would need to take into account all the days off and holidays of a multicultural workforce.

TIME OFF WORK ON ACCOUNT OF RELIGIOUS HOLIDAYS

Although Poland, under separate legal provisions, is classified as a secular state, most statutory public holidays²² nevertheless fall in the same periods as holidays observed by persons professing the Roman Catholic faith. These include all Sundays and an additional 13 days during the year, including 6 January – Epiphany, the first and second days of Easter, Corpus Christi, and 1 November – All Saints' Day. The Constitution does not, however, leave other churches and religious associations without regulation, because, pursuant to its Article 25(5), they may determine their mutual relations with the Republic of Poland on the basis of individually concluded agreements. According to the established position of the Supreme Court, any statute which defines the rights and obligations of employees with regard to days off work constitutes a separate, special (*sui generis*) source of labour law.²³

An example of such a regulation is the Act on the Relationship between the State and the Polish Autocephalous Orthodox Church,²⁴ under which persons belonging to that Church have the right to observe Orthodox holidays also according to the Julian calendar, on such days as 7–8 January – Christmas, 19 January – the Baptism of the Lord, 9 August – the Transfiguration of the Lord, and 28 August – the Dormition of the Most Holy Mother of God. Pursuant to Article 14 of that Act, members of the Orthodox Church may request to be released from work on the holidays specified therein, but without the right to remuneration if those holidays are not statutory public holidays.

Similar regulations have also been laid down with regard to Jewish religious communities in the Republic of Poland,²⁵ where, apart from the legal and property status of such entities, the Act also provides for days on which believers are entitled to obtain time off from work or study. These include, for example, the Day of Atonement – 1 day, the Feast of Tabernacles – 2 days, the Assembly of the Eighth Day – 1 day, as well as the period of the Sabbath, lasting from sunset on Friday until sunset on Saturday.

²¹ Judgment of the European Court of Human Rights of 3 February 2011, 18136/02, *Siebenhaar v. Germany*, ECLI:CE:ECHR:2011:0203JUD001813602; judgment of the European Court of Human Rights of 20 October 2009, 39128/05, *Lautsi v. Italy*, ECLI:CE:ECHR:2009:1103JUD003081406.

²² Article 1 of the Act of 18 January 1951 on Public Holidays (Journal of Laws of 2020, item 1920).

²³ Supreme Court judgment of 29 January 2008, I PK 196/07, *OSNP*, 2009, No. 7–8, item 89.

²⁴ Act of 4 July 1991 on the State's Relationship with the Polish Autocephalous Orthodox Church (Journal of Laws of 2023, item 544).

²⁵ Act of 20 February 1997 on the State's Relations with Jewish Religious Communities in the Republic of Poland (Journal of Laws of 2014, item 1798).

For the observance of all the holidays listed in the Act, pursuant to Article 11(3) of the same Act, employees belonging to Jewish communities are entitled to be released from work under the terms laid down in separate provisions, which constitutes an indirect reference to the Act on Guarantees of Freedom of Conscience and Religion.

Separate legal acts regulating the rights and rules governing release from work and study during religious holidays also apply to members of the following churches:

- The Baptist Church in the Republic of Poland – pursuant to Article 11 of the Act of 30 June 1995 on the Relationship between the State and the Baptist Church in the Republic of Poland,²⁶ members of the Church are entitled to time off work on two days each year: Good Friday and the Feast of the Ascension, for which they may apply under the terms laid down in generally applicable provisions of law.
- The Evangelical Reformed Church in the Republic of Poland – under Article 14 of the Act of 13 May 1994 on the Relationship between the State and the Evangelical Reformed Church in the Republic of Poland,²⁷ on each Good Friday and the Feast of the Ascension, persons belonging to this Church are entitled to be released from work under the conditions provided for in the Act on Guarantees of Freedom of Conscience and Religion. This therefore constitutes a direct reference to separate provisions.
- The Pentecostal Church in the Republic of Poland – in the light of Article 12 of the Act of 20 February 1997 on the Relationship between the State and the Pentecostal Church in the Republic of Poland,²⁸ the religious holidays in the year are Good Friday, the Feast of the Ascension, and the second day of Pentecost, and the members of the Church may obtain time off work on those days under the terms laid down in generally applicable provisions.
- The Evangelical Church of the Augsburg Confession in the Republic of Poland (also known as the Lutheran Church) – the Act of 13 May 1994 on the Relationship between the State and the Evangelical Church of the Augsburg Confession in the Republic of Poland²⁹ designates as Evangelical holidays each Good Friday, the Feast of the Ascension of Christ the Lord, and 31 October, which is Reformation Day. Article 14 of the same Act also contains a direct reference to the Act on Guarantees of Freedom of Conscience and Religion with regard to the rules for granting time off work on those days.
- The Old Catholic Mariavite Church in the Republic of Poland – pursuant to Article 9 of the Act of 20 February 1997 on the Relationship between the State and the Old Catholic Mariavite Church in the Republic of Poland,³⁰ members of the Church are entitled to be released from work on 2 August, which for them commemorates the Revelation of the Work of Great Mercy, under the terms laid down in separate provisions.

²⁶ Journal of Laws of 2023, item 1874.

²⁷ Journal of Laws of 2015, item 483.

²⁸ Journal of Laws of 2015, item 13.

²⁹ Journal of Laws of 2023, item 509.

³⁰ Journal of Laws of 2023, item 47.

- The Mariavite Catholic Church in the Republic of Poland – pursuant to Article 9 of the Act of 20 February 1997 on the Relationship between the State and the Mariavite Catholic Church in the Republic of Poland,³¹ persons belonging to this community are entitled to be released from work, under the terms laid down in separate legal acts, for religious holidays on 2 August, when the Revelation of the Work of Great Mercy is celebrated, and on 23 August, that is, the Feast of the Most Precious Blood of the Lord Jesus and the Sacrifice of the Mother.
- The Evangelical Methodist Church in the Republic of Poland – pursuant to Article 12 of the Act of 30 June 1995 on the Relationship between the State and the Evangelical Methodist Church in the Republic of Poland,³² it is provided that members of this Church are entitled to time off from professional duties on each Good Friday, to commemorate the Day of the Crucifixion of Christ the Lord, and on the Feast of the Ascension of Christ the Lord. Article 12(2) contains a reference to generally applicable provisions concerning the obtaining of days off from employers by employees.

Other employees and students whose religion or denomination is not governed by individual arrangements with the Polish state may obtain a day off under the terms set out in the Act on Guarantees of Freedom of Conscience and Religion. Article 42 of that Act provides that such persons may, at their own request, obtain release from work or study for the time necessary to observe the religious holidays of their faith, provided, however, that the employee makes up that period of release without the right to additional remuneration for work performed on statutory public holidays or in overtime hours.

Requiring an employee to make up such a day is not, however, obligatory and depends solely on the employer's will. Moreover, the Regulation of the Ministers of Labour and Social Policy and of National Education sets a minimum period for submitting such a request by the employee, namely at least 7 days before the day of release, and requires the employer to specify the conditions for making up such time off no later than 3 days before the day of release.³³ In the author's opinion, there is no doubt that if the employee has complied with the time limit laid down in the legislation, the request is binding and should therefore be granted. In legal doctrine, however, views are divided on whether time off must be granted if the employee has failed to comply with the above time limit.³⁴ It should nevertheless be noted that failure to grant release from work for the period necessary to celebrate

³¹ Journal of Laws of 2023, item 8.

³² Journal of Laws of 2023, item 85.

³³ § 1(1) of the Regulation of the Ministers of Labour and Social Policy and of National Education of 11 March 1999 on granting time off from work or school to members of churches and other religious associations for the observance of religious holidays that are not statutory holidays (Journal of Laws No. 26, item 235).

³⁴ Anna Martuszczyk and Katarzyna Piecyk take the position that if an employee fails to meet the 7-day deadline, the granting of leave is at the employer's discretion. See A. Martuszczyk, K. Piecyk, *Urlopy pracownicze i inne zwolnienia od pracy*, Warszawa, 2010; I. Nowak, 'Prawo do zwolnienia od pracy z tytułu świąt religijnych', *Humanities and Social Sciences*, 2015, Vol. XX, No. 1, p. 128.

religious holidays in accordance with the requirements of the religion professed by the employee, if the employee requests such time on their own initiative, may be regarded as a violation of Article 6 of the Act on Guarantees of Freedom of Conscience and Religion, which states:

'No one may be discriminated against or privileged because of religion or beliefs in matters of religion. Citizens may not be compelled not to participate in religious activities or rites, nor to participate in them.'

An employer who does not wish to infringe the prohibition of discrimination should also not require a person professing a different faith to use annual leave or unpaid leave, because the use of such leave is, under labour law, an employee's entitlement and should result from their own initiative.³⁵ Moreover, employers should treat absences from work connected with their employees' religious holidays as unpaid absences only in strictly defined cases. The legislature has expressly stated its intention in relation to certain churches or religious associations, as, for example, in the Act of 4 July 1991 on the Relationship between the State and the Polish Autocephalous Orthodox Church, where Article 14(2) clearly provides that members of this denomination are entitled to release from work without the right to remuneration if those holidays are not statutory public holidays.³⁶ It must therefore be inferred that it would be an impermissible practice for employers to apply the above provision to all employees of other religions. This view is also supported by state authorities, which agree that the above regulation is special in nature in relation to the generally applicable regulation which, in the Act on Freedom of Conscience and Religion, makes the use of release from work conditional upon making up that time, which consequently guarantees the employee the right to remuneration in full.³⁷ Exceptionally, however, if the specific nature of the employer's business does not allow the employee's request to be fully accommodated, for example because of the need to ensure continuity of the technological process, the employer should propose a change of position or, if that is not possible, a reduction in working hours corresponding to the employee's hourly availability.

INDIVIDUAL WORK SCHEDULES: EMPLOYEES' RIGHT TO OBSERVE RECURRING HOLIDAYS

Persons whose religion designates holidays falling on a specific day of the week, but where these are not Sundays or other statutory public holidays, are covered by a separate regulation. In most cases, this concerns members of the Seventh-day

³⁵ Judgment of the Court of Appeal in Kraków of 17 August 2022, III APa 1/22, LEX No. 3438647.

³⁶ Journal of Laws of 2023, item 544.

³⁷ *Odpowiedź sekretarza stanu w Ministerstwie Spraw Wewnętrznych i Administracji – z upoważnienia prezesa Rady Ministrów – na interpelację nr 4994 z 10 października 2008 r.*; <https://orka2.sejm.gov.pl> (accessed: 25 November 2024).

Adventist Church or followers of Judaism. In order that such employees may also properly cultivate their religious traditions, the law grants them the right to apply for an individual work schedule.³⁸ Moreover, some representatives of legal doctrine take the view that employers are bound by such requests, which means that it is the employer's duty to adjust the schedule to the needs of such an employee.³⁹ This view is also shared by representatives of state authorities, including the Commissioner for Human Rights and the Legal Department of the National Labour Inspectorate.⁴⁰

When analysing the issue in question, it is worth noting the view prevailing in the literature that the members of the Seventh-day Adventist Church enjoy a 'stronger entitlement' to release from work for the duration of the Adventist holiday than followers of other religions.⁴¹ This belief may stem from separate regulations other than those arising from the Act on Guarantees of Freedom of Conscience and Religion. In the light of Article 11(2) of the Act of 30 June 1995 on the Relationship between the State and the Seventh-day Adventist Church in the Republic of Poland,⁴² the members of this Church have the right to release from work and study for the duration of the Adventist holiday, that is, from sunset on Friday until sunset on Saturday. It should be noted that there is no additional legislative provision making the grant of such a day off conditional upon making it up, without the right to additional remuneration, which, in turn, applies to other employees under Article 42 of the Act on Guarantees of Freedom of Conscience and Religion. Accordingly, in line with the principles of legislative drafting, namely that an expansive interpretation should not be adopted and that, in the event of doubt as to the meaning of a given provision, it should always be interpreted in favour of the employee (*in dubio pro libertate*), it should be concluded that employees belonging to the Seventh-day Adventist Church, in accordance with the legislature's intention, are entitled to remuneration for days off work taken in order to observe religious holidays.

An analysis of an employee's right to a day off work in connection with religious holidays leads to the conclusion that there is a lack of uniformity in the regulations governing this area. Indeed, both the obligations and the rights of both parties to the employment relationship may arise from the provisions of the Act on Public Holidays, the Labour Code, or specific legal acts, such as the Act on the Relationship between the State and the Seventh-day Adventist Church in the Republic of Poland. The position adopted in the case law, namely that one should always favour

³⁸ § 1(2), Journal of Laws No. 26, item 235.

³⁹ K. Piecyk, 'Zwolnienie od pracy z tytułu świąt religijnych', *Praca i Zabezpieczenie Społeczne*, 2010, No. 4, p. 38; I. Nowak, 'Wolność jednostki w zakresie przekonań religijnych i światopoglądowych a zwolnienie od pracy i nauki z tytułu święta religijnego – soboty (szabat, szabasu)', *Przegląd Prawa Publicznego*, 2013, No. 1, pp. 19–36; I. Nowak, 'Prawo do nauki a święta religijne mniejszości wyznaniowych na gruncie ustawy o systemie oświaty', *Przegląd Prawa Publicznego*, 2014, No. 5, pp. 41 et seq.

⁴⁰ K. Piecyk, 'Zdaniem Państwowej Inspekcji Pracy', *Praca i Zabezpieczenie Społeczne*, 2010, No. 4, pp. 38–39; Letter of 24 July 2007, RPO-563683-1/07/KJ; similarly: letters of 20 January 2011, RPO-560379-1/07/KJ and 18 May 2012, RPO-649337-1/10/KJ.

⁴¹ Z. Hajn, 'Prawo pracowników należących do mniejszości wyznaniowych do zwolnień od pracy w celu uprawiania kultu religijnego', *Gdańskie Studia Prawnicze*, 2007, No. 2, p. 121.

⁴² Journal of Laws of 2022, item 2616.

a solution which takes into account the interests of the entity to whom a given right or freedom is granted, rather than increasing the scope of restrictions on the exercise of constitutional rights and freedoms,⁴³ should not, however, in the author's view, be applied absolutely when deciding whether an employee should be covered by an individual work schedule. It seems, in fact, that the reasonable course of action is to leave the final decision in this matter to the employer and, in particular, to the logistical capacity of the organisation as a whole, since it is not difficult to imagine that changing the working hours or working days of a given employee, or perhaps even of an entire group of employees, will not be feasible in every workplace.

LABOUR DISPUTES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

The observance of religious ceremonies is a very important form of manifesting one's faith; therefore, under the Charter of Fundamental Rights of the European Union, it is one of the fundamental human rights (Article 10), and its restriction, for example on the basis of religious affiliation or lack of affiliation, constitutes, as a rule, a serious violation in a democratic state governed by the rule of law. In practice, however, as national and international case law shows, disputes often arise in this context. Employees' claims, for example claims to be placed on an individual work schedule, are not unconditional, as confirmed by the positions of the European Commission of Human Rights and, subsequently, the Court, according to which freedom of religion and obligations arising from specific standards of conduct established, for example, in the workplace, are not in conflict with one another.⁴⁴ According to the Commission, the freedom of religion guaranteed by Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁵ may be subject to restriction in the light of the interests listed in Article 9(2) of that Convention, including the freedoms of others. This position of the Commission is also reflected in its decisions, one of which expressed the view that a person employed as a teacher is obliged to observe their working hours, even if, in that person's opinion, they conflict with the time for prayer.⁴⁶ A rather radical, yet nevertheless logical, view of the Commission was expressed in the case of a Finnish railway official who belonged to the Seventh-day Adventist Church.⁴⁷ He was dismissed

⁴³ Judgment of the Constitutional Tribunal of 5 June 2014, K 35/11.

⁴⁴ J. Sobczak, W. Sobczak, 'Ograniczanie człowieka w jego prawach ze względu na przynależność wyznaniową albo bezwyznaniowość', *Annales Universitatis Mariae Curie-Skłodowska. Sectio K, Politologia*, 2012, Vol. 19, No. 1, p. 83.

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

⁴⁶ Decision of the European Commission of Human Rights of 12 March 1981 in Application No. 8160/78, *X v. the United Kingdom*, DR 22, pp. 27 et seq, ECLI:CE:ECHR:1981:0312DEC000816078.

⁴⁷ Decision of the European Commission of Human Rights of 3 December 1996 in Application No. 24949/94, *Konttinen v. Finland*, DR 87 – A, p. 68, ECLI:CE:ECHR:1996:1203DEC002494994.

from work because of his failure to observe working hours. The Finnish employee justified his conduct on religious grounds, but, in the Commission's view, although there was undoubtedly a conflict in this respect in the employment relationship, the termination of his employment did not result from religious discrimination but from his failure to comply with his working schedule. In the Commission's opinion, the employee himself should even have decided to resign from his job if its hours could not be reconciled with the time which, in accordance with the requirements of his religion, he should devote to prayer.

Disputes concerning equal treatment in employment on grounds of religious affiliation have also been the subject of the case law of the CJEU. In answering one of the questions referred for a preliminary ruling in *Cresco Investigation GmbH v Markus Achatzi*,⁴⁸ the CJEU had to analyse the factual situation under Austrian law as it stood at the time, according to which Good Friday was a public holiday only for members of four churches, namely the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church, and the Evangelical Methodist Church. If, however, an employee belonging to one of those denominations chose to work on that day, they received a wage supplement. This entitlement was provided exclusively for Christians, while adherents of other religions or atheists were deprived of that right. The Court of Justice held that the legislation of that country did indeed lead to direct discrimination against the remainder of the workforce; however, the further conclusion of the judgment deserves even closer attention. As the CJEU stated, the rule arising from Article 21 of the Charter of Fundamental Rights has direct effect also in horizontal relationships and therefore binds not only Member States but also all other entities, including private undertakings. According to the further reasoning in the judgment, until the national legislature brings its laws into line with the principle of equal treatment, the employer remains under an obligation to grant discriminated employees the same benefits as those enjoyed by persons in a more favourable position. Consequently, employers must also grant a day off for the observance of Good Friday to other employees, provided that those employees have previously requested to be released from the obligation to work on that day. It must therefore be accepted that such employees are also entitled to the wage supplement payable for work performed on that day if the employer rejects such a request. As the Court further argued, the fact that the state permits such discrimination under its laws does not mean that an employer applying those provisions acts lawfully. In the summary of the judgment, it was stated that the principle of non-discrimination also applies to private relationships, primarily between employees and employers, and that the line of case law applied is intended to ensure effective protection for those experiencing discrimination even in countries where the legislature has not taken the necessary legislative measures to protect such values.⁴⁹

⁴⁸ Judgment of the CJEU of 22 January 2019, in Case C-193/17, *Cresco Investigation GmbH v. Markus Achatzi*, ECLI:EU:C:2019:43.

⁴⁹ G. Gruew, 'Zmiany w rozumieniu niedyskryminacji w Unii Europejskiej', *swlex.pl*, 26 July 2022; <https://swlex.pl/zmiany-w-rozumieniu-niedyskryminacji-w-unii-europejskiej/> (accessed: 25 November 2024).

The cited judgment gave rise to considerable debate because of the burden imposed on employers, who, although they have no influence over the wording of the applicable provisions, may nevertheless be accused of acting unlawfully. The Court of Justice, however, chose to uphold the effective protection of employees, even if, as a result, the employer might be burdened with consequences disproportionate to its fault. It follows, therefore, that private entities employing workers must navigate the provisions of both national and international law with great care, even if the two legislative sources are not entirely consistent with one another.

There is no doubt that changes occurring within society influence the evolution of legal norms; therefore, when making legislative amendments, in this case to the catalogue of public holidays, the legislature should take into account the religious composition of society. Otherwise, the amendments introduced could produce an artificial effect, inconsistent with the 'culture rooted in the Christian heritage of the Nation' referred to in the Preamble to the Constitution.⁵⁰

SUMMARY

Relations between employees and employers should be based on mutual respect for each other's religious beliefs. Both national and international legal provisions safeguard rights such as freedom of thought, conscience and religion; however, as the case law demonstrates, conflicts arising on this basis do occur in the workplace. In analysing such disputes, it seems necessary to establish an appropriate balance between the right to freedom to practise one's chosen religion and the possible limitations upon that right. As the European Court of Human Rights has repeatedly emphasised, these freedoms must be respected in the workplace, but only so long as they do not infringe the rights of other colleagues. The examples of cases cited in this article indicate that conflicts of this kind arise not only in Poland, but also in other countries, which points to the transnational character of the issue under discussion.

In summary, an analysis of the current legal regulations and selected case law leads to the conclusion that, for the protection of the rights and freedoms arising from an individual's practised religion and held views to be effective, it should be grounded in national legal provisions, which in turn should reflect the cultural character of society.

⁵⁰ M.A. Mielczarek, 'Święta wolne od pracy a równouprawnienie związków wyznaniowych', *Monitor Prawa Pracy*, 2014, No. 9.

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Cite as:

Przybycień P. (2026), *The Right of an Employee to a Day Off Granted in Connection with Religious Holidays Not Regulated in the Act on Public Holidays*, *Ius Novum* (Vol. 20) 2, 158–171. DOI 10.2478/in-2026-0023

GLOSS ON THE RESOLUTION OF THE SUPREME COURT OF 4 APRIL 2023, III CZP 11/22*

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DOI 10.2478/in-2026-0024

ABSTRACT

This commentary on Supreme Court resolution III CZP 11/22 aims to address the question of whether a mortgage on a third party's property should be extinguished upon cancellation of the bankrupt's debts. It deals with the accessoriness of a mortgage and its role, as well as the admissibility of making a mortgage serve other purposes sanctioned by the legislature in the Bankruptcy Act. The commentary analyses the nature of the debt cancellation mechanism and the extent to which the solution proposed by the Supreme Court is compatible with the normative aim of the regulation, which is to seek creditor satisfaction. It also discusses the potential consequences of applying the judgment in practice, including the weakening of the function of a mortgage and of the position of the creditor, and the risk of abuse by debtors. Reference is also made to the impact the judgment may have in the context of conditional debt cancellation in bankruptcy proceedings.

Keywords: mortgage, debt cancellation, extinguishment of a mortgage

THESIS

Debt cancellation pursuant to Article 369 of the Bankruptcy Act (BA) of 28 February 2003, in the wording applicable before 1 January 2016, results in the extinguishment of a mortgage on a third party's property where the mortgage was created to secure the borrower's debt.

* Resolution of the Supreme Court of 4 April 2023, III CZP 11/22, OSN 2024, No. 5, item 47.

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INTRODUCTION

The following commentary is an attempt to address the question of the continued existence of a mortgage charge on a third party's property where the principal debtor's debt has been cancelled by a court in bankruptcy proceedings. It includes an analysis of the arguments presented in the court proceedings and of selected legal regulations, taking into account the consequences of applying the solution proposed by the Supreme Court.

FACTS

The facts giving rise to the resolution were as follows: the defendant's legal predecessor granted a loan to a person who was later declared bankrupt. The loan was secured by two mortgages created on real property belonging to the plaintiff, who was not the principal debtor. Upon completion of the bankruptcy proceedings, the District Court cancelled the whole of the unpaid debt owed by the debtor. Thereafter, the plaintiff sought the removal from the land register of the mortgage charges concerning the mortgage created on the plaintiff's property as security for the bankrupt's debt. The arguments set out in the plaintiff's claim asserted that debt cancellation in bankruptcy proceedings should lead to the mortgages being extinguished, as stipulated by Article 94 of the Act on Mortgage Registers and on Mortgages (AMRM).¹

In considering the cassation appeal, the Supreme Court, sitting in an expanded composition, dealt with the following point of law:

'Does cancellation of debt, pursuant to Article 369(2) of the Bankruptcy Act of 28 February 2003, in the wording applicable before 1 January 2016, owed by the debtor to the creditor and secured on a property belonging to a third party, lead, with respect to the mortgage debtor who is also a party to the banking transaction establishing the mortgage, to the extinguishment of the claim secured by that mortgage, thereby entailing the extinguishment of the mortgage within the meaning of Article 94 Act of 6 July 1982 on Mortgage Registers and Mortgages?'

RESOLUTION

Pursuant to Article 369 BA, in the wording applicable before 1 January 2016, the admissibility of debt cancellation was contingent on the occurrence of special circumstances set out in that provision. The purpose of the provision was to release the debtor from personal liability so that he could restore his economic equilibrium. The legislature emphasised that this solution was not designed to shift the risk to creditors and should be used only in exceptional circumstances. Article 369 BA did not provide that debt cancellation did not affect the obligations of a loan guarantor or

¹ Act of 6 July 1982 on Mortgage Registers and Mortgages (Journal of Laws of 2023, item 1984).

a co-debtor. In contrast to Article 291 BA then in force, there was no regulation that would provide for the continued existence of a mortgage after the bankrupt's debt had been cancelled. The accessory nature of a mortgage was a further reason why the continued existence of the mortgage was deemed unjustified after the debt it had been created to secure had ceased to exist. The rule enshrined in Article 94 AMRM is that, if the debt is extinguished, the security is extinguished, even if that entails failure to repay the debt. Any exceptions to this rule should follow from special provisions.

ASSESSMENT OF THE RESOLUTION

The resolution in the case discussed must be viewed critically. According to the position taken by the Supreme Court, debt cancellation in bankruptcy proceedings leads to the extinguishment of a mortgage on a third party's property. This position has some basis. However, due to the nature of bankruptcy proceedings and the consequences of applying the resolution, the question arises whether the Supreme Court should in fact have taken a different view.

The resolution was adopted under the legal regime in force before 1 January 2016. At that time, Article 369 BA provided that, in a judgment concluding bankruptcy proceedings involving liquidation of the bankrupt's assets, where the bankrupt is a natural person, the court may, on application by the bankrupt, cancel all or part of the bankrupt's debt that remains outstanding following the bankruptcy proceedings if the bankruptcy was the result of exceptional circumstances beyond the bankrupt's control, the evidence in the case suggests that there are no grounds for depriving the bankrupt of the right to carry on business activity in his own name or the right to act as a representative of, or an attorney for, a commercial company, state enterprise, cooperative, foundation or association, or where the bankrupt duly performed the obligations imposed upon him in the bankruptcy proceedings. The cancellation applied to the debts listed in the schedule of debts and to any debt claims yet to be presented if their existence was documented by the bankrupt. The cancellation did not apply to the bankrupt's child maintenance payments, pensions by way of compensation for causing illness, incapacity for work, disability, or death, wages for employment, or national insurance contributions to employees' pension, disability and sickness funds.

It is tempting to assume that, as a consequence of the cancellation of debt secured on property, the mortgage securing the debt is extinguished. This view is justified by the accessory nature of a mortgage, which stems from Article 94 AMRM. Established case law states that, 'Under this provision, a mortgage interest in property is extinguished whenever the debt is extinguished, regardless of the reasons for its extinguishment, whether the creditor has been satisfied or not.'² One must consider, however, any exceptions whereby a mortgage can continue to exist even though the debt which it has been used to secure ceases to exist.³ Although the

² Order of the Supreme Court of 4 July 2014, II CSK 574/13, LEX No. 1493236.

³ T. Czech, *Księgi wieczyste i hipoteka. Komentarz. Tom II. Hipoteka*, 2nd ed., Warszawa, 2024, Article 94, thesis 20.

exceptions should follow from the Act *expressis verbis*, case law shows that accessory liability may be limited by the application of principles of justice and fairness. An example of this is the view concerning the continued existence of a mortgage on a third party's property where the legal person who is the principal debtor ceases to exist.⁴ Ensuring the continued existence of the security interest in such cases is dictated by the protection afforded to the creditor against any instances of abuse. It would appear that ensuring the continued existence of a mortgage interest after the debt has been cancelled in bankruptcy proceedings should serve a similar purpose.

The view that the accessoriness of a mortgage is of decisive importance is not uniformly upheld in case law. A contrary view holds that

'As a rule, the accessory nature of a mortgage is intended to protect the limited debtor in that its purpose is to provide broader protection for the limited debtor than for the principal debtor, that is, in cases where the principal debtor is no longer liable to the creditor. It also ensures that the creditor is not satisfied twice in respect of the same claim. Specifically, the purpose of the accessory nature of a mortgage transaction is not to release the limited debtor from his liability as a limited debtor in situations where the creditor of the principal debtor removed from the court register, retains the right to have his claims satisfied.'⁵

An unconditional subordination of personal liability relationships to the accessory nature of a mortgage may lead to a violation of the principles of justice and fairness and undermine trust in legal transactions. The position taken in the resolution seems to equate the existence of a mortgage with the existence of the underlying debt. It is contrary to the purpose of the accessory nature of a mortgage, the main aim of which is to protect the limited debtor against any liability over and above the liability he has accepted and the existing status of the debt. It justifies the extinguishment of the mortgage especially where the debt claim has been satisfied or modified, to the extent that its application would be contrary to justice and fairness. By contrast, the main purpose of a mortgage should be understood as securing a debt.

Similar doubts arise with regard to the legal effect under Article 369 BA as compared with that under Article 291 BA. It would appear that, if the legislature had intended Article 369 BA to be read as producing such an effect, it would have made this clear in the wording of the Article. On the other hand, such an interpretation, in its effects, is contrary to the purpose of this regulation, just as it is contrary to the *ratio legis* of bankruptcy proceedings. Article 2(1) BA requires that proceedings be conducted in such a way as to ensure that creditors' claims are satisfied to the fullest extent and, if reasonably justified, that the debtor's business enterprise is preserved. The principle of optimisation should be the lens through which the law is interpreted, so that creditors are protected and have priority over other parties.⁶ It is assumed that the protection and satisfaction of creditors are the ultimate aim

⁴ Order of the Supreme Court of 10 May 2012, IV CSK 369/11, LEX No. 1238133.

⁵ Judgment of the Supreme Court of 10 September 2015, II CSK 745/14, OSNC 2016, No. 7–8, item 90.

⁶ R. Adamus, in: Witosz A.J., Witosz A. (eds), *Prawo upadłościowe i naprawcze. Komentarz*, 5th ed., Warszawa, 2014, Article 2, thesis 6.

of the proceedings and 'must not be diminished by other considerations, e.g. saving the debtor'.⁷

Under the law applicable before 1 January 2016, Article 2(2) BA required that proceedings falling under the law on natural persons not carrying on business activity be conducted in such a way as to ensure the cancellation of those of the bankrupt's debts that had not been settled in the bankruptcy proceedings and, if possible, the satisfaction of creditors' claims to the fullest extent. Consumer proceedings are first and foremost intended to help a bankrupt in financial difficulties make a fresh start by releasing him from debt liabilities he is unable to settle.⁸ Their main aim is the cancellation of the insolvent debtor's liabilities, thereby allowing him to bring his financial affairs under control.⁹ Insofar as the disputes concern consumers, the Supreme Court's position is justifiable to some extent; however, in proceedings concerning entrepreneurs, it raises doubts, not least because of the higher standard of duty of care required of entrepreneurs. Moreover, after the debtor has been made bankrupt and his debts have been cancelled, there are no grounds for shifting the risk of default to creditors. In securing their claims, creditors are primarily concerned with protecting themselves from precisely such circumstances arising. Since consumer proceedings serve a different purpose, neither the rationale of the debt cancellation mechanism *per se* nor the effect of extinguishing the security provided by the bankrupt is subject to dispute. A different state of affairs exists where debt is secured on property belonging to a third party. Extending the extraordinary advantages of debt cancellation to such a party has all the appearance of an abusive practice.

Article 369 BA set out exceptional conditions for the cancellation of a bankrupt's debts. It is worth noting that, currently, the only criterion for debt cancellation is the bankrupt's continued inability to settle any future claims. The introduction of special requirements to prove that the bankrupt acted in good faith and bore no fault is a positive development. Debt cancellation modifies the *pacta sunt servanda* rule and adversely affects the bankrupt's creditors. Extending any such far-reaching effects, potentially interfering with liability relationships, to a third party who is a limited debtor is a distortion of this mechanism. Since debt cancellation applies only to natural persons, such an interpretation is particularly ill-advised where the mortgage is used to secure the debt of a legal person.¹⁰

Due to the direct link between the debt cancellation criteria in Article 369 BA and the bankrupt's conduct, the mortgage debtor has no influence on the application of its provisions. Thus, the extent to which a third party should be protected is an open question, given that its release from material liability is fully predicated on the bankrupt's conduct. The Supreme Court argues that there is no provision that would state *expressis verbis* that debt cancellation in respect of a bankrupt under Article 369 BA does not diminish the rights of mortgage-secured creditors. Moreover, the only basis for an interpretation supporting the cessation of the mortgage interest is Article 94 AMRM. Although this line of reasoning is not entirely unreasonable, it would appear

⁷ P. Janda, *Prawo upadłościowe. Komentarz*, 3rd ed., Warszawa, 2023, Article 2, theses 1–2.

⁸ Order of the Supreme Court of 25 May 2021, I CSKP 100/21, LEX No. 3220045.

⁹ *Ibidem*.

¹⁰ Order of the Supreme Court of 24 January 2020, III CZP 53/19, LEX No. 2769780.

that, in view of the purposive interpretation and the wording of Article 369 BA, it does not offer sufficient grounds for extending the scope of its application. As R. Adamus correctly points out, the extinguishment of the bankrupt's obligations is dictated by exceptional, personal circumstances. The interpretative method applied, however, favours other parties beyond the scope permitted under the Act.¹¹

Article 291 BA does not expressly extend its application to the cancellation of the bankrupt's debts. Even though Article 291 does not extend its effect to Article 369 BA *de iure*, it would appear that this was the legislature's intention.¹² The literal interpretation, although first in order of priority, should not give rise to conclusions that are contrary to the normative purpose of the regulation. *A minori ad maius*, since a consensual modification of the debt through a debt arrangement scheme does not affect the security created on a third party's property, no such effect should, in particular, arise upon cancellation of the debt by the court, which is completely outside the creditor's control. Quite the opposite, in fact: it would seem that the extinguishment of the mortgage on a third party's property would lead to conclusions contrary to the law. It would mean an unjustified variation in the continued existence of the mortgage depending on whether the debt was cancelled by the court or restructured under a debt arrangement scheme.¹³ Article 291 BA is most closely reflected in Articles 370a and 491(15) BA, both of which should be applied by analogy not only to the repayment plan but also to the cancellation of the bankrupt's debt.¹⁴ The debt, despite the release of the bankrupt from liability, continues to exist and may justifiably be enforced against a third person who is liable to the creditor.¹⁵ This view is consistent both with the personal nature of the debt cancellation criteria and with the purpose of bankruptcy proceedings, which seek to reduce the debt burden while at the same time satisfying creditors to the extent possible.

It bears pointing out that the mortgage mechanism has been weakened as a result of the position taken in the resolution. The primary purpose of a mortgage is to secure creditors' claims, with changes in the owner of the mortgaged property being of no consequence. Making a third party a limited debtor with a view to eliminating the risk of insolvency of the principal debtor appears to offer stronger protection. The view expressed in the resolution makes the fulfilment of this purpose illusory. If the main purpose of bankruptcy proceedings is to rescue the bankrupt, the principle of optimisation is compromised, as is the position of creditors. Changing the hierarchy of these values means extending the effects of debt cancellation to other parties at the expense of creditors. It should be noted that, as a model, proceedings should seek to achieve the fullest possible performance of the debtor's

¹¹ R. Adamus, 'Czy oddłużenie upadłego powinno skutkować wygaśnięciem hipoteki na mieniu osoby trzeciej?', *Monitor Prawa Bankowego*, 2023, No. 9, p. 61.

¹² Judgment of the Supreme Court of 10 September 2015, II CSK 745/14, OSNC, 2016, No. 7–8, item 90; judgment of the Supreme Court of 10 May 2012, IV CSK 369/11, LEX No. 1238133.

¹³ R. Adamus, 'Czy oddłużenie...', op. cit., p. 67.

¹⁴ A.J. Witosz, in: Witosz A.J. (ed.), *Prawo upadłościowe. Komentarz*, 2nd ed., Warszawa, 2021, Article 491(15), thesis 11; P. Janda, *Prawo upadłościowe...*, op. cit., Article 370a, thesis 11.

¹⁵ P. Janda, *Prawo upadłościowe...*, op. cit., Article 491(15), thesis 12.

obligations. It is true that creditor satisfaction should not be pursued at any cost, especially if the inability to settle the debt results from the bankrupt debtor's exceptional circumstances. However, the consequences of debt cancellation should not be extended to parties to whom such circumstances are of no relevance.

Based on the view taken in the resolution, it would follow that each time a bankrupt's debt is cancelled, including conditionally, the mortgage securing it must be extinguished. The problem with this reasoning becomes apparent when a decision on conditional debt cancellation is set aside. In such cases, pursuant to Article 369(2g) BA, the debt is not eligible for cancellation. It would seem unreasonable to argue that the mortgage should be restored solely by virtue of the setting aside of the decision on conditional debt cancellation. If this were the case, however, it would be problematic first to remove the mortgage charge from the land register and then to reinstate it. If, on the other hand, the mortgage charge did cease to exist upon conditional debt cancellation, then, after the decision on debt cancellation had been set aside, creditors could continue to enforce their claims, as shown in the debt management plan, but they would have to do so at additional expense in terms of time and money.

Undoubtedly, the continuation of the mortgage after the bankrupt's debt has been cancelled raises questions concerning the relationship between the principal debtor and the limited debtor if the latter has satisfied the debt. In fact, the limited debtor is now the liable party in place of the bankrupt, against whom he has no recourse. It is common to regard the principal debtor and the limited debtor as being liable *in solidum*. The grounds for liability are dissimilar and, to some extent, mutually independent, as they establish individual liability for the debt. Obligations *in solidum* should be regarded in the same way as joint and several obligations *sensu stricto*, which means that the creditor may claim repayment of the whole debt from each debtor.¹⁶ The creditor's rights are grounded in the fact that both debtors stand in a liability relationship with the creditor, and thus both owe him performance. Both parties are liable until the claim is satisfied in full.¹⁷ In this way, the primary purpose of security against the risk of default is fulfilled at the level of the mortgagor and follows directly from the reduction of risk at the level of the creditor once a mortgage has been created. After the creditor has been satisfied from the secured property, the risk attaching to the declaration of bankruptcy passes to the limited debtor, who has no recourse against the principal debtor. From the perspective of bankruptcy proceedings, this order of things is fairer than placing the burden of risk on creditors. Such an interpretation is further sanctioned by the nature of the remedy of recourse under liability *in solidum*, the scope of which depends on the relationship between the debtors.¹⁸ Since the bankruptcy court's decision has an impact on this relationship, modification of the recourse claim is likewise justifiable.

¹⁶ Judgment of the Supreme Court of 10 September 2015, II CSK 745/14, OSNC 2016, No. 7–8, item 90.

¹⁷ Judgment of the Court of Appeal in Gdańsk of 20 January 2015, I ACa 656/14, LEX No. 1770657.

¹⁸ Judgment of the Supreme Court of 19 May 2016, III CSK 263/15, LEX No. 2108505.

It is sometimes argued that, after the creditor has been satisfied from the mortgage on a third party's property in the course of bankruptcy proceedings, any potential recourse claims should be included in the debt management plan.¹⁹ It is likely, however, that the limited debtor may have difficulty recovering the full amount of the payment. On the other hand, 'once the debt management plan has been put in place and the creditor has been satisfied, the co-debtor is not entitled to claim repayment from the bankrupt',²⁰ which also means that the co-debtor bears the risk of assuming responsibility for another's debts. It would appear that a similar effect is justified where the principal debtor's debt is cancelled.²¹ This does not contradict the rules and aims of bankruptcy proceedings, since the legislature has provided for this kind of mechanism *ipso iure*.

The judgment recognises the limited debtor's right to invoke Article 73 AMRM dealing with debt cancellation. That Article grants limited debtors the right to raise legal challenges on a par with principal debtors. There is reason to believe, however, that, due to the exceptional nature of the conditions for cancellation of the bankrupt's debt, the application of this right would violate the principles of justice and fairness. It would mean the third party invoking the defence of insolvency, which does not concern that party as such. Debt cancellation is justified by a desire to allow the debtor to make a fresh start.²² The legislature makes debt cancellation subject to certain exceptional circumstances, since it is closely connected with the inability to discharge the obligation.²³ After all, the main thrust of bankruptcy proceedings should be to draw up a debt management plan with a view to at least partial debt repayment. It is rather unlikely that the legislature intended for a third party, which is not affected by such circumstances, to benefit vicariously from the cancellation of the debt. The rescue plan should serve to help the bankrupt in the first place, and only then to ensure creditor satisfaction. This line of reasoning supports the assumption that Article 291 BA, as it then was, implied an exception to Article 73 AMRM.²⁴

Some doubts arise in comparing the bankrupt's debt cancellation to release from debt granted by the court. Pursuant to Article 508 of the Civil Code (CC), release from debt is an agreement between the debtor and the creditor,²⁵ where the creditor consents to the debt obligation being extinguished. It is unreasonable, however, to equate a voluntary debt modification by the parties with the debt obligation being extinguished by a court judgment, dictated by the occurrence of exceptional circumstances. Release from debt is rather similar to an arrangement with creditors where the arrangement leads to the creditors waiving the debt owed to them. The purpose of debt cancellation is to take into account the bankrupt's

¹⁹ A.J. Witosz, in: Witosz A.J. (ed.), *Prawo upadłościowe...*, op. cit., Article 491(15), thesis 13.

²⁰ P. Janda, *Prawo upadłościowe...*, op. cit. Article 491(15), thesis 12.

²¹ A.J. Witosz, in: Witosz A.J. (ed.), *Prawo upadłościowe...*, op. cit., Article 491(15), thesis 11.

²² F. Zedler, in: Jakubecki A., Zedler F. (eds), *Prawo upadłościowe i naprawcze. Komentarz*, 3rd ed., Warszawa, 2011, Article 369, thesis 1.

²³ A. Machowska, A. Ludwiczynska, P. Skibiński, *Upadłość przedsiębiorców z uwzględnieniem praktyki notarialnej*, Warszawa, 2023, p. 410.

²⁴ Order of the Supreme Court of 24 January 2020, III CZP 53/19, LEX No. 2769780.

²⁵ Judgment of the Court of Appeal in Warsaw of 15 April 2019, V ACA 40/18, LEX No. 3039875.

financial difficulties and rescue him by reference to justice and fairness, whereas the reasons for release from debt may be entirely different. Thus, equating the two mechanisms by virtue of similar consequences alone appears to be a misconstrual. Due to the circumstances of debt cancellation and its being sanctioned by a court judgment, debt cancellation is more similar to the *rebus sic stantibus* provision in Article 357¹ CC. In contrast to release from debt, modification of the debt relationship is in the hands of the court, not the parties. The grounds for modification overlap, however: the parties to an agreement tend not to create obligations if they expect that the obligations will not be performed. Regardless of the above, due to liability *in solidum*, the applicable provision should be Article 373 CC, according to which release from debt or a waiver of joint and several liability with respect to one of the joint and several debtors has no effect on the co-debtors.

CONCLUSION

The Supreme Court's position, whereby cancellation of a bankrupt's debt triggers the extinguishment of a mortgage on a third party's property, may give rise to a misapplication of the law. In view of the traditional role of bankruptcy proceedings, this position contradicts their fundamental aims and principles. The relief granted by the Court to the limited debtor leads to a weakening of creditors' powers. Also weakened is the reassurance traditionally provided by a mortgage as an instrument designed to secure creditors' claims, even if the personal debtor is unable to satisfy them. Nevertheless, even though ensuring the continued existence of a mortgage on a third party's property despite debt cancellation, as proposed in this commentary, appears to be justified, it undoubtedly remains open to question under both the previous and current legal regimes in light of the literal wording of the provisions of the Bankruptcy Act. For this reason, it would seem desirable *de lege ferenda* to provide clarity in this matter so that a balance is struck between rescuing the debtor and protecting the creditor. One solution that presents itself is a clearly worded provision stating that debt cancellation does not affect the creditor's rights with regard to a mortgage created on the limited debtor's property. It would be advisable, however, to exclude the limited debtor's liability in situations where the preservation of justice and fairness so requires, such as, for example, where he becomes insolvent as a result.

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Cite as:

Waga J. (2026), *Gloss on the Resolution of the Supreme Court of 4 April 2023, III CZP 11/22*, *Ius Novum* (Vol. 20) 2, 172–181. DOI 10.2478/in-2026-0024

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